To Be Argued By:
Misha Tseytlin
Time Requested: 15 Minutes

New York Supreme Court

APPELLATE DIVISION — SECOND DEPARTMENT

Docket No. 2024-11753

ORAL CLARKE, ROMANCE REED, GRACE PEREZ, PETER RAMON, ERNEST TIRADO, and DOROTHY FLOURNOY,

Plaintiffs-Appellants,

against

TOWN OF NEWBURGH and TOWN BOARD OF THE TOWN OF NEWBURGH,

Defendants-Respondents,

and

LETITIA JAMES, Attorney General of the State of New York,

Intervenor-Appellant.

BRIEF FOR DEFENDANTS-RESPONDENTS

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Defendants-Respondents Town of Newburgh and Town Board of the Town of Newburgh (collectively, the "Town") by their attorneys, submit this brief in opposition to Plaintiffs-Appellants' appeal from the Decision and Order, dated November 7, 2024 and entered in the office of the Orange County Clerk on November 7, 2024, NYSCEF Doc.147 ("Order"), which granted the Town's motion for summary judgment.

QUESTIONS PRESENTED

QUESTION: Whether the Town has capacity to challenge the constitutionality of the vote-dilution provisions of the John R. Lewis Voting Rights Act of New York when Plaintiffs sued the Town under those provisions.

ANSWER: Yes. The Supreme Court's conclusion was legally correct and should be affirmed.

QUESTION: Whether the John R. Lewis Voting Rights Act of New York's vote-dilution provisions violate the Equal Protection Clauses of the Fourteenth Amendment to the U.S. Constitution and the New York Constitution because they purport to force the Town to change its race-neutral at-large election system so that voters statutorily lumped together by race may achieve greater electoral success.

ANSWER: Yes. The Supreme Court's conclusion was legally correct and should be affirmed.

NATURE OF THE CASE

I. INTRODUCTION

The vote-dilution provisions of the John R. Lewis Voting Rights Act of New York ("NYVRA") require political subdivisions who happen to have racially polarized voting in their jurisdictions—a common voting pattern throughout the United States—to alter or abandon race-neutral election systems whenever doing so would give citizens statutorily lumped together by race a greater opportunity to elect more candidates of their choice (and, given the zero-sum nature of elections, decrease the number of elections won by candidates favored by members of other racial groups). This is a paradigmatic race-based classification scheme that triggers strict scrutiny. Indeed, the NYVRA's mandate that political subdivisions change their election systems whenever doing so would increase the electoral success of citizens lumped together by race is more clearly race-based than college admission systems favoring the college applications of members of certain racial groups as a mere part of an all-things-considered inquiry, which the U.S. Supreme Court recently struck down in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, 600 U.S. 181, 201 (2023) ("*SFFA*").

The NYVRA's vote-dilution provisions do not even try to satisfy strict scrutiny's high bar, which is fatal to these provisions. Although a carefully drawn, remedial race-based redistricting statute—such as Section 2 of the federal Voting

Rights Act of 1965 ("VRA")—may pass constitutional muster if it is narrowly tailored to remedy past discrimination, the NYVRA is not such a statute, proudly rejecting any tailoring or limits. The NYVRA neither advances a compelling governmental interest nor is narrowly tailored. In fact, it expressly *rejects* most of the safeguards that make Section 2 of the VRA narrowly tailored and, thus, constitutional. The NYVRA's rejection of these important safeguards exposes political subdivisions across the State to unprecedented liability, demanding unconstitutional alterations to election systems whenever "there are discernible, non-random relationships between race and voting," as occurs "in most States" and "to no one's great surprise," *Cooper v. Harris*, 581 U.S. 285, 304 n.5 (2017), and when candidates preferred by certain racial groups would perform better under any alternative election system. The NYVRA does not require the political subdivision to have engaged in any racial discrimination whatsoever and does not even purport to be a narrowly tailored means to deal with any discrimination.

Because the NYVRA's vote-dilution provisions demand that the Town impose racial classifications without satisfying strict scrutiny, those provisions violate the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution and the Equal Protection Clause of the New York Constitution. This

Court should affirm the Supreme Court's grant of summary judgment to the Town, since Plaintiffs only brought NYVRA vote-dilution claims in this case.[1]

II. LEGAL BACKGROUND

Enacted by the Legislature in 2022, the NYVRA sets forth various voting-related rules and prohibitions. *See, e.g.*, N.Y. Elec. L. §§ 17-206, 17-208, 17-212. This case concerns just one aspect of this statutory scheme: the NYVRA's vote-dilution provisions. A violation of the NYVRA's vote-dilution prohibition "shall be established" upon one of two "showings," depending upon the type of election method at issue. *Id.* § 17-206(2)(b).

For political subdivisions that rely on "an at-large method of election," vote dilution occurs when "either: (A) voting patterns of members of the 'protected class'"—defined to mean "a class of individuals who are members of a race, color, or language minority group," *id.* § 17-204(5)—"within the political subdivision are racially polarized," *id.* § 17-206(2)(b)(i)(A), "*or* (B) under the totality of the circumstances, the ability of members of the protected class to elect candidates of their choice or influence the outcome of elections is impaired," *id.* § 17-206(2)(b)(i)(B) (emphasis added). Under this provision, as Plaintiffs have explained, when there exists "one or more alternative policies" "that would improve"

[1] The Town's constitutional defense below focused exclusively on the NYVRA's vote-dilution provisions. The Town takes no position on any aspect of the Supreme Court's opinion that could be interpreted as invalidating any other aspect of the NYVRA.

the racial group's ability to elect more candidates of its choice, the subdivision violates the NYVRA if it declines to adopt such an alternative policy. Br. for Pls.-Appellants ("Br.") at 40, 54.

For political subdivisions that rely on "a district-based or alternative method of election" other than an at-large system, illegal vote dilution under the NYVRA occurs when "candidates or electoral choices preferred by members of the protected class would usually be defeated, and either: (A) voting patterns of members of the protected class within the political subdivision are racially polarized; *or* (B) under the totality of the circumstances, the ability of members of the protected class to elect candidates of their choice or influence the outcome of elections is impaired." *Id.* § 17-206(2)(b)(ii) (emphasis added). The NYVRA defines "racially polarized voting" as "voting in which there is a divergence in the . . . choice[s] of members in a protected class from the . . . choice[s] of the rest of the electorate." *Id*. § 17-204(6). Again, as with the at-large provision, when either of these conditions is met, the political subdivision must change its district-based system to ensure that voters lumped together by race may elect more candidates of their choice.

Subsection 17-206(2)(c) provides a series of rules for "weigh[ing] and consider[ing]" evidence to assess whether a political subdivision is liable for vote dilution. *Id*. § 17-206(2)(c). "[E]vidence concerning whether members of a protected class are geographically compact or concentrated *shall not* be considered,

but may be a factor in determining an appropriate remedy." *Id*. § 17-206(2)(c)(viii) (emphasis added). Moreover, "where there is evidence that more than one protected class of eligible voters are politically cohesive in the political subdivision, members of each of those protected classes may be combined" for vote-dilution-claim purposes. *Id*. § 17-206(2)(c)(iv). There need not be any "evidence concerning the intent on the part of the voters, elected officials, or the political subdivision to discriminate against a protected class," *id*. § 17-206(2)(c)(v), and neither "evidence that voting patterns and election outcomes could be explained by factors other than racially polarized voting, including but not limited to partisanship," nor "evidence that sub-groups within a protected class have different voting patterns" may be considered in assessing an alleged violation, *id*. §§ 17-206(2)(c)(vi), (vii).

In Subsection 17-206(3), the statute lists certain non-exhaustive "factors that may be considered" in deciding whether a political subdivision has engaged in prohibited vote dilution under the "totality of the circumstances." *Id*. § 17-206(3). These factors include "the history of discrimination in or affecting the political subdivision," *id*. § 17-206(3)(a), "the extent to which members of the protected class have been elected to office in the political subdivision," *id.* § 17-206(3)(b), "the extent to which members of a protected class in the state or political subdivision vote at lower rates than other members of the electorate," *id*. § 17-206(3)(f), "the extent to which members of the protected class are disadvantaged in," for example,

"education, employment, health, criminal justice, housing, land use, or environmental protection," *id*. § 17-206(3)(g), and "the extent to which members of the protected class are disadvantaged in other areas which may hinder their ability to participate effectively in the political process," *id*. § 17-206(3)(h). Subsection 17-206(3) also allows courts to consider "any additional factors," and states that no "specified number of factors [is] required in establishing that [a vote-dilution] violation has occurred." *Id*. § 17-206(3)(k).

The NYVRA authorizes private individuals to enforce its provisions, while imposing a mandatory notification requirement on potential litigants. *Id.* § 17-206(7). To satisfy the NYVRA's notification requirement, a prospective plaintiff must send a "notification letter" to the governing body of the political subdivision "asserting that the political subdivision may be in violation of" the NYVRA. *Id.* A political subdivision that receives an NYVRA notification letter may take advantage of a 90-day safe harbor from suit by passing, within 50 days of receiving the letter, an "NYVRA resolution" that affirms the political subdivision's "intention to enact and implement a remedy for a potential violation of this title" and the specific steps and schedule for implementing such remedy. *Id.* § 17-206(b). A political subdivision threatened with an NYVRA lawsuit may then only avoid costly litigation by changing its election system to conform with the NYVRA. Failure to change its election system within the 90-day safe-harbor period exposes the political

subdivision to an NYVRA lawsuit in which a prevailing plaintiff is entitled to recover reasonable attorneys' fees and litigation expenses from the political subdivision. *Id.* § 17-218.

If a reviewing court concludes that a political subdivision is liable for vote dilution under the NYVRA, the statute authorizes the court to "implement appropriate remedies to ensure that voters of race, color, and language-minority groups have equitable access to fully participate in the electoral process," including requiring the political subdivision to implement a district-based method of election, an alternative method of election, or adopt new or revised districting or redistricting plans. *Id.* § 17-206(5).

III. LITIGATION BACKGROUND[2]

The Town is a political subdivision of New York. NYSCEF Doc.60 at 11.[3] It was chartered in 1788 and is currently home to just over 30,000 people. *Id.* at 11–12. The Town Board is the Town's legislative and policymaking authority. *See*

[2] In stating their supposed factual background to this case, *see* Br.9–13, Plaintiffs rely heavily on the Statement of Material Facts that they submitted in opposition to the Town's Motion for Summary Judgment below, *see* NYSCEF Doc.72. These purported "facts" are disputed and do not accurately reflect the evidence submitted in this case, as set forth in the Town's Responses to Plaintiffs' Statement of Material Facts. *See* NYSCEF Doc.128. Notably, Plaintiffs declined to file their own motion for summary judgment, so they believe that their version of the facts is fairly disputed in the record below. Regardless, Plaintiffs' purported "facts" are irrelevant to the legal questions at issue in this appeal.

[3] All citations to NYSCEF refer to filings in *Clarke v. Town of Newburgh*, Index No.EF002460-2024 (N.Y. Sup. Ct. Orange Cnty.), unless otherwise stated.

N.Y. Town L. § 60; Div. of Loc. Gov't Servs., N.Y. Dep't of State, *Local Government Handbook* (7th ed. 2018).[4] The Town Supervisor and the Town Board's four members are elected via at-large elections administered by the Orange County Board of Elections. *See* Board of Elections, Orange County, New York.[5] The Town has used this at-large system since at least 1865, NYSCEF Doc.61 at 132:15-17, and it is undisputed that it did not adopt this system for any racially discriminatory reasons.

On March 26, 2024, Plaintiffs Oral Clarke, Romance Reed, Grace Perez, Peter Ramon, Ernest Tirado, and Dorothy Flournoy filed this lawsuit alleging that the Town's at-large election method violates the NYVRA's vote-dilution provisions. NYSCEF Doc.64 ("Compl.") ¶ 157–60. Plaintiffs sought an order requiring the Town to abandon its at-large election method in favor of either a district-based or alternative system. Compl. ¶ 133.

The Town moved to dismiss, arguing that Plaintiffs' lawsuit was premature under the NYVRA's mandatory safe-harbor provisions. NYSCEF Doc.65. The Supreme Court denied the Town's motion to dismiss. NYSCEF Doc.66. The Town appealed that decision to this Court, which held oral argument on October 1, 2024.

[4] Available at https://dos.ny.gov/system/files/documents/2023/06/localgovernmenthandbook_2023.pdf (all websites last visited Dec. 5, 2024).

[5] Available at https://www.orangecountygov.com/783/Board-of-Elections.

See Clarke v. Town of Newburgh, No.2024-04378 (N.Y. Sup. Ct. App. Div.). The Town's appeal remains pending.

Following expedited discovery, the Town moved for summary judgment. NYSCEF Doc.70. The Town explained, as relevant to this appeal, that summary judgment was appropriate because the NYVRA's vote-dilution provisions violate the Equal Protection Clauses of the U.S. Constitution and the New York Constitution because those provisions require political subdivisions to structure their election systems based on racial classifications and cannot survive strict scrutiny review. NYSCEF Doc.70 at 7–21. The Town also emphasized that it was undisputed that it did not adopt its at-large voting system for racially discriminatory reasons. NYSCEF Doc.70 at 7. As relief, the Town requested a grant of summary judgment in its favor, NYSCEF Doc.70 at 26, and did not ask for the much broader relief that the Supreme Court ultimately issued in its own discretion, Order at 2.

In opposition to the Town's motion, Plaintiffs argued that the Town lacked capacity to challenge the NYVRA's constitutionality and that the NYVRA is constitutional. NYSCEF Doc.73. Specifically, Plaintiffs argued that the NYVRA is not subject to strict scrutiny because it does not classify individuals according to their race, NYSCEF Doc.73 at 13–17, and that even if strict scrutiny did apply, the NYVRA would pass constitutional muster because it is narrowly tailored to further the State's interest in combatting racial discrimination in voting, NYSCEF Doc.73

17–22. Plaintiffs did *not* argue—as they do on appeal here, Br.57–58—that the Town's motion should be denied because the NYVRA's vote-dilution provisions are constitutional if applied to a situation where a plaintiff demonstrates that a political subdivision would be liable under Section 2 of the federal VRA. *See generally* NYSCEF Doc.73. Nor did Plaintiffs ever argue below that this case—which alleges only NYVRA claims—satisfies the exacting criteria that Section 2 of the federal VRA mandates.

On November 7, 2024, the Supreme Court granted the Town's motion for summary judgment, and also struck the NYVRA "in its entirety from further enforcement and application to these Defendants and to any other political subdivision in the State of New York." Order at 2.

At the threshold, the Supreme Court rejected Plaintiffs' argument that the Town lacked capacity to challenge the NYVRA's vote-dilution provisions as unconstitutional in the Town's summary judgment motion, while explaining that a municipality may challenge state statutory provisions when compliance would force the municipality "to violate a constitutional proscription." *Id.* at 12. Applying that standard, the Supreme Court held that the Town has capacity to challenge the NYVRA because the Town asserted that "if they are required to comply with the NYVRA, through a mandate of this Court that alters their electoral system, it will require them to violate" the state and federal constitutions. *Id.* at 13.

Turning to the merits, the Supreme Court concluded that the NYVRA is subject to strict scrutiny and cannot satisfy this stringent standard of review. *Id.* at 14–22. "[C]lassification based on race, color and national origin is the *sine qua non* for relief under the NYVRA," and Plaintiffs were "simply . . . deny[ing] the obvious" in arguing otherwise. *Id.* at 16. Because "the text of the NYVRA, on its face, classifies people according to their race, color, and national origin," it must satisfy strict scrutiny under the U.S. Supreme Court's Equal Protection Clause precedent. *Id.* at 16. And because the NYVRA's vote-dilution provisions do not serve a compelling state interest and are not narrowly tailored to achieving any such interest, the Supreme Court determined that those provisions fail to satisfy either prong of the strict-scrutiny analysis. *Id.* at 14–22.

With respect to whether the NYVRA's vote-dilution provisions serve a "compelling state interest," the Supreme Court rejected Plaintiffs' argument that the NYVRA furthers the state interest of combatting racial discrimination in voting. *Id.* at 17–18. While "past discrimination against [a] protected class" may justify "race-based statutes" like the federal VRA, "the wording of the NYVRA is devoid of any requirement of proving past discrimination by a protected class." *Id.* at 17. To the contrary, liability under the statute arises whenever a plaintiff shows "that a protected class has an impaired ability to influence an election." *Id.*

The Supreme Court then held that even if the NYVRA's vote-dilution provisions did further a compelling interest, they are not narrowly tailored to achieving that interest. *Id.* at 19–20. The Supreme Court noted that the NYVRA failed to satisfy the exacting *Gingles* "framework for analyzing vote dilution claims" under the federal VRA, which ensures narrow tailoring for Section 2 claims. *Id.* at 22. "Assuming arguendo that New York has authority equal to Congress to pass voting rights legislation that is race based . . . the NYVRA still must satisfy judicial precedent that permits a rare state-sanctioned infringement on the rights of persons not in the protected class." *Id.* at 23. The statute expressly "mandates that a reviewing court *not* consider the first of the *Gingles* preconditions"—whether a minority group is "sufficiently large and geographically compact to constitute a majority in a [reasonably configured] single-member district"—when deciding a vote-dilution claim. *Id.* at 22 (citation omitted).

The Supreme Court granted summary judgment to the Town, and then also struck the NYVRA "in its entirety from further enforcement and application to the Town and to any other political subdivision in the State of New York." *Id.* at 2.

STANDARD OF REVIEW

This Court reviews a ruling on summary judgment *de novo*. *Rothouse v. Ass'n of Lake Mohegan Park Prop. Owners, Inc.*, 223 N.Y.S.2d 1012 (N.Y. App. Div. 1962). When a party challenges the constitutionality of a state statute, the

challenged statute is presumed to be constitutional, and its invalidity must be demonstrated beyond a reasonable doubt. *McGee v. Korman*, 70 N.Y.2d 225, 231 (1987). Nevertheless, invalidation of a legislative enactment is appropriate when such act violates "the plain intent of the Constitution" and demonstrates "a disregard of its spirit and the purpose for which express limitations are included therein." *Harkenrider v. Hochul*, 38 N.Y.3d 494, 509 (2022).

ARGUMENT

I. The Town Has Capacity To Challenge The NYVRA's Vote-Dilution Provisions As Unconstitutional

A. Civil Practice Law and Rule § 3211(a)(3) requires that a litigant have "capacity to sue." CPLR § 3211(a)(3). As a general rule, "municipalities . . . and their officers lack capacity to mount constitutional challenges to acts of . . . State legislation." *Matter of World Trade Ctr. Lower Manhattan Disaster Site Litig.*, 30 N.Y.3d 377, 383 (2017) (citation omitted). But this capacity rule is "not absolute," *id.* at 386, and an exception exists that allows political subdivisions to challenge a state statute when they assert that, "if they are obliged to comply" with the statute, "they will by that very compliance be forced to violate a constitutional proscription," *Matter of Jeter v. Ellenville Cent. Sch. Dist*., 41 N.Y.2d 283, 287 (1977); *see Bd. of Ed. of Cent. Sch. Dist. No. 1 v. Allen*, 20 N.Y.2d 109, 117 (1967). Under those "special circumstances . . . the general rule must yield." *Matter of World Trade Ctr.*,

30 N.Y.3d at 386. Courts have thus recognized that when a municipality could be "held accountable [ ] under the Equal Protection Clause . . . by reason of" its compliance with a state statute, it has capacity to sue to challenge the constitutionality of that statute. *See City of New York v. State*, 86 N.Y.2d 286, 295 (1995).

B. Here, the Town can challenge the constitutionality of the NYVRA's vote-dilution provisions. *See Matter of Jeter*, 41 N.Y.2d at 287. As a threshold matter, the Town is a defendant here, and has not *sued* anyone related to the NYVRA's enforcement. CPLR § 3211(a)(3). As such, the capacity-to-*sue* limitation does not apply by its very terms, as the Town is simply defending itself under the U.S. Constitution, which is the law of the land under the Supremacy Clause. *See Armstrong v. Exceptional Child Ctr., Inc.*, 575 US 320, 324 (2015); *see also Swift & Co. v. Wickham*, 382 U.S. 111, 120 (1965).

But even if the Town did need "capacity" to raise a constitutional challenge as a defense against this law, the Town would easily qualify for the forced-constitutional-violation exception. The Town's argument here is that if it is found to violate the NYVRA under Plaintiffs' own theory—that is, if there is racially polarized voting in the Town (or, *alternatively*, if Plaintiffs satisfy the NYVRA's capacious totality-of-the-circumstances inquiry) and another voting system would give citizens statutorily lumped together by race greater electoral success than the

Town's at-large system—the Town *must* violate the Equal Protection Clauses of the U.S. Constitution and New York Constitution by changing its election system with the express goal of permitting citizens statutorily lumped together by race to elect more candidates of their choice (and, given the zero-sum nature of elections, to decrease the number of elections won by candidates favored by other racial groups). To be absolutely clear, and as explained in detail below, *see infra* Part II, the Town's position is that any forced change of its race-neutral at-large election system to *comply with the NYVRA* would violate the Equal Protection Clause. While this Court (and, presumably, ultimately the New York Court of Appeals, and perhaps the U.S. Supreme Court), will decide the *merits* of that argument, the Town clearly has the capacity to raise it. Put another way, the Town's theory fits as clearly as possible within the exception—the Town argues that it will "by [its] very compliance [with the NYVRA] be forced to violate a constitutional proscription." *Matter of Jeter*, 41 N.Y.2d at 287.

C. Plaintiffs' challenge[6] to the Town's capacity relies on a straw man argument, namely, that the Town has not argued that the NYVRA requires it to

[6] Plaintiffs' brief assertion that the Town failed to properly invoke this so-called "dilemma exception" is meritless. Br.19–20. Plaintiffs are the ones that brought this lawsuit seeking an order requiring the Town to implement relief that, as the Supreme Court correctly held, would be unconstitutional. Given this posture, the Town properly raised the constitutionality of the NYVRA in its Answer, NYSCEF Doc.34 at 25, and had no need or opportunity to engage with the dilemma exception until filing its summary judgment briefing and responding to Plaintiffs' lack-of-capacity

"racially gerrymander in defiance of the federal Equal Protection Clause," as prohibited in the line of cases beginning with *Shaw v. Reno*, 509 U.S. 630, 655 (1993). Br.22–28. The *Shaw* line of cases holds that making race a "predominant factor" in drawing a particular district violates the Equal Protection Clause, *Miller v. Johnson*, 515 U.S. 900, 916 (1995), prohibiting the moving of a significant number of voters into or out of a district when the primary motivation for doing so is race, unless the state can satisfy strict scrutiny (such as the need to comply with Section 2 of the federal VRA), *Shaw,* 509 U.S. at 649. But the Town has not limited its arguments in any way to a narrow *Shaw* theory, which is focused on a situation where race is used as a primary motivation in drawing the lines of a particular district. *Id.* Again, the Town's theory is that forcing it to change its race-neutral at-large voting system with the *express, statutorily mandated* goal of increasing the electoral success of citizens statutorily lumped together by race violates the U.S. Constitution and New York Constitution. If that theory is correct, it applies to every action the Town could possibly take if its current at-large system violates the NYVRA, regardless of whether the Town chooses an approach that fits within the specific *Shaw* framework.

challenge, NYSCEF Doc.129 at 8–9. Plaintiffs cite no authority suggesting that the Town must "plead" the dilemma exception in the manner that Plaintiffs claim.

The Attorney General takes a slightly different—but equally unpersuasive—tack, arguing that, "[i]f defendants' capacity argument were correct, then a municipality could bring a sweeping facial challenge to strike down an entire state statute without making any particularized showing as to what specific conduct the statute requires but the Constitution prohibits." Br. for Intervenor Att'y Gen. ("AG Br.") at 18. But the Town has not challenged the "entire" NYVRA as unconstitutional—it only sought summary judgment because the vote-dilution provisions would force it to violate the U.S. Constitution and New York Constitution. And the Town has articulated a theory that would apply to every action it could possibly take to come into compliance with the vote-dilution provisions, in a case where its existing system violates those provisions.

Plaintiffs are simply wrong to suggest that the Supreme Court did not properly assess whether the dilemma exception applies here. Br.20–22. Specifically, Plaintiffs claim the Supreme Court erroneously "accept[ed]" the Town's assertions "at face value," Br.20, without "scrutiniz[ing] the merits of [those] assertion[s]," Br.20, and failed to "consid[er] the clarity of the relevant constitutional command," Br.21. But the Supreme Court properly concluded that because "an actual mandated violation is not a prerequisite to a challenge," the Town's assertion that complying with the NYVRA "through a mandate of this Court that alters [the Town's] electoral system" will cause it to violate the Equal Protection Clause comes within the scope

of the dilemma exception. Order at 12–13. Then, the Supreme Court turned to the merits of the Town's constitutional challenge, diligently analyzing the relevant statutory and constitutional provisions, as well as the ample case law interpreting those provisions, before concluding that applying the NYVRA to require a change to the Town's election method would violate the Equal Protection Clause's prohibition on the enactment of laws that call for race-based classifications without satisfying strict scrutiny. Order at 13–25.

None of the cases that Plaintiffs cite support their claim that the Town cannot challenge the constitutionality of the NYVRA's vote-dilution provisions as a defense to this lawsuit. In *Merola v. Cuomo*, 427 F. Supp. 3d 286 (N.D.N.Y. 2019), a federal district court held that a county clerk lacked capacity to bring an affirmative constitutional challenge because he had not identified a constitutional provision the state law would allegedly cause the clerk to violate and because even if such a constitutional provision existed, the risk of violating that provision as a result of statutory compliance was "steps removed and wholly speculative." *Id.* at 292. Here, in contrast, the Town's well-developed theory is that any action it could take to comply with the NYVRA's vote-dilution provisions, if it is found to violate those provisions, would be unconstitutional. Although the courts in *County of Nassau v. State*, 927 N.Y.S.2d 548 (Sup. Ct. Albany Cnty.), and *Blakeman v. James*, No.2:24-cv-1655, 2024 WL 3201671 (E.D.N.Y. Apr. 4, 2024), rejected the application of the

exception in affirmative constitutional challenges to state law brought by political subdivisions, those courts concluded that the plaintiffs' merits arguments were "simply not persuasive," *Nassau*, 927 N.Y.S.2d at 552; *see also Blakeman*, 2024 WL 3201671, at *14. Here, the Town respectfully submits that its core theory is compelling—indeed, that theory prevailed on the merits before the Supreme Court below. And notably, none of these cases, nor any other cases cited by Plaintiffs, suggest that a town lacks capacity to raise a defense grounded in the U.S. Constitution when it has been sued. *See supra* p.15.

II. The NYVRA's Vote-Dilution Provisions Violate The Equal Protection Clauses Of The Fourteenth Amendment Of The U.S. Constitution And The New York Constitution

The Equal Protection Clause of the Fourteenth Amendment mandates that "[n]o State shall make or enforce any law . . . [that] den[ies] to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1; *see Under 21 v. City of New York*, 65 N.Y.2d 344, 360 (1985). Similarly, the New York Constitution provides that "[n]o person shall be denied the equal protection of the laws of this state or any subdivision thereof," and that "[n]o person shall, because of race, color, creed or religion, be subjected to any discrimination in his or her civil rights . . . by the state or any agency or subdivision of the state." N.Y. Const. art. I, § 11; *Esler v. Walters*, 56 N.Y.2d 306, 313 (1982).

Under the Equal Protection Clause, any state law that makes government decisions based upon a "racial classification" is unconstitutional unless the law can "survive [the] daunting two-step examination known . . . as 'strict scrutiny.'" *SFFA*, 600 U.S. at 206. First, the racial classification in the law at issue must be "used to 'further compelling government interests.'" *Id.* at 206–07 (citation omitted). Second, "use of race" must be "narrowly tailored—meaning necessary—to achieve that interest." *Id.* (citations omitted); *see Abbott v. Perez*, 585 U.S. 579, 587 (2018).

The NYVRA's vote-dilution provisions require political subdivisions to change their existing, race-neutral election methods so that citizens lumped together by race may elect more of their preferred candidates and (given the zero-sum nature of elections) other citizens categorized according to different races may elect fewer of their preferred candidates. These provisions violate the Equal Protection Clauses of the U.S. Constitution and the New York Constitution because they require political subdivisions to alter their election systems based upon their residents' racial classifications, *see infra* Section II.A, without satisfying strict scrutiny, *see infra* Section II.B.

A. The NYVRA's Vote-Dilution Provisions Are Subject To Strict Scrutiny Because They Force Political Subdivisions To Change Their Race-Neutral Election Systems Based Upon Racial Classification

1. The Equal Protection Clause "represent[s] a foundational principle" that the Constitution "should not permit any distinctions of law based on race or color,

because any law which operates upon one man should operate *equally* upon all." *SFFA*, 600 U.S. at 201–02 (citations omitted; brackets omitted); *see also Seaman v. Fedourich*, 16 N.Y.2d 94, 102 (1965). Under that Clause, "[t]he time for making distinctions based on race has passed." *SFFA*, 600 U.S. at 204 (discussing *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954)); *accord Under 21*, 65 N.Y.2d at 363. And so, any state law that makes a "racial classification" must be invalidated as unconstitutional unless the law can survive "daunting . . . strict scrutiny" review. *SFFA*, 600 U.S. at 206–07 (citations omitted).

An express racial classification that is "explicit" in a statute, *Hunt v. Cromartie*, 526 U.S. 541, 546 (1999), is "inherently suspect" without any further inquiry into legislative motive, *Washington v. Seattle Sch. Dist. No.1*, 458 U.S. 457, 485 (1982). Strict scrutiny applies to laws that give "preference[s] based on racial or ethnic criteria," *Adarand Constructors Inc. v. Peña*, 515 U.S. 200, 223 (1995), make "distinctions of law based on race," *SFFA*, 600 U.S. at 202 (citations omitted), or require "official conduct discriminating on the basis of race," *id*. at 206. Laws that "demand[ ] consideration of race" are similarly in tension with the Equal Protection Clause. *Abbott*, 585 U.S. at 587. Strict scrutiny review applies to "*all* racial classifications imposed by the government" by law, "even when they may be said to burden or benefit the races equally." *Johnson v. California*, 543 U.S. 499, 505–06 (2005) (emphasis added; citations omitted).

Although strict scrutiny applies to racial classifications in both federal and state law, *Adarand*, 515 U.S. at 230, Congress has greater authority under the Fourteenth and Fifteenth Amendments to "enact prophylactic legislation proscribing practices that are discriminatory in effect, if not in intent," *Tennessee v. Lane*, 541 U.S. 509, 520 (2004). For example, the Equal Protection Clause mandates strict scrutiny review whenever "the government distributes burdens or benefits on the basis of individual racial classifications." *Parents Involved in Cmty. Schs. v Seattle Sch. Dist. No.1*, 551 U.S. 701, 720 (2007).

The U.S. Supreme Court has recently applied strict scrutiny to affirmative action programs that, like the NYVRA, make "distinctions of law based on race." *SFFA*, 600 U.S. at 202. In *SFFA*, the Court considered a challenge to two college admission programs that called for consideration of a candidate's race as one of many factors in the admissions process, alongside extracurricular activities, academic performance, leadership skills, and others. *Id.* at 193–94. Because of the Equal Protection Clause's guarantees, and because race-based distinctions are "by their very nature odious to a free people," *id.* (quoting *Rice v. Cayetano*, 528 U.S. 495, 517 (2000)), the Court applied strict scrutiny and concluded that the programs' use of race as a plus factor failed to satisfy that "daunting two-step examination," *id.* at 206. In particular, the Court explained that the universities' stated educational goals were "not sufficiently coherent," *id.* at 214, and the universities could not

"articulate a meaningful connection between the means they employ and the goals they pursue," *id.* at 215. Therefore, the Court struck down both affirmative action programs as violating the Equal Protection Clause and prohibited college admission programs from tipping the scales in favor of certain applicants because of their race. *Id.* at 230.

2. The NYVRA's vote-dilution provisions similarly require political subdivisions to make "distinctions of law based on race," *id.* at 202 (citations omitted), and take "official conduct discriminating on the basis of race," *id*. at 206 (citations omitted), and therefore trigger strict scrutiny, *id*. at 208. These provisions are explicitly designed to provide an affirmative benefit to "protected class[es]," defined to mean "members of a race, color, or language-minority group." N.Y. Elec. L. § 17-204(5). Not only do they "demand[ ] consideration of race," *Abbott*, 585 U.S. at 587, by requiring that political subdivisions group their citizens by race (and even across racial groups, *see* N.Y. Elec. L. § 17-206(2)(c)(vi)) and then use these racial groupings to analyze voting preferences and anticipated voting behavior, these provisions also "distribute[ ] burdens or benefits on the basis of individual racial classifications," *Parents Involved*, 551 U.S. at 720, requiring political subdivisions to alter their existing race-neutral election methods so that candidates preferred by citizens of one race are elected more often relative to candidates favored by citizens of some other race. Indeed, as the Supreme Court recognized below, "voter dilution

. . . can rest on the slightest impairments in [the] ability to influence an election," and the "NYVRA sets no minimum bar on the extent of any such impairment." Order at 2, 20. Accordingly, strict scrutiny necessarily applies.

First, and most directly relevant here, the NYVRA's vote-dilution provisions for political subdivisions like the Town that use "an at-large method of election," N.Y. Elec. L. § 17-206(2)(b)(i), rely upon "express racial classifications," *Parents Involved*, 551 U.S. at 707. These provisions require a jurisdiction to discard its existing at-large election system and adopt a district-based or alternative system that leads to more minority-favored candidates winning elections if either (i) the "voting patterns of members of [a] protected class"—that is, "members of a race, color, or language-minority group," N.Y. Elec. L. § 17-204(5)—"within the political subdivision are racially polarized"; or (ii) "the ability of members of the protected class to elect candidates of their choice or influence the outcome of elections is impaired" under an all-things-considered, totality-of-the-circumstances inquiry. *Id.* § 17-206(2)(b)(i). The NYVRA directs political subdivisions to group voters together based solely upon their racial identity, *see id*. § 17-206(2)(c)(iv), without regard to whether the people in these groups are geographically compact or concentrated, *id.* § 17-206(2)(c)(viii), and without regard to whether their voting behavior has anything to do with race, as opposed to politics, *id.* § 17-206(2)(c)(vii). This is a racial-classification scheme, from top to bottom.

For example, the NYVRA's racially based vote-dilution provisions mandate that any time there exists racially polarized voting in a town and candidates preferred by members of minority groups would have a better chance of winning under an alternative system—a phenomenon that the U.S. Supreme Court has explained occurs "to no one's great surprise" "in most states," *Cooper*, 581 U.S. at 304 n.5—that town may avoid liability under the NYVRA only by altering its election system or adopting an entirely new one specifically to ensure that candidates preferred by voters lumped together by racial group have a greater chance of electoral success than under the town's race-neutral at-large election system, *see also* N.Y. Elec. L. § 17-206(5) (remedies provision). And, given the zero-sum nature of elections, that town must do so at the expense of the electoral preferences of citizens who are also lumped together on account of their membership in other racial groups. This is clearly the type of distribution of "benefits" (more electoral success, or an increase in voting strength) and "burdens" (less electoral success, or a decrease in voting strength) "on the basis of individual racial classifications" that the Equal Protection Clause subjects to strict-scrutiny review. *See Parents Involved*, 551 U.S. at 720.

The following hypothetical illustrates this point. If a town were to enact an ordinance that, on its face, required the town to change its election system whenever doing so would allow white-favored candidates to have a greater chance of electoral success, that ordinance would plainly be subject to strict-scrutiny review under the

Equal Protection Clause. *See SFFA*, 600 U.S. at 206 (citing *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886)); *Parents Involved*, 551 U.S. at 720; *Johnson*, 543 U.S. at 505. The same is true regardless of which racial group(s) the town's ordinance seeks to benefit. *See SFFA*, 600 U.S. at 206 (citing *Yick Wo*, 118 U.S. at 369); *Parents Involved*, 551 U.S. at 720; *Johnson*, 543 U.S. at 505. That is because such an ordinance would explicitly distribute a benefit (a greater chance of electoral success) based upon voters' race. *See Parents Involved*, 551 U.S. at 720. The NYVRA's vote-dilution provisions are in constitutional principle no different, requiring political subdivisions to change their election systems to create more electoral success for citizens lumped together by racial groups. Accordingly, these provisions trigger strict scrutiny, just as the hypothetical ordinance discussed herein.

Second, the NYVRA's vote-dilution provisions for jurisdictions using "a district-based or alternative method of election"—as they must if the NYVRA forces them to abandon an at-large system, making those provisions relevant to the present case—also classify and distribute benefits and burdens based on race. Like the at-large provisions, the NYVRA's district-based provisions require a jurisdiction to group its voters by race, including across various racial groups and without regard to whether the people in these groups live together, N.Y. Elec. L. §§ 17-206(2)(c)(iv); 17-206(2)(c)(viii), and change its election system whenever those racial-minority groups' preferred candidates "would usually be defeated" and there

is either "racially polarized" voting in a district or, under the amorphous totality-of-the-circumstances test, an impairment of "the ability of members of the protected class to elect candidates of their choice or influence the outcome of elections," *id.* § 17-206(2)(b)(ii). Thus, to avoid liability, a political subdivision using a district-based election system must change that system so that it does not "usually" result in the defeat of a racial-minority-preferred candidate (which requires that the racial-majority-favored candidates cannot win "too" often), if there is also "racially polarized" voting or an impairment of minority groups' ability to determine or influence an election under an amorphous totality-of-the-circumstances inquiry. *Id.* This standard makes potential liability under the NYVRA capacious, because all it requires is that a minority group's preferred candidates "usually" be defeated—a common scenario in the zero-sum context of elections.

In all, the NYVRA's vote-dilution provisions trigger strict scrutiny because they "distribut[e] [ ] burdens or benefits based on individual racial classifications," *Parents Involved*, 551 U.S. at 702, give "preference[s] based on racial or ethnic criteria," *Adarand Constructors, Inc.*, 515 U.S. at 223, and "demand[ ] consideration of race," *Abbott*, 585 U.S. at 587 (citations omitted).

3. Plaintiffs remarkably claim that the NYVRA merely "refers" to race and does not make "racial classifications." Br.29–41; *see also* Br. of Amicus Curiae NAACP Legal Defense & Educ. Fund, Inc. ("NAACP Amicus Br.") at 4–5. This is

belied by the express statutory language. The NYVRA's vote-dilution provisions apply on their face to "members of a protected class," N.Y. Elec. L. § 17-206(2)(a), defined to mean "a *class* of individuals who are members of a *race*, color, or language-minority group," *id.* § 17-204 (emphases added). In particular, the statute confers "benefits" on groups of citizens lumped together by race, *see SFFA*, 600 U.S. at 204–06, requiring political subdivisions to alter their existing, race-neutral election systems to increase lumped-together-racial-minority groups' ability to elect their preferred candidates (and so decrease the ability of other racial groups to elect their preferred candidates, given the zero-sum nature of elections). Accordingly, while Plaintiffs criticize the Supreme Court's opinion below for supposedly failing to pinpoint the NYVRA's race-based classifications, Br.30–31, those classifications are plain from the text.[7]

Plaintiffs contend that the NYVRA "simply mentions race" and "does not thereby advantage or handicap anyone on the basis of race," Br.36, but that is incorrect. Again, the NYVRA mandates that political subdivisions make "racial

[7] Plaintiffs take issue with the Supreme Court's holding that a "person can only seek relief" under the NYVRA "on the basis of their race, color or national origin," arguing that "relief" does not "depend on anyone's race per se." Br.31–35; *see also* NAACP Amicus Br.4–6. Plaintiffs are entitled to relief under the NYVRA's vote-dilution provisions only if they can show that members of their racial-minority group (or color or language-minority group), considered as a lumped-together racial whole, would elect more candidates of their choice under a different election system or different election rules, and the *only* relief that would cure this violation is changing to a system where those voters grouped together by race have more electoral success.

classification[s]" from top to bottom. *SFFA*, 600 U.S. at 206–07 (citations omitted); *supra* Section II.A. The NYVRA requires that political subdivisions lump their citizens together by racial group and then discard their race-neutral at-large election method with the *exclusive* goal of increasing some racial groups' chances of electing their preferred candidates, thereby decreasing other racial groups' chances of electing their preferred candidates. For that reason, Plaintiffs are wrong to suggest that the NYVRA "distributes no burdens or benefits to individuals." Br.40 (emphasis omitted). While the statute regulates political subdivisions, it benefits voters lumped together into "race, color, and language-minority groups," *see* N.Y. Elec. L. § 17-206(5), by forcing those subdivisions to change their race-neutral laws to mandate more electoral success for those voters (at the necessary expense of voters grouped together by other races).

According to Plaintiffs and the Attorney General, the NYVRA does not trigger strict scrutiny because it is an anti-discrimination provision, just like statutes that prohibit employers from discriminating against their employees based upon their race. Br.29–36; AG Br.24–28; *accord* NAACP Amicus Br.4–5. But the NYVRA's vote-dilution provisions do not prohibit racial discrimination. Rather, as explained in detail above, those provisions force political subdivisions who happen to have racially polarized voting in their jurisdictions or satisfy a capacious all-things-considered inquiry to change their election systems with the sole purpose of

ensuring more electoral success for citizens lumped together by race, at the expense of other citizens lumped together by other races. That the NYVRA chooses to *label* as "vote dilution" what Justice Elena Kagan explained for the unanimous U.S. Supreme Court as the common, non-discriminatory phenomenon of racially polarized voting, *see Cooper*, 581 U.S. at 304 n.5, does not transform a statute that on its face requires giving "benefits" (more electoral success) and "burdens" (less electoral success) to citizens lumped together by race into an anti-discrimination provision, *see Parents Involved*, 551 U.S. at 720.

Plaintiffs further argue that the Supreme Court misread the NYVRA's specific listed remedies as classifying by race, Br.33–34; *see* AG Br.31–37, but that too is wrong. No party has argued, and the Supreme Court did not hold, that a town's adoption of "a district-based method of election," "an alternative method of election," or "new or revised districting or redistricting plans," N.Y. Elec. L. § 17-206(5), would always be based upon a racial classification, regardless of *why* the town took these steps. *Contra* Br.33–34. The constitutional problems arise because the NYVRA *forces* political subdivisions to abandon their race-neutral election system for the *sole and express* purpose of increasing the electoral success of citizens lumped together by race. So, of course, the Town (or any political subdivision) could jettison its at-large system and adopt "a district-based method of election" because it concludes that such a system would better its citizens' needs, regardless

of their skin color. But what it could not do is change its election system for the express purpose of giving some of its citizens lumped together by race more electoral success, while giving other citizens lumped together by race less success, unless it could satisfy strict scrutiny. While in some contexts, it is difficult to determine why a town has taken a particular action—race-based or race-neutral—and courts have developed tools like the framework in *Mount Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 285 (1977), to assist with the inquiry in various contexts, the analysis is easy when it comes to complying with the NYVRA. That is because the NYVRA explicitly and unambiguously requires political subdivisions to change their election systems to benefit racial groups, no different in principle from the hypothetical county ordinance requiring changes to give more electoral success to white voters, discussed above. *See supra* pp.26–27.

Notably, the NYVRA's vote-dilution provisions call for even more obvious racial classifications than those at issue in the affirmative action programs challenged in the recent *SFFA* decision, which considered college admissions regimes that gave candidates of certain racial groups a leg up in competing for admission as part of a holistic admissions process. *See* 600 U.S. at 230. Both Plaintiffs here and the affirmative action recipients in *SFFA* sought valuable benefits—here, electoral success, there, college admission—on the basis of their race. But unlike those college admissions policies that considered racial

classifications as part of a holistic review process, the NYVRA distributes its benefits and burdens on account of *nothing more* than membership in a particular "class of individuals who are members of a race, color, or language minority group." N.Y. Elec. L. § 17-204(5); *see id.* § 17-206(2). Thus, even more clearly than the affirmative action schemes in *SFFA*, this racially mandated distribution of benefits and burdens triggers strict scrutiny and distinguishes the NYVRA's vote-dilution provisions from anti-discrimination legislation that prohibits discrimination on the basis of certain protected categories.

As with their argument concerning the Town's capacity to challenge this law, Plaintiffs attempt to confuse matters by arguing that the NYVRA does not require towns to "craft districts that are unlawful racial gerrymanders," in violation of the U.S. Supreme Court's *Shaw* line of cases. Br.34–35. But as explained above, the Town has never argued that the NYVRA would necessarily require it to adopt a redistricting plan that constitutes an unlawful racial gerrymander under *Shaw*. *See supra* pp.16–17. Rather, *any* forced alteration to its race-neutral at-large voting system as a result of the NYVRA's statutory mandate to increase the electoral success of citizens statutorily lumped together by race violates the Equal Protection Clause, regardless of the alternative election method adopted to achieve that end.

The Attorney General's argument that the NYVRA is race-neutral because it "equally protects members of all racial groups," AG Br.23–24, 37, is both incorrect

and irrelevant. It is incorrect because reading the NYVRA to protect white voters as well as voters of color would make no sense. *See Lubonty v. U.S. Bank Nat'l Assoc.*, 34 N.Y.3d 250, 255 (2019) (courts must interpret statutes "so as to avoid an unreasonable or absurd application of the law" (citation omitted)). Indeed, reading the NYVRA's vote-dilution provisions to apply to white majorities would make compliance with those provisions impossible because, given the zero-sum nature of elections, it would render almost *every* election system violative of the NYVRA when there is racially-polarized voting in a political subdivision. To take just the most obvious example, no matter where districts lines are drawn, some group of citizens grouped together by race will have its candidates "usually . . . defeated," N.Y. Elec. L. § 17-206(2)(b)(ii), if one includes white voters within the NYVRA's protected classification.

Regardless, this argument is irrelevant to the question of whether the NYVRA's vote-dilution provisions trigger strict scrutiny. These provisions explicitly protect (and provide benefits to) "race . . . minority" groups, N.Y. Elec. L. § 17-204(5), which in itself is a racial classification triggering strict scrutiny. And even if these provisions applied equally to members of any racial group, which they do not, the NYVRA would still be subject to strict-scrutiny review. The Equal Protection Clause applies to all individuals "without regard to any differences of race, of color, or of nationality," *SFFA*, 600 U.S. at 206 (citations omitted), such that

"all racial classifications imposed by the government must be analyzed by a reviewing court under strict scrutiny," *Johnson*, 543 U.S. at 505. Whenever a law makes "racial classifications"—"even when they may be said to burden or benefit the races equally"—courts must subject that law to strict scrutiny. *Id.* at 499 (citation omitted). Even if the Attorney General is correct that the NYVRA's vote-dilution provisions "may be invoked equally by voters of any race" so long as the voter falls within a "race, color, or language-minority group," AG Br.23–24 (quoting N.Y. Elec. L. § 17-204(5)), that only reinforces the Supreme Court's conclusion here that the key determining factor for whether individuals may take advantage of the NYVRA's vote-dilution protections is their race.

Contrary to Plaintiffs' arguments, the U.S. Supreme Court has not rejected the application of strict scrutiny to Section 2 of the VRA, and has, instead, made clear that Section 2 is only constitutional because it satisfies strict scrutiny. Br.34–37 & n.3. Plaintiffs rely upon the Supreme Court's *Allen v. Milligan*, 599 U.S. 1 (2023), decision to argue that "Section 2 must only be 'appropriate' to pass constitutional muster," Br.34, but that is not what *Allen* holds. Rather, *Allen* notes that the VRA's "ban on electoral changes that are discriminatory in effect . . . is an appropriate method of promoting the purposes of the Fifteenth Amendment." 599 U.S. at 41 (citations omitted). That decision in no way suggests that Section 2 is not subject to strict scrutiny. *See id.* To the exact contrary, the U.S. Supreme Court has explained

that Section 2 must satisfy "strict scrutiny" because it "demands consideration of race" in a state's redistricting process. *Abbott*, 585 U.S. at 587 (citations omitted). Although Plaintiffs claim that *Abbott* does not support the proposition that Section 2 is subject to strict scrutiny, Br.35 n.3, they fail to deal with the implication of the U.S. Supreme Court's "assum[ption]" that "complying with the VRA" means that a state's "consideration of race" in enacting a redistricting plan "satisfies strict scrutiny," *Abbott*, 585 U.S. at 587; *see also Bethune-Hill v. Va. State Bd. of Elections*, 580 U.S. 178, 194 (2017); *Cooper*, 581 U.S. at 292–93. Unlike the NYVRA, Section 2 is constitutional precisely because it is narrowly tailored to satisfying a compelling government interest. *See infra* pp.38–40.

Plaintiffs' and *amici*'s argument that the NYVRA "shares key provisions with other state VRAs"—namely, the California and Washington Voting Rights Acts ("CVRA" and "WVRA")—that have withstood judicial review on constitutional grounds does not help their cause. Br. of Campaign Legal Center, et al. at 4; Br.37–38. As a threshold matter, the nonbinding cases that Plaintiffs and *amici* cite upholding the Washington and California statutes—such as *Portugal v. Franklin County*, 530 P.3d 994 (Wash. 2023) (en banc), and *Sanchez v. City of Modesto*, 145 Cal. App. 4th 660 (Cal. Ct. App. 2006)—were decided before the U.S. Supreme Court's landmark decision in *SFFA*, 600 U.S. at 204, which involved an even less obvious racial classification scheme than at issue in the NYVRA, *see supra* pp.32–

33. To the extent that those decisions contain reasoning that would suggest that the NYVRA is not subject to strict scrutiny, those decisions cannot survive *SFFA*'s landmark holding.

In any event, both the California and Washington statutes are significantly more narrowly tailored than the NYVRA, even though the Town believes that these provisions fall short of satisfying strict scrutiny. The CVRA expressly incorporates "case law regarding enforcement of the federal Voting Rights Act." Cal. Elec. Code § 14026(e). It also contains many of the same procedural safeguards that allow the federal VRA to survive strict scrutiny. *Sanchez*, 51 Cal. Rptr. 3d at 828. By way of example, CVRA plaintiffs must satisfy two of the three necessary *Gingles* preconditions, *see id.*—a showing that the NYVRA does not require, as explained in detail below, *see infra* Section II.B. The WVRA similarly permits a court to "rely on relevant federal case law" in interpreting its provisions. Wash. Rev. Code § 29A.92.010.

B. The NYVRA's Vote-Dilution Provisions Are Not Narrowly Tailored To Achieving A Compelling State Interest

1. A state law that, like the NYVRA, distributes benefits and burdens based upon race violates the Equal Protection Clause unless the law is "narrowly tailored to achieving a compelling state interest." *Wis. Legislature v. Wis. Elections Comm'n*, 595 U.S. 398, 401 (2022) (per curiam) (quoting *Miller*, 515 U.S. at 904). The U.S. Supreme Court's equal-protection precedent has recognized a compelling

interest in "remediating specific, identified instances of past discrimination that violated the Constitution or a statute." *SFFA*, 600 U.S. at 207. But States invoking this interest must "identify that discrimination, public or private, with some specificity before they may use race-conscious relief." *Shaw v. Hunt*, 517 U.S. 899, 909 (1996) ("*Shaw II*") (citations omitted). In redistricting cases, the U.S. Supreme Court has "long assumed" that "one compelling interest" that could justify a State drawing district lines with predominately racial motives is complying with Section 2 of the federal VRA. *Cooper*, 581 U.S. at 292; *see also Wis. Legislature*, 595 U.S. at 401–02. Section 2 of the VRA is the rare law that survives strict-scrutiny review because it contains several "exacting requirements" and safeguards that narrowly tailor its application. *Allen*, 599 U.S. at 30; *see generally* 52 U.S.C. § 10301.

In *Thornburg v. Gingles*, 478 U.S. 30 (1986), the U.S. Supreme Court crafted a narrowly tailored, two-step "framework" for adjudicating Section 2 vote-dilution claims. *Id.* at 50–51; *Wis. Legislature*, 595 U.S. at 402; *see Bartlett v Strickland*, 556 U.S. 1, 21 (2009) (plurality opinion). Under *Gingles* step one, a plaintiff must establish three "necessary preconditions" to make out a *prima facie* vote-dilution claim. *Gingles*, 478 U.S. at 50. First, "[t]he minority group must be sufficiently large and compact to constitute a majority in a reasonably configured district." *Wis. Legislature*, 595 U.S. at 402. This precondition is not satisfied by showing that it is possible to create an "influence district," where "minority voters may not be able to

elect a candidate of choice but can play a substantial, if not decisive, role in the electoral process." *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 445–46 (2006) ("*LULAC*") (citation omitted). Nor can a plaintiff lump minority groups together in a so-called "coalition district." *See Petteway v. Galveston County*, 111 F.4th 596, 599 (5th Cir. 2024) (en banc); *but see Concerned Citizens of Hardee Cnty. v. Hardee Cnty. Bd. of Comm'rs*, 906 F.2d 524, 526 (11th Cir. 1990). Second, "the minority group must be politically cohesive." *Wis. Legislature*, 595 U.S. at 402. And finally, "a majority group must vote sufficiently as a bloc to enable it to usually defeat the minority group's preferred candidate." *Id.* These three preconditions "establish[ ] that the challenged [map] thwarts a distinctive minority vote at least plausibly on account of race." *Allen*, 599 U.S. at 19 (citation omitted). If a plaintiff satisfies each of the preconditions at *Gingles* step one, a court moves to *Gingles* step two and "considers the totality of circumstances to determine 'whether the political process is equally open to minority voters.'" *Wis. Legislature*, 595 U.S. at 402 (quoting *Gingles*, 478 U.S. at 79). The factors relevant to this equally-open-to-minority-voters analysis include the political subdivision's "history of voting-related discrimination," *Gingles*, 478 U.S. at 44–45, "recogniz[ing] that application of the *Gingles* factors is peculiarly dependent upon the facts of each case," *Allen*, 599 U.S. at 19 (citations omitted).

A plaintiff must meet *each* of these exacting standards to demonstrate a violation of Section 2's vote-dilution protections, and only then may a court order a jurisdiction to draw new district lines based on racial considerations. *See Shaw II*, 517 U.S. at 911. Relaxing any of the *Gingles* standards would present "serious constitutional concerns under the Equal Protection Clause," as Section 2 would no longer be narrowly tailored and therefore would no longer satisfy strict scrutiny. *Bartlett*, 556 U.S. at 21 (plurality opinion).

2. The NYVRA's vote-dilution provisions cannot satisfy strict scrutiny, as they do not further a compelling state interest and are not narrowly tailored to achieve any such compelling interest.

a. *No Compelling State Interest.* The NYVRA's vote-dilution provisions fail at prong one of the strict-scrutiny analysis because the Legislature did not design the NYVRA to further a compelling government interest. As noted, a State has a compelling "interest in remedying the effects of . . . racial discrimination" if it has "a strong basis in evidence to conclude that . . . action [is] necessary" to remediate "*identified* discrimination." *Shaw II*, 517 U.S. at 909–10 (emphasis added; citation omitted). But the NYVRA does not target that interest, and instead imposes liability without requiring proof of "specific, identified instances of past discrimination that violated the Constitution or a statute." *SFFA*, 600 U.S. at 207 (citing *Shaw II*, 517 U.S. at 909–10). In other words, the NYVRA's vote-dilution provisions—despite

mandating race-based redistricting in circumstances beyond those covered by Section 2 of the VRA——are "devoid of any requirement of proving past discrimination by a protected class," Order at 17, before requiring a political subdivision to abandon its at-large method of election and adopt a new election system for the benefit of racial minorities. *See* N.Y. Elec. Law § 17-206(2)(b)(i).

The interests that the NYVRA does advance do not qualify as "compelling" under binding U.S. Supreme Court precedent. Instead of seeking to achieve the compelling interest of remediating "identified discrimination" where there exists "a strong basis in evidence to conclude" that such remediation is "necessary," *Shaw II*, 517 U.S. at 909–10 (citations omitted), the NYVRA attempts to protect one normative vision of "an equal opportunity to vote" and "participation in voting by all eligible voters"—"particular[ly] members of racial, ethnic, and language-minority groups," Gov. Kathy Hochul, *Governor Hochul Signs Landmark John R. Lewis Voting Rights Act of New York Into Law* (June 20, 2022).[8] While these interests may be "commendable goals, they are not sufficiently coherent" or compelling "for purposes of strict scrutiny" review and cannot justify the NYVRA's pervasive racial classifications. *SFFA*, 600 U.S. at 214.

[8] Available at https://www.governor.ny.gov/news/governor-hochul-signs-landmark-john-r-lewis-voting-rights-act-new-york-law.

States also lack Congress' constitutional prerogatives to use voting-rights laws to remedy societal discrimination, further showing that the NYVRA serves no compelling *state* interest. The Fourteenth Amendment "explicit[ly] constrain[s]" states' power by barring them from using "race as a criterion for legislative action." *City of Richmond v. J.A. Croson Co*., 488 U.S. 469, 490–91 (1989). This ban applies to allegedly "benign racial classifications," *id*. at 495 (citation omitted), "without regard to any differences of race, of color, or of nationality," *SFFA*, 600 U.S. at 206 (citation omitted). It works to prohibit states from engaging in the "odious" practice of "pick[ing] winners and losers based on the color of their skin." *Id.* at 208, 229 (citation omitted). Thus, while "Congress may identify and redress the effects of society-wide discrimination[, this] does not mean that, *a fortiori*, the States and their political subdivisions are free to decide that such remedies are appropriate." *City of Richmond*, 488 U.S. at 490; *accord Trump v. Anderson*, 601 U.S. 100, 112 (2024).

b. <u>*No Narrow Tailoring*</u>. Even if this Court were to assume or hold that the NYVRA's vote-dilution provisions advance a compelling interest in "remediating specific, identified instances of past discrimination," they would still be invalid, as these provisions are not even arguably "narrowly tailored" to achieving this asserted interest. *SFFA*, 600 U.S. at 206–07 (citation omitted).

At a very minimum, the Equal Protection Clause demands that a statute mandating race-based redistricting contain the same (or at least comparable)

exacting safeguards that make Section 2 of the VRA narrowly tailored, in light of the historical pedigree and narrowly tailored remedial design of that provision. *See Cooper*, 581 U.S. at 292. As interpreted by the U.S. Supreme Court, Section 2 carefully cabins the circumstances under which a jurisdiction may draw districts based upon race: the plaintiff is first required to meet the three *Gingles* "necessary preconditions," *Gingles*, 478 U.S. at 50, and then must *also* meet the equally-open-to-minority-voters inquiry, *id*. at 79; *supra* pp.38–40. A court may not conclude that a "[challenged] district is not equally open" because "minority voters face—unlike their majority peers—bloc voting along racial lines, arising against the backdrop of substantial racial discrimination within the State, that renders a minority vote unequal to a vote by a nonminority voter," unless a plaintiff first makes this difficult two-step showing. *Allen*, 599 U.S. at 25. These safeguards render Section 2 constitutional. *See Bartlett*, 556 U.S. at 21 (plurality opinion).

The NYVRA's vote-dilution provisions forgo Section 2's safeguards and narrow tailoring by design. These provisions "mandate that a reviewing court *not* consider the first of the *Gingles* preconditions in determining a vote dilution claim" at the liability stage, Order at 22, permitting plaintiffs to demonstrate vote-dilution without showing that a minority group "is sufficiently large and geographically compact to constitute a majority in a single-member district," *Gingles*, 478 U.S. at 50; *see* N.Y. Elec. Law § 17-206(2)(c)(viii). Further, the statute expands the first

Gingles precondition's scope by applying even where a minority group only "influence[s] the outcome of elections," *id.* § 17-206(2)(b)(ii), rather than playing a "decisive" role, *LULAC*, 548 U.S. at 445–46, and authorizing the "combin[ing]" of minority groups into coalition districts, N.Y. Elec. Law § 17-206(2)(c)(iv). The NYVRA similarly disregards the second *Gingles* precondition: plaintiffs do not need to show that a minority group is "politically cohesive," *Wis. Legislature*, 595 U.S. at 402, as the statute broadly defines "racially polarized" to mean "voting in which there is a divergence in the . . . choice[s] of members in a protected class from the . . . choice[s] of the rest of the electorate," N.Y. Elec. Law § 17-204(6), rather than voting in which "a significant number" of the minority group's members usually vote for the same "preferred candidate," *Gingles*, 478 U.S. at 51–53, 56. Nor do the NYVRA's vote-dilution provisions require a plaintiff to satisfy *Gingles*' necessary second step—the equally-open-to-minority-voters inquiry—meaning that the NYVRA requires race-based changes to election systems without any demonstration that the "political process is [not] equally open to minority voters." *Wis. Legislature*, 595 U.S. at 402 (citations omitted).

Because the NYVRA rejects the *Gingles* preconditions and does not require a showing that the political process is not equally open to minority voters, it mandates that political subdivisions make race-based changes to their election systems in a much broader range of circumstances than necessary to "remediat[e] specific,

identified instances of past discrimination." *SFFA*, 600 U.S. at 206–07; *see also Parents Involved*, 551 U.S. at 720. A political subdivision may be held liable for "vote dilution" regardless of whether a plaintiff shows that the minority group "is sufficiently large and geographically compact to constitute a majority in a single-member district," *Gingles*, 478 U.S. at 50, or that the minority group is "politically cohesive," as *Gingles* uses that term, *Wis. Legislature*, 595 U.S. at 402. The statute further permits plaintiffs to rely upon "influence," *LULAC*, 548 U.S. at 445–46, or "coalition" districts as the basis of their vote-dilution claim, *Petteway*, 111 F.4th at 599, and relieves them (under the first method of proof) of the requirement of "show[ing], under the 'totality of circumstances,' that the political process is not 'equally open' to minority voters," *Allen*, 599 U.S. at 18 (quoting *Gingles*, 478 U.S. at 45–46). Rather, under Plaintiffs' own theory in this case, political subdivisions must change their existing election system whenever voting is "racially polarized" and an alternative system would give minority-preferred candidates a chance to win more seats than under the political subdivision's current system. *See* N.Y. Elec. L. §§ 17-206(2)(b)(i)(A), 17-206(2)(b)(ii)(A).

Finally, the NYVRA's lack of narrow tailoring is further demonstrated by its provisions allowing liability without a totality-of-the-circumstances inquiry, which inquiry is intended to ensure that the challenged voting is in fact not equally open to minority voters. S*ee supra* pp.39–40. The NYVRA's failure to require an equally-

open-to-minority-voters showing applies both to political subdivisions using an at-large method of voting and those using a district-based method. *See* N.Y. Elec. L. § 17-206(2)(b)(i)(B); *id.* § 17-206(2)(b)(ii)(B). The equally-open-to-minority-voters inquiry helps ensure that Section 2 is narrowly tailored, requiring a plaintiff to make such a showing *in addition to* satisfying the *Gingles* preconditions. By contrast, the NYVRA permits a court to condition liability on factors as nebulous as "disadvantages in," for example, "education, employment, health, criminal justice, housing, land use, or environmental protection," *id.* § 17-206(3)(g), without requiring any particular showing on any particular factor, *see id*. § 17-206(3). In fact, as the Supreme Court recognized, the NYVRA's totality analysis "lacks any defined criteria because the NYVRA lists 11 factors that *may* be considered," thus allowing courts "to find voter dilution based on *any* criteria that the court itself creates, or no criteria at all." Order at 20. And so, the NYVRA's amorphous totality-of-the-circumstances analysis provides another path for a plaintiff to obtain race-based redistricting without even arguably satisfying strict scrutiny's narrow tailoring requirement.

3. Plaintiffs and the Attorney General raise several arguments in their effort to claim that the NYVRA's vote-dilution provisions are narrowly tailored to achieving a compelling state interest, but none are persuasive.

Although Plaintiffs state that "the end of racial discrimination in voting" is the compelling state interest that the NYVRA purportedly furthers, Br.43, the NYVRA's vote-dilution provisions, in particular, are not at all tailored to achieve that interest, as they target what they label as "vote dilution," which is not even arguably racial discrimination. *Supra* pp.40–41. Plaintiffs brush this point aside, arguing that the entire statute's references to "the denial or abridgment of the voting rights of members of a race, color, or language-minority group" and to "[e]nsur[ing] that eligible voters who are members of racial, color, and language-minority groups shall have an equal opportunity to participate in the political processes of the state of New York," as well as extra-statutory evidence, reveals the Legislature's subjective intent to remedy racial discrimination in voting by enacting the NYVRA as a whole. Br.42–44 (citing N.Y. Elec. L. § 17-200); *see* Br.45–46. But the text provides the best evidence of legislative intent, *see People v. Cypress Hills Cemetery*, 208 A.D.2d 247, 251 (N.Y. App. Div. 1995), and here, the NYVRA's *vote-dilution provisions* permit liability without *any* assessment at all of racial discrimination.[9] And while the NYVRA suggests that "the history of discrimination

[9] Plaintiffs' discussion of the NYVRA's purpose as a whole, Br.42–45, is thus irrelevant. Defendants only challenged the NYVRA's vote-dilution provisions, and those provisions on their face do not seek to remedy discrimination of any kind. Rather, they seek to impose liability and force a change whenever, for example, there exists the common phenomenon of a "discernable, non-random relationship[ ] between race and voting," *Cooper*, 581 US at 304 n.5, and those provisions on their face do not even attempt to remedy racial discrimination.

in or affecting the political subdivision" may be relevant to the totality-of-the-circumstances inquiry as an alternative method of proving liability for vote dilution, N.Y. Elec. L. § 17-206(3)(a); *see id.* § 17-206(2)(b)(i)(B), the statute explicitly states that no "specified number of factors [are] required in establishing that such a violation has occurred," *id.* § 17-206(3).

Plaintiffs note that other jurisdictions in New York have been sued under the federal VRA, and suggest that the Legislature's interest in combatting racial discrimination may be ascertained from these lawsuits. Br.45. But "generalized assertion[s] of past discrimination in a particular [ ] region" cannot support a compelling interest for race-based legislation. *Shaw II*, 517 U.S. at 909–10. These lawsuits at most show a compelling interest in implementing a remedy, under a narrowly drawn statute, to address discrimination in these particular jurisdictions. *See id.* They do not, however, support Plaintiffs' contention that the NYVRA's vote-dilution provisions further the compelling interest of "end[ing] [ ] racial discrimination in voting." *Contra* Br.43. And, in any event, Plaintiffs have never presented any evidence that the Town has engaged in racial discrimination in voting—let alone strong evidence indicating that the Town adopted its at-large method of election out of racial animus, thereby necessitating "action" to remediate "identified discrimination." *Shaw II*, 517 U.S. at 909–10 (citation omitted).

The Attorney General contends that if this Court determines that the NYVRA's vote-dilution provisions trigger strict scrutiny, it should remand this case for "factual findings on whether the statute satisfies that standard in this case." AG Br.50–53. The Attorney General's remand request is a concession that the record does not contain evidence satisfying strict scrutiny—*evidence that was Plaintiffs' and the Attorney General's burden to provide*. *See Cooper*, 581 U.S. at 291–92. The Town notified the Attorney General of the constitutional question involved in this case on May 29, 2024, giving the Attorney General and Plaintiffs more than enough time to develop any evidence to satisfy their burden on this point. NYSCEF Doc.35.

Plaintiffs argue that an NYVRA claim based on racially polarized voting "corresponds to the 'essence' of vote dilution because the 'social and historical' conditions that comprise this essence include racially polarized voting," Br.48–49 (quoting *Gingles*, 478 U.S. at 47), but the NYVRA's vote-dilution provisions are not even arguably narrowly tailored to this asserted "essence." What the NYVRA deems "vote dilution" is not "vote dilution" as understood by the Supreme Court in *Gingles*, but rather a barebones concept that exists wherever there is the common condition of a "discernable, non-random relationship between race and voting" in a jurisdiction and another voting system would give voters lumped together by race a greater chance of electoral success. *Cooper*, 581 U.S. at 304 n.5. And, of course,

racially polarized voting is not synonymous with racial discrimination in voting, nor is the NYVRA's capacious all-things-considered inquiry. Plaintiffs claim that "racial discrimination supports an inference of racially polarized voting." Br.51. But regardless of whether that is true, the inverse is clearly not true: the existence of racially polarized voting does not even arguably imply that discrimination has occurred. Plaintiffs do not even argue otherwise. Rather, it is a common phenomenon that the U.S. Supreme Court has explained occurs "to no one's great surprise" "in most States." *Cooper*, 581 U.S. at 304 n.5.

Plaintiffs' futile effort to characterize the NYVRA's capacious vote-dilution provisions as narrowly tailored despite the statute's express rejection of the preconditions required at *Gingles* step one and the equally-open-to-minority-voters analysis required at *Gingles* step two, Br.47–49, is unconvincing. They argue that the *Gingles* prongs "are *not* derived from, meant to operationalize, or otherwise related to the Constitution." Br.52; *see* AG Br.41; NAACP Amicus Br.9–10. But the Supreme Court has explained that relaxing the *Gingles* standards would present "serious constitutional concerns under the Equal Protection Clause." *Bartlett*, 556 U.S. at 21 (plurality opinion); *see also Allen*, 599 U.S. at 41 (rejecting Alabama's argument that Section 2 "as interpreted in *Gingles* exceeds the remedial authority of Congress" under the Fifteenth Amendment). Indeed, even Plaintiffs acknowledge that the *Gingles* prongs are intended to provide structure to what would otherwise

be "sprawling" vote-dilution cases under Section 2. Br.52–53. Accordingly, while Plaintiffs are correct that a state VRA does not "run afoul of the federal Constitution merely because it fails to emulate" the *Gingles* prongs, Br.53; *see* NAACP Amicus Br.8–11, the NYVRA is unconstitutional because it fails to employ *comparable* safeguards (or, indeed, any meaningful safeguards at all).[10]

Plaintiffs say that the NYVRA departs in only "limited" ways from the federal VRA, Br.54–55, but that too is incorrect. With respect to the first *Gingles* precondition, Plaintiffs acknowledge that the NYVRA does not include this precondition, but say that the implicit statutory requirement that a plaintiff present "proof of a reasonable alternative policy that would improve the protected class's representation relative to the status quo . . . has the same point as the first *Gingles* prong." Br.54. But the NYVRA instructs that such evidence "*shall not* be considered" for liability purposes and states only that such evidence "*may* be a factor" in devising a remedy. N.Y. Elec. L. § 17-206(2)(c) (emphases added). Moreover, the NYVRA exceeds the first *Gingles* precondition's scope by permitting

[10] Plaintiffs briefly contend that "courts decide *constitutional* vote dilution cases without reference to any of the *Gingles* prongs," looking instead to "factors revolv[ing] around racial discrimination," including "the maintenance of racial discrimination" and "the existence of past discrimination." Br.51–52 (quoting *Zimmer v. McKeithen*, 485 F.2d 1297, 1305 (5th Cir. 1973)). Of course, Plaintiffs themselves acknowledge that this inquiry has rarely been conducted following the 1982 amendments to Section 2. Br.51. In any event, neither the NYVRA's racially-polarized-voting inquiry nor its totality-of-the-circumstances inquiry require any finding of past or present racial discrimination. *Supra* pp.6–7.

a minority group to bring a vote-dilution claim merely by showing that it could "influence the outcome of elections," *id.* § 17-206(2)(b)(ii), and by permitting different minority groups to "combine[ ]" into coalition districts, *id.* § 17-206(2)(c)(iv). As to the second precondition, Plaintiffs' argument that "the NYVRA's vote dilution claim based on racially polarized voting incorporates the second and third *Gingles* prongs," Br.54, is incorrect, given that the NYVRA contains no requirement that plaintiffs show that members of a protected class are politically cohesive to establish liability, as is required under Section 2 of the VRA, *supra* pp.44–45. And Plaintiffs' contention that an NYVRA vote-dilution claim "based on the totality of the circumstances is essentially identical to Section 2's totality-of-circumstances stage" misses the point. Br.54. Contrary to the federal VRA, a plaintiff can establish liability under the NYVRA without proving *any* of the statute's listed totality-of-the-circumstances factors. *Supra* pp.44–45.

Plaintiffs' contention that the NYVRA's rejection of the *Gingles* framework somehow makes that statute "*better* tailored to preventing and remedying vote dilution," Br.55–56, is risible. Plaintiffs do not point to *any* statutory language tailoring the vote-dilution provisions' scope, which are drafted in the broadest possible terms. And without the safeguards that the *Gingles* framework provides (or, indeed, *any* other meaningful safeguards), towns and counties across New York are exposed to liability whenever there exist "discernable, non-random relationships

between race and voting" and a racial-minority group could do better under a different election system. *Cooper*, 581 U.S. at 304 n.5.

Plaintiffs claim that the NYVRA rightly rejects the first *Gingles* precondition because that precondition prevents "a protected class that happens to be geographically dispersed" from proving a Section 2 claim, even though "such a class can certainly experience vote dilution, as when voting is racially polarized and the class is underrepresented." Br.55. But there is nothing discriminatory about the mere existence of racially polarized voting, and the *SFFA* Court has already explained that vague notions of underrepresentation do not satisfy strict scrutiny. 600 U.S. at 216–17. And while Plaintiffs herald the NYVRA for not requiring a plaintiff to satisfy both the racially-polarized-voting inquiry and the totality-of-the-circumstances inquiry, Br.56, these two steps are precisely what allow a court to conduct the "'intensely local appraisal of the design and impact' of the contested electoral mechanisms" necessary to determine "whether the political process is equally open to minority voters," *Gingles*, 478 U.S. at 79.

Finally, Plaintiffs contend that the Supreme Court erred in facially invalidating the NYVRA's vote-dilution provisions because the NYVRA can be constitutionally applied if a vote-dilution plaintiff can also satisfy Section 2 of the VRA. Br.57–58. But Plaintiffs waived any argument that the NYVRA is constitutional as applied to situations that satisfy Section 2 of the VRA, as they did

not raise this argument below. *See* NYSCEF Doc.73. Indeed, Plaintiffs' experts never conducted any *Gingles* preconditions analysis, and a single paragraph in an appellate brief is not sufficient to meaningfully develop an argument on this complicated topic for the first time on appeal. *Wallace v. Env't Control Bd. of City of New York*, 778 N.Y.S.2d 477, 478 (N.Y. App. Div. 2004). In any event, the Town would not oppose a decision from this Court affirming the grant of summary judgment in the Town's favor based upon the constitutional arguments raised in this brief, while leaving for another day the question of whether the statute would be unconstitutional in a case where a party timely argues that it is only bringing an NYVRA claim in the very narrow circumstances permitted by Section 2 of the federal VRA.[11]

CONCLUSION

This Court should affirm the Supreme Court by holding that the NYVRA's vote-dilution provisions are unconstitutional.

[11] In *Coads v. Nassau County*, counsel for the Town here took the same position, arguing that the court need not decide whether the NYVRA's district-based provisions are constitutional as applied in circumstances where Section 2 is satisfied. *See* Mem. of L. in Supp. of Defs. Mot. for S.J. at 14–15, *Coads v. Nassau County*, No.611872/2023 (Sup. Ct. Nov. 11, 2024) (NYSCEF No.177).

Dated: December 5, 2024

Respectfully submitted,

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138 S.Ct. 2305
Supreme Court of the United States

Greg ABBOTT, Governor of Texas, et al., Appellants
v.
Shannon PEREZ, et al.
Greg Abbott, Governor of Texas, et al., Appellants
v.
Shannon Perez, et al.

Nos. 17–586, 17–626
|
Argued April 24, 2018.
|
Decided June 25, 2018.

Synopsis

Background: Voters, state and federal legislators, and voting rights organizations brought actions alleging that Texas's redistricting plans for United States House of Representatives, Texas House of Representatives, and Texas Senate violated Constitution and Voting Rights Act (VRA). After the District Court issued interim redistricting plans, the Texas Legislature adopted court's interim plans without change, the cases were consolidated, and bench trial was held. A three-judge panel of the United States District Court for the Western District of Texas, Xavier Rodriguez, J., 267 F.Supp.3d 750, 274 F.Supp.3d 624, entered orders barring Texas from using districting plans in effect to conduct the current year's elections, and appeal was taken.

Holdings: The Supreme Court, Justice Alito, held that:

orders were effectively injunctions and thus were appealable to the Supreme Court;

District Court disregarded presumption of legislative good faith and improperly reversed burden of proof;

evidence was insufficient to establish that the Texas Legislature acted in bad faith and engaged in intentional discrimination when it adopted interim redistricting plan approved by the district court;

one congressional district did not violate VRA;

two Texas House districts making up entirety of one Texas county did not violate VRA; and

Texas House district created by moving Latinos into the district to bring the Latino population above 50% was an impermissible racial gerrymander.

Affirmed in part, reversed in part, and remanded.

Justice Thomas filed a concurring opinion in which Justice Gorsuch joined.

Justice Sotomayor filed a dissenting opinion in which Justices Ginsburg, Breyer, and Kagan joined.

****2309** *Syllabus*[*]

***579** In 2011, the Texas Legislature adopted a new congressional districting plan and new districting maps for the two houses of the State Legislature to account for population growth revealed in the 2010 census. To do so, Texas had to comply with a complicated legal regime. The Equal Protection Clause of the Fourteenth Amendment forbids "racial gerrymandering," that is, intentionally assigning citizens to a district on the basis of race without sufficient justification. *Shaw v. Reno,* 509 U.S. 630, 641, 113 S.Ct. 2816, 125 L.Ed.2d 511. But other legal requirements tend to require that state legislatures consider race in drawing districts. Like all States, Texas is subject to § 2 of the Voting Rights Act of 1965(VRA), which is violated when a state districting plan provides "less opportunity" for racial minorities "to elect representatives of their choice," *League of United Latin American Citizens v. Perry,* 548 U.S. 399, 425, 126 S.Ct. 2594, 165 L.Ed.2d 609. And at the time, Texas was also subject to § 5, which barred it from making any districting changes unless it could prove that they did not result in retrogression with respect to the ability of racial minorities to elect the candidates of their choice, *Alabama Legislative Black Caucus v. Alabama,* 575 U.S. 254, 259, 135 S.Ct. 1257, 1263, 191 L.Ed.2d 314. In an effort to harmonize these conflicting demands, the Court has assumed that compliance with the VRA is a compelling State interest for Fourteenth Amendment purposes, see, *e.g., Bethune–Hill v. Virginia State Bd. of Elections,* 580 U.S. 178, 193, 137 S.Ct. 788, 800–801, 197 L.Ed.2d 85; and a State's consideration of race in making a districting decision is narrowly tailored if the State has "good reasons" for believing that its decision is necessary in order to comply with the VRA, ****2310** *Cooper v. Harris,* 581 U.S. 285, 293, 137 S.Ct. 1455, 1464, 197 L.Ed.2d 837.

The Texas Legislature's 2011 plans were immediately tied up in litigation and never used. The case was assigned to a three-judge court (Texas court). Texas also submitted the plans for preclearance to the District Court for the District of Columbia (D.C. court). The Texas court drew up interim plans for the State's rapidly approaching primaries, giving no deference to the Legislature's plans. Texas challenged ***580** the court-ordered plans in this Court, which reversed and remanded with instructions for the Texas court to start with the Texas Legislature's 2011 plans but to make adjustments as required by the Constitution and the VRA. The Texas court then adopted new interim plans. After the D.C. court denied preclearance of the 2011 plans, Texas used the Texas court's interim plans for the 2012 elections. In 2013, the Legislature repealed the 2011 plans and enacted the Texas court's plans (with minor modifications). After *Shelby County v. Holder,* 570 U.S. 529, 133 S.Ct. 2612, 186 L.Ed.2d 651, was decided, Texas, no longer covered by § 5, obtained a vacatur of the D.C. court's preclearance order. But the Texas court did not dismiss the case against the 2011 plans as moot. Instead, it allowed the plaintiffs to amend their complaint to challenge the 2013 plans and held that their challenges to the 2011 plans were live. Texas conducted its 2014 and 2016 elections under the 2013 plans. In 2017, the Texas court found defects in several of the districts in the 2011 federal congressional and State House plans (the State Senate plan is not at issue here). Subsequently, it also invalidated multiple Congressional (CD) and House (HD) Districts in the 2013 plans, holding that the Legislature failed to cure the "taint" of discriminatory intent allegedly harbored by the 2011 Legislature. And the court relied on that finding to invalidate several challenged 2013 districts. The court also held that three districts—CD27, HD32, and HD34—were invalid under § 2 of the VRA because they had the *effect* of depriving Latinos of the equal opportunity to elect their candidates of choice. And it found that HD90 was a racial gerrymander based on changes made by the 2013 Legislature. It gave the state attorney general three days to tell the court whether the Legislature would remedy the violations; and if the Legislature did not intend to adopt new plans, the court would hold remedial hearings.

Held :

1. This Court has jurisdiction to review the orders at issue. Pp. 2318 – 2324.

(a) The Texas court's orders fall within 28 U.S.C. § 1253, which gives the Court jurisdiction to hear an appeal from an order of a three-judge district court "granting or denying ... an interlocutory or permanent injunction." The Texas court did not *call* its orders "injunctions," but where an order has the "practical effect" of granting or denying an injunction, it should be treated as such for purposes of appellate jurisdiction. *Carson v. American Brands, Inc.,* 450 U.S. 79, 83, 101 S.Ct. 993, 67 L.Ed.2d 59. Pp. 2318 – 2322.

(b) The text of the orders and the context in which they were issued make clear that they qualify as interlocutory injunctions under § 1253. The orders were unequivocal that the current legislative plans "violate § 2 and the Fourteenth Amendment"

and that these violations ***581** "must be remedied." And the short timeframe the attorney general was given to act is strong evidence that the court did not intend to allow the elections to go ahead under the plans it had just condemned. The unmistakable import of these actions is that the court intended to have new plans ready for use in this year's ****2311** elections. Texas also had reason to fear that if it tried to conduct elections under those plans, the court would infer an evil motive and perhaps subject the State to the strictures of preclearance under § 3(c) of the VRA. These cases differ from *Gunn v. University Comm. to End War in Viet Nam,* 399 U.S. 383, 90 S.Ct. 2013, 26 L.Ed.2d 684, where the order did not have the same practical effect as an injunction. Nor does it matter that the remedy is not yet known. The issue here is whether this year's elections can be held under the plans enacted by the Legislature, not whether any particular remedies should ultimately be ordered if it is determined that the current plans are flawed. Section 1253 must be strictly but sensibly construed, and here the District Court's orders, for all intents and purposes, constituted injunctions. Thus, § 1253 provides jurisdiction. Pp. 2321 – 2324.

2. The Texas court erred in requiring the State to show that the 2013 Legislature purged the "taint" that the court attributed to the defunct and never-used plans enacted by a prior Legislature in 2011. Pp. 2324 – 2330.

(a) Whenever a challenger claims that a state law was enacted with discriminatory intent, the burden of proof lies with the challenger, not the State. *Reno v. Bossier Parish School Bd.,* 520 U.S. 471, 481, 117 S.Ct. 1491, 137 L.Ed.2d 730. In redistricting cases, the "good faith of [the] state legislature must be presumed." *Miller v. Johnson,* 515 U.S. 900, 915, 115 S.Ct. 2475, 132 L.Ed.2d 762. The allocation of the burden of proof and the presumption of legislative good faith are not changed by a finding of past discrimination, which is but "one evidentiary source" relevant to the question of intent. *Arlington Heights v. Metropolitan Housing Development Corp.,* 429 U.S. 252, 267, 97 S.Ct. 555, 50 L.Ed.2d 450. Here, the 2011 plans were repealed, and not reenacted, by the 2013 Legislature. Nor did it use criteria that arguably carried forward the effects of the 2011 Legislature's discriminatory intent. Instead, it enacted, with only small changes, the Texas court plans developed pursuant to this Court's instructions. The Texas court contravened these basic burden of proof principles, referring, *e.g.,* to the need to "cure" the earlier Legislature's "taint" and concluding that the Legislature had engaged in no deliberative process to do so. This fundamentally flawed approach must be reversed. Pp. 2324 – 2327.

(b) Both the 2011 Legislature's intent and the court's interim plans are relevant to the extent that they give rise to—or tend to refute—inferences about the 2013 Legislature's intent, but they must be weighed together with other relevant direct and circumstantial evidence of the Legislature's intent. But when this evidence is taken into account, ***582** the evidence in the record is plainly insufficient to prove that the 2013 Legislature acted in bad faith and engaged in intentional discrimination. Pp. 2326 – 2330.

3. Once the Texas court's intent finding is reversed, there remain only four districts that were invalidated on alternative grounds. The Texas court's holding as to the three districts in which it relied on § 2's "effects" test are reversed, but its holding that HD90 is a racial gerrymander is affirmed. Pp. 2330 – 2335.

(a) To make out a § 2 "effects" claim, a plaintiff must establish the three "*Gingles* factors": (1) a geographically compact minority population sufficient to constitute a majority in a single-member district, (2) political cohesion among the members of the minority group, and (3) bloc voting by the majority to defeat the minority's preferred candidate. *Thornburg v. Gingles,* 478 U.S. 30, 48–51, 106 S.Ct. 2752, 92 L.Ed.2d 25. A plaintiff who makes that ****2312** showing must then prove that, under the totality of the circumstances, the district lines dilute the votes of the members of the minority group. Pp. 2330 – 2334.

(1) The Texas court held that CD27 violates § 2 because it has the effect of diluting the votes of Nueces County Latino voters, who, the court concluded, should have been included in a Latino opportunity district rather than CD27, which is not such a district. Plaintiffs, however, could not show that an additional Latino opportunity district could be created in that part of Texas. Pp. 2330 – 2332.

(2) The Texas court similarly erred in holding that HD32 and HD34, which make up the entirety of Nueces County, violate § 2. The 2013 plan created two districts that lie wholly within the county: HD34 is a Latino opportunity district, but HD32 is not. The court's findings show that these two districts do not violate § 2, and it is hard to see how the ultimate *Gingles* vote dilution standard could be met if the alternative plan would not enhance the ability of minority voters to elect the candidates of their choice. Pp. 2332 – 2334.

(b) HD90 is an impermissible racial gerrymander. HD90 was not copied from the Texas court's interim plans. Instead, the

2013 Legislature substantially modified that district. In 2011, the Legislature, responding to pressure from counsel to one of the plaintiff groups, increased the district's Latino population in an effort to make it a Latino opportunity district. It also moved the city of Como, which is predominantly African–American, out of the district. When Como residents and their Texas House representative objected, the Legislature moved Como back. But that decreased the Latino population, so the Legislature moved more Latinos into the district. Texas argues that its use of race as the predominant factor in HD90's design was permissible because it had "*good reasons* to believe" that this was necessary to satisfy ***583** § 2, *Bethune–Hill,* 580 U.S., at 194, 137 S.Ct., at 794. But it is the State's burden to prove narrow tailoring, and Texas did not do so on the record here. Pp. 2333 – 2335.

No. 17–586, 274 F.Supp.3d 624, reversed; No. 17–626, 267 F.Supp.3d 750, reversed in part and affirmed in part; and cases remanded.

ALITO, J., delivered the opinion of the Court, in which ROBERTS, C.J., and KENNEDY, THOMAS, and GORSUCH, JJ., joined. THOMAS, J., filed a concurring opinion, in which GORSUCH, J., joined. SOTOMAYOR, J., filed a dissenting opinion, in which GINSBURG, BREYER, and KAGAN, JJ., joined post, p. ----.

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Opinion

Justice ALITO delivered the opinion of the Court.

***584** Before us for review are orders of a three-judge court in the Western District of Texas effectively directing the State not to conduct this year's elections using districting plans that the court itself adopted some years earlier. The court developed those plans for use in the 2012 elections pursuant to our directions in *Perry v. Perez,* 565 U.S. 388, 132 S.Ct. 934, 181 L.Ed.2d 900 (2012) (*per curiam*). We instructed the three-judge court to start with the plans adopted by the Texas Legislature (or Legislature) in 2011 but to make adjustments as required by the Constitution and the Voting Rights Act. *Id.,* at 392–396, 132 S.Ct. 934. After those plans were used in 2012, the Texas Legislature enacted them (with only minor modifications) in 2013, and the plans were used again in both 2014 and 2016.

Last year, however, the three-judge court reversed its prior analysis and held that some of the districts in those plans are unlawful. After reviewing the repealed 2011 plans, which had never been used, the court found that they were tainted by discriminatory intent and that the 2013 Legislature had not "cured" that "taint."

We now hold that the three-judge court committed a fundamental legal error. It was the challengers' burden to show that the 2013 Legislature acted with discriminatory intent when it enacted plans that the court itself had produced. The 2013 Legislature was not obligated to show that it had "cured" the unlawful intent that the court attributed to the ***585** 2011 Legislature. Thus, the essential pillar of the three-judge court's reasoning was critically flawed.

When the congressional and state legislative districts are reviewed under the ****2314** proper legal standards, all but one of them, we conclude, are lawful.

I

A

The 2010 decennial census revealed that the population of Texas had grown by more than 20% and the State was therefore apportioned four additional seats in the United States House of Representatives. C.J.S. 369a.[1] To accommodate this new allocation and the population changes shown by the census, the Legislature adopted a new congressional districting plan, as well as new districting maps for the two houses of the State Legislature.

Redistricting is never easy, and the task was especially complicated in Texas in 2011. Not only was the Legislature required to draw districts that were substantially equal in population, see *Perry, supra,* at 391–392, 126 S.Ct. 2594; *Reynolds v. Sims,* 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964); *Wesberry v. Sanders,* 376 U.S. 1, 84 S.Ct. 526, 11 L.Ed.2d 481 (1964), and to comply with special state-law districting rules,[2] but federal law imposed complex and delicately balanced requirements regarding the consideration of race.

Then, as now, federal law restricted the use of race in making districting decisions. The Equal Protection Clause forbids "racial gerrymandering," that is, intentionally assigning citizens to a district on the basis of race without sufficient ***586** justification. *Shaw v. Reno,* 509 U.S. 630, 641, 113 S.Ct. 2816, 125 L.Ed.2d 511 (1993). It also prohibits intentional "vote dilution"—"invidiously ... minimiz[ing] or cancel[ing] out the voting potential of racial or ethnic minorities." *Mobile v. Bolden,* 446 U.S. 55, 66–67, 100 S.Ct. 1490, 64 L.Ed.2d 47 (1980) (plurality opinion).

While the Equal Protection Clause imposes these important restrictions, its application in the field of districting is complicated. For one thing, because a voter's race sometimes correlates closely with political party preference, see *Cooper v. Harris,* 581 U.S. 285, 308, 137 S.Ct. 1455, 1473–1474, 197 L.Ed.2d 837 (2017); *Easley v. Cromartie,* 532 U.S. 234, 243, 121 S.Ct. 1452, 149 L.Ed.2d 430 (2001), it may be very difficult for a court to determine whether a districting decision was based on race or party preference. Here, the three-judge court found that the two factors were virtually indistinguishable.[3]

At the same time that the Equal Protection Clause restricts the consideration of race in the districting process, compliance with the Voting Rights Act of 1965, 79 Stat. 437, as amended, 52 U.S.C. § 10301 *et seq.* (VRA), pulls in the opposite direction: It often insists that districts be created precisely because of race. Two provisions of the VRA exert such demands, and in 2011, Texas was subject to both. ****2315** At that time, Texas was covered by § 5 of the VRA[4] and was thus barred from making any districting changes unless it could prove that they did not result in "retrogression" with respect to the ability of racial minorities to elect the candidates of their choice. ***587** *Alabama Legislative Black Caucus v. Alabama,* 575 U.S. 254, 259, 135 S.Ct. 1257, 1263, 191 L.Ed.2d 314 (2015). That showing obviously demanded consideration of race.

On top of this, Texas was (and still is) required to comply with § 2 of the VRA. A State violates § 2 if its districting plan provides " 'less opportunity' " for racial minorities " 'to elect representatives of their choice.' " *League of United Latin American Citizens v. Perry,* 548 U.S. 399, 425, 126 S.Ct. 2594, 165 L.Ed.2d 609 (2006) (*LULAC*). In a series of cases tracing back to *Thornburg v. Gingles,* 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986), we have interpreted this standard to mean that, under certain circumstances, States must draw "opportunity" districts in which minority groups form "effective majorit[ies]," *LULAC, supra,* at 426, 126 S.Ct. 2594.

Since the Equal Protection Clause restricts consideration of race and the VRA demands consideration of race, a legislature attempting to produce a lawful districting plan is vulnerable to " 'competing hazards of liability.' " *Bush v. Vera,* 517 U.S. 952, 977, 116 S.Ct. 1941, 135 L.Ed.2d 248 (1996) (plurality opinion). In an effort to harmonize these conflicting demands, we have assumed that compliance with the VRA may justify the consideration of race in a way that would not otherwise be allowed. In technical terms, we have assumed that complying with the VRA is a compelling state interest, see, *e.g., Bethune–Hill v. Virginia State Bd. of Elections,* 580 U.S. 178, 193, 137 S.Ct. 788, 800–801, 197 L.Ed.2d 85 (2017); *Shaw v. Hunt,* 517 U.S. 899, 915, 116 S.Ct. 1894, 135 L.Ed.2d 207 (1996), and that a State's consideration of race in making a districting decision is narrowly tailored and thus satisfies strict scrutiny if the State has " 'good reasons' " for believing that its decision is necessary in order to comply with the VRA. *Cooper, supra,* at 293, 137 S.Ct., at 1464.

B

Facing this legal obstacle course, the Texas Legislature in 2011 adopted new districting plans, but those plans were immediately tied up in litigation and were never used. Several plaintiff groups quickly filed challenges in the District Court for the Western District of Texas, arguing that some ***588** of the districts in the new plans were racial gerrymanders, some were based on intentional vote dilution, and some had the effect of depriving minorities of the equal opportunity to elect the candidates of their choice. This case was assigned to a three-judge court, as required by 28 U.S.C. § 2284(a). (We will call this court "the Texas court" or simply "the District Court.")

The situation was further complicated by the requirement that Texas obtain preclearance of its new plans. To do this, Texas filed for a declaratory judgment in the District Court for the District of Columbia. See *Texas v. United States,* 887 F.Supp.2d 133 (2012). (We will call this court "the D.C. court.") By early 2012, the D.C. court had not yet issued a decision, and Texas needed usable plans for its rapidly approaching primaries. Accordingly, the Texas court drew up interim plans for that purpose. *Perez v. Perry,* 835 F.Supp.2d 209 (W.D.Tex.2011). In ****2316** creating those plans, the majority of the Texas court thought that it was not "required to give any deference to the Legislature's enacted plan." *Id.,* at 213. Instead, it based its plans on what it called "neutral principles that advance the interest of the collective public good." *Id.,* at 212.[5]

Texas challenged those court-ordered plans in this Court, and we reversed. *Perry v. Perez,* 565 U.S. 388, 132 S.Ct. 934, 181 L.Ed.2d 900 (2012) (*per curiam*). Noting that "[r]edistricting is 'primarily the duty and responsibility of the State,' " we held that the Texas court should have respected the legislative judgments embodied in the 2011 plans to the extent allowed by the Constitution and the VRA. *Id.,* at 392–399, 132 S.Ct. 934.

We remanded the case with very specific instructions. The Texas court was told to start with the plans adopted by the Legislature but to modify those plans as needed so as "not to incorporate ... any legal defects." *Id.,* at 394, 132 S.Ct. 934. With ***589** respect to claims under the Constitution or § 2 of the VRA, the District Court was told to change a district if the plaintiffs were *likely* to succeed on the merits of their challenge. *Ibid.* And with respect to § 5 claims, the court was instructed to make whatever changes were needed to obviate any legal claim that was "not insubstantial."[6] *Id.,* at 395, 132 S.Ct. 934.

Thus, our instructions, in an abundance of caution, demanded changes in the challenged 2011 plans without proof that those changes were actually required by either the Constitution or the VRA.

On remand, the Texas court ordered additional briefing and heard two more days of argument. App. 29a, 35a–50a; Order in Civ. No. 11–cv–00360, Doc. No. 616. It issued two opinions, totaling more than 70 pages, and analyzed disputed districts in detail. C.J.S. 367a–423a; H.J.S. 300a–315a. While stressing the preliminary nature of its determinations, see C.J.S. 368a; H.J.S. 314a–315a, the court found that some districts required change and that others were lawful, C.J.S. 367a–423a; H.J.S. 300a–315a. The court then adopted plans for the State's congressional districts and for both houses of the State Legislature. (The plan for the State Senate is not at issue.)

Both the congressional plan and the plan for the Texas House departed significantly from the State's 2011 plans. At least 8 of the 36 congressional districts were markedly altered, and 21 districts in the plan for the Texas House were "substantially" changed. *Id.,* at 314a; C.J.S. 397a–408a.

In August 2012, the D.C. court denied preclearance of the plans adopted by the Legislature in 2011, see *Texas v. United States, supra,* so the State conducted the 2012 elections under the interim plans devised by the Texas court. At the same time, Texas filed an appeal in this Court contesting the ***590** decision of the D.C. court,[7] but that appeal ultimately died for two reasons.

****2317** First, the 2011 plans were repealed. The Texas attorney general urged the Legislature to pass new redistricting plans, C.J.S. 429a, and in his view, the "best way to remedy the violations found by the D.C. court" was to "adopt the [Texas court's] interim plans as the State's permanent redistricting maps." *Id.,* at 432a. Doing so, he said, would "confirm the legislature's intent" to adopt "a redistricting plan that fully comports with the law." *Id.,* at 429a.

The Governor called a special session to do just that, and the Legislature complied. One of the legislative sponsors, Senator Seliger, explained that, although " 'the Texas Legislature remains confident that the legislatively-drawn maps adopted in 2011 are fair and legal ..., there remain several outstanding legal questions regarding these maps that undermine the stability and predictability of the electoral process in Texas.' " 274 F.Supp.3d 624, 649, n. 40 (D.C.Cir.2017). Counsel for one of the plaintiff groups, the Mexican American Legal Defense and Education Fund (MALDEF), testified in favor of the plans. C.J.S. 436a–439a. The 2013 Legislature then repealed the 2011 plans and enacted the Texas court's interim plans with just a few minor changes. The federal congressional plan was not altered at all, and only small modifications were made to the plan for the Texas House. C.J.S. Findings 231a–232a.

On the day after the Legislature passed the new plans and the day before the Governor signed them, this Court issued its decision in *Shelby County v. Holder,* 570 U.S. 529, 133 S.Ct. 2612, 186 L.Ed.2d 651 (2013), which invalidated the coverage formula in § 4 of the VRA. Now no longer subject to § 5, Texas obtained a vacatur of the D.C. court's order on preclearance. 274 F.Supp.3d, at 634–635, and n. 11.

***591** With the never-effective 2011 plans now repealed and any preclearance issues overcome by events, the State argued in the Texas court that the plaintiffs' case against the 2011 plans was moot. In September 2013, the Texas court allowed the plaintiffs to amend their complaints to challenge the 2013 plans, but the court held that their challenges to the 2011 plans were still alive, reasoning that the repeal of the 2011 plans represented the "voluntary cessation" of allegedly unconstitutional conduct.[8]

Texas conducted its 2014 and 2016 elections under the plans that had been preliminarily approved by the Texas court and subsequently adopted (with only minor changes) by the Legislature in 2013. But in March and April 2017, after multiple trials, the Texas court issued a pair of rulings on the defunct 2011 plans. The court reaffirmed the conclusions it had reached in 2012 about defects in the 2011 plans, and it went further. Contrary to its earlier decision, it held that Congressional District (CD) 35 is an impermissible racial gerrymander and that CD27 violates § 2 of the VRA because it has the effect of diluting the electoral opportunities of Latino voters. C.J.S. 181a, 193a–194a. Previously, the court had provided detailed reasons for rejecting the very arguments that it now accepted. *Id.,* at 409a–423a. Similarly, the court held that multiple districts in the plan for the Texas House were the result of intentional vote dilution. These included districts in the counties of Nueces (House District (HD) 32, HD34), Bell (HD54, HD55), and Dallas (HD103, HD104, HD105). H.J.S. 275a–276a.[9]

***592 **2318** In August 2017, having ruled on the repealed 2011 plans, the Texas court finally turned its attention to the plans

then in effect—*i.e.,* the plans that had been developed by the court, adopted by the Legislature in 2013, and used in both the 2014 and 2016 elections. The court invalidated the districts in those plans that correspond to districts in the 2011 plan that it had just held to be unlawful, *i.e.,* CD27, CD35, HD32, HD34, HD54, HD55, HD103, HD104, and HD105. See 274 F.Supp.3d 624 (No. 17–586) and 267 F.Supp.3d 750 (2017) (No. 17–626).

In reaching these conclusions, the court pointed to the discriminatory intent allegedly harbored by the 2011 Legislature, and it attributed this same intent to the 2013 Legislature because it had failed to "engage in a deliberative process to ensure that the 2013 plans cured any taint from the 2011 plans." 274 F.Supp.3d, at 645–652; 267 F.Supp.3d, at 757. The court saw "no indication that the Legislature looked to see whether any discriminatory taint remained in the plans." 274 F.Supp.3d, at 649. And it faulted the State because it "did not accept [findings of the D.C. court] and instead appealed to the Supreme Court." *Ibid.* Seeing no evidence that the State had undergone "a change of heart," the court concluded that the Legislature's "decision to adopt the [District Court's] plans" was a "litigation strategy designed to insulate the 2011 or 2013 plans from further challenge, regardless of their legal infirmities." *Id.,* at 649–650. Finally, summarizing its analysis, the court reiterated that the 2011 Legislature's "discriminatory taint was not removed by the [2013] Legislature's enactment of the Court's interim plans, because the Legislature engaged in no deliberative process to remove any such taint, and in fact intended any such taint to be maintained but be safe from remedy." *Id.,* at 686.

The Texas court's decisions about CD35 and all but three of the Texas House districts were based entirely on its finding that the 2013 Legislature had not purged its predecessor's ***593** discriminatory intent. However, the court also held that three districts—CD27, HD32, and HD34—were invalid under § 2 of the VRA because they had the effect of depriving Latinos of the equal opportunity to elect their candidates of choice. *Id.,* at 682–686; 267 F.Supp.3d, at 775–783. And the court found independent proof that HD90 was a racial gerrymander. *Id.,* at 788–794.

The court held that violations in all these districts "must be remedied." 274 F.Supp.3d, at 686; see also 267 F.Supp.3d, at 795 (describing State House district violations that "must be remedied"). Mindful that October 1 was the deadline for the Texas secretary of state to provide voter registration templates to the State's counties, App. 380a–381a, the court took steps to bring about prompt remedial action. In two orders issued on August 15 and 24, the Texas attorney general was instructed to advise the court, within three days, "whether the Legislature intends to take up redistricting in an effort to cure these violations." 274 F.Supp.3d, at 686; 267 F.Supp.3d, at 795. If the Legislature chose not to do so, the court warned, it would "hold a hearing to consider remedial plans." *Ibid.* After the Governor made clear that the State would not act, the ****2319** court ordered the parties to proceed with a hearing on the congressional plan on September 5, as well as a hearing on the plan for the Texas House on September 6. 274 F.Supp.3d, at 686; 267 F.Supp.3d, at 795; App. 134a–136a; Defendants' Opposed Motion To Stay Order on Plan C235 Pending Appeal or Final Judgment in Civ. No. 11–cv–00360, Doc. 1538, pp. 3–4; Defendants' Opposed Motion To Stay Order on Plan H358 Pending Appeal or Final Judgment, Doc. 1550, pp. 4–5.

Texas applied for stays of both orders, but the District Court denied the applications. App. 134a–136a. Texas then asked this Court to stay the orders, and we granted that relief. After receiving jurisdictional statements, we postponed consideration of jurisdiction and set the cases for consolidated argument. 583 U.S. 1088, 138 S.Ct. 735, 199 L.Ed.2d 601 (2018).

***594** II

Before reaching the merits of these appeals, we must assure ourselves that we have jurisdiction to review the orders at issue. Appellants claim that the orders amount to injunctions and are therefore appealable to this Court under 28 U.S.C. § 1253. Appellees disagree, contending that the orders do not qualify as injunctions. We hold that we have jurisdiction because the orders were effectively injunctions in that they barred Texas from using the districting plans now in effect to conduct this year's elections.

A

The Judiciary Act of 1789, 1 Stat. 73, "established the general principle that only final decisions of the federal district courts would be reviewable on appeal." *Carson v. American Brands, Inc.,* 450 U.S. 79, 83, 101 S.Ct. 993, 67 L.Ed.2d 59 (1981) (emphasis deleted). But because "rigid application of this principle was found to create undue hardship in some cases," Congress created exceptions. *Ibid.* Two are relevant here. We have jurisdiction under 28 U.S.C. § 1253 to hear an appeal from an order of a three-judge district court "granting or denying ... an interlocutory or permanent injunction." Similarly, § 1292(a)(1) gives the courts of appeals jurisdiction over "[i]nterlocutory orders of the district courts" "granting, continuing, modifying, refusing or dissolving injunctions," "except where a direct review may be had in the Supreme Court."

The orders in these cases fall within § 1253. To be sure, the District Court did not *call* its orders "injunctions"—in fact, it disclaimed the term, App. 134a–136a—but the label attached to an order is not dispositive. We have previously made clear that where an order has the "practical effect" of granting or denying an injunction, it should be treated as such for purposes of appellate jurisdiction. *Carson, supra,* at 83, 101 S.Ct. 993; see also *Gulfstream Aerospace Corp. v. Mayacamas Corp.,* 485 U.S. 271, 287–288, 108 S.Ct. 1133, 99 L.Ed.2d 296 (1988). We applied this test in ***595** *Carson,* holding that an order that declined to enter a consent decree prohibiting certain conduct could be appealed under § 1292(a)(1) because it was the practical equivalent of an order denying an injunction and threatened serious and perhaps irreparable harm if not immediately reviewed. 450 U.S., at 83–84, 86–90, 101 S.Ct. 993.

This "practical effect" rule serves a valuable purpose. If an interlocutory injunction is improperly granted or denied, much harm can occur before the final decision in the district court. Lawful and important conduct may be barred, and unlawful and harmful conduct may be allowed to continue. Recognizing this, Congress authorized interlocutory appellate review of such orders. But if the availability of interlocutory ****2320** review depended on the district court's use of the term "injunction" or some other particular language, Congress's scheme could be frustrated. The harms that Congress wanted to avoid could occur so long as the district court was careful about its terminology. The "practical effect" inquiry prevents such manipulation.

In analogous contexts, we have not allowed district courts to "shield [their] orders from appellate review" by avoiding the label "injunction." *Sampson v. Murray,* 415 U.S. 61, 87, 94 S.Ct. 937, 39 L.Ed.2d 166 (1974). For instance, in *Sampson,* we held that an order labeled a temporary restraining order (which is not appealable under § 1292(a)(1)) should be treated as a "preliminary injunction" (which is appealable) since the order had the same practical effect as a preliminary injunction. *Id.,* at 86–88, 94 S.Ct. 937.

Appellees and the dissent contend that the "practical effect" approach should be confined to § 1292(a)(1), but we see no good reason why it should not apply to § 1253 as well. Appellees note that we "narrowly construe[]" § 1253, *Goldstein v. Cox,* 396 U.S. 471, 478, 90 S.Ct. 671, 24 L.Ed.2d 663 (1970), but we also construe § 1292(a)(1) "narrowly," *Carson, supra,* at 84, 101 S.Ct. 993. In addition, the relevant language in the two provisions is nearly identical; ***596** [10] both provisions serve the same purpose; and we have previously called them "analogous." *Goldstein, supra,* at 475, 90 S.Ct. 671.

The provisions are also textually interlocked. Section 1292(a)(1) does not apply where "direct review may be had in the Supreme Court," *i.e.,* where § 1253 applies. If the "practical effects" test applied under § 1292(a)(1) but not § 1253, the consequences would be unfortunate and strange. We would have to identify the magic language needed for an order to qualify as an order granting or denying an injunction, and that standard would hardly constitute the sort of "[s]imple" rule that the dissent prizes. See *Post,* at 2342 – 2343 (opinion of SOTOMAYOR, J.). Then, having developed that standard, we would have to apply it in any case in which a party took an appeal to us from an order of a three-judge court that clearly had the practical effect of an injunction. If we concluded that the magic-words test was not met, the order would appear to be appealable to one of the courts of appeals under § 1292(a)(1). In the language of that provision, the order would be an "orde[r] of [a] district cour[t] of the United States ... granting [an] injunctio[n]." And because this Court would lack jurisdiction under § 1253, the appeal would not fall within § 1292(1)'s exception for cases "where a direct review may be had in the Supreme Court." Having taken pains to provide for review in this Court, and not in the courts of appeals, of three-judge court orders granting injunctions Congress surely did not intend to produce that result.[11]

****2321** ***597** Appellees argue that an order denying an injunction (the situation in *Carson*) and an order granting an injunction (the situation here) should be treated differently, Brief for Appellees in No. 17–586, p. 27, but they offer no convincing reason for doing so. No authority supports their argument. The language of §§ 1253 and 1292(a)(1) makes no such distinction, and we have stated that the "practical effect" analysis applies to the "granting or denying" of injunctions. *Gulfstream, supra,* at 287–288, 108 S.Ct. 1133.

In addition, appellees' suggested distinction would put appellate courts in an awkward position. Suppose that a district court granted an injunction that was narrower than the one requested by the moving party. Would an appellate court (whether this Court or a court of appeals) have jurisdiction to rule on only part of that decision? Suppose the appellate court concluded that the district court was correct in refusing to give the movant all the injunctive relief it sought because the movant's entire claim was doomed to fail. Would the appellate court be limited to holding only that the lower court properly denied the relief that was withheld? The rule advocated by the appellees would needlessly complicate appellate review.[12]

***598** Finally, appellees point in passing to Rule 65(d) of the Federal Rules of Civil Procedure, which requires that an injunction "state its terms specifically" and "describe in reasonable detail ... the act or acts restrained or required." Rules 65(d)(1)(B), (C); see Brief for Appellees in No. 17–586, at 27. But as explained in *Gunn v. University Comm. to End War in Viet Nam,* 399 U.S. 383, 389, n. 4, 90 S.Ct. 2013, 26 L.Ed.2d 684 (1970), we have never suggested that a failure to meet the specificity requirements of Rule 65(d) would "deprive the Court of jurisdiction under § 1253."

A contrary holding would be perverse. Rule 65(d) protects the party against which an injunction is issued by requiring clear notice as to what that party must do or refrain from doing. Where a vague injunction does not comply with Rule 65(d), the aggrieved party has a particularly strong need for appellate review. It would be odd to hold that there can be no appeal in such a circumstance.

For these reasons, we hold that we have jurisdiction under § 1253 to hear an appeal from an order that has the same practical effect as one granting or denying an injunction.

B

With these principles settled, we conclude that the orders in these cases qualify as interlocutory injunctions under § 1253. The text of the orders and the context in which they were issued make this clear.

The orders are unequivocal that the current legislative plans "violate § 2 and the Fourteenth Amendment" and that these violations "must be remedied." ****2322** 274 F.Supp.3d, at 686; see also, *e.g.,* 267 F.Supp.3d, at 795 ("[V]iolations found by this Court in its Order on [the State House plan] now require a remedy"); *ibid.* ("In Bell County, the intentional discrimination previously found by the Court must be remedied"); *ibid.* ("In Dallas County, the intentional discrimination previously found by the Court must be remedied").

***599** We do not suggest that this language alone is sufficient to show that the orders had the practical effect of enjoining use of the current plans in this year's elections, but the court did not stop with these pronouncements. As we have noted, the orders required the Texas attorney general to inform the court within three days whether the Legislature would remedy the violations, and the orders stated that if the Legislature did not intend to adopt new plans, the court would hold remedial hearings.

The short time given the Legislature to respond is strong evidence that the three-judge court did not intend to allow the elections to go ahead under the plans it had just condemned. The Legislature was not in session, so in order to take up the task of redistricting, the Governor would have been required to convene a special session—which is no small matter. And, when the Governor declined to call a special session, the court moved ahead with its scheduled hearings and invited the parties to continue preparing for them even after this Court administratively stayed the August 15 order.

The import of these actions is unmistakable: The court intended to have new plans ready for use in this year's elections. Nothing in the record even hints that the court contemplated the possibility of allowing the elections to proceed under the 2013 plans.

What is more, Texas had reason to believe that it would risk deleterious consequences if it defied the court and attempted to conduct the elections under the plans that the court had found to be based on intentional racial discrimination. In the very orders at issue, the court inferred discriminatory intent from Texas's choice to appeal the D.C. court's preclearance decision rather than immediately taking steps to bring its plans into compliance with that decision. 274 F.Supp.3d, at 649; see Part III,

infra. Reading such an order, Texas had reason to fear that if it tried to conduct elections under plans that the court had found to be racially ***600** discriminatory, the court would infer an evil motive and perhaps subject the State once again to the strictures of preclearance under § 3(c) of the VRA.[13] This is a remedy that the plaintiffs hoped to obtain, see, *e.g.,* App. 177a, and that the District Court seemed inclined to consider, see C.J.S. 122a–123a (declining to declare moot the challenges to the long-since-repealed 2011 plans because "there remains the possibility of declaratory and equitable relief under § 3(c)").

Contending that the orders here do not qualify under § 1253, appellees analogize these cases to *Gunn,* 399 U.S. 383, 90 S.Ct. 2013, 26 L.Ed.2d 684, but there is no relevant similarity. In *Gunn,* anti-war protesters were charged with violating a Texas "disturbing-the-peace statute," *id.,* at 384, 90 S.Ct. 2013 and they challenged the constitutionality of the statute in federal court. After the state charges were dismissed, ****2323** the District Court issued a "discursive" opinion "expressing the view that [the statute was] constitutionally invalid." *Id.,* at 386–387, 90 S.Ct. 2013. But the court then refrained from going any further, "pending the next session, special or general, of the Texas legislature, at which time the State of Texas may, if it so desires, enact such disturbing-the-peace statute as will meet constitutional requirements." *University Comm. to End War in Viet Nam v. Gunn,* 289 F.Supp. 469, 475 (W.D.Tex.1968). The defendants appealed to this Court, and at the time of our decision two years later, neither the Legislature nor the District Court had taken any further action. We therefore held that we lacked jurisdiction under § 1253. The District Court order in that case did not have the same practical effect as an injunction. Indeed, ***601** it had no practical effect whatsoever and is thus entirely different from the orders now before us.[14]

Appellees suggest that appellate jurisdiction is lacking in these cases because we do not know at this point "what a remedy would entail, who it would affect, and when it would be implemented." Brief for Appellees in No. 17–586, at 27. The dissent makes a similar argument with respect to two of the Texas House districts. *Post,* at 2342.[15] But the issue here is whether this year's elections can be held under the plans enacted by the Legislature, not whether any particular remedies would have ultimately been ordered by the District Court.

Appellees and the dissent also fret that this Court will be inundated with redistricting appeals if we accept jurisdiction ***602** here, Brief for Appellees in No. 17–626, p. 34; *post,* at 2342 – 2344, and n. 8, but there is no reason to fear such a flood. Because § 1253 expressly authorizes "interlocutory" appeals, there is no question that there can be more than one appeal in a case challenging a redistricting plan. District courts sometimes expressly enjoin the use of districting plans before moving on to the remedial phase. See, *e.g., Whitford v. Gill,* No. 3:15–cv–421, Doc. No. 190 (WD Wis., Feb. 22, 2017); *Harris v. McCrory,* No. 1:13–cv–949, Doc. No. 143 (MDNC, Feb. 5, 2016). But appeals from such orders have not overwhelmed our docket. Our holding here will affect only a small ****2324** category of additional cases.[16]

It should go without saying that our decision does not mean that a State can always appeal a district court order holding a redistricting plan unlawful. A finding on liability cannot be appealed unless an injunction is granted or denied, and in some cases a district court may see no need for interlocutory relief. If a plan is found to be unlawful long before the next scheduled election, a court may defer any injunctive relief until the case is completed. And if a plan is found to be unlawful very close to the election date, the only reasonable option may be to use the plan one last time.

We appreciate our obligation to heed the limits of our jurisdiction, and we reiterate that § 1253 must be strictly construed. But it also must be sensibly construed, and here the District Court's orders, for all intents and purposes, constituted injunctions barring the State from conducting this year's elections pursuant to a statute enacted by the Legislature. Unless that statute is unconstitutional, this would seriously and irreparably harm[17] the State, and only an interlocutory ***603** appeal can protect that State interest. See Carson, 450 U.S., at 89–90, 101 S.Ct. 993. As a result, § 1253 provides jurisdiction.

III

We now turn to the merits of the appeal. The primary question is whether the Texas court erred when it required the State to show that the 2013 Legislature somehow purged the "taint" that the court attributed to the defunct and never-used plans enacted by a prior Legislature in 2011.

A

Whenever a challenger claims that a state law was enacted with discriminatory intent, the burden of proof lies with the challenger, not the State. *Reno v. Bossier Parish School Bd.,* 520 U.S. 471, 481, 117 S.Ct. 1491, 137 L.Ed.2d 730 (1997). This rule takes on special significance in districting cases.

Redistricting "is primarily the duty and responsibility of the State," and "[f]ederal-court review of districting legislation represents a serious intrusion on the most vital of local functions." *Miller v. Johnson,* 515 U.S. 900, 915, 115 S.Ct. 2475, 132 L.Ed.2d 762 (1995) (internal quotation marks omitted). "[I]n assessing the sufficiency of a challenge to a districting plan," a court "must be sensitive to the complex interplay of forces that enter a legislature's redistricting calculus." *Id.,* at 915–916, 115 S.Ct. 2475. And the "good faith of [the] state legislature must be presumed." *Id.,* at 915, 115 S.Ct. 2475.

The allocation of the burden of proof and the presumption of legislative good faith are not changed by a finding of past discrimination. "[P]ast discrimination cannot, in the manner of original sin, condemn governmental action that is not itself unlawful." *Mobile,* 446 U.S., at 74, 100 S.Ct. 1490 (plurality opinion). The "ultimate question remains whether a discriminatory intent has been proved in a given ****2325** case." *Ibid.* The "historical ***604** background" of a legislative enactment is "one evidentiary source" relevant to the question of intent. *Arlington Heights v. Metropolitan Housing Development Corp.,* 429 U.S. 252, 267, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977). But we have never suggested that past discrimination flips the evidentiary burden on its head.

Neither the District Court nor appellees have pointed to any authority that would justify shifting the burden. The appellees rely primarily on *Hunter v. Underwood,* 471 U.S. 222, 105 S.Ct. 1916, 85 L.Ed.2d 222 (1985), but that case addressed a very different situation. *Hunter* involved an equal protection challenge to an article of the Alabama Constitution adopted in 1901 at a constitutional convention avowedly dedicated to the establishment of white supremacy. *Id.,* at 228–230, 105 S.Ct. 1916. The article disfranchised anyone convicted of any crime on a long list that included many minor offenses. *Id.,* at 226–227, 105 S.Ct. 1916. The court below found that the article had been adopted with discriminatory intent, and this Court accepted that conclusion. *Id.,* at 229, 105 S.Ct. 1916. The article was never repealed, but over the years, the list of disqualifying offenses had been pruned, and the State argued that what remained was facially constitutional. *Id.,* at 232–233, 105 S.Ct. 1916. This Court rejected that argument because the amendments did not alter the intent with which the article, including the parts that remained, had been adopted. *Id.,* at 233, 105 S.Ct. 1916. But the Court specifically declined to address the question whether the then-existing version would have been valid if "[re]enacted today." *Ibid.*

In these cases, we do not confront a situation like the one in *Hunter*. Nor is this a case in which a law originally enacted with discriminatory intent is later reenacted by a different legislature. The 2013 Texas Legislature did not reenact the plan previously passed by its 2011 predecessor. Nor did it use criteria that arguably carried forward the effects of any discriminatory intent on the part of the 2011 Legislature. Instead, it enacted, with only very small changes, plans that had been developed by the Texas court pursuant to instructions from this Court "not to incorporate ... any legal defects." *Perry,* 565 U.S., at 394, 132 S.Ct. 934.

***605** Under these circumstances, there can be no doubt about what matters: It is the intent of the 2013 Legislature. And it was the plaintiffs' burden to overcome the presumption of legislative good faith and show that the 2013 Legislature acted with invidious intent.

The Texas court contravened these basic principles. Instead of holding the plaintiffs to their burden of overcoming the presumption of good faith and proving discriminatory intent, it reversed the burden of proof. It imposed on the State the obligation of proving that the 2013 Legislature had experienced a true "change of heart" and had "engage[d] in a deliberative process to ensure that the 2013 plans cured any taint from the 2011 plans." 274 F.Supp.3d, at 649.

The Texas court's references to the need to "cure" the earlier Legislature's "taint" cannot be dismissed as stray comments. On the contrary, they were central to the court's analysis. The court referred repeatedly to the 2013 Legislature's duty to expiate its predecessor's bad intent, and when the court summarized its analysis, it drove the point home. It stated: "The discriminatory taint [from the 2011 plans] was not removed by the Legislature's enactment of the Court's interim plans, because the Legislature engaged in no deliberative process to remove any such taint, and in fact intended any such taint to be ****2326** maintained but be safe from remedy." *Id.,* at 686.[18]

***606** The dissent labors to explain away all these references to the 2013 Legislature's supposed duty to purge its predecessor's allegedly discriminatory intent, but the dissent loses track of its own argument and characterizes the District Court's reasoning exactly as we have. Indeed, the dissent criticizes us on page 2346 of its opinion for saying precisely the same thing that it said 11 pages earlier. On page 2353, the dissent states:

> "[T]he majority quotes the orders as requiring proof that the Legislature ' "engage[d] in a deliberative process to ensure that the 2013 plans cured any taint from the 2011 plans." ' But the District Court did not put the burden on Texas to make that affirmative showing." *Post,* at 2353 (quoting *supra,* at 23-24, in turn quoting 274 F.Supp.3d, at 649; citations omitted).

But earlier, the dissent itself describes the District Court's analysis as follows:

> "Despite knowing of the discrimination in its 2011 maps, 'the Legislature did not engage in a deliberative process to ensure that the 2013 plans cured any taint from the 2011 plans.' " *Post,* at 2347 (quoting 274 F.Supp.3d, at 649).

And this is not just a single slip of the pen. The dissent writes that the District Court was required "to assess how the 2013 Legislature addressed the known discrimination that motivated" the districts approved by that Court in 2012. *Post,* at 2351 – 2352. The dissent quotes the District Court's statement that " 'there is no indication that the Legislature looked to see whether any discriminatory taint remained in the plans.' " *Post,* at 2348 (quoting 274 F.Supp.3d, at 649). And there is also this: "Texas was just 'not truly interested in fixing any remaining discrimination in [its 2011 maps].' " *Post,* at 2347 (quoting 274 F.Supp.3d, at 651, n. 45). The District Court's true mode of analysis is so obvious that the ***607** dissent cannot help but repeat it. And that approach was fundamentally flawed and demands reversal.

While a district court's finding of fact on the question of discriminatory intent is reviewed for clear error, see *Cromartie,* 532 U.S., at 242, 121 S.Ct. 1452 whether the court applied the correct burden of proof is a question of law subject to plenary review, *U.S. Bank N.A. v. Village at Lakeridge, LLC,* 583 U.S. 387, 393, 138 S.Ct. 960, 965, 200 L.Ed.2d 218 (2018); *Highmark Inc. v. Allcare Health Management System, Inc.,* 572 U.S. 559, 563, 134 S.Ct. 1744, 1748, 188 L.Ed.2d 829 (2014). And when a finding of fact is based on the application of an incorrect burden of proof, the finding cannot stand. *Bose Corp. v. Consumers Union of United States, Inc.,* 466 U.S. 485, 501, 104 S.Ct. 1949, 80 L.Ed.2d 502 (1984) ("An appellate cour[t has] power to correct errors of law, including those that ... infect ... a finding of fact that is predicated on a misunderstanding of the governing rule of law").

B

In holding that the District Court disregarded the presumption of legislative ****2327** good faith and improperly reversed the burden of proof, we do not suggest either that the intent of the 2011 Legislature is irrelevant or that the plans enacted in 2013 are unassailable because they were previously adopted on an interim basis by the Texas court. Rather, both the intent of the 2011 Legislature and the court's adoption of the interim plans are relevant to the extent that they naturally give rise to—or tend to refute—inferences regarding the intent of the 2013 Legislature. They must be weighed together with any other direct and circumstantial evidence of that Legislature's intent. But when all the relevant evidence in the record is taken into account, it is plainly insufficient to prove that the 2013 Legislature acted in bad faith and engaged in intentional discrimination.[19] See, *e.g.,* ***608** *Ricci v. DeStefano,* 557 U.S. 557, 585, 129 S.Ct. 2658, 174 L.Ed.2d 490 (2009); *McCleskey v. Zant,* 499 U.S. 467, 497, 111 S.Ct. 1454, 113 L.Ed.2d 517 (1991). There is thus no need for any further prolongation of this already protracted litigation.

The only direct evidence brought to our attention suggests that the 2013 Legislature's intent was legitimate. It wanted to bring the litigation about the State's districting plans to an end as expeditiously as possible. The attorney general advised the Legislature that the best way to do this was to adopt the interim, court-issued plans. The sponsor of the 2013 plans voiced the same objective, and the Legislature then adopted the court-approved plans.

On its face, this explanation of the Legislature's intent is entirely reasonable and certainly legitimate. The Legislature had reason to know that any new plans it devised were likely to be attacked by one group of plaintiffs or another. (The plaintiffs' conflicting positions with regard to some of the districts in the plans now before us bear this out.) Litigating districting cases is expensive and time consuming, and until the districts to be used in the next election are firmly established, a degree of uncertainty clouds the electoral process. Wishing to minimize these effects is understandable and proper.

The court below discounted this direct evidence, but its reasons for doing so are not sound. The court stated that the "strategy" of the 2013 Legislature was to "insulate [the plans] from further challenge, regardless of [the plans'] legal infirmities." 274 F.Supp.3d, at 650; see also *id.,* at 651, n. 45. But there is no evidence that the Legislature's aim was to gain acceptance of plans that it knew were unlawful.[20] ***609** Indeed, there is no evidence that the Legislature thought that the plans were invalid—and as we will explain, the Legislature had sound reasons to believe just the opposite.[21]

****2328** The District Court found it significant that the Legislature must have realized that enacting the interim plans would not "end the litigation," because it knew that at least some plaintiffs would pursue their challenges anyway. *Id.,* at 651, n. 45. But even if, as seems likely, the Legislature did not think that all the plaintiffs would immediately abandon all their claims, it does not follow that the Legislature was insincere in stating that it adopted the court-approved plan with the aim of bringing the litigation to a close. It was reasonable for the Legislature to think that approving the court-approved plans might at least reduce objections and thus simplify and expedite the conclusion of the litigation.[22] That MALDEF, counsel for one of the plaintiff groups, testified in favor of the plans is evidence that the Legislature's objective was reasonable. C.J.S. 436a–439a.

Not only does the direct evidence suggest that the 2013 Legislature lacked discriminatory intent, but the circumstantial ***610** evidence points overwhelmingly to the same conclusion. Consider the situation when the Legislature adopted the court-approved interim plans. First, the Texas court had adopted those plans, and no one would claim that the court acted with invidious intent when it did so. Second, the Texas court approved those plans only after reviewing them and modifying them as required to comply with our instructions. Not one of the judges on that court expressed the view that the plans were unlawful. Third, we had directed the Texas court to make changes in response to any claims under the Equal Protection Clause and § 2 of the VRA if those claims were merely likely to prevail. *Perry,* 565 U.S., at 394, 132 S.Ct. 934. And the Texas court was told to accommodate any claim under § 5 of the VRA unless it was "insubstantial." *Id.,* at 395, 132 S.Ct. 934. Fourth, the Texas court had made a careful analysis of all the claims, had provided a detailed examination of individual districts, and had modified many districts. Its work was anything but slapdash. All these facts gave the Legislature good reason to believe that the court-approved interim plans were legally sound.

Is there any evidence from which a contrary inference can reasonably be drawn? Appellees stress the preliminary nature of the Texas court's approval of the interim plans, and as we have said, that fact is relevant. But in light of our instructions to the Texas court and the care with which the interim plans were developed, the court's approval still gave the Legislature a sound basis for thinking that the interim plans satisfied all legal requirements.

The court below and the dissent infer bad faith because the Legislature "pushed the redistricting bills through quickly in a special session." 274 F.Supp.3d, at 649. But we do not see how the brevity of the legislative process can give rise to an inference ****2329** of bad faith—and certainly not an inference that is strong enough to overcome the presumption of legislative good faith (a concept to which the dissent pays ***611** only the briefest lipservice, *post,* at 2346). The "special session" was necessary because the regular session had ended. As explained, the Legislature had good reason to believe that the interim plans were sound, and the adoption of those already-completed plans did not require a prolonged process. After all, part of the reason for adopting those plans was to avoid the time and expense of starting from scratch and leaving the electoral process in limbo while that occurred.[23]

The District Court and the dissent also err when they charge that Representative Darby, the chair of the Texas House Redistricting Committee at the time in question, " 'willfully ignored those who pointed out deficiencies' " in the plans. *Post,* at 2346 – 2347 (quoting 274 F.Supp.3d, at 651, n. 45). This accusation is not only misleading, it misses the point. The Legislature adopted the interim plans in large part because they had the preliminary approval of the District Court, and Darby was open about the fact that he wanted to minimize amendments to the plans for that reason. See, *e.g.,* Joint Exh. 17.3, pp. S1–S2. That Darby generally hoped to minimize amendments—so that the plans would remain legally compliant—hardly shows that he, or the Legislature, acted with discriminatory intent. In any event, it is misleading to characterize this attitude as "willfu[l] ignor[ance]." The record shows that, although Darby hoped to minimize amendments, he did not categorically refuse to consider changes. This is illustrated by his support for an amendment to HD90, which was offered by the then-incumbent, Democrat Lon Burnam, precisely because it fixed an objection raised by the Mexican–American Legal Caucus ***612** (MALC) that the district's Latino population was too low. 267 F.Supp.3d, at 790.[24]

The Texas court faulted the 2013 Legislature for failing to take into account the problems with the 2011 plans that the D.C. court identified in denying preclearance, *ibid.,* but the basis for that criticism is hard to understand. One of the 2013

Legislature's principal reasons for adopting the court-approved plans was to fix the problems identified by the D.C. court. The attorney general advised the Legislature to adopt the interim plans because he thought that was the "best way to remedy the violations found by the D.C. court." C.J.S. 432a. Chairman Darby similarly stated that the 2013 plans fixed the errors found by the D.C. court, Tr. 1498, 1584–1585 (July 14, 2017), as did Senator Seliger, Joint Exh. 26.2, p. A–5.

There is nothing to suggest that the Legislature proceeded in bad faith—or even that it acted unreasonably—in pursuing this strategy. Recall that we instructed the Texas court, in developing the interim plans, to remedy any § 5 claim that was "not insubstantial." *Perry,* 565 U.S., at 395, 132 S.Ct. 934. And that is just ****2330** what the interim plans, which the Legislature later enacted, attempted to do. For instance, the D.C. court held that the congressional plan had one too few "ability to elect" districts for Latinos, largely because of changes to CD23, *Texas,* 887 F.Supp.2d, at 156–159; the interim plan (and, by extension, the 2013 plan) amended CD23, C.J.S. 397a–399a. Similarly, in the plan for the Texas House, the D.C. court found § 5 retrogression with respect to HD35, HD117, and HD149, *Texas, supra,* at 167–175, and all of those districts were changed in the 2013 plans, H.J.S. 305a–307a, 312a.

***613** Although the D.C. court found that the 2011 Legislature acted with discriminatory intent in framing the congressional plan, that finding was based on evidence about districts that the interim plan later changed. The D.C. court was concerned about the intent reflected in the drawing of CDs 9, 18, and 30, but all those districts were amended by the Texas court. *Texas, supra,* at 159–160; C.J.S. 406a–408a. With respect to the plan for the Texas House, the D.C. court made no intent findings, but its areas of concern were generally addressed by the Texas court and the 2013 plans. Compare *Texas, supra,* at 178 (noting evidence of unlawful intent in HD117), with H.J.S. 307a (amending HD117).[25]

It is indicative of the District Court's mistaken approach that it inferred bad faith from Texas's decision to take an appeal to this Court from the D.C. court's decision denying preclearance. See 274 F.Supp.3d, at 649 ("Defendants did not accept [these findings] and instead appealed to the Supreme Court"). Congress gave the State the right to appeal, and no bad motive can be inferred from its decision to make use of this right—unless of course the State had no reasonable grounds for appeal. Before our decision in *Shelby County* mooted Texas's appeal to this Court from the D.C. court's preclearance decision, Texas filed a jurisdictional statement claiming that the D.C. court made numerous errors, but the Texas court made no attempt to show that Texas's arguments were frivolous.

As a final note, appellees assert that the 2013 Legislature should have either defended the 2011 plans in litigation or gone back to the drawing board and devised entirely new plans, Brief for Appellees in No. 17–626, at 45, but there is ***614** no reason why the Legislature's options should be limited in this way. It was entirely permissible for the Legislature to favor a legitimate option that promised to simplify and reduce the burden of litigation. That the Legislature chose this course is not proof of discriminatory intent.

IV

Once the Texas court's intent finding is reversed, there remain only four districts that were invalidated on alternative grounds. For three of these districts, the District Court relied on the "effects" test of § 2. We reverse as to each of these, but we affirm the District Court's final holding that HD90 is a racial gerrymander.

A

To make out a § 2 "effects" claim, a plaintiff must establish the three so-called "*Gingles* factors." These are (1) a geographically compact minority population sufficient to constitute a majority in a ****2331** single-member district, (2) political cohesion among the members of the minority group, and (3) bloc voting by the majority to defeat the minority's preferred candidate. *Gingles,* 478 U.S., at 48–51, 106 S.Ct. 2752; *LULAC,* 548 U.S., at 425, 126 S.Ct. 2594. If a plaintiff makes that showing, it must then go on to prove that, under the totality of the circumstances, the district lines dilute the votes of the members of the minority group. *Id.,* at 425–426, 126 S.Ct. 2594.

1

The Texas court held that CD27 violates § 2 of the VRA because it has the effect of diluting the votes of Latino voters in Nueces County. C.J.S. 191a. CD27 is anchored in Nueces County (home to Corpus Christi) and follows the Gulf of Mexico to the northeast before taking a turn inland to the northwest in the direction of Austin. Nueces County contains a Latino population of roughly 200,000 (a little less than one-third the size of an ideal Texas congressional district), and the court held that the Nueces County Latinos ***615** should have been included in a Latino opportunity district, rather than CD27, which is not such a district. The court found that an area centered on Nueces County satisfies the *Gingles* factors and that, under the totality of the circumstances, the placement of the Nueces County Latinos in CD27 deprives them of the equal opportunity to elect candidates of their choice. C.J.S. 181a–195a.

The problem with this holding is that plaintiffs could not establish a violation of § 2 of the VRA without showing that there is a " 'possibility of creating more than the existing number of reasonably compact' " opportunity districts. *LULAC, supra,* at 430, 126 S.Ct. 2594. And as the Texas court itself found, the geography and demographics of south and west Texas do not permit the creation of any more than the seven Latino opportunity districts that exist under the current plan. 274 F.Supp.3d, at 684, and n. 85.

Attempting to get around this problem, the Texas court relied on our decision in *LULAC,* but it misapplied our holding. In *LULAC,* we held that the State should have created six proper Latino opportunity districts but instead drew only five. 548 U.S., at 435, 126 S.Ct. 2594. Although the State claimed that the plan actually included a sixth opportunity district, that district failed to satisfy the *Gingles* factors. 548 U.S., at 430, 126 S.Ct. 2594. We held that a "State's creation of an opportunity district for those without a § 2 right offers no excuse for its failure to provide an opportunity district for those with a § 2 right." *Ibid.*

Here, the Texas court concluded that Texas committed the same violation as in *LULAC* : It created "an opportunity district for those without a § 2 right" (the Latinos in CD35), while failing to create such a district "for those with a § 2 right" (the Latinos of Nueces County). *Ibid.* This holding is based on a flawed analysis of CD35.

CD35 lies to the north of CD27 and runs along I–35 from San Antonio up to Austin, the center of Travis County. In the District Court's view, the Latinos of CD35 do not have a ***616** § 2 right because one of the *Gingles* factors, majority bloc voting, is not present. The Court reached this conclusion because the non-Latino voters of Travis County tend to favor the same candidates as the great majority of Latinos. There are two serious problems with the District Court's analysis.

First, the Court took the wrong approach in evaluating the presence of majority bloc voting in CD35. The Court looked at only one, small part of the district, ****2332** the portion that falls within Travis County. 274 F.Supp.3d, at 683; C.J.S. 175a–176a. But Travis County makes up only 21% of the district. We have made clear that redistricting analysis must take place at the district level. *Bethune–Hill,* 580 U.S., at 191-192, 137 S.Ct., at 800. In failing to perform that district-level analysis, the District Court went astray.

Second, here, unlike in *LULAC,* the 2013 Legislature had "good reasons" to believe that the district at issue (here CD35) was a viable Latino opportunity district that satisfied the *Gingles* factors. CD35 was based on a concept proposed by MALDEF, C.J.S. Findings 315a–316a, and the Latino Redistricting Task Force (a plaintiff group) argued that the district is mandated by § 2. C.J.S. 174a. The only *Gingles* factor disputed by the court was majority bloc voting, and there is ample evidence that this factor is met. Indeed, the court found that majority bloc voting exists throughout the State. C.J.S. Findings 467a. In addition, the District Court extensively analyzed CD35 in 2012 and determined that it was likely not a racial gerrymander and that even if it was, it likely satisfied strict scrutiny. C.J.S. 415a. In other words, the 2013 Legislature justifiably thought that it had placed a viable opportunity district along the I–35 corridor.

2

The District Court similarly erred in holding that HD32 and HD34 violate § 2. These districts make up the entirety of Nueces County, which has a population that is almost exactly ***617** equal to twice the population of an ideal Texas House district. (It can fit 2.0295 ideal districts. H.J.S. Findings 91a.) In 2010, Latinos made up approximately 56% of the voting age population of the county. *Ibid.* The 2013 plan created two districts that lie wholly within the county; one, HD34, is a Latino opportunity district, but the other, HD32, is not. 267 F.Supp.3d, at 767.

Findings made by the court below show that these two districts do not violate § 2 of the VRA. Under *Gingles,* the ultimate question is whether a districting decision dilutes the votes of minority voters, see *LULAC, supra,* at 425–426, 126 S.Ct. 2594 and it is hard to see how this standard could be met if the alternative to the districting decision at issue would not enhance the ability of minority voters to elect the candidates of their choice.

The only plaintiff that pressed a § 2 claim with respect to HD32 and HD34 was MALC, 267 F.Supp.3d, at 767, and as the District Court recognized, that group's own expert determined that it was not possible to divide Nueces County into more than one *performing* Latino district. In his analysis, the expert relied on Nueces County election returns for statewide elections between 2010 and 2016. *Id.,* at 775–776. Based on this data, he calculated that when both HD32 and HD34 were maintained as Latino-majority districts, one performed for Latinos in only 7 out of 35 relevant elections, and the other did so in *none* of the 35 elections. *Ibid.* In order to create two performing districts in that area, it was necessary, he found, to break county lines in *multiple* places, *id.,* at 778, but the District Court held that "breaking the County Line Rule" in the Texas Constitution, see Art. III, § 26, to "remove Anglos and incorporate even more Hispanics to improve electoral outcomes goes beyond what § 2 requires," 267 F.Supp.3d, at 783. So if Texas could *not* create two performing districts in Nueces County and did *not* have to break county lines, the logical result is that Texas did not dilute the Latino vote.

***618** The court refused to accept this conclusion, but its reasons for doing so cannot stand up. As an initial matter, the court ****2333** thought that the two districts would have to be redrawn based on its finding regarding the intent of the 2013 Legislature,[26] and it therefore deferred a final decision on the § 2 issue and advised the plaintiffs to consider at the remedial phase of the case whether they preferred to have two districts that might not perform or just one safe district. *Id.,* at 783. The court's decision cannot be sustained on this ground, since its finding of discriminatory intent is erroneous.

The only other reason provided by the court was the observation that MALC "failed to show" that two majority-Latino districts in Nueces County would not perform. *Id.,* at 782. This observation twisted the burden of proof beyond recognition. It suggested that a plaintiff might succeed on its § 2 claim because its expert failed to show that the necessary factual basis for the claim could not be established.[27] ***619** Courts cannot find § 2 effects violations on the basis of *uncertainty*. In any event, if even the District Court remains unsure how to draw these districts to comply with § 2 (after six years of litigation, almost a dozen trials, and numerous opinions), the Legislature surely had the " 'broad discretion' " to comply as it reasonably saw fit in 2013, *LULAC, 548 U.S.,* at 429, 126 S.Ct. 2594.

The dissent charges us with ignoring the District Court's " 'intensely local appraisal' " of Nueces County, *post,* at 2358, but almost none of the "findings" that the District Court made with respect to HD32 and HD34 referred to present local conditions, and none cast any significant light on the question whether another opportunity district is possible at the present time. For instance, what the dissent describes as Texas's "long 'history of voting-related discrimination,' " *id., at 663,* in no way undermines—or even has any logical bearing on—the conclusions reached by MALC's expert about whether Latino voters would have a real opportunity to elect the candidates of their choice if the county were divided into two districts with narrow majorities of Latino citizens of voting age. The same is true with respect to the District Court's findings regarding racially polarized ****2334** voting in the county and Latinos' "continuing pattern of disadvantage" relative to non-Latinos. 267 F.Supp.3d, at 779 (internal quotation marks omitted). Perhaps recognizing as much, both the District Court and the dissent point to the anticipated future growth in the percentage of eligible voters of Latino descent, but the districts now at issue would not necessarily be used beyond 2020, after which time the 2020 census would likely require redistricting once again.

***620** B

HD90 is a district in Tarrant County that, unlike the other districts at issue in this appeal, was not copied from the District Court's interim plans. Instead, the 2013 Legislature substantially modified the district developed by the District Court, and the District Court held that the 2013 Legislature's creation is an invalid racial gerrymander. 267 F.Supp.3d, at 794.

In drawing HD90, the Legislature was pulled in opposite directions by competing groups. In 2011, the Legislature, responding to pressure from MALDEF, increased the Latino population of the district in an effort to make it a Latino opportunity district. H.J.S. Findings 258a–262a. In the process of doing so, the Legislature moved the community of Como, which is predominantly African–American, out of the district. But Como residents and the member of the Texas House who represented the district, Lon Burnam, objected, and in 2013, the Legislature moved Como back into the district. 267 F.Supp.3d, at 788–789. That change was opposed by MALC because it decreased the Latino population below 50%. App. 398a–399a. So the Legislature moved Latinos into the district to bring the Latino population back above 50%. 267 F.Supp.3d, at 789–790.

In light of these maneuvers, Texas does not dispute that race was the predominant factor in the design of HD90, but it argues that this was permissible because it had " '*good reasons* to believe' " that this was necessary to satisfy § 2 of the VRA." *Bethune–Hill,* 580 U.S., at 194, 137 S.Ct., at 801.

Texas offers two pieces of evidence to support its claim. The first—that one of the plaintiffs, MALC, demanded as much—is insufficient. A group that wants a State to create a district with a particular design may come to have an overly expansive understanding of what § 2 demands. So one group's demands alone cannot be enough.

The other item of evidence consists of the results of the Democratic primaries in 2012 and 2014. In 2012, Representative ***621** Burnham, who was not the Latino candidate of choice, narrowly defeated a Latino challenger by 159 votes. And in 2014, the present representative, Ramon Romero, Jr., beat Burnam by 110 votes. See Brief for Appellants 70. These election returns may be suggestive, but standing alone, they were not enough to give the State good reason to conclude that it had to alter the district's lines solely on the basis of race. And putting these two evidentiary items together helps, but it is simply too thin a reed to support the drastic decision to draw lines in this way.

We have previously rejected proffers of evidence that were at least as strong as Texas's here. For example, in *Cooper,* 581 U.S., at 300, 137 S.Ct., at 1469, we analyzed North Carolina's justification for deliberately moving "African–American voters" into a district to "ensure ... the district's racial composition" in the face of its expansion in size. North Carolina argued that its race-based decisions were necessary to comply with § 2, but the State could point to "no meaningful legislative ****2335** inquiry" into "whether a new, enlarged" district, "created without a focus on race, ... could lead to § 2 liability." *Id.,* at 304, 137 S.Ct., at 1471. North Carolina pointed to two expert reports on "voting patterns throughout the State," but we rejected that evidence as insufficient. *Ibid.,* n. 5. 137 S.Ct., at 1490. Here, Texas has pointed to no actual "legislative inquiry" that would establish the need for its manipulation of the racial makeup of the district.

By contrast, where we have accepted a State's "good reasons" for using race in drawing district lines, the State made a strong showing of a pre-enactment analysis with justifiable conclusions. In *Bethune–Hill,* the State established that the primary mapdrawer "discussed the district with incumbents from other majority-minority districts[,] ... considered turnout rates, the results of the recent contested primary and general elections," and the district's large prison population. 580 U.S., at 194, 137 S.Ct., at 801. The State established that it had performed a "functional analysis" and acted to achieve an "informed ***622** bipartisan consensus." *Ibid*. Texas's showing here is not equivalent.

Perhaps Texas could have made a stronger showing, but it is the State's burden to prove narrow tailoring, and it did not do so on the record before us. We hold that HD90 is an impermissible racial gerrymander. On remand, the District Court will have to consider what if any remedy is appropriate at this time.

* * *

Except with respect to one Texas House district, we hold that the court below erred in effectively enjoining the use of the districting maps adopted by the Legislature in 2013. We therefore reverse with respect to No. 17–586; reverse in part and affirm in part with respect to No. 17–626; and remand for proceedings consistent with this opinion.

It is so ordered.

Justice THOMAS, with whom Justice GORSUCH joins, concurring.

I adhere to my view that § 2 of the Voting Rights Act of 1965 does not apply to redistricting. See *Cooper v. Harris,* 581 U.S. 285, 327, 137 S.Ct. 1455, 1485–1486, 197 L.Ed.2d 837 (2017) (concurring opinion) (citing *Holder v. Hall,* 512 U.S. 874, 922–923, 114 S.Ct. 2581, 129 L.Ed.2d 687 (1994) (THOMAS, J., concurring in judgment)). Thus, § 2 cannot provide a basis for invalidating any district, and it cannot provide a justification for the racial gerrymander in House District 90. Because the Court correctly applies our precedents and reaches the same conclusion, I join its opinion in full.

Justice SOTOMAYOR, with whom Justice GINSBURG, Justice BREYER, and Justice KAGAN join, dissenting.

The Court today goes out of its way to permit the State of Texas to use maps that the three-judge District Court unanimously found were adopted for the purpose of preserving the racial discrimination that tainted its previous maps. ***623** In reaching its desired result, the majority commits three fundamental errors along the way.

First, the majority disregards the strict limits of our appellate jurisdiction and reads into the District Court orders a nonexistent injunction to justify its premature intervention. Second, the majority indulges Texas' distorted reading of the District Court's meticulous orders, mistakenly faulting the court for supposedly shifting the burden of proof to the State to show that it cured the taint of past discrimination, all the while ignoring the clear language and unambiguous factual findings of ****2336** the orders below. Third, the majority elides the standard of review that guides our resolution of the factual disputes in these appeals—indeed, mentioning it only in passing—and selectively parses through the facts. As a result of these errors, Texas is guaranteed continued use of much of its discriminatory maps.

This disregard of both precedent and fact comes at serious costs to our democracy. It means that, after years of litigation and undeniable proof of intentional discrimination, minority voters in Texas—despite constituting a majority of the population within the State—will continue to be underrepresented in the political process. Those voters must return to the polls in 2018 and 2020 with the knowledge that their ability to exercise meaningfully their right to vote has been burdened by the manipulation of district lines specifically designed to target their communities and minimize their political will. The fundamental right to vote is too precious to be disregarded in this manner. I dissent.

I

A

The first obstacle the majority faces in its quest to intervene in these cases is jurisdictional. The statute that governs our jurisdiction over these appeals is 28 U.S.C. § 1253, which provides that "any party may appeal to the Supreme Court from an order granting or denying ... an interlocutory ***624** or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges." Unlike the more typical certiorari

process, for cases falling within § 1253, appellate review in this Court is mandatory. That is why, until today, this Court has repeatedly recognized and adhered to a "long-established rule" requiring "strict construction" of this jurisdictional statute "to protect our appellate docket." *Stainback v. Mo Hock Ke Lok Po,* 336 U.S. 368, 375, 378, 69 S.Ct. 606, 93 L.Ed. 741 (1949); see, *e.g., Gonzalez v. Automatic Employees Credit Union,* 419 U.S. 90, 98, 95 S.Ct. 289, 42 L.Ed.2d 249 (1974) (noting that "only a narrow construction" of our jurisdiction under § 1253 "is consonant with the overriding policy, historically encouraged by Congress, of minimizing the mandatory docket of this Court in the interests of sound judicial administration"); *Gunn v. University Comm. to End War in Viet Nam,* 399 U.S. 383, 387, 90 S.Ct. 2013, 26 L.Ed.2d 684 (1970) (similar); *Goldstein v. Cox,* 396 U.S. 471, 477–478, 90 S.Ct. 671, 24 L.Ed.2d 663 (1970) (rejecting a construction of § 1253 that would "involve an expansion of [our] mandatory appellate jurisdiction," even where the statutory text "is subject to [that] construction," in light of "canon of construction" requiring that § 1253 be "narrowly construed"); *Phillips v. United States,* 312 U.S. 246, 248–250, 61 S.Ct. 480, 85 L.Ed. 800 (1941) (explaining that § 1253 is an "exceptional procedure" and that "inasmuch as this procedure ... brings direct review of a district court to this Court, any loose construction ... would defeat the purposes of Congress ... to keep within narrow confines our appellate docket").

In line with that command, this Court has held that a ruling on the merits will not suffice to invoke our mandatory appellate jurisdiction in the absence of an order granting or denying an injunction. In fact, even if a three-judge district court unequivocally indicates that a state law must be enjoined as it stands, we have required more before accepting mandatory review. For example, the Court in ****2337 *625** *Gunn* found no jurisdiction where the three-judge District Court held that a Texas disturbing-the-peace statute was " 'impermissibly and unconstitutionally broad,' " concluded that the plaintiffs were " 'entitled to their declaratory judgment to that effect, and to injunctive relief against the enforcement of [the statute] as now worded, insofar as it may affect the rights guaranteed under the First Amendment,' " and stayed the mandate to allow the State to, " 'if it so desires, enact such disturbing-the-peace statute as will meet constitutional requirements.' " 399 U.S., at 386, 90 S.Ct. 2013. Despite the District Court's resolution of the merits and its clear indication that, unless amended, the disturbing-the-peace statute would be enjoined, this Court dismissed an appeal from the State for want of jurisdiction, concluding that the District Court merely wrote a "rather discursive *per curiam* opinion" and "there was no order of any kind either granting or denying an injunction—interlocutory or permanent." *Id.,* at 387, 90 S.Ct. 2013. The Court explained that, in addition to the congressional command to " 'keep within narrow confines our appellate docket,' " other "policy considerations" counseled limiting "our power of review," including "that until a district court issues an injunction, or enters an order denying one, it is simply not possible to know with any certainty what the court has decided." *Id.,* at 387–388, 90 S.Ct. 2013. Those considerations, the Court thought, were "conspicuously evident" in that case, where the opinion did not specify, for instance, exactly what was to be enjoined or against whom the injunction would run. *Id.,* at 388, 90 S.Ct. 2013.

Similarly, *Whitcomb v. Chavis,* 403 U.S. 124, 91 S.Ct. 1858, 29 L.Ed.2d 363 (1971), concerned a redistricting challenge in which a three-judge District Court held that "a redistricting of [the challenged county was] necessitated" and "that the evidence adduced ... and the additional apportionment requirements set forth by the Supreme Court call[ed] for a redistricting of the entire state as to both houses of the General Assembly," *Chavis v. Whitcomb,* 305 F.Supp. 1364, 1391 (S.D.Ind.1969). Recognizing "that the federal judiciary functions within a system of federalism which entrusts the responsibility of legislative apportionment and districting primarily to the state legislature," the District Court afforded the Governor "a reasonable ***626** opportunity to call a Special Session of the General Assembly of the State of Indiana so that it may enact legislation to redistrict the State and reapportion the legislative seats in the General Assembly in accordance with federal constitutional requirements and in compliance with [its] opinion." *Id.,* at 1392. The District Court gave the State a little over two months to enact new statutes "to remedy the improper districting and malapportionment." *Ibid.* When the Governor appealed from that order, this Court dismissed for want of jurisdiction because "at [the] time no judgment had been entered and no injunction had been granted or denied." 403 U.S., at 138, n. 19, 91 S.Ct. 1858. The findings of liability on the merits and the unequivocal indication that the redistricting and malapportionment violations had to be remedied were not enough.

B

Straightforward application of this precedent compels the conclusion that this Court lacks jurisdiction over these appeals.

Here, Texas appeals from two orders entered by the three-judge District Court on August 15 and 24, 2017. Those orders concern the constitutional and statutory challenges to Texas' State House and federal congressional redistricting plans, enacted by the Texas Legislature (hereinafter Legislature) in 2013 (hereinafter the 2013 maps). As relevant here, the orders concerned Texas House districts in Bell County (HD54 and HD55), Dallas County (HD103, HD104, and HD105), Nueces ****2338** County (HD32 and HD34), and Tarrant County (HD90), as well as federal congressional districts encompassing Nueces County (CD27) and parts of Travis County (CD35). The District Court concluded that plaintiffs had proved intentional discrimination as to HD54, HD55, HD103, HD104, HD105, HD32, HD34, and CD27.[1] It also ***627** concluded that plaintiffs had proved a "results" violation under § 2 of the Voting Rights Act as to HD32, HD34, and CD27,[2] and had established a racial gerrymandering claim as to HD90 and CD35.[3]

Having ruled on the challengers' statutory and constitutional claims, the District Court stated that all but one of the "violations must be remedied by either the Texas Legislature or [the District] Court." 274 F.Supp.3d 624, 686 (W.D.Tex.2017); see also 267 F.Supp.3d 750, 795 (W.D.Tex.2017).[4] With respect to the § 2 results violation concerning HD32 and HD34, however, the District Court noted that it had yet to decide "whether § 2 requires a remedy for this results violation." *Id.,* at 783, 795. The District Court then ordered "the [Texas] Office of the Attorney General [to] file a written advisory within three business days stating whether the Legislature intends to take up redistricting in an effort to cure these violations and, if so, when the matter will be considered." 274 F.Supp.3d, at 686; see also 267 F.Supp.3d, at 795. The court went on: "If the Legislature does not intend to take up redistricting, the [District] Court will hold a hearing to consider remedial plans" on September 5 and 6, 2017, respecting the congressional and Texas House districts. 274 F.Supp.3d, at 686–687; see also ***628** 267 F.Supp.3d, at 795. "In preparation for the hearing[s]," the District Court ordered the parties to confer and to "take immediate steps to consult with their experts and mapdrawers and prepare" maps to present at those hearings. 274 F.Supp.3d, at 687; 267 F.Supp.3d, at 795.

The District Court went no further. Though there had been a determination on the merits that Texas violated both the Equal Protection Clause and § 2 of the Voting Rights Act with respect to a number of districts in the 2013 maps, the District Court did not enjoin use of the 2013 maps for the upcoming 2018 elections. For instance, with respect to the congressional map, the District Court explained that its order "only partially addresse[d]" the challengers' claims, as it had "bifurcated the remedial phase" from the merits phase. 274 F.Supp.3d, at 687. Importantly, in denying Texas' motions for a stay, the District Court took care to make abundantly clear the scope of its orders: "Although the [District] Court found violations ****2339** [in the congressional and Texas House maps], the [District] Court has not enjoined [their] use for any upcoming elections." App. 134a–136a.

That is the end of the inquiry under our precedent, as our past cases are directly on point. Like in *Gunn* and *Whitcomb,* the District Court issued a ruling on the merits against the State. Like in *Gunn* and *Whitcomb,* the District Court was clear that those violations required a remedy. Like in *Gunn* and *Whitcomb,* the District Court stayed its hand and did not enter an injunction, instead allowing the State an opportunity to remedy the violations. Therefore, like in *Gunn* and *Whitcomb,* this Court lacks jurisdiction under § 1253 because there is "no order of any kind either granting or denying an injunction—interlocutory or permanent." *Gunn,* 399 U.S., at 387, 90 S.Ct. 2013.[5]

***629** C

1

Despite this precedent, the majority nonetheless concludes that our intervention at this early stage is not only authorized, but mandatory. None of the justifications that the majority offers for deviating from our precedent is persuasive.

The majority justifies its jurisdictional overreach by holding that § 1253 mandates appellate review in this Court if a three-judge district court order "has the 'practical effect' of granting or denying an injunction." *Ante,* at 2319. It reasons that the Court has "previously made clear that where an order has the 'practical effect' of granting or denying an injunction, it should be treated as such for purposes of appellate jurisdiction." *Ibid.* That reasoning, however, has no application here. Whereas this Court has applied the "practical effect" rule in the context of the courts of appeals' appellate jurisdiction under 28 U.S.C. § 1292(a)(1), it has never applied it to questions of its own mandatory appellate docket under § 1253. That explains why the only cases the majority can round up to support its position concern jurisdiction ***630** under § 1292(a)(1). *Ante,* at 2319 (citing *Carson v. American Brands, Inc.,* 450 U.S. 79, 83–84, 101 S.Ct. 993, 67 L.Ed.2d 59 (1981), and *Gulfstream Aerospace Corp. v. Mayacamas Corp.,* 485 U.S. 271, 287–288, 108 S.Ct. 1133, 99 L.Ed.2d 296 (1988)).

This distinction matters a great deal. Courts of appeals generally have jurisdiction ****2340** over direct appeals from the district courts. See 15A C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 3901, p. 13 (3d ed. 1992) ("Courts of appeals jurisdiction extends to nearly every action that might be taken by a district court"). In contrast, exercising mandatory review over direct appeals in this Court is a truly "exceptional procedure," *Phillips,* 312 U.S., at 248, 61 S.Ct. 480 in no small part due to our "necessarily finite docket," 16B Wright, Federal Practice and Procedure § 4003, at 19. Reading § 1253 broadly risks transforming that exceptional procedure into a routine matter, when our precedent commands a strict construction precisely so that we can " 'keep within narrow confines our appellate docket.' " *Goldstein,* 396 U.S., at 478, 90 S.Ct. 671.

Brushing that distinction aside, the majority contends that "we also construe § 1292(a)(1) 'narrowly,' " and have referred to the statutes as " 'analogous.' " *Ante,* at 2319 – 2320. True, but that is no response to the jurisdictional obstacle of § 1253. The command from our precedent is not simply one to undertake the same narrow interpretation as we do for § 1292(a)(1). Rather, our "long-established rule" requires "strict construction" of § 1253, *Stainback,* 336 U.S., at 378, 69 S.Ct. 606 so that even where the statutory text could be read to expand our mandatory appellate docket, this Court will not adopt that reading if a narrower construction is available, *Goldstein,* 396 U.S., at 477–478, 90 S.Ct. 671. That "strict construction" rule exists for a purpose specific to this Court: to protect our "carefully limited appellate jurisdiction." *Board of Regents of Univ. of Tex. System v. New Left Ed. Project,* 404 U.S. 541, 543, 92 S.Ct. 652, 30 L.Ed.2d 697 (1972). Unlike the courts of appeals, which hear cases on mandatory jurisdiction regularly, this Court hears ***631** cases on mandatory jurisdiction only rarely. The majority nowhere grapples with that vital contextual distinction between § 1253 and § 1292(a)(1). Nor does the majority acknowledge that, in interpreting § 1253, this Court has itself recognized that distinction, noting that "this Court *above all others* must limit its review of interlocutory orders." *Goldstein,* 396 U.S., at 478, 90 S.Ct. 671 (emphasis added).

2

Looking to escape that pitfall in its reasoning, the majority turns to the text of the two jurisdictional statutes. But the text provides no refuge for its position. The majority first states that "the relevant language in the two provisions is nearly identical." *Ante,* at 2320. But whereas § 1253 provides for appeal "from an order granting or denying ... an interlocutory or permanent injunction," § 1292(a)(1) provides for appeal from "[i]nterlocutory orders ... granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions." It is a stretch, to say the least, to characterize these provisions as "nearly identical." *Ante,* at 2319 – 2320.

Next, the majority contends that § 1253 and § 1292(a)(1) are "textually interlocked," *ante,* at 2320, in that § 1292(a)(1) provides for appeal to the courts of appeals, "except where a direct review may be had in the Supreme Court." In its view, this demonstrates that the "practical effect" rule must apply under § 1253. The majority reasons that "the consequences would be unfortunate and strange" otherwise, imagining that an order from a three-judge district court that had the practical effect of an injunction but did not invoke § 1253 jurisdiction would "appear to be appealable to one of the courts of appeals" in light of the "excep[t]" clause, a result "Congress surely did not intend" given that it took "pains to provide for ****2341** review in this Court, and not in the courts of appeals, of three-judge court orders granting injunctions." *Ante,* at 2320.

***632** This reasoning rests on a mistaken premise. Congress did not provide for review of *every* three-judge court order in this Court. It provided for review of only certain narrow categories of orders, *i.e.,* those granting or denying an injunction. There is nothing "unfortunate" or "strange" about the proposition that orders from a three-judge court that do not fall within these narrow categories of actions made directly appealable to this Court can be appealed only to the courts of appeals. In fact, this Court itself has recognized as much. See, *e.g., Rockefeller v. Catholic Medical Center of Brooklyn & Queens, Inc.,* 397 U.S. 820, 90 S.Ct. 1517, 25 L.Ed.2d 806 (1970) (*per curiam*) ("The judgment appealed from does not include an order granting or denying an interlocutory or permanent injunction and is therefore not appealable to this Court under 28 U.S.C. § 1253. The judgment of the District Court is vacated and the case is remanded to that court so that it may enter a fresh decree from which timely appeal may be taken to the Court of Appeals" (citation omitted)); see also*Mitchell v. Donovan,* 398 U.S. 427, 431–432, 90 S.Ct. 1763, 26 L.Ed.2d 378 (1970) (*per curiam*) (concluding that "this Court lacks jurisdiction of the appeal" under § 1253 and directing "the District Court [to] enter a fresh order ... thus affording the appellants an opportunity to take a timely appeal to the Court of Appeals").[6] And to the extent a party prematurely appeals to the court of appeals an order that would otherwise fall within § 1253, *e.g.,* ***633** if Texas had appealed the August 15 and 24 orders to the Court of Appeals for the Fifth Circuit, that court surely will be more than capable of identifying as much and instructing the party to wait for an actual injunction before bringing an appeal to this Court.

3

The majority attempts to bolster its jurisdictional conclusion with a passing reference to the "valuable purpose" served by the " 'practical effect' '' rule, *i.e.,* preventing district courts from manipulating proceedings by avoiding labeling their orders as " 'injunction[s].' " *Ante,* at 2318 – 2319. Notably, the majority cites no evidence for the proposition that district courts are engaging in any kind of manipulation. Nor is there any indication that the District Court here attempted to manipulate the proceedings by shielding its orders from appellate review. Instead, the District Court carefully adhered to a common practice in cases implicating important state interests, staying its hand as to the remedy to allow the State an opportunity to act, as happened in *Gunn* and *Whitcomb*.

More important, the majority ignores the "valuable purposes" served by the longstanding rule requiring strict construction of § 1253. Not only does it comply with the congressional command to " 'keep within narrow confines our appellate docket,' ****2342** " but without strict enforcement of the requirement that an order grant or deny an injunction, "it is simply not possible to know with any certainty what the court has decided." *Gunn,* 399 U.S., at 387–388, 90 S.Ct. 2013. Such clarity "is absolutely vital in a case where a federal court is asked to nullify a law duly enacted by a sovereign State." *Id.,* at 389, 90 S.Ct. 2013. Orders coming to this Court on direct appeal under the "practical effect" rule will more often than not lack that clarity.

In these cases, for instance, what does the majority read the "practical effect" of the orders to have been with respect to HD32 and HD34? The District Court held that the challengers ***634** had "not proven that § 2 requires breaking the County Line Rule" in the Texas Constitution, Art. III, but that "§ 2 could require" drawing two majority-HCVAP[7] districts. 267 F.Supp.3d, at 783, 795. Does the majority read that to mean that the § 2 results violation could potentially go without a remedy? If so, there would have been no obstacle to use of the 2013 maps for those districts even after a remedial phase. Or does the majority read that to mean that the challengers still had more to show before the District Court "would" redraw the districts that § 2 "could" require to be redrawn? And what is the effect of the conclusion respecting the County Line Rule on the potential remedy for the intentional vote dilution holding as to HD32 and HD34? The majority conveniently avoids confronting this lack of clarity by ignoring the relevant record, instead stating without explanation that it believes "it clear that the District Court effectively enjoined use of these districts as currently configured." *Ante,* at 2323, n. 15. But it cannot escape the reality that its rule will "needlessly complicate appellate review," *ante,* at 2321, given that "it is simply not possible [absent an injunction] to know with any certainty what the court has decided," *Gunn,* 399 U.S., at 388, 90 S.Ct. 2013.

I do not disagree that "lack of specificity in an injunctive order would [not] alone deprive the Court of jurisdiction under § 1253." *Id.,* at 389, n. 4, 90 S.Ct. 2013; see also *ante,* at 2321 (quoting *Gunn*). "But the absence of any semblance of effort by the District Court to comply with [the specificity required of injunctive orders under the Federal Rules] makes clear that the court did not think its [orders] constituted an order granting an injunction." *Gunn,* 399 U.S., at 389, n.4. 90 S.Ct. 2013. If any doubt remained as to the effect of the orders here, moreover, the District Court explicitly assured the parties that, even though it had found violations, it was not enjoining use of the 2013 maps for the upcoming elections. App. 134a–136a.

***635** Finally, it is axiomatic that "administrative simplicity is a major virtue in a jurisdictional statute." *Hertz Corp. v. Friend,* 559 U.S. 77, 94, 130 S.Ct. 1181, 175 L.Ed.2d 1029 (2010).

> "Complex jurisdictional tests complicate a case.... Complex tests produce appeals and reversals, [and] encourage gamesmanship.... Judicial resources too are at stake [as] courts benefit from straightforward rules under which they can readily assure themselves of their power to hear a case. Simple jurisdictional rules also promote greater predictability." *Ibid.* (citations omitted).

Simple is thus the name of the game when it comes to jurisdictional rules. The rule in the majority opinion is anything but. Although the majority claims that a mere "finding on liability cannot be appealed unless an injunction is granted or denied," ****2343** *ante,* at 2324, the rule it embraces today makes it hard to understand when a finding on liability would not be read, as the majority does here, as having the "practical effect" of an injunction. It is a worrisome prospect that, after today, whenever a three-judge district court expresses that a statutory or constitutional violation must be remedied, the party held liable will straightaway file an appeal in this Court and assert jurisdiction under § 1253, even where the district court is clear that no injunction has issued.[8]

***636** The majority opinion purports to add a limit by distinguishing between unappealable orders that find a plan "unlawful long before the next scheduled election" or "very close to the election date," and those (presumably) appealable orders that are entered neither "long before" nor "very close" to the next election. *Ante,* at 2323 – 2324.[9] What does that even mean? The orders at issue here were entered about 15 months before the 2018 elections, and according to the majority fall within the not "long before" but not "very close" appealable range. Why this is so, however, the majority never says. Without any definitions for its boundary posts, courts will be left to wonder: What about orders entered 17 or 18 months before an election? Are those considered "long before" so they would be unappealable? And are orders entered 14, 13, or 12 months before the election similarly unappealable because they were entered "very close" to the election date? And what does the majority mean by "the election date"? Does that include primaries? What about registration deadlines, or ballot-printing deadlines? It is not uncommon for there to be, at any given time, multiple impending deadlines relating to an upcoming election. Thinking through the many variations of jurisdictional disputes that will arise over the years following this novel reading of § 1253 should be enough to stop the majority from rewriting our long established jurisprudence in this area.

After today, our mandatory appellate docket will be flooded by unhappy litigants in three-judge district court cases, demanding our review. Given the lack of predictability, ***637** the rule will incentivize appeals and "encourage gamesmanship." *Hertz Corp.,* 559 U.S., at 94, 130 S.Ct. 1181. The Court will no doubt regret the day it opened its courthouse doors to such time-consuming and needless manipulation of its docket.

D

Even if the majority were correct to import the "practical effect" rule into the ****2344** § 1253 context, moreover, that would still not justify the Court's premature intervention in these appeals for at least two reasons. First, while taking from *Carson* the "practical effect" rule it likes, the majority gives short shrift to the second half of that case, in which the Court was explicit that "[u]nless a litigant can show that an interlocutory order ... might have a 'serious, perhaps irreparable, consequence,' and that the order can be 'effectually challenged' only by immediate appeal, the general congressional policy against piecemeal review will preclude interlocutory appeal." 450 U.S., at 84, 101 S.Ct. 993. Texas has made no showing of a "serious, perhaps irreparable consequence" requiring our immediate intervention, nor has Texas shown that the orders could

not be "effectually challenged" after the remedial stage was completed. In fact, when Texas sought a stay of those orders before this Court, the 2018 elections were more than a year away. For the majority, however, it is enough that the District Court found the Texas redistricting maps to be in violation of federal law. *Ante,* at 2323 – 2324. That cursory application of *Carson,* in particular whether the injunctions the majority reads into the August 15 and 24 orders could be "effectually challenged" absent immediate appeal to this Court, deprives that limit to our jurisdiction of much of its meaning when assessing Texas' request for our intervention in these cases. Nothing in our precedent supports that truncated approach. And in any event, if Texas wanted review of the orders after any injunction was entered by the District Court, it could have asked this Court for an emergency stay.

***638** Second, the August 15 and 24 orders at issue here simply did not have the "practical effect" of enjoining Texas' use of the 2013 maps. The majority thinks otherwise in part because the District Court noted that the violations " 'must be remedied.' " *Ante,* at 2321 – 2322. In addition, the majority believes that "Texas had reason to fear that if it tried to conduct elections under plans that the court had found to be racially discriminatory, the court would infer an evil motive and perhaps subject the State once again to the strictures of preclearance under § 3(c) of the Voting Rights Act." *Ante,* at 2322. But the majority forgets that the District Court made explicit that "[a]lthough [it] found violations [in the 2013 maps], [it] ha[d] not enjoined [their] use for any upcoming elections." App. 134a–136a. That the District Court requested the Texas attorney general to advise it, within "three business days," whether "the Legislature intends to take up redistricting in an effort to cure [the] violations," 274 F.Supp.3d, at 686; 267 F.Supp.3d, at 795, does not undermine that unequivocal statement. Nothing in that language indicates that the District Court required the Legislature to "redraw both maps *immediately* " or else "the court would do so itself." Brief for Appellants 20 (emphasis in original). Instead, recognizing "that the federal judiciary functions within a system of federalism which entrusts the responsibility of legislative ... districting primarily to the state legislature," *Whitcomb,* 305 F.Supp., at 1392, the District Court gave Texas an opportunity to involve its Legislature and asked for a simple statement of intent so that the court could manage its docket accordingly. This request for a statement of intent, which was necessary for the District Court to manage its own docket, does not transform the orders into injunctions.

As to the second point, if Texas had any "fear" regarding the use of its maps, despite having been explicitly told that the maps were not enjoined, that would still not be enough. This Court recognized in *Gunn* that the State in that case, ***639** faced ****2345** with the order declaring its statute unconstitutional, "would no doubt hesitate long before disregarding it." 399 U.S., at 390, 90 S.Ct. 2013. That hesitation was not enough in *Gunn* to magically transform an order into an injunction for purposes of § 1253, and nothing about these cases justifies the majority taking out its wand today. Whatever "fear" Texas had does not transform the August 15 and 24 orders into injunctions. And absent an injunction, this Court lacks jurisdiction over these appeals. The cases should thus be dismissed.

II

Having rewritten the limits of § 1253, the majority moves to the merits. There again the Court goes astray. It asserts that the District Court legally erred when it purportedly shifted the burden of proof and "required the State to show that the 2013 Legislature somehow purged the 'taint' that the court attributed to the defunct and never-used plans enacted by a prior legislature in 2011." *Ante,* at 2324. But that holding ignores the substantial amount of evidence of Texas' discriminatory intent, and indulges Texas' warped reading of the legal analysis and factual record below.[10]

A

Before delving into the content of the August 15 and 24 orders, a quick recap of the rather convoluted history of these cases

is useful. In 2011, the Texas Legislature redrew its electoral districts. Various plaintiff groups challenged the 2011 maps under § 2 of the Voting Rights Act and the Fourteenth Amendment, and those lawsuits were consolidated before the three-judge District Court below pursuant to 28 U.S.C. § 2284(a). Because Texas then was subject to preclearance under § 5 of the Voting Rights Act, the 2011 ***640** maps did not take effect immediately, and Texas filed a declaratory action in the District Court for the District of Columbia to obtain preclearance.

"Faced with impending election deadlines and un-precleared plans that could not be used in the [2012] election, [the District] Court was faced with the 'unwelcome obligation' of implementing interim plans so that the primaries could proceed." 274 F.Supp.3d, at 632. In January 2012, this Court vacated the first iteration of those interim maps in *Perry v. Perez,* 565 U.S. 388, 394–395, 132 S.Ct. 934, 181 L.Ed.2d 900 (2012) (*per curiam*), finding that the District Court failed to afford sufficient deference to the Legislature. In February 2012, the District Court issued more deferential interim plans, but noted that its analysis had been expedited and curtailed, and that it had only made preliminary conclusions that might be revised on full consideration. C.J.S. 367a–424a; H.J.S. 300a–315a.

In August 2012, the D.C. District Court denied preclearance of the 2011 maps. *Texas v. United States,* 887 F.Supp.2d 133 (2012). It concluded that the federal congressional map had "retrogressive effect" and "was enacted with discriminatory intent," *id.,* at 159, 161, and that the State House map was retrogressive and that "the full record strongly suggests that the retrogressive effect ... may not have been accidental," *id.,* at 178. Texas appealed, and the case was eventually dismissed following *Shelby County v. Holder,* 570 U.S. 529, 133 S.Ct. 2612, 186 L.Ed.2d 651 (2013) (holding unconstitutional the formula used to subject States to the preclearance requirement).

****2346** In June 2013, the Texas Governor called a special legislative session, and that same month the Legislature adopted the 2012 interim maps as the permanent maps for the State. The Legislature made small changes to the maps, including redrawing the lines in HD90, but the districts at issue in these appeals all remained materially unchanged from the 2011 maps.

The District Court in these cases denied Texas' motion to dismiss the challenges to the 2011 maps, and the challengers ***641** amended their complaints to assert claims respecting the 2013 maps. In April and May 2017, the District Court held that districts in Texas' 2011 maps violated § 2 and the Fourteenth Amendment. The August 15 and 24 orders respecting the 2013 maps followed.

B

The majority believes that, in analyzing the 2013 maps, the District Court erroneously "attributed [the] same [discriminatory] intent [harbored by the 2011 Legislature] to the 2013 Legislature" and required the 2013 Legislature to purge that taint. *Ante,* at 2317 – 2318. The District Court did no such thing. It engaged in a painstaking analysis of discriminatory intent under *Arlington Heights v. Metropolitan Housing Development Corp.,* 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977), which is critical to understanding why, as explained in Part II–D, *infra,* the District Court did not improperly presume that the Legislature acted with discriminatory intent.

Under *Arlington Heights,* "in determining whether racially discriminatory intent existed," this Court considers "circumstantial and direct evidence" of: (1) the discriminatory "impact of the official action," (2) the "historical background," (3) the "specific sequence of events leading up to the challenged decision," (4) departures from procedures or substance, and (5) the "legislative or administrative history," including any "contemporary statements" of the lawmakers. 429 U.S., at 266–268, 97 S.Ct. 555. Although this analysis must start from a strong "presumption of good faith," *Miller v. Johnson,* 515 U.S. 900, 916, 115 S.Ct. 2475, 132 L.Ed.2d 762 (1995), a court must not overlook the relevant facts. This Court reviews the "findings of fact" made by the District Court, including those respecting legislative motivations, "only for clear error." *Cooper v. Harris,* 581 U.S. 285, 293, 137 S.Ct. 1455, 1465, 197 L.Ed.2d 837 (2017); see also *Anderson v. Bessemer City,* 470 U.S. 564, 573, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985). The Court therefore "may not reverse just because we 'would

have decided the [matter] differently.'.... A finding that is 'plausible' in light of the ***642** full record—even if another is equally or more so—must govern." *Harris,* 581 U.S., at 293, 137 S.Ct., at 1465.

The District Court followed the guidance in *Arlington Heights* virtually to a tee, and its factual findings are more than "plausible" in light of the record. To start, there is no question as to the discriminatory impact of the 2013 plans, as the "specific portions of the 2011 plans that [the District Court] found to be discriminatory or unconstitutional racial gerrymanders continue unchanged in the 2013 plans, their harmful effects 'continu[ing] to this day.' " 274 F.Supp.3d, at 649 (alteration in original). Texas, moreover, has a long "history of discrimination" against minority voters. *Id.,* at 648, n. 37. "In the last four decades, Texas has found itself in court every redistricting cycle, and each time it has lost." *Texas,* 887 F.Supp.2d, at 161.

There is also ample evidence that the 2013 Legislature knew of the discrimination that tainted its 2011 maps. "The 2013 plans were enacted by a substantially similar ****2347** Legislature with the same leadership only two years after the original enactment." 274 F.Supp.3d, at 648, n. 37. The Legislature was also well aware that "the D.C. court concluded that [its 2011] maps were tainted by evidence of discriminatory purpose," H.J.S. 443a, and despite the District Court having warned of the potential that the Voting Rights Act may require further changes to the maps, "the Legislature continued its steadfast refusal to consider [that] possibility," 274 F.Supp.3d, at 649.

Turning to deliberative process—on which the majority is singularly focused, to the exclusion of the rest of the factors analyzed in the orders below, see Part II–D, *infra*—the District Court concluded that Texas was just "not truly interested in fixing any remaining discrimination in the [maps]." 274 F.Supp.3d, at 651, n. 45. Despite knowing of the discrimination in its 2011 maps, "the Legislature did not engage in a deliberative process to ensure that the 2013 plans cured ***643** any taint from the 2011 plans."[11] *Id.,* at 649. For instance, Representative Darby, a member of the redistricting committee, "kept stating that he wanted to be informed of legal deficiencies so he could fix them," but "he did not himself seek to have the plan evaluated for deficiencies and he willfully ignored those who pointed out deficiencies, continuing to emphasize that he had thought 'from the start' that the interim plans were fully legal." *Id.,* at 651, n. 45.[12] The ***644** Legislature made no substantive changes to the challenged districts that ****2348** were the subject of the 2011 complaints, and "there is no indication that the Legislature looked to see whether any discriminatory taint remained in the plans." *Id.,* at 649. In fact, the only substantive change that the Legislature made to the maps was to add *more* discrimination in the form of a new racially gerrymandered HD90, as the majority concedes. *Ante,* at 2334 – 2335.

The absence of a true deliberative process was coupled with a troubling sequence of events leading to the enactment of the 2013 maps. Specifically, "the Legislature pushed the redistricting bills through quickly in a special session," 274 F.Supp.3d, at 649, despite months earlier having been urged by the Texas attorney general to take on redistricting during the regular session, *id.,* at 634; see also H.J.S. 440a. By pushing the bills through a special session, the Legislature did not have to comply with "a two-thirds rule in the Senate or a calendar rule in the House," 274 F.Supp.3d, at 649, n. 38, and it avoided the "full public notice and hearing" that would have allowed " 'meaningful input' from all Texans, including the minority community," H.J.S. 444a. In addition, "necessary resources were not allocated to support a true deliberative process." 274 F.Supp.3d, at 649. For instance, the House committee "did not have counsel when the session started." *Ibid.,* n. 39.

Nor can Texas credibly claim to have understood the 2012 interim orders as having endorsed the legality of its maps so that adopting them would resolve the challengers' complaints. ***645** In its 2012 interim orders, "the [District] Court clearly warned that its preliminary conclusions ... were not based on a full examination of the record or the governing law and were subject to revision" "given the severe time constraints ... at the time" the orders were adopted. *Id.,* at 650. The District Court also explained that the "claims presented ... involve difficult and unsettled legal issues as well as numerous factual disputes." C.J.S. 367a. During the redistricting hearings, chief legislative counsel for the Texas Legislative Council in 2013, Jeff Archer, advised the Legislature that the District Court " 'had not made full determinations, ... had not made fact findings on every issue, had not thoroughly analyzed all the evidence,' " and had " 'made it explicitly clear that this was an interim plan to address basically first impression of voting rights issues.' " 274 F.Supp.3d, at 650 (alterations in original); see also App. 441a–442a (testimony that interim plans were "impromptu" and "preliminary" and that the District Court "disclaimed making final determinations"). Archer explained that although the Legislature had " 'put to bed' " challenges regarding " 'those issues that the [District] Court identified so far,' " it had not " 'put the rest to bed.' " 274 F.Supp.3d, at 651, n. 45; see also App. 446a–447a (advising that, "on a realistic level," the Legislature had not "removed legal challenges" and that adopting the interim maps "in no way would inoculate the plans").

There was substantial evidence that the 2013 Legislature instead adopted the interim plans as part of a "strategy [that] involved adopting the interim maps, however flawed," to insulate (and thus continue to benefit from) the discriminatory taint of its 2011 maps. 274 F.Supp.3d, at 651. Texas hoped that, by adopting the 2012 interim maps, the challengers "would have no remedy, and [the Legislature] would maintain the benefit of such discrimination or unconstitutional effects." *Ibid.* That strategy originated with the Texas attorney general, who was responsible for defending ***646** the State in the redistricting challenges. *Id.,* at 650, and n. 41. He advised the Legislature that adopting the interim plans was the " 'best way to ****2349** avoid further intervention from federal judges' " and to " '*insulate* [Texas'] redistricting plans from further legal challenge.' " *Id.,* at 650 (emphasis added); see also H.J.S. 443a. The Texas attorney general also drafted the "legislative fact findings accompanying the plans, *before* the Legislature had engaged in any fact findings on the bills," stating that the 2012 interim plans "complied 'with all federal and state constitutional provisions or laws applicable to redistricting plans.' " 274 F.Supp.3d, at 650, n. 41 (emphasis added). That the legislative factfindings were predrafted by the attorney defending Texas in these redistricting challenges—purporting to conclude that the 2012 interim plans complied with the law, when in fact the evidence showed that the Legislature did not engage in a true deliberative process or meaningfully consider evidence of the legality of the plans so that it could have endorsed such factfindings—demonstrates that the adoption of the interim plans was a mere pretext to insulate the discriminatory benefits of the 2011 plans. That explains why legislators thought that removal of those factfindings would " 'gu[t] the bill.' " *Ibid.*

In the end, having presided over years of litigation and seeing firsthand all of the evidence, the District Court thought it clear that Texas' "strategy involved adopting the interim maps, however flawed," so that the challengers "would have no remedy, and [Texas] would maintain the benefit of such discrimination and unconstitutional effects." *Id.,* at 651. It is hard to imagine what a more thorough consideration of the *Arlington Heights* factors in these cases would have looked like. Review of the District Court's thorough inquiry leads to the inescapable conclusion that it did not err—let alone clearly err—in concluding that the "Legislature in 2013 intentionally furthered and continued the existing discrimination in the plans." 274 F.Supp.3d, at 652.

***647** C

In contrast to that thorough *Arlington Heights* inquiry, the majority engages in a cursory analysis of the record to justify its conclusion that the evidence "overwhelmingly" shows that Texas acted with legitimate intent. *Ante,* at 2328. Two critical things are conspicuously missing from its analysis: first, consideration of the actual factual record (or most of it, anyway),[13] and second, meaningful consideration of the limits of our review of facts on these appeals.[14]

The majority first makes reference to the fact that the Texas attorney general "advised the Legislature that the best way to [end the redistricting litigation] was to adopt the interim, court-issued plans," a position repeated by the sponsor of the plans. *Ante,* at 2327. And in its view, it was reasonable for the Legislature to believe that adopting the interim plans "might at least reduce objections and thus ****2350** simplify and expedite the conclusion of the litigation." *Ante,* at 2328. The majority also states that "there is no evidence that the Legislature thought that the plans were invalid." *Ante,* at 2327. In reaching those findings, however, the majority ignores all of the evidence in the record that demonstrates that the Legislature was aware of (and ignored) the infirmities in the maps, that it knew that adopting the interim plans would not resolve the litigation concerning the disputed districts, ***648** and that it nevertheless moved forward with the bills as a strategy to "insulate" the discriminatory maps from further judicial scrutiny and perpetuate the discrimination embedded in the 2012 interim maps. See Part II–B, *supra*.

Instead of engaging with the factual record, the majority opinion sets out its own view of "the situation when the Legislature adopted the court-approved interim plans." *Ante,* at 2328. Under that view, "the Legislature [had] good reason to believe that the court-approved interim plans were legally sound," particularly in light of our remand instructions in *Perry,* 565 U.S. 388, 132 S.Ct. 934, 181 L.Ed.2d 900. *Ante,* at 2328 – 2329. The majority nowhere considers, however, the evidence regarding what the Legislature *actually* had before it concerning the effect of the interim orders, including the explicit cautionary statements in the orders and the repeated warnings of the chief legislative counsel that the interim plans were preliminary,

incomplete, and impromptu.[15] See Part II–B, *supra*.

The majority finds little significance in the fact that the Legislature " 'pushed the redistricting bills through quickly ***649** in a special session,' " reasoning that a special session was needed "because the regular session had ended." *Ante,* at 2329. That of course ignores the evidence that the Legislature disregarded requests by the Texas attorney general, months earlier, to take up redistricting during the regular session, that proceeding through a special session permitted the Legislature to circumvent procedures that would have ensured full and adequate consideration, and that resources were not sufficiently allocated to permit considered review of the plans. See Part II–B, *supra*.

Finally, the majority sees nothing wrong with the fact that the Legislature failed "to take into account the problems with the 2011 plans that the D.C. court identified in denying preclearance." *Ante,* at 2329. It maintains that the purpose of adopting the interim plans was to "fix the problems identified by the D.C. court" and reasons that the interim maps did just that by modifying any problematic districts. *Ibid.* ****2351** But of course the finding of discriminatory intent rested not only on what happened with particular districts. Rather, the evidence suggested that discriminatory motive permeated the entire 2011 redistricting process, as the D.C. court considered that "Texas has found itself in court every redistricting cycle [in the last four decades], and each time it has lost"; that "Black and Hispanic members of Congress testified at trial that they were excluded completely from the process of drafting new maps, while the preferences of Anglo members were frequently solicited and honored"; that the redistricting committees "released a joint congressional redistricting proposal for the public to view only after the start of a special legislative session, and each provided only seventy-two hours' notice before the sole public hearing on the proposed plan in each committee"; that minority members of the Texas Legislature "raised concerns regarding their exclusion from the drafting process and their inability to influence the plan"; and that the Legislature departed from normal procedure in the "failure to release a redistricting ***650** proposal during the regular session, the limited time for review, and the failure to provide counsel with the necessary election data to evaluate [Voting Rights Act] compliance." 887 F.Supp.2d, at 161. The majority also ignores the findings of retrogression concerning the previous version of CD25, which of course are relevant to the challengers' claims about CD27 and CD35 in this litigation and were not addressed in the 2012 interim plans. See Part III–A, *infra*. That the 2012 interim maps addressed some of the deficiencies identified by the D.C. court in the preclearance litigation does not mean that the Legislature in 2013 was free to wholly disregard the significance of other evidence of discrimination that tainted its 2011 maps and were entrenched in the 2012 interim maps.

Even had the majority not ignored the factual record, it still would be wrong in concluding that the District Court erred in finding that the 2013 Legislature acted with the intent to further and benefit from the discrimination in the 2011 maps. In light of the record before this Court, the finding of invidious intent is at least more than " 'plausible' " and thus "must govern." *Harris,* 581 U.S., at 293, 137 S.Ct., at 1465. The majority might think that it has a "better view of the facts" than the District Court did, but "the very premise of clear error review is that there are often 'two permissible'—because two 'plausible'—'views of the evidence.' " *Id.,* at 299, 137 S.Ct., at 1468.

D

The majority resists the weight of all this evidence of invidious intent not only by disregarding most of it and ignoring the clear-error posture but also by endorsing Texas' distorted characterizations of the intent analysis in the orders below. Specifically, the majority accepts Texas' argument that the District Court "reversed the burden of proof" and "imposed on the State the obligation of proving that the 2013 Legislature had experienced a true 'change of heart' and had 'engage[d] in a deliberative process to ensure that ***651** the 2013 plans cured any taint from the 2011 plans.' " *Ante,* at 2325 (alteration in original). The District Court did no such thing, and only a selective reading of the orders below could support Texas' position.

It is worth noting, as a preliminary matter, that the majority does not question the relevance of historical discrimination in assessing present discriminatory intent. Indeed, the majority leaves undisturbed the longstanding principle recognized in *Arlington Heights* that the " 'historical background' of a legislative enactment is 'one evidentiary source' relevant to the

question ****2352** of intent." *Ante,* at 2325 (quoting *Arlington Heights,* 429 U.S., at 267, 97 S.Ct. 555). With respect to these cases, the majority explicitly acknowledges that, in evaluating whether the 2013 Legislature acted with discriminatory purpose, "the intent of the 2011 Legislature [is] relevant" and "must be weighed together with any other direct and circumstantial evidence" bearing on intent. *Ante,* at 2327.

If consideration of this " 'historical background' " factor means anything in the context of assessing intent of the 2013 Legislature, it at a minimum required the District Court to assess how the 2013 Legislature addressed the known discrimination that motivated the drawing of the district lines that the Legislature was adopting, unchanged, from the 2011 maps. Therefore, the findings as to whether the 2013 Legislature engaged in a good-faith effort to address any known discrimination that tainted its 2011 plans were entirely apposite, so long as the District Court "weighed [this factor] together with any other direct and circumstantial evidence" bearing on the intent question, and so long as the burden remained on the challengers to establish invidious intent. *Ibid.*

The majority faults the District Court for not adequately engaging in that weighing and giving too "central" a focus to the historical factor in its intent analysis. *Ante,* at 2325 – 2326; see also *Ibid.,* That alleged "central" focus, the majority contends, led the District Court to shift the ***652** burden of proof on the intent inquiry away from the challengers, instead requiring Texas to show that the Legislature cured its past transgressions. *Ante,* at 2325 – 2326. Those conclusions can only be supported if, as Texas and the majority have done, one engages in a highly selective reading of the District Court orders.

To begin, entirely absent from the majority opinion is any reference to the portions of the District Court orders that unequivocally confirm its understanding that the burden remained on the challengers to show that the 2013 Legislature acted with invidious intent. The District Court was explicit that the challengers bore the burden to "establish their claim by showing that the Legislature adopted the plans with a discriminatory purpose, maintained the district lines with a discriminatory purpose, or intentionally furthered preexisting intentional discrimination." 274 F.Supp.3d, at 646; see also *id.,* at 645 (discussing Circuit precedent regarding the showing needed for "a plaintiff [to] meet the purpose standard").[16]

Even when it does look at the actual language of the orders, the majority picks the few phrases that it believes support its ****2353** argument, choosing to disregard the rest. For instance, ***653** the majority quotes the District Court order as having required Texas to show that the 2013 Legislature had a " 'change of heart.' " *Ante,* at 2325 (quoting 274 F.Supp.3d, at 649). When that sentence is read in full, however, it is evident that the District Court was not imposing a "duty to expiate" the bad intent of the previous Legislature, as the majority contends, *ante,* at 2325 – 2326, but instead was describing what the weighing of the direct and circumstantial evidence revealed about the motivations of the 2013 Legislature: "The decision to adopt the interim plans was not a change of heart concerning the validity of [the challengers'] claims ...—it was a litigation strategy designed to insulate the 2011 or 2013 plans from further challenge, regardless of their legal infirmities." 274 F.Supp.3d, at 649–650.

Likewise, the majority quotes the orders as requiring proof that the Legislature " 'engage[d] in a deliberative process to ensure that the 2013 plans cured any taint from the 2011 plans.' " *Ante,* at 2325 – 2326 (quoting 274 F.Supp.3d, at 649). But the District Court did not put the burden on Texas to make that affirmative showing. Instead, that partial quote is lifted from a sentence in which the District Court, having held a trial on these factual issues, concluded that the challengers had met their burden to show that "the Legislature did not engage in a deliberative process," which it supported later in that paragraph with findings that the Legislature "pushed the redistricting bills through quickly in a special session" without allocating the "necessary resources ... to support a true deliberative process." Id., at 649.

The majority finally asserts that the District Court "drove the point home" when it "summarized its analysis" as follows: " 'The discriminatory taint [from the 2011 plans] was not removed by the Legislature's enactment of the Court's interim plans, because the Legislature engaged in no deliberative process to remove any such taint, and in fact intended any such taint to be maintained but safe from remedy.' " *Ante,* at 2325 – 2326 (quoting 274 F.Supp.3d, at 686). The majority no ***654** doubt hopes that the reader will focus on the portion of the sentence in which the District Court concludes that the discriminatory taint found in the 2011 maps " 'was not removed' " by the enactment of the interim maps " 'because the Legislature engaged in no deliberative process to remove any such taint.' " *Ante,* at 2325 (quoting 274 F.Supp.3d, at 686).[17] But the majority ignores the import of the remaining part of the sentence, in which the District Court held that the Legislature "in fact intended any such taint to be maintained but be safe from remedy." *id.,*at 652; see also *id.,* at 686. The majority also conveniently leaves out the sentence that immediately follows: "The Legislature in 2013 intentionally furthered and continued the existing discrimination in the plans." *Id.,* at 652. When read in full and in context, it is clear that the District Court remained focused

on the evidence proving the intent of the 2013 Legislature to shield its plans from a remedy and thus further the discrimination, rather than simply presuming invidious intent ****2354** from the failure to remove the taint, as the majority claims.

In selectively reviewing the record below, the majority attempts to shield itself from the otherwise unavoidable conclusion that the District Court did not err. If forced to acknowledge the true scope of the legal analysis in the orders below, the majority would find itself without support for its insistence that the District Court was singularly focused on whether the Legislature "removed" past taint. And then the majority would have to contend with the thorough analysis of the *Arlington Heights* factors, Part II–B, *supra,* that ***655** led the District Court to conclude that the 2013 Legislature acted with invidious intent.

III

The majority fares no better in its district-by-district analysis. In line with the theme underlying the rest of its analysis, the majority opinion overlooks the factual record and mischaracterizes the bulk of the analysis in the orders below in concluding that the District Court erred in finding a § 2 results violation as to CD27, HD32, and HD34. I first address CD27, and then turn to HD32 and HD34.

A

1

To put in context the objections to the District Court's conclusion regarding CD27, a brief review of the District Court's factual findings as to that district is necessary. Before 2011, CD27 was a Latino opportunity district, *i.e.,* a majority-HCVAP district with an opportunity to elect a Hispanic-preferred candidate. When the Legislature reconfigured the district in 2013, it moved Nueces County, a majority-HCVAP county, into a new Anglo-majority district to protect an incumbent "who was not the candidate of choice of those Latino voters" and likely would have been "ousted" by them absent the redistricting. C.J.S. 191a. The District Court found that the "placement of Nueces County Hispanics in an Anglo-majority district ensures that the Anglo majority usually will defeat the minority-preferred candidate, given the racially polarized voting in the area." *Id.,* at 189a–190a. It also found that "the political processes are not equally open to Hispanics" in Texas as a result of its "history of official discrimination touching on the right of Hispanics to register, vote, and otherwise to participate in the democratic process [that] is well documented," and that "Latinos bear the effects of past discrimination in areas such as education and employment/income, which hinder their ***656** ability to participate effectively in the political process." *Id.,* at 190a–191a. Given those findings, the District Court concluded that the newly constituted CD27 "has the effect of diluting Nueces County Hispanic voters' electoral opportunity." *Id.,* at 191a.

Texas nevertheless contended (and maintains here) that no § 2 results violation existed because only "seven compact Latino opportunity districts could be drawn in South/West Texas," *id.,* at 181a, and that all seven districts already existed under its maps. To explain how it counted to seven, Texas pointed to the creation of CD35 as a supposed new Latino opportunity

district that joined Travis County Hispanics with Hispanics in San Antonio. The District Court agreed that only seven such districts could be drawn in the area, but rejected Texas' invocation of CD35 as a defense. The District Court concluded that because Travis County "[did] not have Anglo bloc voting," 274 F.Supp.3d, at 683, § 2 did not require the placement of Travis County Hispanics in an opportunity district, C.J.S. 176a; see also *Thornburg v. Gingles,* 478 U.S. 30, 51, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986). The District Court ****2355** found that Texas had moved Travis County Hispanics from their pre–2011 district, CD25, to the newly constituted CD35, not to comply with § 2, but "to use race as a tool for partisan goals ... to intentionally destroy an existing district with significant minority population (both African American and Hispanic) that consistently elected a Democrat (CD25)." 274 F.Supp.3d, at 683. Thus, it concluded that "CD35 was an impermissible racial gerrymander because race predominated in its creation without furthering a compelling state interest." *Ibid.*

Importantly, the District Court concluded that, without CD35, Texas could have drawn one more Latino opportunity district in South/West Texas that included Nueces County Hispanics. C.J.S. 181a; see also *id.,* at 190a ("Plaintiffs have thus shown that a district could be drawn in which Hispanics, including Nueces County Hispanics, are sufficiently numerous and geographically compact to constitute a majority ***657** HCVAP"); *id.,* at 192a ("Numerous maps also demonstrated that accommodating the § 2 rights of all or most Nueces County Hispanic voters would not compromise the § 2 rights of any other voters, and in fact including it substantially accommodates the § 2 rights of Hispanic voters in South/West Texas"). Indeed, "[p]lans were submitted during the legislative session and during this litigation that showed that seven compact districts could be drawn that included all or most Nueces County Hispanic voters but not Travis County voters." *Id.,* at 181a, n. 47.

2

Nothing in the record or the parties' briefs suggests that the District Court clearly erred in these findings of fact, which unambiguously support its conclusion that there is a § 2 results violation with respect to CD27. Nevertheless, the majority offers two reasons for reversing that conclusion. First, the majority contends that the District Court erred because "in evaluating the presence of majority bloc voting in CD35," it "looked at only one, small part of the district, the portion that falls within Travis County." *Ante,* at 2331 – 2332. It cites to *Bethune–Hill v. Virginia State Bd. of Elections,* 580 U.S. 178, 192, 137 S.Ct. 788, 800, 197 L.Ed.2d 85 (2017), an equal protection racial gerrymandering case, for the proposition "that redistricting analysis must take place at the district level." *Ante,* at 2332. According to the majority, then, the District Court should have looked at the existence of majority bloc voting in CD35 as a whole after the 2011 redistricting.

But the majority confuses the relevant inquiry, as well as the relevant timeline. The particular § 2 question here does not concern the status of Travis County Latinos in the newly constituted CD35 after the 2011 redistricting. Rather, it concerns the status of Travis County Latinos in the old CD25, prior to the 2011 redistricting. That is because the challengers' § 2 claim concerns the choices before the Legislature *at the time of the 2011 redistricting,* when it was deciding which Latinos in Southwest Texas to place in the ***658** new opportunity district to be created in that area of the State. The Legislature chose to include Travis County Latinos in an opportunity district at the expense of the Nueces County Latinos, who were instead moved into a majority-Anglo district. So the question is whether, knowing that Nueces County Latinos indisputably had a § 2 right, the Legislature's choice was nevertheless justified because the Travis County Latinos also had a § 2 right that needed to be accommodated. In other words, did the Legislature actually create a new § 2 opportunity district for persons with a § 2 right, or did it simply move people without a § 2 right into a new ****2356** district and just call it an opportunity district? To answer that question, the status of Travis County Latinos in 2011 is the only thing that matters, and the District Court thus correctly focused its inquiry on whether bloc voting existed in Travis County *prior* to the 2011 redistricting, such that Travis County Latinos could be found to have a § 2 right. Whether the newly constituted CD35 *now* qualifies as a § 2 opportunity district—an inquiry that would, as the majority suggests, call for district wide consideration—is beside the point.

Second, the majority reasons that "the 2013 Legislature had 'good reasons' to believe that [CD35] was a viable Latino opportunity district that satisfied the *Gingles* factors." *Ante,* at 2332. For this, the majority cites to the fact that the district "was based on a concept proposed by MALDEF" and that one group of plaintiffs "argued that the district [was] mandated by

§ 2," and vaguely suggests that, contrary to the District Court's finding, "there is ample evidence" of majority bloc voting in CD35. *Ibid.*[18]

The majority forgets, yet again, that we review factual findings for clear error. *Harris,* 581 U.S., at 293, 137 S.Ct., at 1464–1465. Indeed, ***659** its analysis is too cursory even for *de novo* review. The majority does not meaningfully engage with the full factual record below. Instead, it looks only to the handful of favorable facts cited in Texas' briefs. Compare Brief for Appellants 46 with *ante,* at 2332. Had the majority considered the full record, it could only have found that the District Court cited ample evidence in support of its conclusion that the Legislature had no basis for believing that § 2 required its drawing of CD35. In fact, the District Court noted that Texas in 2011 "actually asserted that CD35 is not required by § 2," C.J.S. 174a, n. 40, that the main plan architect testified that he was not sure whether § 2 required drawing the district, and that testimony at trial showed that the district was drawn because, on paper, it would fulfill the requirement of being majority-HCVAP while providing Democrats only one new district, and "not because all of the *Gingles* factors were satisfied," *id.,* at 179a, n. 45. The District Court also concluded that "there is no evidence that any member of the Legislature ... had any basis in evidence for believing that CD35 was required by § 2 other than its HCVAP-majority status." *Ibid.*

Had the majority properly framed the inquiry and applied the clear-error standard to the full factual record, it could not convincingly dispute the existence of a § 2 results violation as to CD27. Texas diluted the voting strength of Nueces County Latinos by transforming a minority-opportunity district into a majority-Anglo district. The State cannot defend that result by pointing to CD35, because its "creation of an opportunity district for [Travis County Latinos] without a § 2 right offers no excuse for its failure to provide an opportunity district for [Nueces County Latinos] with a § 2 right." *League of United Latin American Citizens v. Perry,* 548 U.S. 399, 430, 126 S.Ct. 2594, 165 L.Ed.2d 609 (2006) (*LULAC*).[19]

****2357 *660** B

1

I turn now to HD32 and HD34. Before the 2011 redistricting, Nueces County had within it two Latino opportunity districts and part of one Anglo-represented district. 267 F.Supp.3d, at 767. Due to slower population growth reflected in the 2010 census, however, Nueces County was entitled to have within it only two districts. Accordingly, during the 2011 redistricting, the Legislature opted to "eliminate one of the Latino opportunity districts ... and draw two districts wholly within Nueces County—one strongly Latino (HD34) and one a safe Anglo Republican seat (HD32) to protect [an] incumbent." *Ibid.* "Based on an analysis of the *Gingles* requirements and the totality of the circumstances," however, the District Court found that the Legislature could have drawn two compact minority districts in Nueces County. *Id.,* at 780. Namely, the evidence demonstrated that it was possible to draw a map with "two districts with greater than 50% HCVAP," that "Latinos in Nueces County are highly cohesive, and that Anglos vote as a block usually to defeat minority preferred candidates." *Id.,* at 777–778.

***661** The District Court then considered two proposed configurations for those districts: one with two HCVAP-majority districts located wholly within Nueces County, and another that required breaking the County Line Rule. *Id.,* at 777. The challengers preferred the latter configuration because, according to their expert, "an exogenous election index" revealed that the two HCVAP-majority districts wholly within Nueces County did "not perform sufficiently." *Id.,* at 778. The District Court did not accept that expert's assessment at face value. Instead, it explained that "an exogenous election index alone will not determine opportunity," and so evaluated the expert testing and ample other evidence and ultimately concluded that the challengers had "not adequately demonstrated that they lack equal opportunity in [an alternative] configuration ... such that a county line break is necessary." *Id.,* at 778, 781. Thus, although it found that "two HCVAP-districts could have been drawn that would provide Hispanics with equal electoral opportunity, and that § 2 could require those two districts," because § 2 did

not require the challengers' requested remedy (*i.e.,* breaking the County Line Rule), the District Court had to "consider whether § 2 requires a remedy" and directed the challengers to "consider their preferred configuration for the remedy stage" that was to follow (before Texas prematurely appealed). *Id.,* at 783.

2

The majority purports to accept these factual findings and contends that they "show that [HD32 and HD34] do not violate § 2." *Ante,* at 2332. Specifically, the majority points to the fact that the challengers' "own expert determined that it ****2358** was not possible to divide Nueces County into more than one *performing* Latino district" without breaking the County Line Rule, a remedy the District Court concluded was not required by § 2. *Ante,* at 2332 – 2333 (emphasis in original). "So if Texas could *not* create two performing districts in Nueces County and did *not* have to break county lines," the ***662** majority reasons, "the logical result is that Texas did not dilute the Latino vote." *Ibid.* (emphasis in original). In its view, a districting decision cannot be said to dilute the votes of minority voters "if the alternative to the districting decision at issue would not enhance the ability of minority voters to elect the candidates of their choice." *Ibid.*

At bottom, then, the majority rests its conclusion on one aspect of the challengers' expert evidence, *i.e.,* that it was not possible to place within Nueces County more than one performing Latino district without breaking county lines. The majority acknowledges the District Court's finding that the challengers had " 'failed to show' that two majority-Latino districts in Nueces County would not perform," but waves away that finding by concluding that the District Court "twisted the burden of proof beyond recognition" by "suggest [ing] that a plaintiff might succeed on its § 2 claim because its expert failed to show that the necessary factual basis for the claim could not be established." *Ante,* at 2333. That conclusion is only possible because the majority closes its eyes to significant evidence in the record and misrepresents the District Court's conclusion about the potential for creating two performing Latino-majority districts in Nueces County.

The majority, of course, is right on one thing: The District Court recognized that the challengers' expert opined that the two HCVAP-majority districts would not perform based on the results of an exogenous election index. See *ante,* at 2332 – 2333. But the majority ignores that the District Court rejected that expert's conclusion because "the results of an exogenous election index alone will not determine opportunity," as "[s]uch indices often do not mirror endogenous election performance." 267 F.Supp.3d, at 778. Instead of "just relying on an exogenous election index to measure opportunity," the District Court "conduct[ed] an intensely local appraisal to determine whether real electoral opportunity exists." *Ibid.*

***663** That "intensely local appraisal" resulted in a lengthy analysis that considered, among other facts: that Texas had a long "history of voting-related discrimination"; that "racially polarized voting exist[s] in Nueces County and its house district elections, the level is high, and the high degree of Anglo bloc voting plays a role in the defeat of Hispanic candidates"; "that Hispanics, including in Nueces County, suffer a 'continuing pattern of disadvantage' relative to non-Hispanics"; that population growth in the county "was [driven by] Hispanic growth" and that the "HCVAP continues to climb"; that the districts "include demographic distributions strongly favoring Hispanic voters," and that the "numbers translate into a significant advantage in house district elections"; and that data analysis showed that "performance for Latinos increased significantly in presidential election years," which "indicates that the districts provide potential to elect." *Id.,* at 778–782.[20]

****2359** The District Court's focus on the history of the county as well as its potential performance going forward was an important point of departure from the challengers' expert, who considered only the former. See *LULAC,* 548 U.S., at 442, 126 S.Ct. 2594 (noting "a significant distinction" in analysis of what district performance " 'had been' " compared to "how it would operate today ... given the growing Latino political power in the district"). The District Court also found the expert's analysis lacking in other key respects. Namely, the District Court noted that one of the majority-HCVAP districts "provides opportunity, at least in presidential election years"; ***664** that "[m]ost of the elections in [the exogenous election] index did not involve a *Latino* Democrat candidate"; and that the expert "only looked at statewide races and no county races," even though it was "conceivable that, in competitive local races with Latino candidates, Hispanic voters would mobilize in significantly higher numbers." 267 F.Supp.3d, at 781 (emphasis in original).

Based on this review of the evidence, the District Court concluded "that Hispanics have equal opportunity in two districts drawn wholly within Nueces County (or at least [the challengers] failed to show that they do not)." *Id.,* at 782. It further explained that, whereas the "evidence shows that two HCVAP-districts could have been drawn that would provide Hispanics with equal electoral opportunity, ... the evidence does not show that the Legislature was required to break the County Line Rule to draw what [the challengers] consider to be 'effective' districts." *Id.,* at 783.

When read in the context of the full analysis just detailed, it is clear that the District Court was not "twist[ing] the burden of proof," *ante,* at 2333, when it observed that the challengers "failed to show that" the two HCVAP-majority districts drawn wholly within Nueces County would not perform. That statement plainly refers to the challengers' failure to rebut the finding that the two districts wholly within Nueces County provided equal electoral opportunity to Hispanics, as they needed to do to show that § 2 required breaking the County Line Rule. If anything is "twisted ... beyond recognition," *ibid.,* it is the majority opinion's description of the District Court's findings. For while relying on a reference to what the challengers' expert opined, the majority wholly ignores the District Court's lengthy discussion rejecting that opinion on the basis of other evidence in the record.[21]

***665** This Court has been clear that "the ultimate right of § 2 is equality of opportunity." *Johnson v. De Grandy,* 512 U.S. 997, 1014, n. 11, 114 S.Ct. 2647, 129 L.Ed.2d 775 (1994). The District Court found that ****2360** two HCVAP-majority districts drawn wholly within Nueces County provided such "equality of opportunity," and its findings of fact are not clearly erroneous. Only by selectively reading the factual record and ignoring the relevant analysis of those facts can the majority escape the § 2 results violation that flows from those findings.

IV

The Equal Protection Clause of the Fourteenth Amendment and § 2 of the Voting Rights Act secure for all voters in our country, regardless of race, the right to equal participation in our political processes. Those guarantees mean little, however, if courts do not remain vigilant in curbing States' efforts to undermine the ability of minority voters to meaningfully exercise that right. For although we have made progress, "voting discrimination still exists; no one doubts that." *Shelby County,* 570 U.S., at 536, 133 S.Ct. 2612.

The Court today does great damage to that right of equal opportunity. Not because it denies the existence of that right, but because it refuses its enforcement. The Court intervenes when no intervention is authorized and blinds itself to the overwhelming factual record below. It does all of this to allow Texas to use electoral maps that, in design and effect, ***666** burden the rights of minority voters to exercise that most precious right that is "preservative of all rights." *Yick Wo v. Hopkins,* 118 U.S. 356, 370, 6 S.Ct. 1064, 30 L.Ed. 220 (1886); see *Husted v. A. Philip Randolph Institute,* 584 U.S. 756, 810, 138 S.Ct. 1833, 1865, —— L.Ed.2d —— (2018) (SOTOMAYOR, J., dissenting) ("Our democracy rests on the ability of all individuals, regardless of race, income, or status, to exercise their right to vote"). Because our duty is to safeguard that fundamental right, I dissent.

All Citations

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Footnotes

[*] The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

[1] There are several appendixes in these cases. We use "App." to refer to the joint appendix filed at the merits stage. We use "C.J.S." and "H.J.S." to refer to the appendixes attached to Texas's jurisdictional statements in No. 17–586 and No. 17–626, respectively. We use "C.J.S. Findings" and "H.J.S. Findings" to refer to appellees' supplemental appendixes in No. 17–586 and No. 17–626.

[2] See, *e.g.,* Tex. Const., Art. III, § 25 (Senate), § 26 (House).

[3] The court found: "[I]t is difficult to differentiate an intent to affect Democrats from an intent to affect minority voters. Making minorities worse off will likely make Democrats worse off, and vice versa." C.J.S. Findings 467a (citation omitted). "This correlation is so strong that [an expert] assessed whether districts were minority opportunity districts by looking at Democratic results/wins (noting that in Texas, minority candidates of choice means Democrats)." *Ibid.*

[4] See *Shelby County v. Holder,* 570 U.S. 529, 133 S.Ct. 2612, 186 L.Ed.2d 651 (2013).

[5] Judge Smith dissented, arguing that the majority had produced a "runaway plan" that "award[ed] judgment on the pleadings in favor of one side—a slam-dunk victory for the plaintiffs." *Perez v. Perry,* 835 F.Supp.2d 209, 218 (W.D.Tex.2011).

[6] The Texas court was given more leeway to make changes to districts challenged under § 5 because it would have been inappropriate for that court to address the "merits of § 5 challenges," a task committed by statute to the District Court for the District of Columbia. *Perez,* 565 U.S., at 394, 132 S.Ct. 934.

[7] Notice of Appeal in *Texas v. United States,* Civ. No. 11–cv–1303, Doc. 234. (D DC, Aug. 31, 2012).

[8] We express no view on the correctness of this holding.

[9] Judge Smith again dissented, on both mootness and the merits. On mootness, Judge Smith explained that, "[s]ix years later, we are still enveloped in litigation over plans that have never been used and will never be implemented." C.J.S. 349a. On the merits, Judge Smith argued that the majority erroneously inferred a "complex, widespread conspiracy of scheming and plotting, by various legislators and staff, carefully designed to obscure the alleged race-based motive," when the intent was in fact partisan. H.J.S. 294a; C.J.S. 351a.

[10] In relevant part, § 1253 applies to "an order granting ... an interlocutory ... injunction." Section 1292(a)(1) applies to "[i]nterlocutory orders ... granting ... injunctions." Although the similarity is obvious, the dissent perceives some unspecified substantive difference.

[11] The dissent sees nothing strange about such a result because we held in *Mitchell v. Donovan,* 398 U.S. 427, 90 S.Ct. 1763, 26 L.Ed.2d 378 (1970) (*per curiam*), that we lacked jurisdiction under § 1253 to hear an appeal from a three-judge court order denying a declaratory judgment. The decision in *Donovan* was based on the plain language of § 1253, which says nothing about orders granting or denying declaratory judgments. By contrast, § 1253 gives us jurisdiction to hear appeals from orders granting or

denying injunctions.

The same goes for *Rockefeller v. Catholic Medical Center of Brooklyn & Queens, Inc.,* 397 U.S. 820, 90 S.Ct. 1517, 25 L.Ed.2d 806 (1970) (*per curiam*), also cited by the dissent. In that case, the District Court issued a declaratory judgment, not an injunction. Again, the text of § 1253 says nothing about declaratory judgments.

12 The inquiry required by the practical effects test is no more difficult when the question is whether an injunction was effectively granted than it is when the question is whether an injunction was effectively denied. Lower courts have had "no problem concluding that [certain orders have] the practical effect of granting an injunction." *I.A.M. Nat. Pension Fund Benefit Plan A v. Cooper Industries, Inc.,* 789 F.2d 21, 24 (C.A.D.C.1986); see also *Andrew v. American Import Center,* 110 A.3d 626, 634 (D.C.2015) ("[G]ranting a stay pending arbitration does have the 'practical effect' of enjoining the party opposing arbitration").

13 Section 3(c) provides that if "the court finds that violations of the fourteenth or fifteenth amendment justif[y] equitable relief," the court "shall retain jurisdiction for such period as it may deem appropriate and during such period no voting" practice shall go into effect unless first precleared by the court or the United States Attorney General. 52 U.S.C. § 10302(c).

14 The other authority cited by the dissent is a footnote in *Whitcomb v. Chavis,* 403 U.S. 124, 91 S.Ct. 1858, 29 L.Ed.2d 363 (1971), a case that came to us in an exceedingly complicated procedural posture. In *Whitcomb,* the District Court held in August 1969 that Indiana's legislative districting scheme was unconstitutional, but the court made it clear that it would take no further action for two months. See *Chavis v. Whitcomb,* 305 F.Supp. 1364, 1392 (S.D.Ind.). The Governor nevertheless appealed to this Court, but by the time we ruled, the Governor had taken another appeal from a later order, entered in December 1969, prohibiting the use of Indiana's current plans and requiring the use of court-created plans in the 1970 elections. See 403 U.S., at 139, 91 S.Ct. 1858; Juris. Statement in *Whitcomb v. Chavis,* O.T.1970, No. 92, pp. 1–3. And to further complicate matters, by the time we reviewed the case, the Indiana Legislature had enacted new plans. *Whitcomb,* 403 U.S., at 140, 91 S.Ct. 1858.

This Court entertained the later appeal and reversed, but the Court dismissed the earlier—and by then, entirely superfluous—appeal, stating that, at the time when it was issued, "no judgment had been entered and no injunction had been granted or denied." *Id.,* at 138, n. 19, 91 S.Ct. 1858. But that cursory conclusion has little relevance here, where the District Court's orders were far more specific, immediate, and likely to demand compliance.

15 While we think it clear that the District Court effectively enjoined the use of these districts as currently configured for this year's elections, even if the court had not done so, that would not affect our jurisdiction to review the court's order with respect to all other districts.

16 The dissent cites exactly two cases (*Gunn* and *Whitcomb*) decided during the past half-century in which a party attempted to take an appeal to this Court from a three-judge court order holding a state statute unconstitutional but declining to issue an injunction.

17 The dissent argues that we give "short shrift" to the irreparable harm question, *post,* at 2343 – 2344, but the inability to enforce its duly enacted plans clearly inflicts irreparable harm on the State, see, *e.g., Maryland v. King,* 567 U.S. 1301, 133 S.Ct. 1, 183 L.Ed.2d 667 (2012) (ROBERTS, C.J., in chambers).

18 The dissent attempts to rehabilitate this statement by focusing on the last part of this sentence, in which the District Court stated that the Legislature '' ' ''intended [the] taint to be maintained but safe from remedy.'' ' '' *Post,* at 2353. In making this argument, the dissent, like the District Court, refuses to heed the presumption of legislative good faith and the allocation of the burden of proving intentional discrimination. We do not dispute that the District Court purportedly found that the 2013 Legislature acted with discriminatory intent. The problem is that, in making that finding, it relied overwhelmingly on what it perceived to be the 2013

Legislature's duty to show that it had purged the bad intent of its predecessor.

19 The dissent is simply wrong in claiming over and over that we have not thoroughly examined the record. See *post,* at 2344 – 2345, 2349, 2349 – 2350, 2351, 2353 – 2354, 2357 – 2358, 2360. The dissent seems to think that the repetition of these charges somehow makes them true. It does not. On the contrary, it betrays the substantive weakness of the dissent's argument.

20 The dissent and the District Court attach much meaning to the attorney general's use of the term "insulate" when he advised the Legislature to adopt the District Court's plans to avoid further legal challenge. Setting aside that the word "insulate" is a common term used to describe minimizing legal concerns, the context of the letter makes clear that the attorney general was trying to make the point that adopting these plans was the best method of obtaining legal compliance, not the start of a grand conspiracy to trick the District Court. Indeed, if his plan was to dupe the District Court, shouting it to the world in a public letter was an odd way to go about it.

21 In any event, the Texas court was simply wrong that Texas believed its plans would be free from any legal challenge. 274 F.Supp.3d 624, 651 (2017). Texas consistently acknowledged that effects claims would continue to be available and responded in detail to those arguments in both the District Court and this Court. See Brief for Appellants 64; Defendants' Post–Trial Brief, Doc. 1526, p. 53. Moreover, Texas has not argued that intentional discrimination claims are unavailable; it has instead argued that intent must be assessed with respect to the *2013 Legislature,* the Legislature that actually enacted the plans at issue.

22 The 2013 Legislature had no reason to believe that the District Court would spend four years examining moot plans before reversing its own previous decisions by imputing the intent of the 2011 Legislature to the 2013 Legislature. At the very least, the 2013 Legislature had good reason to believe that adopting the court-approved plans would lessen the time, expense, and complexity of further litigation (even if that belief turned out to be wrong).

23 Moreover, in criticizing the Legislature for moving too quickly, the dissent downplays the significant time and effort that went into consideration of the 2013 plans. Legislative committees held multiple field hearings in four cities, Tr. 1507 (July 14, 2017), and the legislative actors spent significant time considering the legislation, as well as accepting and rejecting amendments, see, *e.g.,* Joint Exh. 17.3, p. S29; Joint Exh. 24.4, p. 21.

24 The dissent tries to minimize the relevance of this amendment by arguing that it turned HD90 into a racial gerrymander. See *post,* at 2347, n. 12. But again this is misleading. The Legislature adopted changes to HD90 at the behest of *minority groups,* not out of a desire to discriminate. See Part IV–B, *infra*. That is, Darby was *too* solicitous of changes with respect to HD90.

25 In assessing the significance of the D.C. court's evaluation of intent, it is important not to forget that the burden of proof in a preclearance proceeding was on the State. *Texas v. United States,* 887 F.Supp.2d 133, 151 (D.C.Cir.2012). Particularly where race and partisanship can so often be confused, see *supra,* at 2314, and n. 3, the burden of proof may be crucial.

26 The District Court also purported to find a violation of the "one person, one vote" principle in Nueces County, 267 F.Supp.3d 750, 783 (2017); H.J.S. 254a–255a, but that finding was in actuality a restatement of its racial discrimination finding. The population deviations from the ideal are quite small (0.34% in HD32 and 3.29% in HD34, *id.,* at 254a), and the District Court relied solely on the "evidence of the use of race in drawing the lines in Nueces County" to find a one person, one vote violation. *Id.,* at 255a; see also *id.,* at 254a ("[T]he State intentionally discriminated against minority voters by overpopulating minority districts and underpopulating Anglo districts"). Even assuming that a court could find a one person, one vote violation on the basis of such a small deviation, cf. *Brown v. Thomson,* 462 U.S. 835, 842–843, 103 S.Ct. 2690, 77 L.Ed.2d 214 (1983) (noting that deviations under 10% are generally insufficient to show invidious discrimination), the District Court erred in relying on its unsound finding

regarding racial discrimination.

Moreover, plaintiffs rejected any separate one person, one vote claims before the District Court, Tr. 22 (July 10, 2017), and they have not mentioned such a claim as a separate theory in their briefing in this Court.

27 The District Court's belief that simple Latino majorities in Nueces County might be sufficient to create opportunity districts—and that Texas should have known as much—conflicts with other parts of its decision. With respect to numerous other districts, the District Court *chided* Texas for focusing on bare numbers and not considering real opportunity to elect. See, *e.g.,* C.J.S. 134a ("[T]he court rejects [the] bright-line rule that any HCVAP-majority district is by definition a Latino opportunity district" because it "may still lack real electoral opportunity" (internal quotation marks omitted)); H.J.S. 121a (Texas "increase[d the Latino population] while simultaneously ensuring that election success rates remained minimally improved").

1 The Fourteenth Amendment and § 2 of the Voting Rights Act of 1965 prohibit intentional "vote dilution," *i.e.,* purposefully enacting "a particular voting scheme ... 'to minimize or cancel out the voting potential of racial or ethnic minorities,' an action disadvantaging voters of a particular race." *Miller v. Johnson,* 515 U.S. 900, 911, 115 S.Ct. 2475, 132 L.Ed.2d 762 (1995) (citations omitted).

2 The § 2 "results" test focuses, as relevant here, on vote dilution accomplished through cracking or packing, *i.e.,* "the dispersal of [a protected class of voters] into districts in which they constitute an ineffective minority of voters or from the concentration of [those voters] into districts where they constitute an excessive majority." *Thornburg v. Gingles,* 478 U.S. 30, 46, n. 11, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986).

3 The Fourteenth Amendment "limits racial gerrymanders" and "prevents a State, in the absence of 'sufficient justification,' from 'separating its citizens into different voting districts on the basis of race.' " *Cooper v. Harris,* 581 U.S. 285, 291, 137 S.Ct. 1455, 1463, 197 L.Ed.2d 837 (2017).

4 The various appendixes are abbreviated herein consistent with the majority opinion. See *ante,* at 2314, n. 1.

5 Contrary to what the majority contends, whether *Whitcomb* involved an "exceedingly complicated procedural posture" has no effect on whether, at the time the State first appealed, the District Court had granted or denied an injunction for purposes of § 1253 jurisdiction. *Ante,* at 2323, n. 14. Nor was the order at issue in *Whitcomb* less "specific" or less "likely to demand compliance" than the orders at issue in these appeals. *Ibid.* The District Court in *Whitcomb,* like here, issued an order on the merits finding the State liable and unambiguously holding that a remedy was required. *Chavis v. Whitcomb,* 305 F.Supp. 1364, 1391–1392 (S.D.Ind.1969). The District Court discussed how the Indiana Legislature might go about redistricting. *Ibid.* Also, the orders here were no more "immediate" than the order in *Whitcomb*. *Ante,* at 2323, n. 14. As in *Whitcomb,* the District Court here first attempted to defer to the State to redistrict, and nothing in the record suggests that the court would not have allowed the Texas Legislature a reasonable amount of time to redistrict had the State decided to take up the task, as the District Court did in *Whitcomb*. To the extent the majority relies on the 3–day deadline contained in the orders below, that deadline was solely for the Texas attorney general to inform the District Court whether the Legislature intended to take up redistricting; it was not a deadline to enact new maps. See *infra,* at 2344 – 2345. *Whitcomb* is thus not distinguishable in any relevant respect.

6 The majority opinion attempts to distinguish *Donovan* and *Rockefeller* by stating that the decisions there were "based on the plain language of § 1253, which says nothing about orders granting or denying declaratory judgments." *Ante,* at 2320, n. 11. But of course, "the plain language of § 1253" also "says nothing about" noninjunctive orders, like the ones issued by the District Court below. Notably, the order at issue in *Rockefeller* looked similar to the orders on appeal here: There, the three-judge District Court declined to enter an injunction only because "the state ha[d] shown a desire to comply with applicable federal requirements," but its order nevertheless clearly resolved the merits against the State. See *Catholic Medical Center of Brooklyn & Queens, Inc. v.*

Rockefeller, 305 F.Supp. 1268, 1271 (E.D.N.Y.1969).

7 "HCVAP" stands for Hispanic citizen voting age population.

8 The majority guarantees that there is "no reason to fear such a flood" of appeals from three-judge district court orders because "appeals from [orders expressly enjoining redistricting plans] have not overwhelmed our docket." *Ante,* at 2323. But of course, its jurisdictional ruling applies to all § 1253 cases, not just those involving redistricting. The majority also makes much of the fact that only "two cases (*Gunn* and *Whitcomb*) decided during the past half-century" have involved the scenario at issue here, *i.e.,* an effort to invoke our mandatory jurisdiction to review "a three-judge court order holding a state statute unconstitutional but declining to issue an injunction." *Ante,* at 2324, n. 16. The majority never stops to consider, however, that one reason so few cases have come to the Court in this posture may be that *Gunn* and *Whitcomb* drew clear jurisdictional lines that litigants easily understood—the same clear lines the majority erases today.

9 The majority believes these "long before" and "very close" limits guide district courts' determinations about whether to enter an injunction. *Ante,* at 2323 – 2324. Presumably the majority would resort to the same indeterminate limits in determining whether, in its view, a noninjunctive order had the "practical effect" of an injunction such that it would be justified to accept an appeal under § 1253.

10 Because the Court reaches the merits of these appeals despite lacking jurisdiction, this dissent addresses that portion of the majority opinion as well.

11 The majority is correct that our reference to these findings in the District Court orders below is "not just a single slip of the pen." *Ante,* at 2326. That is because these findings form part (though not the whole) of the comprehensive analysis that led the District Court to conclude that the 2013 Legislature acted with the specific intent to further the discrimination in its 2011 maps. Full consideration of that analysis, as I have endeavored to do here, requires review of those findings, and when read in the context of the full factual record and legal reasoning contained in the orders below, it is clear that these statements do not come close to suggesting what Texas and the majority read into them, *i.e.,* that the District Court somehow shifted the burden of proof to require Texas to show that it cured the taint from its past maps.

12 The majority again engages in its own factfinding, without reference to the fact that our review is for clear error only, when it decides that the District Court was wrong in concluding that Representative Darby willfully ignored the deficiencies in the 2013 maps. The legislative hearing that the District Court cited, see 274 F.Supp.3d, at 651, n. 45, shows, *inter alia,* that Representative Darby: told certain members of the Legislature that changes to district lines would not be considered; rejected proposed amendments where there was disagreement among the impacted members; rejected an amendment to the legislative findings that set out the history underlying the 2011 maps and related court rulings; acknowledged that the accepted amendments did not address concerns of retrogression or minority opportunity to elect their preferred candidates; and dismissed concerns regarding the packing and cracking of minority voters in, *inter alia,* HD32, HD34, HD54, and HD55, stating simply that the 2012 court had already rejected the challengers' claims respecting those districts but without engaging in meaningful discussion of the other legislators' concerns. See Joint Exh. 17.3, pp. S7–S9, S11, S30–S35, S39–S43, S53. Instead of addressing what is evident from the 64–page hearing transcript, the majority fixates on the single fact that Representative Darby accepted an amendment for the redrawing of the new (racially gerrymandered) HD90, believing that this fact somehow erases or outweighs all the evidence in the record showing that Representative Darby was not interested in addressing concerns regarding the interim plans. *Ante,* at 2328 – 2330, and n. 24. Even if Representative Darby was in fact responsive to minority concerns regarding the composition of HD90—which the record contradicts, see 267 F.Supp.3d, at 791, 793—that does not undermine the weight of *all* of the evidence in the record regarding his intent with respect to the enactment of the 2013 maps as a whole.

13 The majority contends in passing that its analysis takes account of "all the relevant evidence in the record," *ante,* at 2327, and n.

19, apparently believing that stating it explicitly somehow makes it true. It does not. The District Court orders in these cases are part of the public record and readers can therefore judge for themselves.

14 The majority never explains why it believes it appropriate to engage in what amounts to *de novo* review of the factual record. Presumably, it justifies its *de novo* review with its claim of legal error as to the finding of invidious intent. See Part II–D, *infra*. But even if the majority were correct that the District Court improperly shifted the burden to the State to disprove invidious intent, the proper next step would have been to remand to the District Court for reconsideration of the facts in the first instance under the correct legal standard.

15 The majority is also just flat wrong on its characterization of the interim orders. With respect to all but two of the challenged State House districts, the discussion in the interim orders states only in general terms that the District Court "preliminarily [found] that any [§ 2] and constitutional challenges do not have a likelihood of success, and any [§ 5] challenges are insubstantial," emphasizing the "preliminarily nature of [its] order." H.J.S. 303a, 307a–309a. With respect to the congressional districts, the District Court opined that the "claims are not without merit" and were "a close call," but ultimately concluded that the challengers had not at that time demonstrated a likelihood of success on the merits. C.J.S. 409a, 419a. The District Court nevertheless emphasized that there remained "unsettled legal issues as well as numerous factual disputes" such that the interim map was "not a final ruling on the merits of any claims." *Id.,* at 367a. It is a stretch to characterize these interim orders as providing "a careful analysis of all the claims," *ante,* at 2328, and borderline disingenuous to state that, despite repeated and explicit warnings that its rulings were not final and subject to change, the District Court was somehow "reversing its own previous decisions" when it finally did render a final decision, *ante,* at 2328, n. 22.

16 The majority spends some time distinguishing *Hunter v. Underwood,* 471 U.S. 222, 105 S.Ct. 1916, 85 L.Ed.2d 222 (1985), adamant that it does not support "shifting the burden" as it purports the District Court did below. *Ante,* at 2324 - 2325. But the District Court agreed that *Hunter* was distinguishable and did not rely on it to support any sort of burden shifting. As the majority explains, *Hunter* involved a state constitutional provision adopted with discriminatory intent that, despite pruning over the years, the State never repealed. *Ante,* at 2324 - 2325 (citing 471 U.S., at 229, 232–233, 105 S.Ct. 1916). The District Court discussed the differences between *Hunter* and these cases, namely, that *Hunter* "did not involve a later reenactment ... which is what [Texas] now claims cleanses the plans." 274 F.Supp.3d, at 647. It noted the important distinction that, " 'when a plan is reenacted—as opposed to merely remaining on the books like the provision in *Hunter*—the state of mind of the reenacting body must also be considered.' " *Id.,* at 648. That the majority ignores that the District Court did not, as it suggests, rely on *Hunter* as controlling is another example of how it conveniently overlooks the District Court's express legal analysis.

17 Notably, the majority takes no issue with that first conclusion, *i.e.,* that the enactment of the interim plans does not, on its own, insulate the 2013 plans from challenge. It explicitly notes that the opinion does not hold that the ''2013 [plans] are unassailable because they were previously adopted on an interim basis by the Texas court," noting that such a factor is relevant insofar as it informs the inquiry into the intent of the 2013 Legislature. *Ante,* at 2326 – 2327.

18 The majority also believes that the interim orders gave the Legislature cover with respect to CD35, *ante,* at 2332, forgetting that the District Court explicitly and repeatedly warned the parties that its interim orders did not resolve all factual and legal disputes in the cases.

19 It is worth noting that Texas' efforts to suppress the voting strength of minority voters in Nueces County eerily mirror the actions this Court invalidated as a violation of § 2 in *LULAC,* 548 U.S. 399, 126 S.Ct. 2594, 165 L.Ed.2d 609. Like in *LULAC,* "a majority-Hispanic district that would likely have elected the Hispanic-preferred candidate was flipped into an Anglo-majority district to protect a candidate that was not preferred by the Hispanic voters." C.J.S. 182a; see also *LULAC,* 548 U.S., at 427–429, 126 S.Ct. 2594. And like in *LULAC,* Texas attempted to defend that curtailment of minority voters' rights by pointing to the creation of another supposed opportunity district. 274 F.Supp.3d, at 684–685; *LULAC,* 548 U.S., at 429, 126 S.Ct. 2594. In finding a § 2 results violation, the Court concluded that the "vote dilution of a group that was beginning to ... overcome prior electoral discrimination ... cannot be sustained." *Id.,* at 442, 126 S.Ct. 2594. The Court also rejected Texas' defense, holding that its

"creation of an opportunity district for those without a § 2 right offers no excuse for its failure to provide an opportunity district for those with a § 2 right." *Id.,* at 430, 126 S.Ct. 2594. In line with *LULAC,* the Court should hold that Texas has once again contravened § 2 in its drawing of CD27.

20 The majority contends that the District Court did not engage in a sufficiently local analysis because it cited to the statewide history of discrimination against minority voters, the continuing disadvantage of Latino voters, and racially polarized voting. *Ante,* at 2333 – 2334. The majority not only misapprehends the importance of that statewide evidence to the local appraisal, but again ignores the many other factual findings and analysis that are specific to Nueces County and thus problematic for its conclusion. See infra at 2359 – 2360.

21 Contrary to what the majority suggests, the District Court did not believe that "simple Latino majorities in Nueces County might be sufficient to create opportunity districts" based only on "bare numbers." *Ante,* at 2333, n. 27. Consistent with its rebuke of Texas elsewhere in the opinion for advocating a "bright-line rule that any HCVAP-majority district is by definition a Latino opportunity district" because it "may still lack 'real electoral opportunity,' " C.J.S. 134a, the District Court in its analysis of HD32 and HD34 was clear that the challengers "could assert that [the] HCVAP-majority districts do not present real electoral opportunity due to racially polarized voting and lower registration and turnout caused by the lingering effects of official discrimination." 267 F.Supp.3d, at 781. Based on its review of that evidence, it concluded that the two majority-HCVAP districts drawn within Nueces County provided minority voters equal electoral opportunity. *Id.,* at 783.

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115 S.Ct. 2097
Supreme Court of the United States

ADARAND CONSTRUCTORS, INC., Petitioner
v.
Federico PENA, Secretary of Transportation, et al.

No. 93–1841.
|
Argued Jan. 17, 1995.
|
Decided June 12, 1995.

Synopsis

Subcontractor that was not awarded guardrail portion of federal highway project brought action challenging constitutionality of federal program designed to provide highway contracts to disadvantaged business enterprises. The United States District Court for the District of Colorado, Jim R. Carrigan, J., granted summary judgment in favor of defendants, 790 F.Supp. 240, and subcontractor appealed. The Court of Appeals affirmed, 16 F.3d 1537, and certiorari was granted. The Supreme Court, Justice O'Connor, held that: (1) subcontractor had standing to seek forward-looking declaratory and injunctive relief; (2) all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by reviewing court under strict scrutiny, overruling*Metro Broadcasting*, 497 U.S. 547, 110 S.Ct. 2997, 111 L.Ed.2d 445; and (3) remand was required to determine whether challenged program satisfied strict scrutiny.

Vacated and remanded.

Justice O'Connor filed opinion joined by Justice Kennedy.

Justices Scalia and Thomas filed opinions concurring in part and concurring in judgment.

Justice Stevens filed dissenting opinion in which Justice Ginsburg joined.

Justice Souter filed dissenting opinion in which Justices Ginsburg and Breyer joined.

Justice Ginsburg filed dissenting opinion in which Justice Breyer joined.

****2099** *Syllabus*[*]

***200** Most federal agency contracts must contain a subcontractor compensation clause, which gives a prime contractor a financial incentive to hire subcontractors certified as small businesses controlled by socially and economically disadvantaged individuals, and requires the contractor to presume that such individuals include minorities or any other individuals found to be disadvantaged by the Small Business Administration (SBA). The prime contractor under a federal highway construction contract containing such a clause awarded a subcontract to a company that was certified as a small disadvantaged business. The record does not reveal how the company obtained its certification, but it could have been by any one of three routes: under one of two SBA programs—known as the 8(a) and 8(d) programs—or by a state agency under relevant Department of Transportation regulations. Petitioner Adarand Constructors, Inc., which submitted the low bid on the subcontract but was not a certified business, filed suit against respondent federal officials, claiming that the race-based presumptions used in subcontractor compensation clauses violate the equal protection component of the Fifth Amendment's Due Process Clause. The District Court granted respondents summary judgment. In affirming, the Court of Appeals assessed the constitutionality

of the federal race-based action under a lenient standard, resembling intermediate scrutiny, which it determined was required by ****2100** *Fullilove v. Klutznick,* 448 U.S. 448, 100 S.Ct. 2758, 65 L.Ed.2d 902, and *Metro Broadcasting, Inc. v. FCC,* 497 U.S. 547, 110 S.Ct. 2997, 111 L.Ed.2d 445.

Held: The judgment is vacated, and the case is remanded.

16 F.3d 1537 (CA10 1994), vacated and remanded.

Justice O'CONNOR delivered an opinion with respect to Parts I, II, III–A, III–B, III–D, and IV, which was for the Court except insofar as it might be inconsistent with the views expressed in Justice SCALIA's concurrence, concluding that:

1. Adarand has standing to seek forward-looking relief. It has met the requirements necessary to maintain its claim by alleging an invasion of a legally protected interest in a particularized manner, and by showing that it is very likely to bid, in the relatively near future, on another Government contract offering financial incentives to a prime contractor ***201** for hiring disadvantaged subcontractors. See *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560, 112 S.Ct. 2130, 2136, 119 L.Ed.2d 351. Pp. 2104–2105.

2. All racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. Pp. 2105–2114; 2117–2118.

(a) In *Richmond v. J.A. Croson Co.,* 488 U.S. 469, 109 S.Ct. 706, 102 L.Ed.2d 854, a majority of the Court held that the Fourteenth Amendment requires strict scrutiny of all race-based action by state and local governments. While *Croson* did not consider what standard of review the Fifth Amendment requires for such action taken by the Federal Government, the Court's cases through *Croson* had established three general propositions with respect to governmental racial classifications. First, skepticism: " 'Any preference based on racial or ethnic criteria must necessarily receive a most searching examination,' " *Wygant v. Jackson Bd. of Ed.,* 476 U.S. 267, 273–274, 106 S.Ct. 1842, 1847, 90 L.Ed.2d 260. Second, consistency: "[T]he standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification," *Croson, supra,* at 494, 109 S.Ct., at 722. And third, congruence: "Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment," *Buckley v. Valeo,* 424 U.S. 1, 93, 96 S.Ct. 612, 670, 46 L.Ed.2d 659. Taken together, these propositions lead to the conclusion that any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny. Pp. 2105–2111.

(b) However, a year after *Croson,* the Court, in *Metro Broadcasting,* upheld two federal race-based policies against a Fifth Amendment challenge. The Court repudiated the long-held notion that "it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government" than it does on a State to afford equal protection of the laws, *Bolling v. Sharpe,* 347 U.S. 497, 500, 74 S.Ct. 693, 694, 98 L.Ed. 884, by holding that congressionally mandated "benign" racial classifications need only satisfy intermediate scrutiny. By adopting that standard, *Metro Broadcasting* departed from prior cases in two significant respects. First, it turned its back on *Croson*'s explanation that strict scrutiny of governmental racial classifications is essential because it may not always be clear that a so-called preference is in fact benign. Second, it squarely rejected one of the three propositions established by this Court's earlier cases, namely, congruence between the standards applicable to federal and state race-based action, and in doing so also undermined the other two. Pp. 2111–2112.

(c) The propositions undermined by *Metro Broadcasting* all derive from the basic principle that the Fifth and Fourteenth Amendments protect persons, not groups. It follows from that principle that all governmental ***202** action based on race—a group classification long recognized as in most circumstances irrelevant and therefore prohibited—should be subjected to detailed judicial inquiry to ensure that the personal right to equal protection has not been infringed. Thus, strict scrutiny is the proper standard for analysis of all racial classifications, whether ****2101** imposed by a federal, state, or local actor. To the extent that *Metro Broadcasting* is inconsistent with that holding, it is overruled. Pp. 2112–2114.

(d) The decision here makes explicit that federal racial classifications, like those of a State, must serve a compelling governmental interest, and must be narrowly tailored to further that interest. Thus, to the extent that *Fullilove* held federal racial classifications to be subject to a less rigorous standard, it is no longer controlling. Requiring strict scrutiny is the best way to ensure that courts will consistently give racial classifications a detailed examination, as to both ends and means. It is not true that strict scrutiny is strict in theory, but fatal in fact. Government is not disqualified from acting in response to the

unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country. When race-based action is necessary to further a compelling interest, such action is within constitutional constraints if it satisfies the "narrow tailoring" test set out in this Court's previous cases. Pp. 2117–2126.

3. Because this decision alters the playing field in some important respects, the case is remanded to the lower courts for further consideration. The Court of Appeals did not decide whether the interests served by the use of subcontractor compensation clauses are properly described as "compelling." Nor did it address the question of narrow tailoring in terms of this Court's strict scrutiny cases. Unresolved questions also remain concerning the details of the complex regulatory regimes implicated by the use of such clauses. P. 2118.

Justice SCALIA agreed that strict scrutiny must be applied to racial classifications imposed by all governmental actors, but concluded that government can never have a "compelling interest" in discriminating on the basis of race in order to "make up" for past racial discrimination in the opposite direction. Under the Constitution there can be no such thing as either a creditor or a debtor race. We are just one race in the eyes of government. P. 2118.

O'CONNOR, J., announced the judgment of the Court and delivered an opinion with respect to Parts I, II, III–A, III–B, III–D, and IV, which was for the Court except insofar as it might be inconsistent with the views expressed in the concurrence of MCALIA, J., and an opinion with respect to Part III–C. Parts I, II, III–A, III–B, III–D, and IV of that opinion were joined by REHNQUIST, C.J., and KENNEDY and THOMAS, JJ., and by ***203** SCALIA, J., to the extent heretofore indicated; and Part III–C was joined by KENNEDY, J. SCALIA, J., *post,* p. 2118, and THOMAS, J., *post,* p. 2119, filed opinions concurring in part and concurring in the judgment. STEVENS, J., filed a dissenting opinion, in which GINSBURG, J., joined, *post,* p. 2120. SOUTER, J., filed a dissenting opinion, in which GINSBURG and BREYER, JJ., joined, *post,* p. 2131. GINSBURG, J., filed a dissenting opinion, in which BREYER, J., joined, *post,* p. 2134.

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Opinion

***204** Justice O'CONNOR announced the judgment of the Court and delivered an opinion with respect to Parts I, II, III–A, III–B, III–D, and IV, which is for the Court except insofar as it might be inconsistent with the views expressed in Justice SCALIA's concurrence, and an opinion with respect to Part III–C in which Justice KENNEDY joins.

Petitioner Adarand Constructors, Inc., claims that the Federal Government's practice of giving general contractors on Government projects a financial incentive to hire subcontractors controlled by "socially and economically disadvantaged individuals," and in particular, the Government's use of race-based presumptions in identifying such individuals, violates the equal protection component of the Fifth Amendment's Due Process Clause. The Court of Appeals rejected Adarand's claim. We conclude, however, that courts should analyze cases of this kind under ****2102** a different standard of review than the one the Court of Appeals applied. We therefore ***205** vacate the Court of Appeals' judgment and remand the case for further proceedings.

I

In 1989, the Central Federal Lands Highway Division (CFLHD), which is part of the United States Department of Transportation (DOT), awarded the prime contract for a highway construction project in Colorado to Mountain Gravel &

Construction Company. Mountain Gravel then solicited bids from subcontractors for the guardrail portion of the contract. Adarand, a Colorado-based highway construction company specializing in guardrail work, submitted the low bid. Gonzales Construction Company also submitted a bid.

The prime contract's terms provide that Mountain Gravel would receive additional compensation if it hired subcontractors certified as small businesses controlled by "socially and economically disadvantaged individuals," App. 24. Gonzales is certified as such a business; Adarand is not. Mountain Gravel awarded the subcontract to Gonzales, despite Adarand's low bid, and Mountain Gravel's Chief Estimator has submitted an affidavit stating that Mountain Gravel would have accepted Adarand's bid, had it not been for the additional payment it received by hiring Gonzales instead. *Id.,* at 28–31. Federal law requires that a subcontracting clause similar to the one used here must appear in most federal agency contracts, and it also requires the clause to state that "[t]he contractor shall presume that socially and economically disadvantaged individuals include Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities, or any other individual found to be disadvantaged by the [Small Business] Administration pursuant to section 8(a) of the Small Business Act." 15 U.S.C. §§ 637(d)(2), (3). Adarand claims that the presumption set forth in that statute discriminates on the basis of ***206** race in violation of the Federal Government's Fifth Amendment obligation not to deny anyone equal protection of the laws.

These fairly straightforward facts implicate a complex scheme of federal statutes and regulations, to which we now turn. The Small Business Act (Act), 72 Stat. 384, as amended, 15 U.S.C. § 631 *et seq.*, declares it to be "the policy of the United States that small business concerns, [and] small business concerns owned and controlled by socially and economically disadvantaged individuals, ... shall have the maximum practicable opportunity to participate in the performance of contracts let by any Federal agency." § 8(d)(1), 15 U.S.C. § 637(d)(1). The Act defines "socially disadvantaged individuals" as "those who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities," § 8(a)(5), 15 U.S.C. § 637(a)(5), and it defines "economically disadvantaged individuals" as "those socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged." § 8(a)(6)(A), 15 U.S.C. § 637(a)(6)(A).

In furtherance of the policy stated in § 8(d)(1), the Act establishes "[t]he Government-wide goal for participation by small business concerns owned and controlled by socially and economically disadvantaged individuals" at "not less than 5 percent of the total value of all prime contract and subcontract awards for each fiscal year." 15 U.S.C. § 644(g)(1). It also requires the head of each federal agency to set agency-specific goals for participation by businesses controlled by socially and economically disadvantaged individuals. *Ibid.*

The Small Business Administration (SBA) has implemented these statutory directives in a variety of ways, two of which are relevant here. One is the "8(a) program," ***207** which is available to small businesses controlled by socially and economically disadvantaged individuals as the SBA has defined those terms. The 8(a) program confers a wide range of benefits on participating businesses, see, *e.g.,* 13 CFR §§ 124.303–124.311, 124.403 (1994); 48 CFR subpt. 19.8 (1994), one of which is automatic eligibility for subcontractor compensation provisions of the kind at issue in ****2103** this case, 15 U.S.C. § 637(d)(3)(C) (conferring presumptive eligibility on anyone "found to be disadvantaged ... pursuant to section 8(a) of the Small Business Act"). To participate in the 8(a) program, a business must be "small," as defined in 13 CFR § 124.102 (1994); and it must be 51% owned by individuals who qualify as "socially and economically disadvantaged," § 124.103. The SBA presumes that black, Hispanic, Asian Pacific, Subcontinent Asian, and Native Americans, as well as "members of other groups designated from time to time by SBA," are "socially disadvantaged," § 124.105(b)(1). It also allows any individual not a member of a listed group to prove social disadvantage "on the basis of clear and convincing evidence," as described in § 124.105(c). Social disadvantage is not enough to establish eligibility, however; SBA also requires each 8(a) program participant to prove "economic disadvantage" according to the criteria set forth in § 124.106(a).

The other SBA program relevant to this case is the "8(d) subcontracting program," which unlike the 8(a) program is limited to eligibility for subcontracting provisions like the one at issue here. In determining eligibility, the SBA presumes social disadvantage based on membership in certain minority groups, just as in the 8(a) program, and again appears to require an individualized, although "less restrictive," showing of economic disadvantage, § 124.106(b). A different set of regulations, however, says that members of minority groups wishing to participate in the 8(d) subcontracting program are entitled to a race-based presumption of social *and* economic disadvantage. 48 CFR §§ 19.001, ***208** 19.703(a)(2) (1994). We are left with some uncertainty as to whether participation in the 8(d) subcontracting program requires an individualized showing of

economic disadvantage. In any event, in both the 8(a) and the 8(d) programs, the presumptions of disadvantage are rebuttable if a third party comes forward with evidence suggesting that the participant is not, in fact, either economically or socially disadvantaged. 13 CFR §§ 124.111(c)–(d), 124.601–124.609 (1994).

The contract giving rise to the dispute in this case came about as a result of the Surface Transportation and Uniform Relocation Assistance Act of 1987, Pub.L. 100–17, 101 Stat. 132 (STURAA), a DOT appropriations measure. Section 106(c)(1) of STURAA provides that "not less than 10 percent" of the appropriated funds "shall be expended with small business concerns owned and controlled by socially and economically disadvantaged individuals." 101 Stat. 145. STURAA adopts the Small Business Act's definition of "socially and economically disadvantaged individual," including the applicable race-based presumptions, and adds that "women shall be presumed to be socially and economically disadvantaged individuals for purposes of this subsection." § 106(c)(2)(B), 101 Stat. 146. STURAA also requires the Secretary of Transportation to establish "minimum uniform criteria for State governments to use in certifying whether a concern qualifies for purposes of this subsection." § 106(c)(4), 101 Stat. 146. The Secretary has done so in 49 CFR pt. 23, subpt. D (1994). Those regulations say that the certifying authority should presume both social and economic disadvantage (*i.e.,* eligibility to participate) if the applicant belongs to certain racial groups, or is a woman. 49 CFR § 23.62 (1994); 49 CFR pt. 23, subpt. D, App. C (1994). As with the SBA programs, third parties may come forward with evidence in an effort to rebut the presumption of disadvantage for a particular business. 49 CFR § 23.69 (1994).

The operative clause in the contract in this case reads as follows:

> ***209** "*Subcontracting.* This subsection is supplemented to include a Disadvantaged Business Enterprise (DBE) Development and Subcontracting Provision as follows:
>
> "Monetary compensation is offered for awarding subcontracts to small business concerns owned and controlled by socially and economically disadvantaged individuals....
>
> "A small business concern will be considered a DBE after it has been certified as such by the U.S. Small Business Administration or any State Highway Agency. Certification by other Government agencies, ****2104** counties, or cities may be acceptable on an individual basis provided the Contracting Officer has determined the certifying agency has an acceptable and viable DBE certification program. If the Contractor requests payment under this provision, the Contractor shall furnish the engineer with acceptable evidence of the subcontractor(s) DBE certification and shall furnish one certified copy of the executed subcontract(s).
>
> . . . . .
>
> "The Contractor will be paid an amount computed as follows:
>
> "1. If a subcontract is awarded to one DBE, 10 percent of the final amount of the approved DBE subcontract, not to exceed 1.5 percent of the original contract amount.
>
> "2. If subcontracts are awarded to two or more DBEs, 10 percent of the final amount of the approved DBE subcontracts, not to exceed 2 percent of the original contract amount." App. 24–26.

To benefit from this clause, Mountain Gravel had to hire a subcontractor who had been certified as a small disadvantaged business by the SBA, a state highway agency, or some other certifying authority acceptable to the contracting officer. Any of the three routes to such certification described above—SBA's 8(a) or 8(d) program, or certification by a State ***210** under the DOT regulations—would meet that requirement. The record does not reveal how Gonzales obtained its certification as a small disadvantaged business.

After losing the guardrail subcontract to Gonzales, Adarand filed suit against various federal officials in the United States District Court for the District of Colorado, claiming that the race-based presumptions involved in the use of subcontracting compensation clauses violate Adarand's right to equal protection. The District Court granted the Government's motion for summary judgment. *Adarand Constructors, Inc. v. Skinner,* 790 F.Supp. 240 (1992). The Court of Appeals for the Tenth Circuit affirmed. 16 F.3d 1537 (1994). It understood our decision in *Fullilove v. Klutznick,* 448 U.S. 448, 100 S.Ct. 2758, 65 L.Ed.2d 902 (1980), to have adopted "a lenient standard, resembling intermediate scrutiny, in assessing" the constitutionality of federal race-based action. 16 F.3d, at 1544. Applying that "lenient standard," as further developed in *Metro Broadcasting,*

Inc. v. FCC, 497 U.S. 547, 110 S.Ct. 2997, 111 L.Ed.2d 445 (1990), the Court of Appeals upheld the use of subcontractor compensation clauses. 16 F.3d, at 1547. We granted certiorari. 512 U.S. 1288, 115 S.Ct. 41, 129 L.Ed.2d 936 (1994).

II

Adarand, in addition to its general prayer for "such other and further relief as to the Court seems just and equitable," specifically seeks declaratory and injunctive relief against any *future* use of subcontractor compensation clauses. App. 22–23 (complaint). Before reaching the merits of Adarand's challenge, we must consider whether Adarand has standing to seek forward-looking relief. Adarand's allegation that it has lost a contract in the past because of a subcontractor compensation clause of course entitles it to seek damages for the loss of that contract (we express no view, however, as to whether sovereign immunity would bar such relief on these facts). But as we explained in *Los Angeles v. Lyons,* 461 U.S. 95, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983), the fact of past injury, "while presumably affording [the plaintiff] standing to claim damages ..., does ***211** nothing to establish a real and immediate threat that he would again" suffer similar injury in the future. *Id.,* at 105, 103 S.Ct., at 1667.

If Adarand is to maintain its claim for forward-looking relief, our cases require it to allege that the use of subcontractor compensation clauses in the future constitutes "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560, 112 S.Ct. 2130, 2136, 119 L.Ed.2d 351 (1992) (footnote, citations, and internal quotation marks omitted). Adarand's claim that the Government's use of subcontractor compensation clauses denies it equal protection of the laws of course alleges an invasion of a legally protected interest, and it does so in a manner that is "particularized" ****2105** as to Adarand. We note that, contrary to respondents' suggestion, see Brief for Respondents 29–30, Adarand need not demonstrate that it has been, or will be, the low bidder on a Government contract. The injury in cases of this kind is that a "discriminatory classification prevent[s] the plaintiff from competing on an equal footing." *Northeastern Fla. Chapter, Associated Gen. Contractors of America v. Jacksonville,* 508 U.S. 656, 667, 113 S.Ct. 2297, 2304, 124 L.Ed.2d 586 (1993). The aggrieved party "need not allege that he would have obtained the benefit but for the barrier in order to establish standing." *Id.,* at 666, 113 S.Ct., at 2303.

It is less clear, however, that the future use of subcontractor compensation clauses will cause Adarand "imminent" injury. We said in *Lujan* that "[a]lthough 'imminence' is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes—that the injury is '*certainly* impending.' " *Lujan, supra,* at 565, n. 2, 112 S.Ct., at 2138, n. 2. We therefore must ask whether Adarand has made an adequate showing that sometime in the relatively near future it will bid on another Government contract that offers financial incentives to a prime contractor for hiring disadvantaged subcontractors.

***212** We conclude that Adarand has satisfied this requirement. Adarand's general manager said in a deposition that his company bids on every guardrail project in Colorado. See Reply Brief for Petitioner 5–A. According to documents produced in discovery, the CFLHD let 14 prime contracts in Colorado that included guardrail work between 1983 and 1990. Plaintiff's Motion for Summary Judgment in No. 90–C–1413, Exh. I, Attachment A (D.Colo.). Two of those contracts do not present the kind of injury Adarand alleges here. In one, the prime contractor did not subcontract out the guardrail work; in another, the prime contractor was itself a disadvantaged business, and in such cases the contract generally does not include a subcontractor compensation clause. *Ibid.;* see also *id.,* Supplemental Exhibits, Deposition of Craig Actis 14 (testimony of CFLHD employee that 8(a) contracts do not include subcontractor compensation clauses). Thus, statistics from the years 1983 through 1990 indicate that the CFLHD lets on average 1 ½ contracts per year that could injure Adarand in the manner it alleges here. Nothing in the record suggests that the CFLHD has altered the frequency with which it lets contracts that include guardrail work. And the record indicates that Adarand often must compete for contracts against companies certified as small disadvantaged businesses. See *id.,* Exh. F, Attachments 1–3. Because the evidence in this case indicates that the CFLHD is likely to let contracts involving guardrail work that contain a subcontractor compensation clause at least once per year in Colorado, that Adarand is very likely to bid on each such contract, and that Adarand often must compete for such contracts against small disadvantaged businesses, we are satisfied that Adarand has standing to bring this lawsuit.

III

Respondents urge that "[t]he Subcontracting Compensation Clause program is ... a program based on *disadvantage,* not on race," and thus that it is subject only to "the most ***213** relaxed judicial scrutiny." Brief for Respondents 26. To the extent that the statutes and regulations involved in this case are race neutral, we agree. Respondents concede, however, that "the race-based rebuttable presumption used in some certification determinations under the Subcontracting Compensation Clause" is subject to some heightened level of scrutiny. *Id.,* at 27. The parties disagree as to what that level should be. (We note, incidentally, that this case concerns only classifications based explicitly on race, and presents none of the additional difficulties posed by laws that, although facially race neutral, result in racially disproportionate impact and are motivated by a racially discriminatory purpose. See generally *Arlington Heights v. Metropolitan Housing Development Corp.,* 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977); *Washington v. Davis,* 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976).)

Adarand's claim arises under the Fifth Amendment to the Constitution, which provides that "No person shall ... be deprived ****2106** of life, liberty, or property, without due process of law." Although this Court has always understood that Clause to provide some measure of protection against *arbitrary* treatment by the Federal Government, it is not as explicit a guarantee of *equal* treatment as the Fourteenth Amendment, which provides that "No *State* shall ... deny to any person within its jurisdiction the equal protection of the laws" (emphasis added). Our cases have accorded varying degrees of significance to the difference in the language of those two Clauses. We think it necessary to revisit the issue here.

A

Through the 1940's, this Court had routinely taken the view in non-race-related cases that, "[u]nlike the Fourteenth Amendment, the Fifth contains no equal protection clause and it provides no guaranty against discriminatory legislation by Congress." *Detroit Bank v. United States,* 317 U.S. 329, 337, 63 S.Ct. 297, 301, 87 L.Ed. 304 (1943); see also, *e.g., Helvering v. Lerner Stores Corp.,* 314 U.S. 463, 468, 62 S.Ct. 341, 343, 86 L.Ed. 482 (1941); *LaBelle Iron Works v. United* ***214** *States,* 256 U.S. 377, 392, 41 S.Ct. 528, 532, 65 L.Ed. 998 (1921) ("Reference is made to cases decided under the equal protection clause of the Fourteenth Amendment ...; but clearly they are not in point. The Fifth Amendment has no equal protection clause"). When the Court first faced a Fifth Amendment equal protection challenge to a federal racial classification, it adopted a similar approach, with most unfortunate results. In *Hirabayashi v. United States,* 320 U.S. 81, 63 S.Ct. 1375, 87 L.Ed. 1774 (1943), the Court considered a curfew applicable only to persons of Japanese ancestry. The Court observed—correctly—that "[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality," and that "racial discriminations are in most circumstances irrelevant and therefore prohibited." *Id.,* at 100, 63 S.Ct., at 1385. But it also cited *Detroit Bank* for the proposition that the Fifth Amendment "restrains only such discriminatory legislation by Congress as amounts to a denial of due process," 320 U.S., at 100, 63 S.Ct., at 1385, and upheld the curfew because "circumstances within the knowledge of those charged with the responsibility for maintaining the national defense afforded a rational basis for the decision which they made." *Id.,* at 102, 63 S.Ct., at 1386.

Eighteen months later, the Court again approved wartime measures directed at persons of Japanese ancestry. *Korematsu v. United States,* 323 U.S. 214, 65 S.Ct. 193, 89 L.Ed. 194 (1944), concerned an order that completely excluded such persons from particular areas. The Court did not address the view, expressed in cases like *Hirabayashi* and *Detroit Bank,* that the Federal Government's obligation to provide equal protection differs significantly from that of the States. Instead, it began by noting that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect ... [and] courts must subject them to the most rigid scrutiny." 323 U.S., at 216, 65 S.Ct., at 194. That promising dictum might be read to undermine the view that the Federal Government is under a lesser obligation to avoid injurious racial classifications ***215**

than are the States. Cf. *id.,* at 234–235, 65 S.Ct., at 202 (Murphy, J., dissenting) ("[T]he order deprives all those within its scope of the equal protection of the laws as guaranteed by the Fifth Amendment"). But in spite of the "most rigid scrutiny" standard it had just set forth, the Court then inexplicably relied on "the principles we announced in the *Hirabayashi* case," *id.,* at 217, 65 S.Ct., at 194, to conclude that, although "exclusion from the area in which one's home is located is a far greater deprivation than constant confinement to the home from 8 p.m. to 6 a.m.," *id.,* at 218, 65 S.Ct., at 195, the racially discriminatory order was nonetheless within the Federal Government's power.*

****2107** In *Bolling v. Sharpe,* 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884 (1954), the Court for the first time explicitly questioned the existence of any difference between the obligations of the Federal Government and the States to avoid racial classifications. *Bolling* did note that "[t]he 'equal protection of the laws' is a more explicit safeguard of prohibited unfairness than 'due process of law,' " *id.,* at 499, 74 S.Ct., at 694. But *Bolling* then concluded that, "[i]n view of [the] decision that the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government." *Id.,* at 500, 74 S.Ct., at 695.

Bolling's facts concerned school desegregation, but its reasoning was not so limited. The Court's observations that "[d]istinctions between citizens solely because of their ancestry are by their very nature odious," *Hirabayashi, supra,* 320 U.S., at 100, 63 S.Ct., at 1385, and that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect," ***216** *Korematsu, supra,* 323 U.S., at 216, 65 S.Ct., at 194, carry no less force in the context of federal action than in the context of action by the States—indeed, they first appeared in cases concerning action by the Federal Government. *Bolling* relied on those observations, 347 U.S., at 499, n. 3, 74 S.Ct., at 694, n. 3, and reiterated " 'that the Constitution of the United States, in its present form, forbids, so far as civil and political rights are concerned, discrimination *by the General Government, or by the States,* against any citizen because of his race,' " *id.,* at 499, 74 S.Ct., at 694 (quoting *Gibson v. Mississippi,* 162 U.S. 565, 591, 16 S.Ct. 904, 910, 40 L.Ed. 1075 (1896)) (emphasis added). The Court's application of that general principle to the case before it, and the resulting imposition on the Federal Government of an obligation equivalent to that of the States, followed as a matter of course.

Later cases in contexts other than school desegregation did not distinguish between the duties of the States and the Federal Government to avoid racial classifications. Consider, for example, the following passage from *McLaughlin v. Florida,* 379 U.S. 184, 85 S.Ct. 283, 13 L.Ed.2d 222, a 1964 case that struck down a race-based state law:

> "[W]e deal here with a classification based upon the race of the participants, which must be viewed in light of the historical fact that the central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States. This strong policy renders racial classifications 'constitutionally suspect,' *Bolling v. Sharpe,* 347 U.S. 497, 499 [74 S.Ct. 693, 694]; and subject to the 'most rigid scrutiny,' *Korematsu v. United States,* 323 U.S. 214, 216 [65 S.Ct. 193, 194]; and 'in most circumstances irrelevant' to any constitutionally acceptable legislative purpose, *Hirabayashi v. United States,* 320 U.S. 81, 100 [63 S.Ct. 1375, 1385]." *Id.,* at 191–192, 85 S.Ct., at 288.

McLaughlin's reliance on cases involving federal action for the standards applicable to a case involving state legislation ***217** suggests that the Court understood the standards for federal and state racial classifications to be the same.

Cases decided after *McLaughlin* continued to treat the equal protection obligations imposed by the Fifth and the Fourteenth Amendments as indistinguishable; one commentator observed that "[i]n case after case, fifth amendment equal protection problems are discussed on the assumption that fourteenth amendment precedents are controlling." Karst, The Fifth Amendment's Guarantee of Equal Protection, 55 N.C.L.Rev. 541, 554 (1977). *Loving v. Virginia,* 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967), which struck down a race-based state law, cited *Korematsu* for the proposition that "the Equal Protection Clause demands that racial classifications ... be subjected to the 'most rigid scrutiny.' " 388 U.S., at 11, 87 S.Ct., at 1823. The various opinions in *Frontiero v. Richardson,* 411 U.S. 677, 93 S.Ct. 1764, 36 L.Ed.2d 583 (1973), which concerned sex discrimination by the Federal Government, took their equal protection standard of review from *Reed v. Reed,* 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed.2d 225 (1971), a case that invalidated sex discrimination by a State, without mentioning ****2108** any possibility of a difference between the standards applicable to state and federal action. *Frontiero,* 411 U.S. at 682–684, 93 S.Ct., at 1768–1769 (plurality opinion of Brennan, J.); *id.,* at 691, 93 S.Ct., at 1772 (Stewart, J., concurring in judgment); *id.,* at 692, 93 S.Ct., at 1773 (Powell, J., concurring in judgment). Thus, in 1975, the Court stated explicitly that "[t]his Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment." *Weinberger v. Wiesenfeld,* 420 U.S. 636, 638, n. 2, 95 S.Ct. 1225, 1228, n. 2, 43 L.Ed.2d 514; see also *Buckley v. Valeo,* 424 U.S. 1, 93, 96 S.Ct. 612, 670, 46 L.Ed.2d 659 (1976) ("Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment"); *United States v.*

Paradise, 480 U.S. 149, 166, n. 16, 107 S.Ct. 1053, 1064, n. 16, 94 L.Ed.2d 203 (1987) (plurality opinion of Brennan, J.) ("[T]he reach of the equal protection guarantee of the Fifth Amendment is coextensive with that of the Fourteenth"). We do not understand a few contrary suggestions appearing in cases in which we found special deference to ***218** the political branches of the Federal Government to be appropriate, *e.g., Hampton v. Mow Sun Wong,* 426 U.S. 88, 100, 101–102, n. 21, 96 S.Ct. 1895, 1903, 1904–1905, n. 21, 48 L.Ed.2d 495 (1976) (federal power over immigration), to detract from this general rule.

B

Most of the cases discussed above involved classifications burdening groups that have suffered discrimination in our society. In 1978, the Court confronted the question whether race-based governmental action designed to *benefit* such groups should also be subject to "the most rigid scrutiny." *Regents of Univ. of Cal. v. Bakke,* 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750, involved an equal protection challenge to a state-run medical school's practice of reserving a number of spaces in its entering class for minority students. The petitioners argued that "strict scrutiny" should apply only to "classifications that disadvantage 'discrete and insular minorities.' " *Id.,* at 287–288, 98 S.Ct., at 2747 (opinion of Powell, J.) (citing *United States v. Carolene Products Co.,* 304 U.S. 144, 152, n. 4, 58 S.Ct. 778, 784, n. 4, 82 L.Ed. 1234 (1938)). *Bakke* did not produce an opinion for the Court, but Justice Powell's opinion announcing the Court's judgment rejected the argument. In a passage joined by Justice White, Justice Powell wrote that "[t]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color." 438 U.S., at 289–290, 98 S.Ct., at 2748. He concluded that "[r]acial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination." *Id.,* at 291, 98 S.Ct., at 2748. On the other hand, four Justices in *Bakke* would have applied a less stringent standard of review to racial classifications "designed to further remedial purposes," see *id.,* at 359, 98 S.Ct., at 2783 (Brennan, White, Marshall, and Blackmun, JJ., concurring in judgment in part and dissenting in part). And four Justices thought the case should be decided on statutory grounds. *Id.,* at 411–412, 421, 98 S.Ct., at 2809–2810, 2815 (STEVENS, J., joined by Burger, C.J., and Stewart and REHNQUIST, ***219** JJ., concurring in judgment in part and dissenting in part).

Two years after *Bakke,* the Court faced another challenge to remedial race-based action, this time involving action undertaken by the Federal Government. In *Fullilove v. Klutznick,* 448 U.S. 448, 100 S.Ct. 2758, 65 L.Ed.2d 902 (1980), the Court upheld Congress' inclusion of a 10% set-aside for minority-owned businesses in the Public Works Employment Act of 1977. As in *Bakke,* there was no opinion for the Court. Chief Justice Burger, in an opinion joined by Justices White and Powell, observed that "[a]ny preference based on racial or ethnic criteria must necessarily receive a most searching examination to make sure that it does not conflict with constitutional guarantees." 448 U.S., at 491, 100 S.Ct., at 2781. That opinion, however, "d[id] not adopt, either expressly or implicitly, the formulas of analysis articulated in such cases as [*Bakke*]." *Id.,* at 492, 100 S.Ct., at 2781. It employed instead ****2109** a two-part test which asked, first, "whether the *objectives* of th[e] legislation are within the power of Congress," and second, "whether the limited use of racial and ethnic criteria, in the context presented, is a constitutionally permissible *means* for achieving the congressional objectives." *Id.,* at 473, 100 S.Ct., at 2772. It then upheld the program under that test, adding at the end of the opinion that the program also "would survive judicial review under either 'test' articulated in the several *Bakke* opinions." *Id.,* at 492, 100 S.Ct., at 2781. Justice Powell wrote separately to express his view that the plurality opinion had essentially applied "strict scrutiny" as described in his *Bakke* opinion—*i.e.,* it had determined that the set-aside was "a necessary means of advancing a compelling governmental interest"—and had done so correctly. 448 U.S., at 496, 100 S.Ct., at 2783–2784 (concurring opinion). Justice Stewart (joined by then-Justice REHNQUIST) dissented, arguing that the Constitution required the Federal Government to meet the same strict standard as the States when enacting racial classifications, *id.,* at 523, and n. 1, 100 S.Ct., at 2797, and n. 1, and that the program before the Court failed that standard. Justice STEVENS also dissented, ***220** arguing that "[r]acial classifications are simply too pernicious to permit any but the most exact connection between justification and classification," *id.,* at 537, 100 S.Ct., at 2805, and that the program before the Court could not be characterized "as a 'narrowly tailored' remedial measure." *Id.,* at 541, 100 S.Ct., at 2807. Justice Marshall (joined by Justices Brennan and Blackmun) concurred in the judgment, reiterating the view of four Justices in *Bakke* that any race-based governmental action designed to "remed[y] the present effects of past racial discrimination" should be upheld if it was "substantially related" to the achievement of an "important governmental objective"—*i.e.,* such action should be subjected only to what we now call "intermediate scrutiny." 448 U.S.,

at 518–519, 100 S.Ct., at 2795.

In *Wygant v. Jackson Bd. of Ed.,* 476 U.S. 267, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986), the Court considered a Fourteenth Amendment challenge to another form of remedial racial classification. The issue in *Wygant* was whether a school board could adopt race-based preferences in determining which teachers to lay off. Justice Powell's plurality opinion observed that "the level of scrutiny does not change merely because the challenged classification operates against a group that historically has not been subject to governmental discrimination," *id.,* at 273, 106 S.Ct., at 1846, and stated the two-part inquiry as "whether the layoff provision is supported by a compelling state purpose and whether the means chosen to accomplish that purpose are narrowly tailored." *Id.,* at 274, 106 S.Ct., at 1847. In other words, "racial classifications of any sort must be subjected to 'strict scrutiny.' " *Id.,* at 285, 106 S.Ct., at 1852 (O'CONNOR, J., concurring in part and concurring in judgment). The plurality then concluded that the school board's interest in "providing minority role models for its minority students, as an attempt to alleviate the effects of societal discrimination," *id.,* at 274, 106 S.Ct., at 1847, was not a compelling interest that could justify the use of a racial classification. It added that "[s]ocietal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy," *id.,* at 276, 106 S.Ct., at 1848, and insisted instead that "a public employer ... must ***221** ensure that, before it embarks on an affirmative-action program, it has convincing evidence that remedial action is warranted. That is, it must have sufficient evidence to justify the conclusion that there has been prior discrimination," *id.,* at 277, 106 S.Ct., at 1848–1849. Justice White concurred only in the judgment, although he agreed that the school board's asserted interests could not, "singly or together, justify this racially discriminatory layoff policy." *Id.,* at 295, 106 S.Ct., at 1858. Four Justices dissented, three of whom again argued for intermediate scrutiny of remedial race-based government action. *Id.,* at 301–302, 106 S.Ct., at 1861–1862 (Marshall, J., joined by Brennan and Blackmun, JJ., dissenting).

The Court's failure to produce a majority opinion in *Bakke, Fullilove,* and *Wygant* left unresolved the proper analysis for remedial race-based governmental action. See ****2110** *United States v. Paradise,* 480 U.S., at 166, 107 S.Ct., at 1063 (plurality opinion of Brennan, J.) ("[A]lthough this Court has consistently held that some elevated level of scrutiny is required when a racial or ethnic distinction is made for remedial purposes, it has yet to reach consensus on the appropriate constitutional analysis"); *Sheet Metal Workers v. EEOC,* 478 U.S. 421, 480, 106 S.Ct. 3019, 3052, 92 L.Ed.2d 344 (1986) (plurality opinion of Brennan, J.). Lower courts found this lack of guidance unsettling. See, *e.g., Kromnick v. School Dist. of Philadelphia,* 739 F.2d 894, 901 (CA3 1984) ("The absence of an Opinion of the Court in either *Bakke* or *Fullilove* and the concomitant failure of the Court to articulate an analytic framework supporting the judgments makes the position of the lower federal courts considering the constitutionality of affirmative action programs somewhat vulnerable"), cert. denied, 469 U.S. 1107, 105 S.Ct. 782, 83 L.Ed.2d 777 (1985); *Williams v. New Orleans,* 729 F.2d 1554, 1567 (CA5 1984) (en banc) (Higginbotham, J., concurring specially); *South Florida Chapter of Associated General Contractors of America, Inc. v. Metropolitan Dade County, Fla.,* 723 F.2d 846, 851 (CA11), cert. denied, 469 U.S. 871, 105 S.Ct. 220, 83 L.Ed.2d 150 (1984).

The Court resolved the issue, at least in part, in 1989. *Richmond v. J.A. Croson Co.,* 488 U.S. 469, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989), concerned a ***222** city's determination that 30% of its contracting work should go to minority-owned businesses. A majority of the Court in *Croson* held that "the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification," and that the single standard of review for racial classifications should be "strict scrutiny." *Id.,* at 493–494, 109 S.Ct., at 722 (opinion of O'CONNOR, J., joined by REHNQUIST, C.J., and White and KENNEDY, JJ.); *id.,* at 520, 109 S.Ct., at 735 (SCALIA, J., concurring in judgment) ("I agree ... with Justice O'CONNOR's conclusion that strict scrutiny must be applied to all governmental classification by race"). As to the classification before the Court, the plurality agreed that "a state or local subdivision ... has the authority to eradicate the effects of private discrimination within its own legislative jurisdiction," *id.,* at 491–492, 109 S.Ct., at 720–721, but the Court thought that the city had not acted with "a 'strong basis in evidence for its conclusion that remedial action was necessary,' " *id.,* at 500, 109 S.Ct., at 725 (majority opinion) (quoting *Wygant, supra,* at 277, 106 S.Ct., at 1849 (plurality opinion)). The Court also thought it "obvious that [the] program is not narrowly tailored to remedy the effects of prior discrimination." 488 U.S., at 508, 109 S.Ct., at 729–730.

With *Croson,* the Court finally agreed that the Fourteenth Amendment requires strict scrutiny of all race-based action by state and local governments. But *Croson* of course had no occasion to declare what standard of review the Fifth Amendment requires for such action taken by the Federal Government. *Croson* observed simply that the Court's "treatment of an exercise of congressional power in *Fullilove* cannot be dispositive here," because *Croson*'s facts did not implicate Congress' broad power under § 5 of the Fourteenth Amendment. *Id.,* at 491, 109 S.Ct., at 720 (plurality opinion); see also *id.,* at 522, 109 S.Ct., at 737 (SCALIA, J., concurring in judgment) ("[W]ithout revisiting what we held in *Fullilove* ..., I do not believe our

decision in that case controls the one before us here"). On the other hand, the Court subsequently indicated that *Croson* had at least some bearing on federal race-based action ***223** when it vacated a decision upholding such action and remanded for further consideration in light of *Croson*. *H.K. Porter Co. v. Metropolitan Dade County,* 489 U.S. 1062, 109 S.Ct. 1333, 103 L.Ed.2d 804 (1989); see also *Shurberg Broadcasting of Hartford, Inc. v. FCC,* 876 F.2d 902, 915, n. 16 (CADC 1989) (opinion of Silberman, J.) (noting the Court's action in *H.K. Porter Co.*), rev'd *sub nom. Metro Broadcasting, Inc. v. FCC,* 497 U.S. 547, 110 S.Ct. 2997, 111 L.Ed.2d 445 (1990). Thus, some uncertainty persisted with respect to the standard of review for federal racial classifications. See, *e.g., Mann v. Albany,* 883 F.2d 999, 1006 (CA11 1989) (*Croson* "may be applicable to race-based classifications imposed by Congress"); *Shurberg,* 876 F.2d, at 910 (noting the difficulty of extracting general principles ****2111** from the Court's fractured opinions); *id.,* at 959 (Wald, J., dissenting from denial of rehearing en banc) ("*Croson* certainly did not resolve the substantial questions posed by congressional programs which mandate the use of racial preferences"); *Winter Park Communications, Inc. v. FCC,* 873 F.2d 347, 366 (CADC 1989) (Williams, J., concurring in part and dissenting in part) ("The unresolved ambiguity of *Fullilove* and *Croson* leaves it impossible to reach a firm opinion as to the evidence of discrimination needed to sustain a congressional mandate of racial preferences"), aff'd *sub nom. Metro Broadcasting, supra.*

Despite lingering uncertainty in the details, however, the Court's cases through *Croson* had established three general propositions with respect to governmental racial classifications. First, skepticism: " 'Any preference based on racial or ethnic criteria must necessarily receive a most searching examination,' " *Wygant,* 476 U.S., at 273, 106 S.Ct., at 1847 (plurality opinion of Powell, J.); *Fullilove,* 448 U.S., at 491, 100 S.Ct., at 2781 (opinion of Burger, C.J.); see also *id.,* at 523, 100 S.Ct., at 2798 (Stewart, J., dissenting) ("[A]ny official action that treats a person differently on account of his race or ethnic origin is inherently suspect"); *McLaughlin,* 379 U.S., at 192, 85 S.Ct., at 288 ("[R]acial classifications [are] 'constitutionally suspect' "); *Hirabayashi,* 320 U.S., at 100, 63 S.Ct., at 1385 ("Distinctions ***224** between citizens solely because of their ancestry are by their very nature odious to a free people"). Second, consistency: "[T]he standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification," *Croson,* 488 U.S., at 494, 109 S.Ct., at 722 (plurality opinion); *id.,* at 520, 109 S.Ct., at 735 (SCALIA, J., concurring in judgment); see also *Bakke,* 438 U.S., at 289–290, 98 S.Ct., at 2747–2748 (opinion of Powell, J.), *i.e.,* all racial classifications reviewable under the Equal Protection Clause must be strictly scrutinized. And third, congruence: "Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment," *Buckley v. Valeo,* 424 U.S., at 93, 96 S.Ct., at 670; see also *Weinberger v. Wiesenfeld,* 420 U.S., at 638, n. 2, 95 S.Ct., at 1228, n. 2; *Bolling v. Sharpe,* 347 U.S., at 500, 74 S.Ct., at 694. Taken together, these three propositions lead to the conclusion that any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny. Justice Powell's defense of this conclusion bears repeating here:

> "If it is the individual who is entitled to judicial protection against classifications based upon his racial or ethnic background because such distinctions impinge upon personal rights, rather than the individual only because of his membership in a particular group, then constitutional standards may be applied consistently. Political judgments regarding the necessity for the particular classification may be weighed in the constitutional balance, [*Korematsu*], but the standard of justification will remain constant. This is as it should be, since those political judgments are the product of rough compromise struck by contending groups within the democratic process. When they touch upon an individual's race or ethnic background, he is entitled to a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling ***225** governmental interest. The Constitution guarantees that right to every person regardless of his background. *Shelley v. Kraemer,* 334 U.S. [1, 22, 68 S.Ct. 836, 846, 92 L.Ed. 1161 (1948)]." *Bakke, supra,* 438 U.S., at 299, 98 S.Ct., at 2753 (opinion of Powell, J.) (footnote omitted).

A year later, however, the Court took a surprising turn. *Metro Broadcasting, Inc. v. FCC,* involved a Fifth Amendment challenge to two race-based policies of the Federal Communications Commission (FCC). In *Metro Broadcasting,* the Court repudiated the long-held notion that "it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government" than it does on a State to afford equal protection of the laws, ****2112** *Bolling, supra,* at 500, 74 S.Ct., at 694. It did so by holding that "benign" federal racial classifications need only satisfy intermediate scrutiny, even though *Croson* had recently concluded that such classifications enacted by a State must satisfy strict scrutiny. "[B]enign" federal racial classifications, the Court said, "—even if those measures are not 'remedial' in the sense of being designed to compensate victims of past governmental or societal discrimination—are constitutionally permissible to the extent that they serve *important* governmental objectives within the power of Congress and are *substantially related* to achievement of those objectives." *Metro Broadcasting,* 497 U.S., at 564–565, 110 S.Ct., at 3008–3009 (emphasis added). The Court did not explain how to tell whether a racial classification should be deemed "benign," other than to express "confiden[ce] that an

'examination of the legislative scheme and its history' will separate benign measures from other types of racial classifications." *Id.,* at 564, n. 12, 110 S.Ct., at 3009, n. 12 (citation omitted).

Applying this test, the Court first noted that the FCC policies at issue did not serve as a remedy for past discrimination. *Id.,* at 566, 110 S.Ct., at 3009. Proceeding on the assumption that the policies were nonetheless "benign," it concluded that they served the "important governmental objective" of "enhancing broadcast diversity," *id.,* at 566–567, 110 S.Ct., at 3009–3010, and that they were ***226** "substantially related" to that objective, *id.,* at 569, 110 S.Ct., at 3011. It therefore upheld the policies.

By adopting intermediate scrutiny as the standard of review for congressionally mandated "benign" racial classifications, *Metro Broadcasting* departed from prior cases in two significant respects. First, it turned its back on *Croson's* explanation of why strict scrutiny of all governmental racial classifications is essential:

> "Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics. Indeed, the purpose of strict scrutiny is to 'smoke out' illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool. The test also ensures that the means chosen 'fit' this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype." *Croson, supra,* at 493, 109 S.Ct., at 721 (plurality opinion of O'CONNOR, J.).

We adhere to that view today, despite the surface appeal of holding "benign" racial classifications to a lower standard, because "it may not always be clear that a so-called preference is in fact benign," *Bakke, supra,* at 298, 98 S.Ct., at 2752 (opinion of Powell, J.). "[M]ore than good motives should be required when government seeks to allocate its resources by way of an explicit racial classification system." Days, Fullilove, 96 Yale L.J. 453, 485 (1987).

Second, *Metro Broadcasting* squarely rejected one of the three propositions established by the Court's earlier equal protection cases, namely, congruence between the standards applicable to federal and state racial classifications, and in so doing also undermined the other two—skepticism of all racial ***227** classifications and consistency of treatment irrespective of the race of the burdened or benefited group. See *supra,* at 2110–2111. Under *Metro Broadcasting,* certain racial classifications ("benign" ones enacted by the Federal Government) should be treated less skeptically than others; and the race of the benefited group is critical to the determination of which standard of review to apply. *Metro Broadcasting* was thus a significant departure from much of what had come before it.

The three propositions undermined by *Metro Broadcasting* all derive from the basic principle that the Fifth and Fourteenth Amendments to the Constitution protect *persons,* not *groups.* It follows from that principle that all governmental action based on race—a *group* classification long recognized as "in most circumstances irrelevant and therefore prohibited," ****2113** *Hirabayashi,* 320 U.S., at 100, 63 S.Ct., at 1385—should be subjected to detailed judicial inquiry to ensure that the *personal* right to equal protection of the laws has not been infringed. These ideas have long been central to this Court's understanding of equal protection, and holding "benign" state and federal racial classifications to different standards does not square with them. "[A] free people whose institutions are founded upon the doctrine of equality," *ibid.,* should tolerate no retreat from the principle that government may treat people differently because of their race only for the most compelling reasons. Accordingly, we hold today that all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests. To the extent that *Metro Broadcasting* is inconsistent with that holding, it is overruled.

In dissent, Justice STEVENS criticizes us for "deliver[ing] a disconcerting lecture about the evils of governmental racial classifications," *post,* at 2120. With respect, we believe his criticisms reflect a serious misunderstanding of our opinion.

***228** Justice STEVENS concurs in our view that courts should take a skeptical view of all governmental racial classifications. *Ibid.* He also allows that "[n]othing is inherently wrong with applying a single standard to fundamentally different situations, as long as that standard takes relevant differences into account." *Post,* at 2122. What he fails to recognize is that strict scrutiny *does* take "relevant differences" into account—indeed, that is its fundamental purpose. The point of carefully examining the interest asserted by the government in support of a racial classification, and the evidence offered to show that the classification is needed, is precisely to distinguish legitimate from illegitimate uses of race in governmental

decisionmaking. See *supra,* at 2112. And Justice STEVENS concedes that "some cases may be difficult to classify," *post,* at 2122, and n. 4; all the more reason, in our view, to examine all racial classifications carefully. Strict scrutiny does not "trea[t] dissimilar race-based decisions as though they were equally objectionable," *post,* at 2121; to the contrary, it evaluates carefully all governmental race-based decisions *in order to decide* which are constitutionally objectionable and which are not. By requiring strict scrutiny of racial classifications, we require courts to make sure that a governmental classification based on race, which "so seldom provide[s] a relevant basis for disparate treatment," *Fullilove,* 448 U.S., at 534, 100 S.Ct., at 2803 (STEVENS, J., dissenting), is legitimate, before permitting unequal treatment based on race to proceed.

Justice STEVENS chides us for our "supposed inability to differentiate between 'invidious' and 'benign' discrimination," because it is in his view sufficient that "people understand the difference between good intentions and bad." *Post,* at 2121. But, as we have just explained, the point of strict scrutiny is to "differentiate between" permissible and impermissible governmental use of race. And Justice STEVENS himself has already explained in his dissent in *Fullilove* why "good intentions" alone are not enough to sustain ***229** a supposedly "benign" racial classification: "[E]ven though it is not the actual predicate for this legislation, a statute of this kind inevitably is perceived by many as resting on an assumption that those who are granted this special preference are less qualified in some respect that is identified purely by their race. Because that perception—*especially when fostered by the Congress of the United States*—can only exacerbate rather than reduce racial prejudice, it will delay the time when race will become a truly irrelevant, or at least insignificant, factor. *Unless Congress clearly articulates the need and basis* for a racial classification, *and also tailors the classification to its justification,* the Court should not uphold this kind of statute." *Fullilove,* 448 U.S., at 545, 100 S.Ct., at 2809 (dissenting opinion) (emphasis added; footnote omitted); see also *id.,* at 537, 100 S.Ct., at 2805 ("Racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification"); *Croson,* 488 U.S., at 516–517, 109 S.Ct., at 734 (STEVENS, J., concurring in part and concurring in judgment) ****2114** ("Although [the legislation at issue] stigmatizes the disadvantaged class with the unproven charge of past racial discrimination, it actually imposes a greater stigma on its supposed beneficiaries"); *supra,* at 2112; but cf. *post,* at 2121–2122 (STEVENS, J., dissenting). These passages make a persuasive case for requiring strict scrutiny of congressional racial classifications.

Perhaps it is not the standard of strict scrutiny itself, but our use of the concepts of "consistency" and "congruence" in conjunction with it, that leads Justice STEVENS to dissent. According to Justice STEVENS, our view of consistency "equate[s] remedial preferences with invidious discrimination," *post,* at 2122, and ignores the difference between "an engine of oppression" and an effort "to foster equality in society," or, more colorfully, "between a 'No Trespassing' sign and a welcome mat," *post,* at 2120, 2121. It does nothing of the kind. The principle of consistency simply means that whenever the government treats any person unequally because ***230** of his or her race, that person has suffered an injury that falls squarely within the language and spirit of the Constitution's guarantee of equal protection. It says nothing about the ultimate validity of any particular law; that determination is the job of the court applying strict scrutiny. The principle of consistency explains the circumstances in which the injury requiring strict scrutiny occurs. The application of strict scrutiny, in turn, determines whether a compelling governmental interest justifies the infliction of that injury.

Consistency *does* recognize that any individual suffers an injury when he or she is disadvantaged by the government because of his or her race, whatever that race may be. This Court clearly stated that principle in *Croson,* see 488 U.S., at 493–494, 109 S.Ct., at 721–722 (plurality opinion); *id.,* at 520–521, 109 S.Ct., at 735–736 (SCALIA, J., concurring in judgment); see also *Shaw v. Reno,* 509 U.S. 630, 643, 113 S.Ct. 2816, 2824–2845, 125 L.Ed.2d 511 (1993); *Powers v. Ohio,* 499 U.S. 400, 410, 111 S.Ct. 1364, 1370, 113 L.Ed.2d 411 (1991). Justice STEVENS does not explain how his views square with *Croson,* or with the long line of cases understanding equal protection as a personal right.

Justice STEVENS also claims that we have ignored any difference between federal and state legislatures. But requiring that Congress, like the States, enact racial classifications only when doing so is necessary to further a "compelling interest" does not contravene any principle of appropriate respect for a coequal branch of the Government. It is true that various Members of this Court have taken different views of the authority § 5 of the Fourteenth Amendment confers upon Congress to deal with the problem of racial discrimination, and the extent to which courts should defer to Congress' exercise of that authority. See, *e.g., Metro Broadcasting,* 497 U.S., at 605–606, 110 S.Ct., at 3030–3031 (O'CONNOR, J., dissenting); *Croson,* 488 U.S., at 486–493, 109 S.Ct., at 717–722 (opinion of O'CONNOR, J., joined by REHNQUIST, C.J., and White, J.); *id.,* at 518–519, 109 S.Ct., at 734–735 (KENNEDY, J., concurring in part and concurring in judgment); *id.,* at 521–524, 109 S.Ct., at 736–738 (SCALIA, J., concurring in judgment); *Fullilove,* 448 U.S., at 472–473, 100 S.Ct., at 2771–2772 (opinion of Burger, ***231** C.J.); *id.,* at 500–502, and nn. 2–3, 515, and n. 14, 100 S.Ct., at 2786–2787, and nn. 2–3, 2793, and n. 14 (Powell, J., concurring); *id.,* at 526–527, 100 S.Ct., at 2799–2800 (Stewart, J., dissenting). We need not, and do not, address

these differences today. For now, it is enough to observe that Justice STEVENS' suggestion that any Member of this Court has repudiated in this case his or her previously expressed views on the subject, *post,* at 2123–2125, 2127, is incorrect.

C

"Although adherence to precedent is not rigidly required in constitutional cases, any departure from the doctrine of *stare decisis* demands special justification." *Arizona v. Rumsey,* 467 U.S. 203, 212, 104 S.Ct. 2305, 2311, 81 L.Ed.2d 164 (1984). In deciding whether this case presents such justification, we recall Justice Frankfurter's admonition that "*stare decisis* is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable, ****2115** when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience." *Helvering v. Hallock,* 309 U.S. 106, 119, 60 S.Ct. 444, 451, 84 L.Ed. 604 (1940). Remaining true to an "intrinsically sounder" doctrine established in prior cases better serves the values of *stare decisis* than would following a more recently decided case inconsistent with the decisions that came before it; the latter course would simply compound the recent error and would likely make the unjustified break from previously established doctrine complete. In such a situation, "special justification" exists to depart from the recently decided case.

As we have explained, *Metro Broadcasting* undermined important principles of this Court's equal protection jurisprudence, established in a line of cases stretching back over 50 years, see *supra,* at 2105–2112. Those principles together stood for an "embracing" and "intrinsically soun[d]" understanding of equal protection "verified by experience," namely, that the Constitution imposes upon federal, state, and local governmental actors the same obligation to respect ***232** the personal right to equal protection of the laws. This case therefore presents precisely the situation described by Justice Frankfurter in *Helvering:* We cannot adhere to our most recent decision without colliding with an accepted and established doctrine. We also note that *Metro Broadcasting*'s application of different standards of review to federal and state racial classifications has been consistently criticized by commentators. See, *e.g.,* Fried, *Metro Broadcasting, Inc. v. FCC:* Two Concepts of Equality, 104 Harv.L.Rev. 107, 113–117 (1990) (arguing that *Metro Broadcasting*'s adoption of different standards of review for federal and state racial classifications placed the law in an "unstable condition," and advocating strict scrutiny across the board); Comment, *Metro Broadcasting, Inc. v. FCC:* Requiem for a Heavyweight, 69 Texas L.Rev. 125, 145–146 (1990) (same); Linder, Review of Affirmative Action After *Metro Broadcasting v. FCC:* The Solution Almost Nobody Wanted, 59 UMKC L.Rev. 293, 297, 316–317 (1991) (criticizing "anomalous results as exemplified by the two different standards of review"); Katz, Public Affirmative Action and the Fourteenth Amendment: The Fragmentation of Theory After *Richmond v. J.A. Croson Co.* and *Metro Broadcasting, Inc. v. Federal Communications Commission,* 17 T. Marshall L.Rev. 317, 319, 354–355, 357 (1992) (arguing that "the current fragmentation of doctrine must be seen as a dangerous and seriously flawed approach to constitutional interpretation," and advocating intermediate scrutiny across the board).

Our past practice in similar situations supports our action today. In *United States v. Dixon,* 509 U.S. 688, 113 S.Ct. 2849, 125 L.Ed.2d 556 (1993), we overruled the recent case of *Grady v. Corbin,* 495 U.S. 508, 110 S.Ct. 2084, 109 L.Ed.2d 548 (1990), because *Grady* "lack[ed] constitutional roots" and was "wholly inconsistent with earlier Supreme Court precedent." *Dixon, supra,* at 704, 712, 113 S.Ct., at 2860, 2864. In *Solorio v. United States,* 483 U.S. 435, 107 S.Ct. 2924, 97 L.Ed.2d 364 (1987), we overruled *O'Callahan v. Parker,* 395 U.S. 258, 89 S.Ct. 1683, 23 L.Ed.2d 291 (1969), which had caused "confusion" and had rejected "an unbroken line of decisions from 1866 to 1960." *Solorio,* ***233** *supra,* at 439–441, 450–451, 107 S.Ct., at 2926–2928, 2932–2933. And in *Continental T.V., Inc. v. GTE Sylvania Inc.,* 433 U.S. 36, 97 S.Ct. 2549, 53 L.Ed.2d 568 (1977), we overruled *United States v. Arnold, Schwinn & Co.,* 388 U.S. 365, 87 S.Ct. 1856, 18 L.Ed.2d 1249 (1967), which was "an abrupt and largely unexplained departure" from precedent, and of which "[t]he great weight of scholarly opinion ha[d] been critical." *Continental T.V., supra,* at 47–48, 58, 97 S.Ct., at 2556, 2561. See also, *e.g., Payne v. Tennessee,* 501 U.S. 808, 830, 111 S.Ct. 2597, 2611, 115 L.Ed.2d 720 (1991) (overruling *Booth v. Maryland,* 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987), and *South Carolina v. Gathers,* 490 U.S. 805, 109 S.Ct. 2207, 104 L.Ed.2d 876 (1989)); *Monell v. New York City Dept. of Social Servs.,* 436 U.S. 658, 695–701, 98 S.Ct. 2018, 2038–2041, 56 L.Ed.2d 611 (1978) (partially overruling *Monroe v. Pape,* 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961), because *Monroe* was a "departure from prior practice" that had not ****2116** engendered substantial reliance); *Swift & Co. v. Wickham,* 382 U.S. 111, 128–129, 86 S.Ct. 258, 267–268, 15 L.Ed.2d 194 (1965) (overruling *Kesler v. Department of Public Safety of Utah,* 369 U.S.

153, 82 S.Ct. 807, 7 L.Ed.2d 641 (1962), to reaffirm "pre-*Kesler* precedent" and restore the law to the "view ... which this Court has traditionally taken" in older cases).

It is worth pointing out the difference between the applications of *stare decisis* in this case and in *Planned Parenthood of Southeastern Pa. v. Casey,* 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992). *Casey* explained how considerations of *stare decisis* inform the decision whether to overrule a long-established precedent that has become integrated into the fabric of the law. Overruling precedent of that kind naturally may have consequences for "the ideal of the rule of law," *id.,* at 854, 112 S.Ct., at 2808. In addition, such precedent is likely to have engendered substantial reliance, as was true in *Casey* itself, *id.,* at 856, 112 S.Ct., at 2809 ("[F]or two decades of economic and social developments, people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail"). But in this case, as we have explained, we do not face a precedent of that kind, because *Metro Broadcasting* itself *departed* from our prior cases—and did so quite recently. By refusing to follow ***234** *Metro Broadcasting,* then, we do not depart from the fabric of the law; we restore it. We also note that reliance on a case that has recently departed from precedent is likely to be minimal, particularly where, as here, the rule set forth in that case is unlikely to affect primary conduct in any event. Cf. *Allied–Bruce Terminix Cos. v. Dobson,* 513 U.S. 265, 272, 115 S.Ct. 834, 838–839, 130 L.Ed.2d 753 (1995) (declining to overrule *Southland Corp. v. Keating,* 465 U.S. 1, 104 S.Ct. 852, 79 L.Ed.2d 1 (1984), where "private parties have likely written contracts relying upon *Southland* as authority" in the 10 years since *Southland* was decided).

Justice STEVENS takes us to task for what he perceives to be an erroneous application of the doctrine of *stare decisis.* But again, he misunderstands our position. We have acknowledged that, after *Croson,* "some uncertainty persisted with respect to the standard of review for federal racial classifications," *supra,* at 2110, and we therefore do not say that we "merely restor[e] the *status quo ante* " today, *post,* at 2127. But as we have described *supra,* at 2105–2113, we think that well-settled legal principles pointed toward a conclusion different from that reached in *Metro Broadcasting,* and we therefore disagree with Justice STEVENS that "the law at the time of that decision was entirely open to the result the Court reached," *post,* at 2127. We also disagree with Justice STEVENS that Justice Stewart's dissenting opinion in *Fullilove* supports his "novelty" argument, see *post,* at 2128, and n. 13. Justice Stewart said that "[u]nder our Constitution, any official action that treats a person differently on account of his race or ethnic origin is inherently suspect and presumptively invalid," and that " '[e]qual protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment.' " *Fullilove,* 448 U.S., at 523, and n. 1, 100 S.Ct., at 2798, and n. 1. He took the view that "[t]he hostility of the Constitution to racial classifications by government has been manifested in many cases decided by this Court," and that "our cases have made clear that the Constitution is ***235** wholly neutral in forbidding such racial discrimination, whatever the race may be of those who are its victims." *Id.,* at 524, 100 S.Ct., at 2798. Justice Stewart gave no indication that he thought he was addressing a "novel" proposition, *post,* at 2128. Rather, he relied on the fact that the text of the Fourteenth Amendment extends its guarantee to "persons," and on cases like *Buckley, Loving, McLaughlin, Bolling, Hirabayashi,* and *Korematsu,* see *Fullilove, supra,* at 524–526, 100 S.Ct., at 2798–2800, as do we today. There is nothing new about the notion that Congress, like the States, may treat people differently because of their race only for compelling reasons.

"The real problem," Justice Frankfurter explained, "is whether a principle shall prevail over its later misapplications." *Helvering,* ****2117** 309 U.S., at 122, 60 S.Ct., at 453. *Metro Broadcasting*'s untenable distinction between state and federal racial classifications lacks support in our precedent, and undermines the fundamental principle of equal protection as a personal right. In this case, as between that principle and "its later misapplications," the principle must prevail.

D

Our action today makes explicit what Justice Powell thought implicit in the *Fullilove* lead opinion: Federal racial classifications, like those of a State, must serve a compelling governmental interest, and must be narrowly tailored to further that interest. See *Fullilove,* 448 U.S., at 496, 100 S.Ct., at 2783–84 (concurring opinion). (Recall that the lead opinion in *Fullilove* "d[id] not adopt ... the formulas of analysis articulated in such cases as [*Bakke*]." *Id.,* at 492, 100 S.Ct., at 2781 (opinion of Burger, C.J.).) Of course, it follows that to the extent (if any) that *Fullilove* held federal racial classifications to be

subject to a less rigorous standard, it is no longer controlling. But we need not decide today whether the program upheld in *Fullilove* would survive strict scrutiny as our more recent cases have defined it.

***236** Some have questioned the importance of debating the proper standard of review of race-based legislation. See, *e.g., post,* at 2122 (STEVENS, J., dissenting); *Croson,* 488 U.S., at 514–515, and n. 5, 109 S.Ct., at 733, and n. 5 (STEVENS, J., concurring in part and concurring in judgment); cf. *Metro Broadcasting,* 497 U.S., at 610, 110 S.Ct., at 3033 (O'CONNOR, J., dissenting) ("This dispute regarding the appropriate standard of review may strike some as a lawyers' quibble over words"). But we agree with Justice STEVENS that, "[b]ecause racial characteristics so seldom provide a relevant basis for disparate treatment, and because classifications based on race are potentially so harmful to the entire body politic, it is especially important that the reasons for any such classification be clearly identified and unquestionably legitimate," and that "[r]acial classifications are simply too pernicious to permit any but the most exact connection between justification and classification." *Fullilove, supra,* at 533–535, 537, 100 S.Ct., at 2803–2804, 2805 (dissenting opinion) (footnotes omitted). We think that requiring strict scrutiny is the best way to ensure that courts will consistently give racial classifications that kind of detailed examination, both as to ends and as to means. *Korematsu* demonstrates vividly that even "the most rigid scrutiny" can sometimes fail to detect an illegitimate racial classification, compare *Korematsu,* 323 U.S., at 223, 65 S.Ct., at 197 ("To cast this case into outlines of racial prejudice, without reference to the real military dangers which were presented, merely confuses the issue. Korematsu was not excluded from the Military Area because of hostility to him or his race"), with Pub.L. 100–383, § 2(a), 102 Stat. 903–904 ("[T]hese actions [of relocating and interning civilians of Japanese ancestry] were carried out without adequate security reasons ... and were motivated largely by racial prejudice, wartime hysteria, and a failure of political leadership"). Any retreat from the most searching judicial inquiry can only increase the risk of another such error occurring in the future.

***237** Finally, we wish to dispel the notion that strict scrutiny is "strict in theory, but fatal in fact." *Fullilove, supra,* at 519, 100 S.Ct., at 2795 (Marshall, J., concurring in judgment). The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it. As recently as 1987, for example, every Justice of this Court agreed that the Alabama Department of Public Safety's "pervasive, systematic, and obstinate discriminatory conduct" justified a narrowly tailored race-based remedy. See *United States v. Paradise,* 480 U.S., at 167, 107 S.Ct., at 1064 (plurality opinion of Brennan, J.); *id.,* at 190, 107 S.Ct., at 1076 (STEVENS, J., concurring in judgment); *id.,* at 196, 107 S.Ct., at 1079–1080 (O'CONNOR, J., dissenting). When race-based action is necessary to further a compelling interest, such action is within constitutional constraints if it satisfies the "narrow tailoring" test this Court has set out in previous cases.

****2118** IV

Because our decision today alters the playing field in some important respects, we think it best to remand the case to the lower courts for further consideration in light of the principles we have announced. The Court of Appeals, following *Metro Broadcasting* and *Fullilove,* analyzed the case in terms of intermediate scrutiny. It upheld the challenged statutes and regulations because it found them to be "narrowly tailored to achieve [their] *significant governmental purpose* of providing subcontracting opportunities for small disadvantaged business enterprises." 16 F.3d, at 1547 (emphasis added). The Court of Appeals did not decide the question whether the interests served by the use of subcontractor compensation clauses are properly described as "compelling." It also did not address the question of narrow tailoring in terms of our strict scrutiny cases, by asking, for example, whether there was "any consideration of the use of ***238** race-neutral means to increase minority business participation" in government contracting, *Croson, supra,* at 507, 109 S.Ct., at 729, or whether the program was appropriately limited such that it "will not last longer than the discriminatory effects it is designed to eliminate," *Fullilove, supra,* at 513, 100 S.Ct., at 2792–2793 (Powell, J., concurring).

Moreover, unresolved questions remain concerning the details of the complex regulatory regimes implicated by the use of subcontractor compensation clauses. For example, the SBA's 8(a) program requires an individualized inquiry into the economic disadvantage of every participant, see 13 CFR § 124.106(a) (1994), whereas the DOT's regulations implementing STURAA § 106(c) do *not* require certifying authorities to make such individualized inquiries, see 49 CFR § 23.62 (1994); 49

CFR pt. 23, subpt. D, App. C (1994). And the regulations seem unclear as to whether 8(d) subcontractors must make individualized showings, or instead whether the race-based presumption applies both to social *and* economic disadvantage, compare 13 CFR § 124.106(b) (1994) (apparently requiring 8(d) participants to make an individualized showing), with 48 CFR § 19.703(a)(2) (1994) (apparently allowing 8(d) subcontractors to invoke the race-based presumption for social and economic disadvantage). See generally Part I, *supra.* We also note an apparent discrepancy between the definitions of which socially disadvantaged individuals qualify as economically disadvantaged for the 8(a) and 8(d) programs; the former requires a showing that such individuals' ability to compete has been impaired "as compared to others in the same or similar line of business *who are not socially disadvantaged,*" 13 CFR § 124.106(a)(1)(i) (1994) (emphasis added), while the latter requires that showing only "as compared to others in the same or similar line of business," § 124.106(b)(1). The question whether any of the ways in which the Government uses subcontractor compensation clauses can survive strict scrutiny, and any relevance distinctions such as these may have to that question,should ***239** be addressed in the first instance by the lower courts.

Accordingly, the judgment of the Court of Appeals is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice SCALIA, concurring in part and concurring in the judgment.

I join the opinion of the Court, except Part III–C, and except insofar as it may be inconsistent with the following: In my view, government can never have a "compelling interest" in discriminating on the basis of race in order to "make up" for past racial discrimination in the opposite direction. See *Richmond v. J.A. Croson Co.,* 488 U.S. 469, 520, 109 S.Ct. 706, 735–736, 102 L.Ed.2d 854 (1989) (SCALIA, J., concurring in judgment). Individuals who have been wronged by unlawful racial discrimination should be made whole; but under our Constitution there can be no such thing as either a creditor or a debtor race. That concept is alien to the Constitution's focus upon the individual, see Amdt. 14, § 1 ("[N]or shall any State ... deny *to any person*" the equal protection of the laws) (emphasis added), and its rejection of dispositions based on race, see Amdt. 15, § 1 (prohibiting abridgment of the right to vote "on account of race"), or based on blood, see Art. III, § 3 ("[N]o Attainder of Treason ****2119** shall work Corruption of Blood"); Art. I, § 9, cl. 8 ("No Title of Nobility shall be granted by the United States"). To pursue the concept of racial entitlement—even for the most admirable and benign of purposes—is to reinforce and preserve for future mischief the way of thinking that produced race slavery, race privilege and race hatred. In the eyes of government, we are just one race here. It is American.

It is unlikely, if not impossible, that the challenged program would survive under this understanding of strict scrutiny, but I am content to leave that to be decided on remand.

***240** Justice THOMAS, concurring in part and concurring in the judgment.

I agree with the majority's conclusion that strict scrutiny applies to *all* government classifications based on race. I write separately, however, to express my disagreement with the premise underlying Justice STEVENS' and Justice GINSBURG's dissents: that there is a racial paternalism exception to the principle of equal protection. I believe that there is a "moral [and] constitutional equivalence," *post,* at 2120 (STEVENS, J., dissenting), between laws designed to subjugate a race and those that distribute benefits on the basis of race in order to foster some current notion of equality. Government cannot make us equal; it can only recognize, respect, and protect us as equal before the law.

That these programs may have been motivated, in part, by good intentions cannot provide refuge from the principle that under our Constitution, the government may not make distinctions on the basis of race. As far as the Constitution is concerned, it is irrelevant whether a government's racial classifications are drawn by those who wish to oppress a race or by

those who have a sincere desire to help those thought to be disadvantaged. There can be no doubt that the paternalism that appears to lie at the heart of this program is at war with the principle of inherent equality that underlies and infuses our Constitution. See Declaration of Independence ("We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness").

These programs not only raise grave constitutional questions, they also undermine the moral basis of the equal protection principle. Purchased at the price of immeasurable human suffering, the equal protection principle reflects our Nation's understanding that such classifications ultimately have a destructive impact on the individual and our society. Unquestionably, "[i]nvidious [racial] discrimination is an engine ***241** of oppression," *post,* at 2120 (STEVENS, J., dissenting). It is also true that "[r]emedial" racial preferences may reflect "a desire to foster equality in society," *ibid.* But there can be no doubt that racial paternalism and its unintended consequences can be as poisonous and pernicious as any other form of discrimination. So-called "benign" discrimination teaches many that because of chronic and apparently immutable handicaps, minorities cannot compete with them without their patronizing indulgence. Inevitably, such programs engender attitudes of superiority or, alternatively, provoke resentment among those who believe that they have been wronged by the government's use of race. These programs stamp minorities with a badge of inferiority and may cause them to develop dependencies or to adopt an attitude that they are "entitled" to preferences. Indeed, Justice STEVENS once recognized the real harms stemming from seemingly "benign" discrimination. See *Fullilove v. Klutznick,* 448 U.S. 448, 545, 100 S.Ct. 2758, 2809, 65 L.Ed.2d 902 (1980) (STEVENS, J., dissenting) (noting that "remedial" race legislation "is perceived by many as resting on an assumption that those who are granted this special preference are less qualified in some respect that is identified purely by their race").

In my mind, government-sponsored racial discrimination based on benign prejudice is just as noxious as discrimination inspired by malicious prejudice.* In each instance, it is racial discrimination, plain and simple.

****2120 *242** Justice STEVENS, with whom Justice GINSBURG joins, dissenting.

Instead of deciding this case in accordance with controlling precedent, the Court today delivers a disconcerting lecture about the evils of governmental racial classifications. For its text the Court has selected three propositions, represented by the bywords "skepticism," "consistency," and "congruence." See *ante,* at 2110–2111. I shall comment on each of these propositions, then add a few words about *stare decisis,* and finally explain why I believe this Court has a duty to affirm the judgment of the Court of Appeals.

I

The Court's concept of skepticism is, at least in principle, a good statement of law and of common sense. Undoubtedly, a court should be wary of a governmental decision that relies upon a racial classification. "Because racial characteristics so seldom provide a relevant basis for disparate treatment, and because classifications based on race are potentially so harmful to the entire body politic," a reviewing court must satisfy itself that the reasons for any such classification are "clearly identified and unquestionably legitimate." *Fullilove v. Klutznick,* 448 U.S. 448, 533–535, 100 S.Ct. 2758, 2804, 65 L.Ed.2d 902 (1980) (STEVENS, J., dissenting). This principle is explicit in Chief Justice Burger's opinion, *id.,* at 480, 100 S.Ct., at 2775–2776; in Justice Powell's concurrence, *id.,* at 496, 100 S.Ct., at 2783–2784; and in my dissent in *Fullilove, id.,* at 533–534, 100 S.Ct., at 2803–2804. I welcome its renewed endorsement by the Court today. But, as the opinions in *Fullilove* demonstrate, substantial agreement on the standard to be applied in deciding difficult cases does not necessarily lead to

agreement on how those cases actually should or will be resolved. In my judgment, because uniform standards are often anything but uniform, we should evaluate the Court's comments on "consistency," "congruence," and *stare decisis* with the same type of skepticism that the Court advocates for the underlying issue.

***243** II

The Court's concept of "consistency" assumes that there is no significant difference between a decision by the majority to impose a special burden on the members of a minority race and a decision by the majority to provide a benefit to certain members of that minority notwithstanding its incidental burden on some members of the majority. In my opinion that assumption is untenable. There is no moral or constitutional equivalence between a policy that is designed to perpetuate a caste system and one that seeks to eradicate racial subordination. Invidious discrimination is an engine of oppression, subjugating a disfavored group to enhance or maintain the power of the majority. Remedial race-based preferences reflect the opposite impulse: a desire to foster equality in society. No sensible conception of the Government's constitutional obligation to "govern impartially," *Hampton v. Mow Sun Wong,* 426 U.S. 88, 100, 96 S.Ct. 1895, 1903, 48 L.Ed.2d 495 (1976), should ignore this distinction.[1]

****2121 *244** To illustrate the point, consider our cases addressing the Federal Government's discrimination against Japanese-Americans during World War II, *Hirabayashi v. United States,* 320 U.S. 81, 63 S.Ct. 1375, 87 L.Ed. 1774 (1943), and *Korematsu v. United States,* 323 U.S. 214, 65 S.Ct. 193, 89 L.Ed. 194 (1944). The discrimination at issue in those cases was invidious because the Government imposed special burdens—a curfew and exclusion from certain areas on the West Coast[2]—on the members of a minority class defined by racial and ethnic characteristics. Members of the same racially defined class exhibited exceptional heroism in the service of our country during that war. Now suppose Congress decided to reward that service with a federal program that gave all Japanese–American veterans an extraordinary preference in Government employment. Cf. *Personnel Administrator of Mass. v. Feeney,* 442 U.S. 256, 99 S.Ct. 2282, 60 L.Ed.2d 870 (1979). If Congress had done so, the same racial characteristics that motivated the discriminatory burdens in *Hirabayashi* and *Korematsu* would have defined the preferred class of veterans. Nevertheless, "consistency" surely would not require us to describe the incidental burden on everyone else in the country as "odious" or "invidious" as those terms were used in those cases. We should reject a concept of "consistency" that would view the special preferences that the National Government has provided to Native Americans since 1834[3] ***245** as comparable to the official discrimination against African-Americans that was prevalent for much of our history.

The consistency that the Court espouses would disregard the difference between a "No Trespassing" sign and a welcome mat. It would treat a Dixiecrat Senator's decision to vote against Thurgood Marshall's confirmation in order to keep African-Americans off the Supreme Court as on a par with President Johnson's evaluation of his nominee's race as a positive factor. It would equate a law that made black citizens ineligible for military service with a program aimed at recruiting black soldiers. An attempt by the majority to exclude members of a minority race from a regulated market is fundamentally different from a subsidy that enables a relatively small group of newcomers to enter that market. An interest in "consistency" does not justify treating differences as though they were similarities.

The Court's explanation for treating dissimilar race-based decisions as though they were equally objectionable is a supposed inability to differentiate between "invidious" and "benign" discrimination. *Ante,* at 2111–2112. But the term "affirmative action" is common and well understood. Its presence in everyday parlance shows that people understand the difference between good intentions and bad. As with any legal concept, some cases ****2122** may be difficult to classify,[4] but our equal protection jurisprudence has identified a critical difference between state action that imposes burdens on a ***246** disfavored few and state action that benefits the few "in spite of" its adverse effects on the many. *Feeney,* 442 U.S., at 279, 99 S.Ct., at 2296.

Indeed, our jurisprudence has made the standard to be applied in cases of invidious discrimination turn on whether the discrimination is "intentional," or whether, by contrast, it merely has a discriminatory "effect." *Washington v. Davis,* 426

U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976). Surely this distinction is at least as subtle, and at least as difficult to apply, see *id.,* at 253–254, 96 S.Ct., at 2054 (concurring opinion), as the usually obvious distinction between a measure intended to benefit members of a particular minority race and a measure intended to burden a minority race. A state actor inclined to subvert the Constitution might easily hide bad intentions in the guise of unintended "effects"; but I should think it far more difficult to enact a law intending to preserve the majority's hegemony while casting it plausibly in the guise of affirmative action for minorities.

Nothing is inherently wrong with applying a single standard to fundamentally different situations, as long as that standard takes relevant differences into account. For example, if the Court in all equal protection cases were to insist that differential treatment be justified by relevant characteristics of the members of the favored and disfavored classes that provide a legitimate basis for disparate treatment, such a standard would treat dissimilar cases differently while still recognizing that there is, after all, only one Equal Protection Clause. See *Cleburne v. Cleburne Living Center, Inc.,* 473 U.S. 432, 451–455, 105 S.Ct. 3249, 3260–3262, 87 L.Ed.2d 313 (1985) (STEVENS, J., concurring); *San Antonio Independent School Dist. v. Rodriguez,* 411 U.S. 1, 98–110, 93 S.Ct. 1278, 1329–1336, 36 L.Ed.2d 16 (1973) (Marshall, J., dissenting). Under such a standard, subsidies for disadvantaged businesses may be constitutional though special taxes on such businesses would be invalid. But a single standard that purports to equate remedial preferences with invidious discrimination cannot be defended in the name of "equal protection."

***247** Moreover, the Court may find that its new "consistency" approach to race-based classifications is difficult to square with its insistence upon rigidly separate categories for discrimination against different classes of individuals. For example, as the law currently stands, the Court will apply "intermediate scrutiny" to cases of invidious gender discrimination and "strict scrutiny" to cases of invidious race discrimination, while applying the same standard for benign classifications as for invidious ones. If this remains the law, then today's lecture about "consistency" will produce the anomalous result that the Government can more easily enact affirmative-action programs to remedy discrimination against women than it can enact affirmative-action programs to remedy discrimination against African-Americans—even though the primary purpose of the Equal Protection Clause was to end discrimination against the former slaves. See *Associated General Contractors of Cal., Inc. v. San Francisco,* 813 F.2d 922 (CA9 1987) (striking down racial preference under strict scrutiny while upholding gender preference under intermediate scrutiny). When a court becomes preoccupied with abstract standards, it risks sacrificing common sense at the altar of formal consistency.

As a matter of constitutional and democratic principle, a decision by representatives of the majority to discriminate against the members of a minority race is fundamentally different from those same representatives' decision to impose incidental costs on the majority of their constituents in order to provide a benefit to a disadvantaged minority.[5] Indeed, ***248** as I have previously argued, the former is virtually always repugnant to ****2123** the principles of a free and democratic society, whereas the latter is, in some circumstances, entirely consistent with the ideal of equality. *Wygant v. Jackson Bd. of Ed.,* 476 U.S. 267, 316–317, 106 S.Ct. 1842, 1869–70, 90 L.Ed.2d 260 (1986) (STEVENS, J., dissenting).[6] ***249** By insisting on a doctrinaire notion of "consistency" in the standard applicable to all race-based governmental actions, the Court obscures this essential dichotomy.

III

The Court's concept of "congruence" assumes that there is no significant difference between a decision by the Congress of the United States to adopt an affirmative-action program and such a decision by a State or a municipality. In my opinion that assumption is untenable. It ignores important practical and legal differences between federal and state or local decisionmakers.

These differences have been identified repeatedly and consistently both in opinions of the Court and in separate opinions authored by Members of today's majority. Thus, in *Metro Broadcasting, Inc. v. FCC,* 497 U.S. 547, 110 S.Ct. 2997, 111 L.Ed.2d 445 (1990), in which we upheld a federal program designed ****2124** to foster racial diversity in broadcasting, we

identified the special "institutional ***250** competence" of our National Legislature. *Id.,* at 563, 110 S.Ct., at 3008. "It is of overriding significance in these cases," we were careful to emphasize, "that the FCC's minority ownership programs have been specifically approved—indeed, mandated—by Congress." *Ibid.* We recalled the several opinions in *Fullilove* that admonished this Court to " 'approach our task with appropriate deference to the Congress, a co-equal branch charged by the Constitution with the power to "provide for the ... general Welfare of the United States" and "to enforce, by appropriate legislation," the equal protection guarantees of the Fourteenth Amendment.' [*Fullilove,* 448 U.S.], at 472 [100 S.Ct., at 2771]; see also *id.,* at 491 [100 S.Ct., at 2781]; *id.,* at 510, and 515–516, n. 14 [100 S.Ct., at 2791, 2794, n. 14] (Powell, J., concurring); *id.,* at 517–520 [100 S.Ct., at 2794–2796] (MARSHALL, J., concurring in judgment)." 497 U.S., at 563, 110 S.Ct., at 3008. We recalled that the opinions of Chief Justice Burger and Justice Powell in *Fullilove* had "explained that deference was appropriate in light of Congress' institutional competence as the National Legislature, as well as Congress' powers under the Commerce Clause, the Spending Clause, and the Civil War Amendments." 497 U.S., at 563, 110 S.Ct., at 3008 (citations and footnote omitted).

The majority in *Metro Broadcasting* and the plurality in *Fullilove* were not alone in relying upon a critical distinction between federal and state programs. In his separate opinion in *Richmond v. J.A. Croson Co.,* 488 U.S. 469, 520–524, 109 S.Ct. 706, 735–738, 102 L.Ed.2d 854 (1989), Justice SCALIA discussed the basis for this distinction. He observed that "it is one thing to permit racially based conduct by the Federal Government—whose legislative powers concerning matters of race were explicitly enhanced by the Fourteenth Amendment, see U.S. Const., Amdt. 14, § 5—and quite another to permit it by the precise entities against whose conduct in matters of race that Amendment was specifically directed, see Amdt. 14, § 1." *Id.,* at 521–522, 109 S.Ct., at 736. Continuing, Justice SCALIA explained why a "sound distinction between federal and state (or local) action based on race rests not only upon the substance of the ***251** Civil War Amendments, but upon social reality and governmental theory." *Id.,* at 522, 109 S.Ct., at 737.

> "What the record shows, in other words, is that racial discrimination against any group finds a more ready expression at the state and local than at the federal level. To the children of the Founding Fathers, this should come as no surprise. An acute awareness of the heightened danger of oppression from political factions in small, rather than large, political units dates to the very beginning of our national history. See G. Wood, The Creation of the American Republic, 1776–1787, pp. 499–506 (1969). As James Madison observed in support of the proposed Constitution's enhancement of national powers:
>
> " 'The smaller the society, the fewer probably will be the distinct parties and interests composing it; the fewer the distinct parties and interests, the more frequently will a majority be found of the same party; and the smaller the number of individuals composing a majority, and the smaller the compass within which they are placed, the more easily will they concert and execute their plan of oppression. Extend the sphere and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength and to act in unison with each other.' The Federalist No. 10, pp. 82–84 (C. Rossiter ed. 1961)." *Id.,* at 523 (opinion concurring in judgment).

In her plurality opinion in *Croson,* Justice O'CONNOR also emphasized the importance of this distinction when she responded to the city's argument that *Fullilove* was controlling. She wrote:

> ***252** "What appellant ignores is that Congress, unlike any State or political subdivision, has a specific constitutional mandate to enforce the dictates of the Fourteenth Amendment. The power to 'enforce' may at times also include the power to define ****2125** situations which *Congress* determines threaten principles of equality and to adopt prophylactic rules to deal with those situations. The Civil War Amendments themselves worked a dramatic change in the balance between congressional and state power over matters of race." 488 U.S., at 490, 109 S.Ct., at 720 (joined by REHNQUIST, C.J., and White, J.) (citations omitted).

An additional reason for giving greater deference to the National Legislature than to a local lawmaking body is that federal affirmative-action programs represent the will of our entire Nation's elected representatives, whereas a state or local program may have an impact on nonresident entities who played no part in the decision to enact it. Thus, in the state or local context, individuals who were unable to vote for the local representatives who enacted a race-conscious program may nonetheless feel the effects of that program. This difference recalls the goals of the Commerce Clause, U.S. Const., Art. I, § 8, cl. 3, which permits Congress to legislate on certain matters of national importance while denying power to the States in this area for fear of undue impact upon out-of-state residents. See *Southern Pacific Co. v. Arizona ex rel. Sullivan,* 325 U.S. 761, 767–768, n.

2, 65 S.Ct. 1515, 1519–1520, n. 2, 89 L.Ed. 1915 (1945) ("[T]o the extent that the burden of state regulation falls on interests outside the state, it is unlikely to be alleviated by the operation of those political restraints normally exerted when interests within the state are affected").

Ironically, after all of the time, effort, and paper this Court has expended in differentiating between federal and state affirmative action, the majority today virtually ignores the issue. See *ante,* at 2114–2115. It provides not a word of direct explanation for its sudden and enormous departure from ***253** the reasoning in past cases. Such silence, however, cannot erase the difference between Congress' institutional competence and constitutional authority to overcome historic racial subjugation and the States' lesser power to do so.

Presumably, the majority is now satisfied that its theory of "congruence" between the substantive rights provided by the Fifth and Fourteenth Amendments disposes of the objection based upon divided constitutional powers. But it is one thing to say (as no one seems to dispute) that the Fifth Amendment encompasses a general guarantee of equal protection as broad as that contained within the Fourteenth Amendment. It is another thing entirely to say that Congress' institutional competence and constitutional authority entitles it to no greater deference when it enacts a program designed to foster equality than the deference due a state legislature.[7] The latter is an extraordinary proposition; and, as the foregoing discussion demonstrates, our precedents have rejected it explicitly and repeatedly.[8]

****2126 *254** Our opinion in *Metro Broadcasting* relied on several constitutional provisions to justify the greater deference we owe to Congress when it acts with respect to private individuals. 497 U.S., at 563, 110 S.Ct., at 3008. In the programs challenged in this case, Congress has acted both with respect to private individuals and, as in *Fullilove,* with respect to the States themselves.[9] When Congress does this, it draws its power directly from § 5 of the Fourteenth Amendment.[10] That section reads: ***255** "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." One of the "provisions of this article" that Congress is thus empowered to enforce reads: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const., Amdt. 14, § 1. The Fourteenth Amendment directly empowers Congress at the same time it expressly limits the States.[11] This is no accident. It represents our Nation's consensus, achieved after hard experience throughout our sorry history of race relations, that the Federal Government must be the primary defender of racial minorities against the States, some of which may be inclined to oppress such minorities. A rule of "congruence" that ignores a purposeful "incongruity" so fundamental to our system of government is unacceptable.

In my judgment, the Court's novel doctrine of "congruence" is seriously misguided. Congressional deliberations about a matter as important as affirmative action should be accorded far greater deference than those of a State or municipality.

IV

The Court's concept of *stare decisis* treats some of the language we have used in explaining our decisions as though it ***256** were more important than our actual holdings. In my opinion that treatment is incorrect.

This is the third time in the Court's entire history that it has considered the constitutionality of a federal affirmative-action program. On each of the two prior occasions, the first in 1980, *Fullilove v. Klutznick,* 448 U.S. 448, 100 S.Ct. 2758, 65 L.Ed.2d 902 and the second in 1990, ****2127** *Metro Broadcasting, Inc. v. FCC,* 497 U.S. 547, 110 S.Ct. 2997, 111 L.Ed.2d 445, the Court upheld the program. Today the Court explicitly overrules *Metro Broadcasting* (at least in part), *ante,* at 2112–2113, and undermines *Fullilove* by recasting the standard on which it rested and by calling even its holding into question, *ante,* at 2116–2117. By way of explanation, Justice O'CONNOR advises the federal agencies and private parties that have made countless decisions in reliance on those cases that "we do not depart from the fabric of the law; we restore it." *Ante,* at 2116. A skeptical observer might ask whether this pronouncement is a faithful application of the doctrine of *stare decisis.*[12] A brief comment on each of the two ailing cases may provide the answer.

In the Court's view, our decision in *Metro Broadcasting* was inconsistent with the rule announced in *Richmond v. J.A. Croson Co.,* 488 U.S. 469, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989). *Ante,* at 2111–2112. But two decisive distinctions separate those two cases. First, *Metro Broadcasting* involved a federal program, whereas *Croson* involved a city ordinance. *Metro Broadcasting* thus drew primary support from *Fullilove,* which predated *Croson* and which *Croson* distinguished on the grounds of the federal-state dichotomy that the majority today discredits. Although Members of today's majority trumpeted the importance of that distinction in *Croson,* they now reject it in the name of "congruence." It is therefore ***257** quite wrong for the Court to suggest today that overruling *Metro Broadcasting* merely restores the *status quo ante,* for the law at the time of that decision was entirely open to the result the Court reached. *Today's* decision is an unjustified departure from settled law.

Second, *Metro Broadcasting* 's holding rested on more than its application of "intermediate scrutiny." Indeed, I have always believed that, labels notwithstanding, the Federal Communications Commission (FCC) program we upheld in that case would have satisfied any of our various standards in affirmative-action cases—including the one the majority fashions today. What truly distinguishes *Metro Broadcasting* from our other affirmative-action precedents is the distinctive goal of the federal program in that case. Instead of merely seeking to remedy past discrimination, the FCC program was intended to achieve future benefits in the form of broadcast diversity. Reliance on race as a legitimate means of achieving diversity was first endorsed by Justice Powell in *Regents of Univ. of Cal. v. Bakke,* 438 U.S. 265, 311–319, 98 S.Ct. 2733, 2759–2763, 57 L.Ed.2d 750 (1978). Later, in *Wygant v. Jackson Bd. of Ed.,* 476 U.S. 267, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986), I also argued that race is not always irrelevant to governmental decisionmaking, see *id.,* at 314–315, 98 S.Ct., at 2760–61 (STEVENS, J., dissenting); in response, Justice O'CONNOR correctly noted that, although the school board had relied on an interest in providing black teachers to serve as role models for black students, that interest "should not be confused with the very different goal of promoting racial diversity among the faculty." *Id.,* at 288, n., 106 S.Ct., at 1854, n. She then added that, because the school board had not relied on an interest in diversity, it was not "necessary to discuss the magnitude of that interest or its applicability in this case." *Ibid.*

Thus, prior to *Metro Broadcasting,* the interest in diversity had been mentioned in a few opinions, but it is perfectly clear that the Court had not yet decided whether that interest had sufficient magnitude to justify a racial classification. *Metro Broadcasting,* of course, answered that question in the ***258** affirmative. The majority today overrules *Metro Broadcasting* only insofar as it is "inconsistent with [the] holding" that strict scrutiny applies to "benign" racial classifications promulgated by the Federal Government. *Ante,* at 2112. The proposition that fostering diversity may provide a sufficient interest to justify such a program is *not* inconsistent with the Court's holding today—indeed, the question is not remotely presented in this case—and I do not take the Court's ****2128** opinion to diminish that aspect of our decision in *Metro Broadcasting.*

The Court's suggestion that it may be necessary in the future to overrule *Fullilove* in order to restore the fabric of the law, *ante,* at 2117, is even more disingenuous than its treatment of *Metro Broadcasting.* For the Court endorses the "strict scrutiny" standard that Justice Powell applied in *Bakke,* see *ante,* at 2111, and acknowledges that he applied that standard in *Fullilove* as well, *ante,* at 2108–2109. Moreover, Chief Justice Burger also expressly concluded that the program we considered in *Fullilove* was valid under any of the tests articulated in *Bakke,* which of course included Justice Powell's. 448 U.S., at 492, 100 S.Ct., at 2781–82. The Court thus adopts a standard applied in *Fullilove* at the same time it questions that case's continued vitality and accuses it of departing from prior law. I continue to believe that the *Fullilove* case was incorrectly decided, see *id.,* at 532–554, 100 S.Ct., at 2802–2814 (STEVENS, J., dissenting), but neither my dissent nor that filed by Justice Stewart, *id.,* at 522–532, 100 S.Ct., at 2797–2803, contained any suggestion that the issue the Court was resolving had been decided before.[13] As was true ***259** of *Metro Broadcasting,* the Court in *Fullilove* decided an important, novel, and difficult question. Providing a different answer to a similar question today cannot fairly be characterized as merely "restoring" previously settled law.

V

The Court's holding in *Fullilove* surely governs the result in this case. The Public Works Employment Act of 1977 (1977 Act), 91 Stat. 116, which this Court upheld in *Fullilove,* is different in several critical respects from the portions of the Small Business Act (SBA), 72 Stat. 384, as amended, 15 U.S.C. § 631 *et seq.,* STURAA, 101 Stat. 132, challenged in this case. Each of those differences makes the current program designed to provide assistance to DBE's significantly less objectionable than the 1977 categorical grant of $400 million in exchange for a 10% set-aside in public contracts to "a class of investors defined solely by racial characteristics." *Fullilove,* 448 U.S., at 532, 100 S.Ct., at 2803 (STEVENS, J., dissenting). In no meaningful respect is the current scheme more objectionable than the 1977 Act. Thus, if the 1977 Act was constitutional, then so must be the SBA and STURAA. Indeed, even if my dissenting views in *Fullilove* had prevailed, this program would be valid.

Unlike the 1977 Act, the present statutory scheme does not make race the sole criterion of eligibility for participation in the program. Race does give rise to a rebuttable presumption of social disadvantage which, at least under STURAA,[14] gives rise to a second rebuttable presumption ***260** of economic disadvantage. 49 CFR § 23.62 (1994). But a small business may qualify as a DBE, by showing that it is both socially and economically disadvantaged, even if it receives neither of these presumptions. 13 CFR §§ 124.105(c), 124.106 (1995); 48 CFR § 19.703 (1994); 49 CFR pt. 23, subpt. D., Apps. A and C (1994). Thus, the current ****2129** preference is more inclusive than the 1977 Act because it does not make race a necessary qualification.

More importantly, race is not a sufficient qualification. Whereas a millionaire with a long history of financial successes, who was a member of numerous social clubs and trade associations, would have qualified for a preference under the 1977 Act merely because he was an Asian-American or an African-American, see *Fullilove,* 448 U.S., at 537–538, 540, 543–544, and n. 16, 546, 100 S.Ct., at 2805–2806, 2806–2807, 2808–2809, and n. 16, 2809–2810 (STEVENS, J., dissenting), neither the SBA nor STURAA creates any such anomaly. The DBE program excludes members of minority races who are not, in fact, socially or economically disadvantaged.[15] 13 CFR § 124.106(a)(1)(ii) (1995); 49 CFR § 23.69 (1994). The presumption of social disadvantage reflects the unfortunate fact that irrational racial prejudice—along with its lingering effects—still survives.[16] The presumption of economic disadvantage ***261** embodies a recognition that success in the private sector of the economy is often attributable, in part, to social skills and relationships. Unlike the 1977 set-asides, the current preference is designed to overcome the social and economic disadvantages that are often associated with racial characteristics. If, in a particular case, these disadvantages are not present, the presumptions can be rebutted. 13 CFR §§ 124.601–124.610 (1995); 49 CFR § 23.69 (1994). The program is thus designed to allow race to play a part in the decisional process only when there is a meaningful basis for assuming its relevance. In this connection, I think it is particularly significant that the current program targets the negotiation of subcontracts between private firms. The 1977 Act applied entirely to the award of public contracts, an area of the economy in which social relationships should be irrelevant and in which proper supervision of government contracting officers should preclude any discrimination against particular bidders on account of their race. In this case, in contrast, the program seeks to overcome barriers of prejudice between private parties—specifically, between general contractors and subcontractors. The SBA and STURAA embody Congress' recognition that such barriers may actually handicap minority firms seeking business as subcontractors from established leaders in the industry that have a history of doing business with their golfing partners. Indeed, minority subcontractors may face more obstacles than direct, intentional racial prejudice: They may face particular barriers simply because they are more likely to be new in the business and less likely to know others in the business. Given such difficulties, Congress could reasonably find that a minority subcontractor is less likely to receive favors from the entrenched businesspersons who award subcontracts only to people with whom—or with whose friends—they have an existing relationship. This program, then, if in part a remedy for past discrimination, is most importantly a ***262** forward-looking response to practical problems faced by minority subcontractors.

The current program contains another forward-looking component that the 1977 set-asides did not share. Section 8(a) of the SBA provides for periodic review of the status of DBE's, 15 U.S.C. §§ 637(a)(1)(B)–(C) (1988 ed., Supp. V); 13 CFR § 124.602(a) (1995),[17] and DBE status can be challenged ****2130** by a competitor at any time under any of the routes to certification. 13 CFR § 124.603 (1995); 49 CFR § 23.69 (1994). Such review prevents ineligible firms from taking part in the program solely because of their minority ownership, even when those firms were once disadvantaged but have since become successful. The emphasis on review also indicates the Administration's anticipation that after their presumed disadvantages have been overcome, firms will "graduate" into a status in which they will be able to compete for business, including prime contracts, on an equal basis. 13 CFR § 124.208 (1995). As with other phases of the statutory policy of encouraging the formation and growth of small business enterprises, this program is intended to facilitate entry and increase competition in the free market.

Significantly, the current program, unlike the 1977 set-aside, does not establish any requirement—numerical or otherwise—that a general contractor must hire DBE subcontractors. The program we upheld in *Fullilove* required that 10% of the federal grant for every federally funded project be expended on minority business enterprises. In contrast, the current program contains no quota. Although it provides monetary incentives to general contractors to hire DBE subcontractors, it does not require them to hire DBE's, ***263** and they do not lose their contracts if they fail to do so. The importance of this incentive to general contractors (who always seek to offer the lowest bid) should not be underestimated; but the preference here is far less rigid, and thus more narrowly tailored, than the 1977 Act. Cf. *Bakke,* 438 U.S., at 319–320, 98 S.Ct., at 2763–2764 (opinion of Powell, J.) (distinguishing between numerical set-asides and consideration of race as a factor).

Finally, the record shows a dramatic contrast between the sparse deliberations that preceded the 1977 Act, see *Fullilove,* 448 U.S., at 549–550, 100 S.Ct., at 2811–2812 (STEVENS, J., dissenting), and the extensive hearings conducted in several Congresses before the current program was developed.[18] However we might ***264** evaluate the benefits and costs—both fiscal and social—of this or any other affirmative-action program, our obligation to give deference to Congress' policy choices is much more demanding in this case than it was in *Fullilove.* If the 1977 program of race-based set-asides satisfied the strict scrutiny dictated by Justice Powell's vision of the Constitution—a vision the Court expressly endorses today—it must follow as night follows the day that the Court of Appeals' judgment upholding this more carefully crafted program should be affirmed.

****2131** VI

My skeptical scrutiny of the Court's opinion leaves me in dissent. The majority's concept of "consistency" ignores a difference, fundamental to the idea of equal protection, between oppression and assistance. The majority's concept of "congruence" ignores a difference, fundamental to our constitutional system, between the Federal Government and the States. And the majority's concept of *stare decisis* ignores the force of binding precedent. I would affirm the judgment of the Court of Appeals.

Justice SOUTER, with whom Justice GINSBURG and Justice BREYER join, dissenting.

As this case worked its way through the federal courts prior to the grant of certiorari that brought it here, petitioner Adarand Constructors, Inc., was understood to have raised only one significant claim: that before a federal agency may exceed the goals adopted by Congress in implementing a race-based remedial program, the Fifth and Fourteenth Amendments require the agency to make specific findings of ***265** discrimination, as under *Richmond v. J.A. Croson Co.,* 488 U.S. 469, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989), sufficient to justify surpassing the congressional objective. See 16 F.3d 1537, 1544 (CA10 1994) ("The gravamen of Adarand's argument is that the CFLHD must make particularized findings of past discrimination to justify its race-conscious SCC program under *Croson* because the precise goals of the challenged SCC program were fashioned and specified by an agency and not by Congress"); *Adarand Constructors, Inc. v. Skinner,* 790 F.Supp. 240, 242 (Colo.1992) ("Plaintiff's motion for summary judgment seeks a declaratory judgment and permanent injunction against the DOT, the FHA and the CFLHD until specific findings of discrimination are made by the defendants as allegedly required by *City of Richmond v. Croson* "); cf. Complaint ¶ 28, App. 20 (federal regulations violate the Fourteenth and Fifteenth Amendments by requiring "the use of racial and gender preferences in the award of federally financed highway construction contracts, without any findings of past discrimination in the award of such contracts").

Although the petition for certiorari added an antecedent question challenging the use, under the Fifth and Fourteenth Amendments, of any standard below strict scrutiny to judge the constitutionality of the statutes under which respondents acted, I would not have entertained that question in this case. The statutory scheme must be treated as constitutional if *Fullilove v. Klutznick,* 448 U.S. 448, 100 S.Ct. 2758, 65 L.Ed.2d 902 (1980), is applied, and petitioner did not identify any of

the factual premises on which *Fullilove* rested as having disappeared since that case was decided.

As the Court's opinion explains in detail, the scheme in question provides financial incentives to general contractors to hire subcontractors who have been certified as disadvantaged business enterprises (DBE's) on the basis of certain race-based presumptions. See generally *ante,* at 2102–2103. These statutes (or the originals, of which the current ones are reenactments) have previously been justified as providing ***266** remedies for the continuing effects of past discrimination, see, *e.g., Fullilove, supra,* at 465–466, 100 S.Ct., at 2768 (citing legislative history describing SBA § 8(a) as remedial); S.Rep. No. 100–4, p. 11 (1987) U.S.Code Cong. & Admin.News 1987, pp. 66, 76 (Committee Report stating that the DBE provision of STURAA was "necessary to remedy the discrimination faced by socially and economically disadvantaged persons"), and the Government has so defended them in this case, Brief for Respondents 33. Since petitioner has not claimed the obsolescence of any particular fact on which the *Fullilove* Court upheld the statute, no issue has come up to us that might be resolved in a way that would render *Fullilove* inapposite. See, *e.g.,* 16 F.3d, at 1544 ("Adarand has stipulated that section 502 of the Small Business Act ... satisfies the evidentiary requirements of *Fullilove* "); Memorandum of Points and Authorities in Support of Plaintiff's Motion for Summary Judgment in No. 90–C–1413 (D.Colo.), p. 12 (*Fullilove* is not applicable to the case at bar because "[f]irst and foremost, *Fullilove* stands for only one proposition relevant ****2132** here: the ability of the U.S. Congress, under certain limited circumstances, to adopt a race-base[d] remedy").

In these circumstances, I agree with Justice STEVENS's conclusion that *stare decisis* compels the application of *Fullilove.* Although *Fullilove* did not reflect doctrinal consistency, its several opinions produced a result on shared grounds that petitioner does not attack: that discrimination in the construction industry had been subject to government acquiescence, with effects that remain and that may be addressed by some preferential treatment falling within the congressional power under § 5 of the Fourteenth Amendment.[1] *Fullilove,* 448 U.S., at 477–478, 100 S.Ct., at 2774–2775 (opinion of Burger, ***267** C.J.); *id.,* at 503, 100 S.Ct., at 2787 (Powell, J., concurring); *id.,* at 520–521, 100 S.Ct., at 2796–2797 (Marshall, J., concurring in judgment). Once *Fullilove* is applied, as Justice STEVENS points out, it follows that the statutes in question here (which are substantially better tailored to the harm being remedied than the statute endorsed in *Fullilove,* see *ante,* at 2128–2130 (STEVENS, J., dissenting)) pass muster under Fifth Amendment due process and Fourteenth Amendment equal protection.

The Court today, however, does not reach the application of *Fullilove* to the facts of this case, and on remand it will be incumbent on the Government and petitioner to address anew the facts upon which statutes like these must be judged on the Government's remedial theory of justification: facts about the current effects of past discrimination, the necessity for a preferential remedy, and the suitability of this particular preferential scheme. Petitioner could, of course, have raised all of these issues under the standard employed by the *Fullilove* plurality, and without now trying to read the current congressional evidentiary record that may bear on resolving these issues I have to recognize the possibility that proof of changed facts might have rendered *Fullilove* 's conclusion obsolete as judged under the *Fullilove* plurality's own standard. Be that as it may, it seems fair to ask whether the statutes will meet a different fate from what *Fullilove* would have decreed. The answer is, quite probably not, though of course there will be some interpretive forks in the road before the significance of strict scrutiny for congressional remedial statutes becomes entirely clear.

The result in *Fullilove* was controlled by the plurality for whom Chief Justice Burger spoke in announcing the judgment. Although his opinion did not adopt any label for the standard it applied, and although it was later seen as calling for less than strict scrutiny, *Metro Broadcasting, Inc. v.* ***268** *FCC,* 497 U.S. 547, 564, 110 S.Ct. 2997, 3008, 111 L.Ed.2d 445 (1990), none other than Justice Powell joined the plurality opinion as comporting with his own view that a strict scrutiny standard should be applied to all injurious race-based classifications. *Fullilove, supra,* at 495–496, 100 S.Ct., at 2783 (concurring opinion) ("Although I would place greater emphasis than THE CHIEF JUSTICE on the need to articulate judicial standards of review in conventional terms, I view his opinion announcing the judgment as substantially in accord with my views"). Chief Justice Burger's noncategorical approach is probably best seen not as more lenient than strict scrutiny but as reflecting his conviction that the treble-tiered scrutiny structure merely embroidered on a single standard of reasonableness whenever an equal protection challenge required a balancing of justification against probable harm. See *Cleburne v. Cleburne Living Center, Inc.,* 473 U.S. 432, 451, 105 S.Ct. 3249, 3260, 87 L.Ed.2d 313 (1985) (STEVENS, J., concurring, joined by Burger, C.J.). Indeed, the Court's very recognition today that strict scrutiny can be compatible with the survival of a classification so reviewed demonstrates that our concepts of equal protection enjoy a greater elasticity than the standard categories might suggest. See *ante,* at 2117 ("[W]e wish to dispel the notion that strict scrutiny is 'strict in theory, ****2133** but fatal in fact.' *Fullilove, supra,* at 519 [100 S.Ct., at 2795–2796] (Marshall, J., concurring in judgment)"); see also *Missouri v. Jenkins,* 515 U.S., at 112, 115 S.Ct., at 2061 (O'CONNOR, J., concurring) ("But it is not true that strict scrutiny is 'strict in theory, but fatal in fact' ").

In assessing the degree to which today's holding portends a departure from past practice, it is also worth noting that nothing in today's opinion implies any view of Congress's § 5 power and the deference due its exercise that differs from the views expressed by the *Fullilove* plurality. The Court simply notes the observation in *Croson* "that the Court's 'treatment of an exercise of congressional power in *Fullilove* cannot be dispositive here,' because *Croson* 's facts did not implicate Congress's broad power under § 5 of the Fourteenth Amendment," *ante,* at 2110, and explains that there is disagreement ***269** among today's majority about the extent of the § 5 power, *ante,* at 2114–2115. There is therefore no reason to treat the opinion as affecting one way or another the views of § 5 power, described as "broad," *ante,* at 2110, "unique," *Fullilove,* 448 U.S., at 500, 100 S.Ct., at 2786 (Powell, J., concurring), and "unlike [that of] any state or political subdivision," *Croson,* 488 U.S., at 490, 109 S.Ct., at 720 (opinion of O'CONNOR, J.). See also *Jenkins, post,* at 113, 115 S.Ct., at 2061 (O'CONNOR, J., concurring) ("Congress ... enjoys ' "discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment," ' *Croson,* 488 U.S., at 490, 109 S.Ct., at 720 (quoting *Katzenbach v. Morgan,* 384 U.S., at 651 [86 S.Ct., at 1723])"). Thus, today's decision should leave § 5 exactly where it is as the source of an interest of the National Government sufficiently important to satisfy the corresponding requirement of the strict scrutiny test.

Finally, I should say that I do not understand that today's decision will necessarily have any effect on the resolution of an issue that was just as pertinent under *Fullilove* 's unlabeled standard as it is under the standard of strict scrutiny now adopted by the Court. The Court has long accepted the view that constitutional authority to remedy past discrimination is not limited to the power to forbid its continuation, but extends to eliminating those effects that would otherwise persist and skew the operation of public systems even in the absence of current intent to practice any discrimination. See *Albemarle Paper Co. v. Moody,* 422 U.S. 405, 418, 95 S.Ct. 2362, 2372, 45 L.Ed.2d 280 (1975) ("Where racial discrimination is concerned, 'the [district] court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future' "), quoting *Louisiana v. United States,* 380 U.S. 145, 154, 85 S.Ct. 817, 822, 13 L.Ed.2d 709 (1965). This is so whether the remedial authority is exercised by a court, see *ibid.; Green v. School Bd. of New Kent Cty.,* 391 U.S. 430, 437, 88 S.Ct. 1689, 1693–1694, 20 L.Ed.2d 716 (1968), the Congress, see *Fullilove, supra,* 448 U.S., at 502, 100 S.Ct., at 2787 (Powell, J., concurring), or some other legislature, see *Croson, supra,* 488 U.S., at 491–492, 109 S.Ct., at 720–721 (opinionof ***270** O'CONNOR, J.). Indeed, a majority of the Court today reiterates that there are circumstances in which Government may, consistently with the Constitution, adopt programs aimed at remedying the effects of past invidious discrimination. See, *e.g., ante,* at 2113–2114, 2117–2118 (opinion of O'CONNOR, J.); *ante,* at 2120 (STEVENS, J., with whom GINSBURG, J., joins, dissenting); *post,* at 2135, 2136 (GINSBURG, J., with whom BREYER, J. joins, dissenting); *Jenkins,* 515 U.S., at 112, 115 S.Ct., at 2061 (O'CONNOR, J., concurring) (noting the critical difference "between unconstitutional discrimination and narrowly tailored remedial programs that legislatures may enact to further the compelling governmental interest in redressing the effects of past discrimination").

When the extirpation of lingering discriminatory effects is thought to require a catch-up mechanism, like the racially preferential inducement under the statutes considered here, the result may be that some members of the historically favored race are hurt by that remedial mechanism, however innocent they may be of any personal responsibility for any discriminatory conduct. When this ****2134** price is considered reasonable, it is in part because it is a price to be paid only temporarily; if the justification for the preference is eliminating the effects of a past practice, the assumption is that the effects will themselves recede into the past, becoming attenuated and finally disappearing. Thus, Justice Powell wrote in his concurring opinion in *Fullilove* that the "temporary nature of this remedy ensures that a race-conscious program will not last longer than the discriminatory effects it is designed to eliminate." 448 U.S., at 513, 100 S.Ct., at 2792–2793; *ante,* at 2117–2118 (opinion of the Court).

Surely the transition from the *Fullilove* plurality view (in which Justice Powell joined) to today's strict scrutiny (which will presumably be applied as Justice Powell employed it) does not signal a change in the standard by which the burden of a remedial racial preference is to be judged as reasonable or not at any given time. If in the District Court Adarand ***271** had chosen to press a challenge to the reasonableness of the burden of these statutes,[2] more than a decade after *Fullilove* had examined such a burden, I doubt that the claim would have fared any differently from the way it will now be treated on remand from this Court.

Justice GINSBURG, with whom Justice BREYER joins, dissenting.

For the reasons stated by Justice SOUTER, and in view of the attention the political branches are currently giving the matter of affirmative action, I see no compelling cause for the intervention the Court has made in this case. I further agree with Justice STEVENS that, in this area, large deference is owed by the Judiciary to "Congress' institutional competence and constitutional authority to overcome historic racial subjugation." *Ante,* at 2125 (STEVENS, J., dissenting); see *ante,* at 2126.[1] I write separately to underscore not the differences the several opinions in this case display, but the considerable field of agreement—the common understandings and concerns—revealed in opinions that together speak for a majority of the Court.

***272** I

The statutes and regulations at issue, as the Court indicates, were adopted by the political branches in response to an "unfortunate reality": "[t]he unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country." *Ante,* at 2117 (lead opinion). The United States suffers from those lingering effects because, for most of our Nation's history, the idea that "we are just one race," *ante,* at 2119 (SCALIA, J., concurring in part and concurring in judgment), was not embraced. For generations, our lawmakers and judges were unprepared to say that there is in this land no superior race, no race inferior to any other. In *Plessy v. Ferguson,* 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256 (1896), not only did this Court endorse the oppressive practice of race segregation, but even Justice Harlan, the advocate of a "color-blind" Constitution, stated:

> "The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage and holds fast to the principles of constitutional ****2135** liberty." *Id.,* at 559, 16 S.Ct., at 1146 (dissenting opinion).

Not until *Loving v. Virginia,* 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967), which held unconstitutional Virginia's ban on interracial marriages, could one say with security that the Constitution and this Court would abide no measure "designed to maintain White Supremacy." *Id.,* at 11, 87 S.Ct., at 1823.[2]

***273** The divisions in this difficult case should not obscure the Court's recognition of the persistence of racial inequality and a majority's acknowledgment of Congress' authority to act affirmatively, not only to end discrimination, but also to counteract discrimination's lingering effects. *Ante,* at 2117 (lead opinion); see also *ante,* at 2133 (SOUTER, J., dissenting). Those effects, reflective of a system of racial caste only recently ended, are evident in our workplaces, markets, and neighborhoods. Job applicants with identical resumés, qualifications, and interview styles still experience different receptions, depending on their race.[3] White and African–American consumers still encounter different deals.[4] People of color looking for housing still face discriminatory treatment by landlords, real estate agents, and mortgage lenders.[5] ***274** Minority entrepreneurs sometimes fail to gain contracts though they are the low bidders, and they are sometimes refused work even after winning contracts.[6] Bias both conscious and unconscious, reflecting traditional and unexamined habits of thought,[7] keeps up barriers that must come down if equal opportunity and nondiscrimination are ever genuinely to become this country's law and practice.

****2136** Given this history and its practical consequences, Congress surely can conclude that a carefully designed affirmative action program may help to realize, finally, the "equal protection of the laws" the Fourteenth Amendment has promised since 1868.[8]

***275** II

The lead opinion uses one term, "strict scrutiny," to describe the standard of judicial review for all governmental classifications by race. *Ante,* at 2117–2118. But that opinion's elaboration strongly suggests that the strict standard announced is indeed "fatal" for classifications burdening groups that have suffered discrimination in our society. That seems to me, and, I believe, to the Court, the enduring lesson one should draw from *Korematsu v. United States,* 323 U.S. 214, 65 S.Ct. 193, 89 L.Ed. 194 (1944); for in that case, scrutiny the Court described as "most rigid," *id.,* at 216, 65 S.Ct., at 194, nonetheless yielded a pass for an odious, gravely injurious racial classification. See *ante,* at 2106 (lead opinion). A *Korematsu*-type classification, as I read the opinions in this case, will never again survive scrutiny: Such a classification, history and precedent instruct, properly ranks as prohibited.

For a classification made to hasten the day when "we are just one race," *ante,* at 2119 (SCALIA, J., concurring in part and concurring in judgment), however, the lead opinion has dispelled the notion that "strict scrutiny" is " 'fatal in fact.' " *Ante,* at 2117 (quoting *Fullilove v. Klutznick,* 448 U.S. 448, 519, 100 S.Ct. 2758, 2795–2796, 65 L.Ed.2d 902 (1980) (Marshall, J., concurring in judgment)). Properly, a majority of the Court calls for review that is searching, in order to ferret out classifications in reality malign, but masquerading as benign. See *ante,* at 2113–2114 (lead opinion). The Court's once lax review of sex-based classifications demonstrates the need for such suspicion. See, *e.g., Hoyt v. Florida,* 368 U.S. 57, 60, 82 S.Ct. 159, 161–162, 7 L.Ed.2d 118 (1961) (upholding women's "privilege" of automatic exemption from jury service); *Goesaert v. Cleary,* 335 U.S. 464, 69 S.Ct. 198, 93 L.Ed. 163 (1948) (upholding Michigan law barring women from employment as bartenders); see also Johnston & Knapp, Sex Discrimination by Law: A Study in Judicial Perspective, 46 N.Y.U.L.Rev. 675 (1971). Today's decision thus usefully reiterates that the purpose of strict scrutiny "is precisely to distinguish legitimate from ***276** illegitimate uses of race in governmental decisionmaking," *ante,* at 2113 (lead opinion), "to 'differentiate between' permissible and impermissible governmental use of race," *ibid.,* to distinguish " 'between a "No Trespassing" sign and a welcome mat,' " *ante,* at 2114.

Close review also is in order for this further reason. As Justice SOUTER points out, *ante,* at 2133–2134 (dissenting opinion), and as this very case shows, some members of the historically favored race can be hurt by catchup mechanisms designed to cope with the lingering effects of entrenched racial subjugation. Court review can ensure that preferences are not so large as to trammel unduly upon the opportunities of others or interfere too harshly with legitimate expectations of persons in once-preferred groups. See, *e.g., Bridgeport Guardians, Inc. v. Bridgeport Civil Service Comm'n,* 482 F.2d 1333, 1341 (CA2 1973).

* * *

While I would not disturb the programs challenged in this case, and would leave their improvement to the political branches, I see today's decision as one that allows our precedent to evolve, still to be informed by and responsive to changing conditions.

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Footnotes

[*] The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

[*] Justices Roberts, Murphy, and Jackson filed vigorous dissents; Justice Murphy argued that the challenged order "falls into the ugly abyss of racism." *Korematsu,* 323 U.S., at 233, 65 S.Ct., at 202. Congress has recently agreed with the dissenters' position, and has attempted to make amends. See Pub.L. 100–383, § 2(a), 102 Stat. 903 ("The Congress recognizes that ... a grave injustice was done to both citizens and permanent resident aliens of Japanese ancestry by the evacuation, relocation, and internment of civilians during World War II").

[*] It should be obvious that every racial classification helps, in a narrow sense, some races and hurts others. As to the races benefited, the classification could surely be called "benign." Accordingly, whether a law relying upon racial taxonomy is "benign" or "malign," *post,* at 2136 (GINSBURG, J., dissenting); see also, *post,* at 2122 (STEVENS, J., dissenting) (addressing differences between "invidious" and "benign" discrimination), either turns on " 'whose ox is gored,' " *Regents of Univ. of Cal. v. Bakke,* 438 U.S. 265, 295, n. 35, 98 S.Ct. 2733, 2751, n. 35, 57 L.Ed.2d 750 (1978) (Powell, J.) (quoting, A. Bickel, The Morality of Consent 133 (1975)), or on distinctions found only in the eye of the beholder.

[1] As Justice GINSBURG observes, *post,* at 2136, the majority's "flexible" approach to "strict scrutiny" may well take into account differences between benign and invidious programs. The majority specifically notes that strict scrutiny can accommodate " 'relevant differences,' " *ante,* at 2113; surely the intent of a government actor and the effects of a program are relevant to its constitutionality. See *Missouri v. Jenkins,* 515 U.S. 70, 112, 115 S.Ct. 2038, 2060–2061, 132 L.Ed.2d 63 (1995) (O'CONNOR, J., concurring) ("[T]ime and again, we have recognized the ample authority legislatures possess to combat racial injustice.... It is only by applying strict scrutiny that we can distinguish between unconstitutional discrimination and narrowly tailored remedial programs that legislatures may enact to further the compelling governmental interest in redressing the effects of past discrimination").

Even if this is so, however, I think it is unfortunate that the majority insists on applying the label "strict scrutiny" to benign race-based programs. That label has usually been understood to spell the death of any governmental action to which a court may apply it. The Court suggests today that "strict scrutiny" means something different—something less strict—when applied to benign racial classifications. Although I agree that benign programs deserve different treatment than invidious programs, there is a danger that the fatal language of "strict scrutiny" will skew the analysis and place well-crafted benign programs at unnecessary risk.

[2] These were, of course, neither the sole nor the most shameful burdens the Government imposed on Japanese-Americans during that War. They were, however, the only such burdens this Court had occasion to address in *Hirabayashi* and *Korematsu.* See *Korematsu,* 323 U.S., at 223, 65 S.Ct., at 197 ("Regardless of the true nature of the assembly and relocation centers ... we are dealing specifically with nothing but an exclusion order").

[3] See *Morton v. Mancari,* 417 U.S. 535, 541, 94 S.Ct. 2474, 2478, 41 L.Ed.2d 290 (1974). To be eligible for the preference in 1974, an individual had to " 'be one fourth or more degree Indian blood and be a member of a Federally-recognized tribe.' " *Id.,* at 553, n. 24, 94 S.Ct., at 2484, quoting 44 BIAM 335, 3.1 (1972). We concluded that the classification was not "racial" because it did not encompass all Native Americans. 417 U.S., at 553–554, 94 S.Ct., at 2484–2485. In upholding it, we relied in part on the plenary power of Congress to legislate on behalf of Indian tribes. *Id.,* at 551–552, 94 S.Ct., at 2483–2484. In this case Respondents rely, in part, on the fact that not all members of the preferred minority groups are eligible for the preference, and on the special power to legislate on behalf of minorities granted to Congress by § 5 of the Fourteenth Amendment.

[4] For example, in *Richmond v. J.A. Croson Co.,* 488 U.S. 469, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989), a majority of the members of the city council that enacted the race-based set-aside were of the same race as its beneficiaries.

[5] In his concurrence, Justice THOMAS argues that the most significant cost associated with an affirmative-action program is its adverse stigmatic effect on its intended beneficiaries. *Ante,* at 2119. Although I agree that this cost may be more significant than many people realize, see *Fullilove v. Klutznick,* 448 U.S. 448, 545, 100 S.Ct. 2758, 2809, 65 L.Ed.2d 902 (1980) (STEVENS, J., dissenting), I do not think it applies to the facts of this case. First, this is not an argument that petitioner Adarand, a white-owned business, has standing to advance. No beneficiaries of the specific program under attack today have challenged its constitutionality—perhaps because they do not find the preferences stigmatizing, or perhaps because their ability to opt out of the program provides them all the relief they would need. Second, even if the petitioner in this case were a minority-owned business challenging the stigmatizing effect of this program, I would not find Justice THOMAS' extreme proposition—that there is a moral and constitutional equivalence between an attempt to subjugate and an attempt to redress the effects of a caste system, *ante,* at 2119—at all persuasive. It is one thing to question the wisdom of affirmative-action programs: There are many responsible arguments against them, including the one based upon stigma, that Congress might find persuasive when it decides whether to

enact or retain race-based preferences. It is another thing altogether to equate the many well-meaning and intelligent lawmakers and their constituents—whether members of majority or minority races—who have supported affirmative action over the years, to segregationists and bigots.

Finally, although Justice THOMAS is more concerned about the potential effects of these programs than the intent of those who enacted them (a proposition at odds with this Court's jurisprudence, see *Washington v. Davis,* 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976), but not without a strong element of common sense, see *id.,* at 252–256, 96 S.Ct., at 2053–2055 (STEVENS, J., concurring); *id.,* at 256–270, 96 S.Ct., at 2055–2062 (BRENNAN, J., dissenting)), I am not persuaded that the psychological damage brought on by affirmative action is as severe as that engendered by racial subordination. That, in any event, is a judgment the political branches can be trusted to make. In enacting affirmative-action programs, a legislature intends to remove obstacles that have unfairly placed individuals of equal qualifications at a competitive disadvantage. See *Fullilove,* 448 U.S., at 521, 100 S.Ct., at 2796–2797 (Marshall, J., concurring in judgment). I do not believe such action, whether wise or unwise, deserves such an invidious label as "racial paternalism," *ante,* at 2119 (opinion of THOMAS, J.). If the legislature is persuaded that its program is doing more harm than good to the individuals it is designed to benefit, then we can expect the legislature to remedy the problem. Significantly, this is not true of a government action based on invidious discrimination.

6 As I noted in *Wygant:*

"There is ... a critical difference between a decision to *exclude* a member of a minority race because of his or her skin color and a decision to *include* more members of the minority in a school faculty for that reason.

"The exclusionary decision rests on the false premise that differences in race, or in the color of a person's skin, reflect real differences that are relevant to a person's right to share in the blessings of a free society. As noted, that premise is 'utterly irrational,' *Cleburne v. Cleburne Living Center,* 473 U.S. 432, 452, 105 S.Ct. 3249, 3261, 87 L.Ed.2d 313 (1985), and repugnant to the principles of a free and democratic society. Nevertheless, the fact that persons of different races do, indeed have differently colored skin, may give rise to a belief that there is some significant difference between such persons. The inclusion of minority teachers in the educational process inevitably tends to dispel that illusion whereas their exclusion could only tend to foster it. The inclusionary decision is consistent with the principle that all men are created equal; the exclusionary decision is at war with that principle. One decision accords with the Equal Protection Clause of the Fourteenth Amendment; the other does not. Thus, consideration of whether the consciousness of race is exclusionary or inclusionary plainly distinguishes the Board's valid purpose in this case from a race-conscious decision that would reinforce assumptions of inequality." 476 U.S., at 316–317, 106 S.Ct., at 1869 (dissenting opinion).

7 Despite the majority's reliance on *Korematsu v. United States,* 323 U.S. 214, 65 S.Ct. 193, 89 L.Ed. 194 (1944), *ante,* at 2106, that case does not stand for the proposition that federal remedial programs are subject to strict scrutiny. Instead, *Korematsu* specifies that "all legal restrictions *which curtail the civil rights of a single racial group* are immediately suspect." 323 U.S., at 216, 65 S.Ct., at 194, quoted *ante,* at 2106 (emphasis added). The programs at issue in this case (as in most affirmative-action cases) do not "curtail the civil rights of a single racial group"; they benefit certain racial groups and impose an indirect burden on the majority.

8 We have rejected this proposition outside of the affirmative-action context as well. In *Hampton v. Mow Sun Wong,* 426 U.S. 88, 100, 96 S.Ct. 1895, 1903–1904, 48 L.Ed.2d 495 (1976), we held:

"The federal sovereign, like the States, must govern impartially. The concept of equal justice under law is served by the Fifth Amendment's guarantee of due process, as well as by the Equal Protection Clause of the Fourteenth Amendment. Although both Amendments require the same type of analysis, see *Buckley v. Valeo,* 424 U.S. 1, 93, 96 S.Ct. 612, 670, 46 L.Ed.2d 659 [(1976)], the Court of Appeals correctly stated that the two protections are not always coextensive. Not only does the language of the two Amendments differ, but more importantly, there may be overriding national interests which justify selective federal legislation that would be unacceptable for an individual State. On the other hand, when a federal rule is applicable to only a limited territory, such as the District of Columbia, or an insular possession, and when there is no special national interest involved, the Due Process Clause has been construed as having the same significance as the Equal Protection Clause."

9 The funding for the preferences challenged in this case comes from the Surface Transportation and Uniform Relocation Assistance Act of 1987 (STURAA), 101 Stat. 132, in which Congress has granted funds to the States in exchange for a commitment to foster

subcontracting by disadvantaged business enterprises, or "DBE's." STURAA is also the source of funding for DBE preferences in federal highway contracting. Approximately 98% of STURAA's funding is allocated to the States. Brief for Respondents 38, n. 34. Moreover, under STURAA States are empowered to certify businesses as "disadvantaged" for purposes of receiving subcontracting preferences in both state and federal contracts. STURAA § 106(c)(4), 101 Stat. 146.

In this case, Adarand has sued only the federal officials responsible for implementing federal highway contracting policy; it has not directly challenged DBE preferences granted in state contracts funded by STURAA. It is not entirely clear, then, whether the majority's "congruence" rationale would apply to federally regulated state contracts, which may conceivably be within the majority's view of Congress' § 5 authority even if the federal contracts are not. See *Metro Broadcasting,* 497 U.S., at 603–604, 110 S.Ct., at 3029–3030 (O'CONNOR, J., dissenting). As I read the majority's opinion, however, it draws no distinctions between direct federal preferences and federal preferences achieved through subsidies to States. The extent to which STURAA intertwines elements of direct federal regulations with elements of federal conditions on grants to the States would make such a distinction difficult to sustain.

10 Because Congress has acted with respect to the States in enacting STURAA, we need not revisit today the difficult question of § 5's application to pure federal regulation of individuals.

11 We have read § 5 as a positive grant of authority to Congress, not just to punish violations, but also to define and expand the scope of the Equal Protection Clause. *Katzenbach v. Morgan,* 384 U.S. 641, 86 S.Ct. 1717, 16 L.Ed.2d 828 (1966). In *Katzenbach,* this meant that Congress under § 5 could require the States to allow non-English-speaking citizens to vote, even if denying such citizens a vote would not have been an independent violation of § 1. *Id.,* at 648–651, 86 S.Ct., at 1722–1724. Congress, then, can expand the coverage of § 1 by exercising its power under § 5 when it acts to foster equality. Congress has done just that here; it has decided that granting certain preferences to minorities best serves the goals of equal protection.

12 Our skeptical observer might also notice that Justice O'CONNOR's explanation for departing from settled precedent is joined only by Justice KENNEDY. *Ante,* at 2100. Three Members of the majority thus provide no explanation whatsoever for their unwillingness to adhere to the doctrine of *stare decisis.*

13 Of course, Justice Stewart believed that his view, disapproving of racial classifications of any kind, was consistent with this Court's precedents. See *ante,* at 2116, citing 448 U.S., at 523–526, 100 S.Ct., at 2797–2799. But he did not claim that the question whether the Federal Government could engage in race-conscious affirmative action had been decided before *Fullilove.* The fact that a Justice dissents from an opinion means that he disagrees with the result; it does not usually mean that he believes the decision so departs from the fabric of the law that its reasoning ought to be repudiated at the next opportunity. Much less does a dissent bind or authorize a later majority to reject a precedent with which it disagrees.

14 STURAA accords a rebuttable presumption of both social and economic disadvantage to members of racial minority groups. 49 CFR § 23.62 (1994). In contrast, § 8(a) of the SBA accords a presumption only of social disadvantage, 13 CFR § 124.105(b) (1995); the applicant has the burden of demonstrating economic disadvantage, *id.,* § 124.106. Finally, § 8(d) of the SBA accords at least a presumption of social disadvantage, but it is ambiguous as to whether economic disadvantage is presumed or must be shown. See 15 U.S.C. § 637(d)(3) (1988 ed. and Supp. V); 13 CFR § 124.601 (1995).

15 The Government apparently takes this exclusion seriously. See *Autek Systems Corp. v. United States,* 835 F.Supp. 13 (DC 1993) (upholding Small Business Administration decision that minority business owner's personal income disqualified him from DBE status under § 8(a) program), aff'd, 43 F.3d 712 (CADC 1994).

16 "The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this

country is an unfortunate reality, and government is not disqualified from acting in response to it." *Ante,* at 2117.

"Our findings clearly state that groups such as black Americans, Hispanic Americans, and Native Americans, have been and continue to be discriminated against and that this discrimination has led to the social disadvantagement of persons identified by society as members of those groups." 124 Cong.Rec. 34097 (1978)

17 The Department of Transportation strongly urges States to institute periodic review of businesses certified as DBE's under STURAA, 49 CFR pt. 23, subpt. D, App. A (1994), but it does not mandate such review. Respondents point us to no provisions for review of § 8(d) certification, although such review may be derivative for those businesses that receive § 8(d) certification as a result of § 8(a) or STURAA certification.

18 Respondents point us to the following legislative history: H.R. 5612, To amend the Small Business Act to Extend the current SBA 8(a) Pilot Program: Hearing on H.R. 5612 before the Senate Select Committee on Small Business, 96th Cong., 2d Sess. (1980); Small and Minority Business in the Decade of the 1980's (Part 1): Hearings before the House Committee on Small Business, 97th Cong., 1st Sess. (1981); Minority Business and Its Contribution to the U.S. Economy: Hearing before the Senate Committee on Small Business, 97th Cong., 2d Sess. (1982); Federal Contracting Opportunities for Minority and Women–Owned Businesses—An Examination of the 8(d) Subcontracting Program: Hearings before the Senate Committee on Small Business, 98th Cong., 1st Sess. (1983); Women Entrepreneurs—Their Success and Problems: Hearing before the Senate Committee on Small Business, 98th Cong., 2d Sess. (1984); State of Hispanic Small Business in America: Hearing before the Subcommittee on SBA and SBIC Authority, Minority Enterprise, and General Small Business Problems of the House Committee on Small Business, 99th Cong., 1st Sess. (1985); Minority Enterprise and General Small Business Problems: Hearing before the Subcommittee on SBA and SBIC Authority, Minority Enterprise, and General Small Business Problems of the House Committee on Small Business, 99th Cong., 2d Sess. (1986); Disadvantaged Business Set–Asides in Transportation Construction Projects: Hearings before the Subcommittee on Procurement, Innovation, and Minority Enterprise Development of the House Committee on Small Business, 100th Cong., 2d Sess. (1988); Barriers to Full Minority Participation in Federally Funded Highway Construction Projects: Hearing before a Subcommittee of the House Committee on Government Operations, 100th Cong., 2d Sess. (1988); Surety Bonds and Minority Contractors: Hearing before the Subcommittee on Commerce, Consumer Protection, and Competitiveness of the House Committee on Energy and Commerce, 100th Cong., 2d Sess. (1988); Small Business Problems: Hearings before the House Committee on Small Business, 100th Cong., 1st Sess. (1987). See Brief for Respondents 9–10, n. 9.

1 If the statutes are within the § 5 power, they are just as enforceable when the National Government makes a construction contract directly as when it funnels construction money through the States. In any event, as Justice STEVENS has noted, see *ante,* at 2122–2123, n. 5, 2123, n. 6, it is not clear whether the current challenge implicates only Fifth Amendment due process or Fourteenth Amendment equal protection as well.

2 I say "press a challenge" because petitioner's Memorandum in Support of Summary Judgment did include an argument challenging the reasonableness of the duration of the statutory scheme; but the durational claim was not, so far as I am aware, stated elsewhere, and, in any event, was not the gravamen of the complaint.

1 On congressional authority to enforce the equal protection principle, see, *e.g., Heart of Atlanta Motel, Inc. v. United States,* 379 U.S. 241, 286, 85 S.Ct. 348, 373, 13 L.Ed.2d 258 (1964) (Douglas, J., concurring) (recognizing Congress' authority, under § 5 of the Fourteenth Amendment, to "pu[t] an end to all obstructionist strategies and allo[w] every person—whatever his race, creed, or color—to patronize all places of public accommodation without discrimination whether he travels interstate or intrastate."); *id.,* at 291, 293, 85 S.Ct., at 375, 377 (Goldberg, J., concurring) ("primary purpose of the Civil Rights Act of 1964 ... is the vindication of human dignity"; "Congress clearly had authority under both § 5 of the Fourteenth Amendment and the Commerce Clause" to enact the law); G. Gunther, Constitutional Law 147–151 (12th ed. 1991).

2 The Court, in 1955 and 1956, refused to rule on the constitutionality of antimiscegenation laws; it twice declined to accept appeals from the decree on which the Virginia Supreme Court of Appeals relied in *Loving.* See *Naim v. Naim,* 197 Va. 80, 87 S.E.2d 749,

vacated and remanded, 350 U.S. 891, 76 S.Ct. 151, 100 L.Ed. 784 (1955), reinstated and aff'd, 197 Va. 734, 90 S.E.2d 849, appeal dism'd, 350 U.S. 985, 76 S.Ct. 472, 100 L.Ed. 852 (1956). *Naim* expressed the state court's view of the legislative purpose served by the Virginia law: "to preserve the racial integrity of [Virginia's] citizens"; to prevent "the corruption of blood," "a mongrel breed of citizens," and "the obliteration of racial pride." 197 Va., at 90, 87 S.E.2d, at 756.

3 See, *e.g.,* H. Cross, G. Kennedy, J. Mell, & W. Zimmermann, Employer Hiring Practices: Differential Treatment of Hispanic and Anglo Job Seekers 42 (Urban Institute Report 90–4, 1990) (*e.g.,* Anglo applicants sent out by investigators received 52% more job offers than matched Hispanics); M. Turner, M. Fix, & R. Struyk, Opportunities Denied, Opportunities Diminished: Racial Discrimination in Hiring xi (Urban Institute Report 91–9, 1991) ("In one out of five audits, the white applicant was able to advance farther through the hiring process than his black counterpart. In one out of eight audits, the white was offered a job although his equally qualified black partner was not. In contrast, black auditors advanced farther than their white counterparts only 7 percent of the time, and received job offers while their white partners did not in 5 percent of the audits.").

4 See, *e.g.,* Ayres, Fair Driving: Gender and Race Discrimination in Retail Car Negotiations, 104 Harv.L.Rev. 817, 821–822, 819, 828 (1991) ("blacks and women simply cannot buy the same car for the same price as can white men using identical bargaining strategies"; the final offers given white female testers reflected 40 percent higher markups than those given white male testers; final offer markups for black male testers were twice as high, and for black female testers three times as high as for white male testers).

5 See, *e.g.,* A Common Destiny: Blacks and American Society 50 (G. Jaynes & R. Williams eds. 1989) ("[I]n many metropolitan areas one-quarter to one-half of all [housing] inquiries by blacks are met by clearly discriminatory responses."); M. Turner, R. Struyk, & J. Yinger, U.S. Dept. of Housing and Urban Development, Housing Discrimination Study: Synthesis i-vii (Sept. 1991) (1989 audit study of housing searches in 25 metropolitan areas; over half of African–American and Hispanic testers seeking to rent or buy experienced some form of unfavorable treatment compared to paired white testers); Leahy, Are Racial Factors Important for the Allocation of Mortgage Money?, 44 Am.J.Econ. & Soc. 185, 193 (1985) (controlling for socioeconomic factors, and concluding that "even when neighborhoods appear to be similar on every major mortgage-lending criterion except race, mortgage-lending outcomes are still unequal").

6 See, *e.g., Associated General Contractors v. Coalition for Economic Equity,* 950 F.2d 1401, 1415 (CA9 1991) (detailing examples in San Francisco).

7 Cf. *Wygant v. Jackson Bd. of Ed.,* 476 U.S. 267, 318, 106 S.Ct. 1842, 1870, 90 L.Ed.2d 260 (1986) (STEVENS, J., dissenting); *Califano v. Goldfarb,* 430 U.S. 199, 222–223, 97 S.Ct. 1021, 1034–1035, 51 L.Ed.2d 270 (1977) (STEVENS, J., concurring in judgment).

8 On the differences between laws designed to benefit a historically disfavored group and laws designed to burden such a group, see, *e.g.,* Carter, When Victims Happen To Be Black, 97 Yale L.J. 420, 433–434 (1988) ("[W]hatever the source of racism, to count it the same as racialism, to say that two centuries of struggle for the most basic of civil rights have been mostly about freedom from racial categorization rather than freedom from racial oppression, is to trivialize the lives and deaths of those who have suffered under racism. To pretend ... that the issue presented in *Bakke* was the same as the issue in *Brown* is to pretend that history never happened and that the present doesn't exist.").

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143 S.Ct. 1487
Supreme Court of the United States.

Wes ALLEN, Alabama Secretary of State, et al., Appellants
v.
Evan MILLIGAN, et al.
Wes Allen, Alabama Secretary of State, et al., Petitioners
v.
Marcus Caster, et al.

Nos. 21-1086 and 21-1087
|
Argued October 4, 2022
|
Decided June 8, 2023*

Synopsis
Background: Black registered voters and civil rights organizations brought actions against Alabama Secretary of State and others, challenging Alabama's congressional redistricting plan, for which only one of seven districts had a Black majority, as violating equal protection and diluting votes in violation of § 2 of Voting Rights Act (VRA). Two actions were consolidated for preliminary injunction proceedings, and a three-judge panel of the United States District Court for the Northern District of Alabama, 582 F.Supp.3d 924, granted preliminary injunctions, with clarification, 2022 WL 272637, and denied a stay pending appeal, 2022 WL 272636. In third action, which involved vote dilution claim under VRA, the United States District Court for the Northern District of Alabama, Anna M. Manasco, J., 2022 WL 264819, granted preliminary injunction. The Supreme Court, 142 S.Ct. 879, noted its probable jurisdiction in first two actions, granted certiorari before judgment in third action, and stayed the preliminary injunctions.

Holdings: The Supreme Court, Chief Justice Roberts, held that:

challengers were likely to succeed, as element for obtaining preliminary injunction, in showing precondition, under Supreme Court's *Gingles* framework for proving vote dilution claim under § 2 of VRA, that group of Black voters was sufficiently large and geographically compact to constitute a majority in second, reasonably configured district;

challengers were likely to succeed in showing *Gingles* preconditions that group of Black voters was politically cohesive, and that the white majority voted sufficiently as a bloc to enable it to defeat Black voters' preferred candidate;

challengers were likely to succeed at totality of circumstances stage of *Gingles* framework; and

single-minded view that focuses on race-neutral benchmark is not a permissible approach to determining vote dilution claim under § 2 of VRA.

Affirmed.

Justices Sotomayor, Kagan, and Jackson joined, and Justice Kavanaugh joined in part.

Justice Kavanaugh filed an opinion concurring in part.

Justice Thomas filed a dissenting opinion, in which Justice Gorsuch joined, and Justices Alito and Barrett joined in part.

Justice Alito filed a dissenting opinion, in which Justice Gorsuch joined.

****1492** *Syllabus*[*]

The issue presented is whether the districting plan adopted by the State of Alabama for its 2022 congressional elections likely violated § 2 of the Voting Rights Act, 52 U.S.C. § 10301. As originally enacted in 1965, § 2 of the Act tracked the language of the Fifteenth Amendment, providing that "[t]he right of citizens of the United States to vote shall not be denied or abridged ... on account of race, color, or previous condition of servitude." In *City of Mobile v. Bolden*, 446 U.S. 55, 100 S.Ct. 1519, 64 L.Ed.2d 47, this Court held that the Fifteenth Amendment—and thus § 2—prohibits States from acting with a "racially discriminatory motivation" or an "invidious purpose" to discriminate, but it does not prohibit laws that are discriminatory only in effect. *Id.*, at 61–65, 100 S.Ct. 1519 (plurality opinion). Criticism followed, with many viewing *Mobile*'s intent test as not sufficiently protective of voting rights. But others believed that adoption of an effects test would inevitably require a focus on proportionality, calling voting laws into question whenever a minority group won fewer seats in the legislature than its share of the population. Congress ultimately resolved this debate in 1982, reaching a bipartisan compromise that amended § 2 to incorporate both an effects test and a robust disclaimer that "nothing" in § 2 "establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." § 10301(b).

In 1992, § 2 litigation challenging the State of Alabama's then-existing districting map resulted in the State's first majority-black district and, subsequently, the State's first black Representative since 1877. Alabama's congressional map has remained remarkably similar since that litigation. Following the 2020 decennial census, a group of plaintiffs led by Alabama legislator Bobby Singleton sued the State, arguing that the State's population growth rendered the existing congressional map malapportioned and racially gerrymandered in violation of the Equal Protection Clause. While litigation was proceeding, the Alabama Legislature's Committee on Reapportionment drew a new districting map that would reflect the distribution of the prior decade's population growth across the State. The resulting map largely resembled the 2011 map on which it was based and similarly produced only one district in which black voters constituted a majority. That new map was signed into law as HB1.

Three groups of Alabama citizens brought suit seeking to stop Alabama's Secretary of State from conducting congressional elections under HB1. One group (*Caster* plaintiffs) challenged HB1 as invalid under § 2. Another group (*Milligan* plaintiffs) brought claims under § 2 and the Equal Protection Clause of the Fourteenth Amendment. And a third group (the *Singleton* plaintiffs) amended the complaint in their ongoing litigation to challenge HB1 as a racial gerrymander under the Equal Protection Clause. A three-judge District Court was convened, and the *Singleton* and *Milligan* actions were consolidated before that District Court for purposes of preliminary injunction proceedings, while *Caster* proceeded before one of the judges on a parallel track. After an extensive hearing, the District Court concluded in a 227-page opinion that the question whether HB1 likely violated § 2 was not "close." The Court preliminarily enjoined Alabama from using HB1 in forthcoming elections. The same relief was ordered in *Caster.*

Held: The Court affirms the District Court's determination that plaintiffs demonstrated a reasonable likelihood of success on their claim that HB1 violates § 2. Pp. 1502 – 1510, 1511 – 1517.

(a) The District Court faithfully applied this Court's precedents in concluding that HB1 likely violates § 2. Pp. 1502 – 1506.

(1) This Court first addressed the 1982 amendments to § 2 in *Thornburg v. Gingles*, 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25, and has for the last 37 years evaluated § 2 claims using the *Gingles* framework. *Gingles* described the "essence of a § 2 claim" as when "a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters." *Id.*, at 47, 106 S.Ct. 2752. That occurs where an "electoral structure operates to minimize or cancel out" minority voters' "ability to elect their preferred candidates." *Id.*, at 48, 106 S.Ct. 2752. Such a risk is greatest "where minority and majority voters consistently prefer different candidates" and where minority voters are submerged in a majority voting population that "regularly defeat[s]" their choices. *Ibid.*

To prove a § 2 violation under *Gingles*, plaintiffs must satisfy three "preconditions." *Id.*, at 50, 106 S.Ct. 2752. First, the

"minority group must be sufficiently large and [geographically] compact to constitute a majority in a reasonably configured district." *Wisconsin Legislature* v. *Wisconsin Elections Comm'n*, 595 U. S. ——, ——, 142 S.Ct. 1245, 1248, 212 L.Ed.2d 251 (*per curiam*). "Second, the minority group must be able to show that it is politically cohesive." *Gingles*, 478 U.S. at 51, 106 S.Ct. 2752. And third, "the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it ... to defeat the minority's preferred candidate." *Ibid.* A plaintiff who demonstrates the three preconditions must then show, under the "totality of circumstances," that the challenged political process is not "equally open" to minority voters. *Id.*, at 45–46, 106 S.Ct. 2752. The totality of circumstances inquiry recognizes that application of the *Gingles* factors is fact dependent and requires courts to conduct "an intensely local appraisal" of the electoral mechanism at issue, as well as a "searching practical evaluation of the past and present reality." *Id.*, at 79, 106 S.Ct. 2752. Congress has not disturbed the Court's understanding of § 2 as *Gingles* construed it nearly 40 years ago. Pp. 1502 – 1504.

(2) The extensive record in these cases supports the District Court's conclusion that plaintiffs' § 2 claim was likely to succeed under *Gingles*. As to the first *Gingles* precondition, the District Court correctly found that black voters could constitute a majority in a second district that was "reasonably configured." The plaintiffs adduced eleven illustrative districting maps that Alabama could enact, at least one of which contained two majority-black districts that comported with traditional districting criteria. With respect to the compactness criteria, for example, the District Court explained that the maps submitted by one expert "perform[ed] generally better on average than" did HB1, and contained no "bizarre shapes, or any other obvious irregularities." Plaintiffs' maps contained equal populations, were contiguous, and respected existing political subdivisions. Indeed, some of plaintiffs' proposed maps split the same (or even fewer) county lines than the State's.

The Court finds unpersuasive the State's argument that plaintiffs' maps were not reasonably configured because they failed to keep together the Gulf Coast region. Even if that region is a traditional community of interest, the District Court found the evidence insufficient to sustain Alabama's argument that no legitimate reason could exist to split it. Moreover, the District Court found that plaintiffs' maps were reasonably configured because they joined together a different community of interest called the Black Belt—a community with a high proportion of similarly situated black voters who share a lineal connection to "the many enslaved people brought there to work in the antebellum period."

As to the second and third *Gingles* preconditions, the District Court determined that there was "no serious dispute that Black voters are politically cohesive, nor that the challenged districts' white majority votes sufficiently as a bloc to usually defeat Black voters' preferred candidate." The court noted that, "on average, Black voters supported their candidates of choice with 92.3% of the vote" while "white voters supported Black-preferred candidates with 15.4% of the vote." Even Alabama's expert conceded "that the candidates preferred by white voters in the areas that he looked at regularly defeat the candidates preferred by Black voters." Finally, the District Court concluded that plaintiffs had carried their burden at the totality of circumstances stage given the racial polarization of elections in Alabama, where "Black Alabamians enjoy virtually zero success in statewide elections" and where "Alabama's extensive history of repugnant racial and voting-related discrimination is undeniable and well documented." The Court sees no reason to disturb the District Court's careful factual findings, which are subject to clear error review and have gone unchallenged by Alabama in any event. Pp. 1503 – 1506.

(b) The Court declines to remake its § 2 jurisprudence in line with Alabama's "race-neutral benchmark" theory.

(1) The Court rejects the State's contention that adopting the race-neutral benchmark as the point of comparison in § 2 cases would best match the text of the VRA. Section 2 requires political processes in a State to be "equally open" such that minority voters do not "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." § 10301(b). Under the Court's precedents, a district is not equally open when minority voters face—unlike their majority peers—bloc voting along racial lines, arising against the backdrop of substantial racial discrimination within the State, that renders a minority vote unequal to a vote by a nonminority voter. Alabama would ignore this precedent in favor of a rationale that a State's map cannot "abridge[ ]" a person's right to vote "on account of race" if the map resembles a sufficient number of race-neutral alternatives. But this Court's cases have consistently focused, for purposes of litigation, on the specific illustrative maps that a plaintiff adduces. Deviation from that map shows it is *possible* that the State's map has a disparate effect on account of race. The remainder of the *Gingles* test helps determine whether that possibility is reality by looking to polarized voting preferences and the frequency of racially discriminatory actions taken by the State.

The Court declines to adopt Alabama's interpretation of § 2, which would "revise and reformulate the *Gingles* threshold inquiry that has been the baseline of [the Court's] § 2 jurisprudence" for decades. *Bartlett v. Strickland*, 556 U.S. 1, 16, 129

S.Ct. 1231, 173 L.Ed.2d 173 (plurality opinion). Pp. 1506 – 1508.

(2) Alabama argues that absent a benchmark, the *Gingles* framework ends up requiring the racial proportionality in districting that § 2(b) forbids. The Court's decisions implementing § 2 demonstrate, however, that when properly applied, the *Gingles* framework itself imposes meaningful constraints on proportionality. See *Shaw v. Reno*, 509 U.S. 630, 633–634, 113 S.Ct. 2816, 125 L.Ed.2d 511; *Miller v. Johnson*, 515 U.S. 900, 906, 115 S.Ct. 2475, 132 L.Ed.2d 762; *Bush v. Vera*, 517 U.S. 952, 957, 116 S.Ct. 1941, 135 L.Ed.2d 248 (plurality opinion). In *Shaw* v. *Reno*, for example, the Court considered the permissibility of a second majority-minority district in North Carolina, which at the time had 12 seats in the U. S. House of Representatives and a 20% black voting age population. 509 U.S. at 633–634, 113 S.Ct. 2816. Though North Carolina believed § 2 required a second majority-minority district, the Court found North Carolina's approach an impermissible racial gerrymander because the State had "concentrated a dispersed minority population in a single district by disregarding traditional districting principles such as compactness, contiguity, and respect for political subdivisions." *Id.*, at 647, 113 S.Ct. 2816. The Court's decisions in *Bush* and *Shaw* similarly declined to require additional majority-minority districts under § 2 where those districts did not satisfy traditional districting principles.

The Court recognizes that reapportionment remains primarily the duty and responsibility of the States, not the federal courts. Section 2 thus never requires adoption of districts that violate traditional redistricting principles and instead limits judicial intervention to "those instances of intensive racial politics" where the "excessive role [of race] in the electoral process ... den[ies] minority voters equal opportunity to participate." S. Rep. No. 97–417, pp. 33–34. Pp. 1507 – 1510.

(c) To apply its race-neutral benchmark in practice, Alabama would require plaintiffs to make at least three showings. First, Alabama would require § 2 plaintiffs to show that the illustrative maps adduced for the first *Gingles* precondition are not based on race. Alabama would next graft onto § 2 a requirement that plaintiffs demonstrate, at the totality of circumstances stage, that the State's enacted plan contains fewer majority-minority districts than what an "average" race-neutral plan would contain. And finally, Alabama would have plaintiffs prove that any deviation between the State's plan and a race-neutral plan is explainable "only" by race. The Court declines to adopt any of these novel requirements.

Here, Alabama contends that because HB1 sufficiently "resembles" the "race-neutral" maps created by the State's experts—all of which lack two majority-black districts—HB1 does not violate § 2. Alabama's reliance on the maps created by its experts Dr. Duchin and Dr. Imai is misplaced because those maps do not accurately represent the districting process in Alabama. Regardless, the map-comparison test that Alabama proposes is flawed in its fundamentals. Neither the text of § 2 nor the fraught debate that produced it suggests that "equal access" to the fundamental right of voting turns on technically complicated computer simulations. Further, while Alabama has repeatedly emphasized that HB1 cannot have violated § 2 because none of plaintiffs' two million odd maps contained more than one majority-minority district, that (albeit very big) number is close to irrelevant in practice, where experts estimate the possible number of Alabama districting maps numbers is at least in the trillion trillions.

Alabama would also require plaintiffs to demonstrate that any deviations between the State's enacted plan and race-neutral alternatives "can be explained *only* by racial discrimination." Brief for Alabama 44 (emphasis added). But the Court's precedents and the legislative compromise struck in the 1982 amendments clearly rejected treating discriminatory intent as a requirement for liability under § 2. Pp. 1510, 1511 – 1515.

(d) The Court disagrees with Alabama's assertions that the Court should stop applying § 2 in cases like these because the text of § 2 does not apply to single-member redistricting and because § 2 is unconstitutional as the District Court applied it here. Alabama's understanding of § 2 would require abandoning four decades of the Court's § 2 precedents. The Court has unanimously held that § 2 and the *Gingles* framework apply to claims challenging single-member districts. *Growe v. Emison*, 507 U.S. 25, 40, 113 S.Ct. 1075, 122 L.Ed.2d 388. As Congress is undoubtedly aware of the Court's construction of § 2 to apply to districting challenges, statutory *stare decisis* counsels staying the course until and unless Congress acts. In any event, the statutory text supports the conclusion that § 2 applies to single-member districts. Indeed, the contentious debates in Congress about proportionality would have made little sense if § 2's coverage was as limited as Alabama contends.

The Court similarly rejects Alabama's argument that § 2 as applied to redistricting is unconstitutional under the Fifteenth Amendment. The Court held over 40 years ago "that, even if § 1 of the [Fifteenth] Amendment prohibits only purposeful discrimination," *City of Rome v. United States*, 446 U.S. 156, 173, 100 S.Ct. 1548, 64 L.Ed.2d 119, the VRA's "ban on electoral changes that are discriminatory in effect is an appropriate method of promoting the purposes of the Fifteenth

Amendment," *id.,* at 177, 100 S.Ct. 1548. Alabama's contention that the Fifteenth Amendment does not authorize race-based redistricting as a remedy for § 2 violations similarly fails. The Court is not persuaded by Alabama's arguments that § 2 as interpreted in *Gingles* exceeds the remedial authority of Congress.

The Court's opinion does not diminish or disregard the concern that § 2 may impermissibly elevate race in the allocation of political power within the States. Instead, the Court simply holds that a faithful application of precedent and a fair reading of the record do not bear those concerns out here. Pp. 1514 – 1517.

Nos. 21–1086, 582 F. Supp. 3d 924, and 21–1087, affirmed.

ROBERTS, C. J., delivered the opinion of the Court, except as to Part III–B–1. SOTOMAYOR, KAGAN, and JACKSON, JJ., joined that opinion in full, and KAVANAUGH, J., joined except for Part III–B–1. KAVANAUGH, J., filed an opinion concurring in all but Part III–B–1. THOMAS, J., filed a dissenting opinion, in which GORSUCH, J., joined, in which BARRETT, J., joined as to Parts II and III, and in which ALITO, J., joined as to Parts II–A and II–B. ALITO, J., filed a dissenting opinion, in which GORSUCH, J., joined.

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Opinion

CHIEF JUSTICE ROBERTS delivered the opinion of the Court, except as to Part III–B–1.*

***9 **1498** In January 2022, a three-judge District Court sitting in Alabama preliminarily enjoined the State from using the districting plan it had recently adopted for the 2022 congressional ***10** elections, finding that the plan likely violated Section 2 of the Voting Rights Act, 52 U.S.C. § 10301. This Court stayed the District Court's order pending further review. 595 U. S. —— (2022). After conducting that review, we now affirm.

I

A

Shortly after the Civil War, Congress passed and the States ratified the Fifteenth Amendment, providing that "[t]he right of citizens of the United States to vote shall not be denied or abridged ... on account of race, color, or previous condition of servitude." U. S. Const., Amdt. 15, § 1. In the century that followed, however, the Amendment proved little more than a parchment promise. Jim Crow laws like literacy tests, poll taxes, and "good-morals" requirements abounded, *South Carolina v. Katzenbach*, 383 U.S. 301, 312–313, 86 S.Ct. 803, 15 L.Ed.2d 769 (1966), "render[ing] the right to vote illusory for blacks," ****1499** *Northwest Austin Municipal Util. Dist. No. One v. Holder*, 557 U.S. 193, 220–221, 129 S.Ct. 2504, 174 L.Ed.2d 140 (2009) (THOMAS, J., concurring in judgment in part and dissenting in part). Congress stood up to little of it; "[t]he first century of congressional enforcement of the [Fifteenth] Amendment ... can only be regarded as a failure." *Id.*, at 197, 129 S.Ct. 2504 (majority opinion).

That changed in 1965. Spurred by the Civil Rights movement, Congress enacted and President Johnson signed into law the Voting Rights Act. 79 Stat. 437, as amended, 52 U.S.C. § 10301 *et seq.* The Act "create[d] stringent new remedies for voting discrimination," attempting to forever "banish the blight of racial discrimination in voting." *Katzenbach*, 383 U.S. at 308, 86 S.Ct. 803. By 1981, in only sixteen years' time, many considered the VRA "the most successful civil rights statute in the history of the Nation." S. Rep. No. 97–417, p. 111 (1982) (Senate Report).

These cases concern Section 2 of that Act. In its original form, "§ 2 closely tracked the language of the [Fifteenth] ***11** Amendment" and, as a result, had little independent force. *Brnovich* v. *Democratic National Committee*, 594 U. S. ——, ——, 141 S.Ct. 2321, 2331, 210 L.Ed.2d 753 (2021).[1] Our leading case on § 2 at the time was *City of Mobile* v. *Bolden*, which involved a claim by black voters that the City's at-large election system effectively excluded them from participating in the election of city commissioners. 446 U.S. 55, 100 S.Ct. 1519, 64 L.Ed.2d 47 (1980). The commission had three seats, black voters comprised one-third of the City's population, but no black-preferred candidate had ever won election.

The Court ruled against the plaintiffs. The Fifteenth Amendment—and thus § 2—prohibits States from acting with a "racially discriminatory motivation" or an "invidious purpose" to discriminate. *Id.*, at 61–65, 100 S.Ct. 1519 (plurality opinion). But it does not prohibit laws that are discriminatory only in effect. *Ibid.* The *Mobile* plaintiffs could "register and vote without hindrance"—"their freedom to vote ha[d] not been denied or abridged by anyone." *Id.*, at 65, 100 S.Ct. 1519. The fact that they happened to lose frequently was beside the point. Nothing the City had done "purposeful[ly] exclu[ded]" them "from participati[ng] in the election process." *Id.*, at 64, 100 S.Ct. 1519.

Almost immediately after it was decided, *Mobile* "produced an avalanche of criticism, both in the media and within the civil rights community." T. Boyd & S. Markman, The 1982 Amendments to the Voting Rights Act: A Legislative History, 40 Wash. & Lee L. Rev. 1347, 1355 (1983) (Boyd & Markman). The New York Times wrote that the decision represented "the biggest step backwards in civil rights to come from the Nixon Court." N. Y. Times, Apr. 23, 1980, p. A22. And the Washington Post described *Mobile* as a "major defeat for blacks and other minorities fighting electoral schemes that exclude them from office." Washington ***12** Post, Apr. 23, 1980, p. A5. By focusing on discriminatory intent and ignoring disparate effect, critics argued, the Court had abrogated "the standard used by the courts to determine whether [racial] discrimination

existed ...: Whether such discrimination existed." It's Results That Count, Philadelphia Inquirer, Mar. 3, 1982, p. 8–A.

**1500 But *Mobile* had its defenders, too. In their view, abandoning the intent test in favor of an effects test would inevitably require a focus on *proportionality*—wherever a minority group won fewer seats in the legislature than its share of the population, the charge could be made that the State law had a discriminatory effect. That, after all, was the type of claim brought in *Mobile*. But mandating racial proportionality in elections was regarded by many as intolerable. Doing so, wrote Senator Orrin Hatch in the Washington Star, would be "strongly resented by the American public." Washington Star, Sept. 30, 1980, p. A–9. The Wall Street Journal offered similar criticism. An effects test would generate "more, not less, racial and ethnic polarization." Wall Street Journal, Jan. 19, 1982, p. 28.

This sharp debate arrived at Congress's doorstep in 1981. The question whether to broaden § 2 or keep it as is, said Hatch—by then Chairman of the Senate Subcommittee before which § 2 would be debated—"involve[d] one of the most substantial constitutional issues ever to come before this body." 2 Hearings before the Subcommittee on the Constitution of the Senate Committee on the Judiciary, 97th Cong., 2d Sess., pt. 1, p. 1 (1982).

Proceedings in Congress mirrored the disagreement that had developed around the country. In April 1981, Congressman Peter W. Rodino, Jr.—longtime chairman of the House Judiciary Committee—introduced a bill to amend the VRA, proposing that the words "to deny or abridge" in § 2 be replaced with the phrase "*in a manner which results* in a denial or abridgement." H. R. 3112, 97th Cong., 1st Sess., 2 ***13** (as introduced) (emphasis added). This was the effects test that *Mobile*'s detractors sought.

But those wary of proportionality were not far behind. Senator Hatch argued that the effects test "was intelligible only to the extent that it approximated a standard of proportional representation by race." Boyd & Markman 1392. The Attorney General had the same concern. The effects test "would be triggered whenever election results did not mirror the population mix of a particular community," he wrote, producing "essentially a quota system for electoral politics." N. Y. Times, Mar. 27, 1982, p. 23.

The impasse was not resolved until late April 1982, when Senator Bob Dole proposed a compromise. Boyd & Markman 1414. Section 2 would include the effects test that many desired but also a robust disclaimer against proportionality. Seeking to navigate any tension between the two, the Dole Amendment borrowed language from a Fourteenth Amendment case of ours, *White v. Regester*, 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973), which many in Congress believed would allow courts to consider effects but avoid proportionality. The standard for liability in voting cases, *White* explained, was whether "the political processes leading to nomination and election were not equally open to participation by the group in question—[in] that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice." *Id.*, at 766, 93 S.Ct. 2332.

The Dole compromise won bipartisan support and, on June 18, the Senate passed the 1982 amendments by an overwhelming margin, 85–8. Eleven days later, President Reagan signed the Act into law. The amended § 2 reads as follows:

> "(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner ***14** which results in a denial or abridgement of the right of any citizen ****1501** of the United States to vote on account of race or color ... as provided in subsection (b).
>
> "(b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens ... in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." 52 U.S.C. § 10301.

B

For the first 115 years following Reconstruction, the State of Alabama elected no black Representatives to Congress. See *Singleton v. Merrill*, 582 F.Supp.3d 924, 947 (ND Ala. 2022) (*per curiam*). In 1992, several plaintiffs sued the State, alleging that it had been impermissibly diluting the votes of black Alabamians in violation of § 2. See *Wesch v. Hunt*, 785 F.Supp. 1491, 1493 (SD Ala.). The lawsuit produced a majority-black district in Alabama for the first time in decades. *Id.*, at 1499. And that fall, Birmingham lawyer Earl Hillard became the first black Representative from Alabama since 1877. 582 F.Supp.3d at 947.

Alabama's congressional map has "remained remarkably similar" after *Wesch*. Brief for Appellants in No. 21–1086 etc., p. 9 (Brief for Alabama). The map contains seven congressional districts, each with a single representative. See Supp. App. 205–211; 582 F.Supp.3d at 951. District 1 encompasses the Gulf Coast region in the southwest; District ***15** 2—known as the Wiregrass region—occupies the southeast; District 3 covers the eastern-central part of the State; Districts 4 and 5 stretch width-wise across the north, with the latter layered atop the former; District 6 is right in the State's middle; and District 7 spans the central west. *Id.*, at 951.

In 2020, the decennial census revealed that Alabama's population had grown by 5.1%. See 1 App. 86. A group of plaintiffs led by Alabama legislator Bobby Singleton sued the State, arguing that the existing congressional map was malapportioned and racially gerrymandered in violation of the Equal Protection Clause. 582 F.Supp.3d at 938–939. While litigation was proceeding, the Alabama Legislature's Committee on Reapportionment began creating a new districting map. *Ibid.* Although the prior decade's population growth did not change the number of seats that Alabama would receive in the House, the growth had been unevenly distributed across the State, and the existing map was thus out of date.

To solve the problem, the State turned to experienced mapmaker Randy Hinaman, who had created several districting maps that Alabama used over the past 30 years. *Id.*, at 947–948. The starting point for Hinaman was the then-existing 2011 congressional map, itself a product of the 2001 map that Hinaman had also created. Civ. No. 21–1530 (ND Ala.), ECF Doc. 70–2, pp. 40, 93–94; see also 582 F.Supp.3d at 950. Hinaman worked to adjust the 2011 map in accordance with the redistricting guidelines set by the legislature's Reapportionment Committee. *Id.*, at 948–950; 1 App. 275. Those guidelines prioritized population equality, contiguity, compactness, and avoiding dilution of minority voting strength. 582 F.Supp.3d at 1035–1036. ****1502** They also encouraged, as a secondary matter, avoiding incumbent pairings, respecting communities of interest, minimizing the number of counties in each district, and preserving cores of existing districts. *Id.*, at 1036–1037.

***16** The resulting map Hinaman drew largely resembled the 2011 map, again producing only one district in which black voters constituted a majority of the voting age population. Supp. App. 205–211. The Alabama Legislature enacted Hinaman's map under the name HB1. 582 F.Supp.3d at 935, 950–951. Governor Ivey signed HB1 into law on November 4, 2021. *Id.*, at 950.

C

Three groups of plaintiffs brought suit seeking to stop Alabama's Secretary of State from conducting congressional elections under HB1. The first group was led by Dr. Marcus Caster, a resident of Washington County, who challenged HB1 as invalid under § 2. *Id.*, at 934–935, 980. The second group, led by Montgomery County resident Evan Milligan, brought claims under § 2 and the Equal Protection Clause of the Fourteenth Amendment. *Id.*, at 939–940, 966. Finally, the *Singleton* plaintiffs, who had previously sued to enjoin Alabama's 2011 congressional map, amended their complaint to challenge HB1 as an impermissible racial gerrymander under the Equal Protection Clause. *Id.*, at 938–939.

A three-judge District Court was convened, comprised of Circuit Judge Marcus and District Judges Manasco and Moorer. The *Singleton* and *Milligan* actions were consolidated before the three-judge Court for purposes of preliminary injunction proceedings, while *Caster* proceeded before Judge Manasco on a parallel track. 582 F.Supp.3d at 934–935. A preliminary injunction hearing began on January 4, 2022, and concluded on January 12. *Id.*, at 943. In that time, the three-judge District Court received live testimony from 17 witnesses, reviewed more than 1000 pages of briefing and upwards of 350 exhibits, and considered arguments from the 43 different lawyers who had appeared in the litigation. *Id.*, at 935–936. After reviewing that extensive record, the Court concluded in a 227-page opinion that the question whether HB1 likely violated § 2 was not "a close one." It did. *Id.*, at 1026. The Court thus preliminarily enjoined ***17** Alabama from using HB1 in forthcoming elections.

Id., at 936.[2]

Four days later, on January 28, Alabama moved in this Court for a stay of the District Court's injunction. This Court granted a stay and scheduled the cases for argument, noting probable jurisdiction in *Milligan* and granting certiorari before judgment in *Caster*. 595 U. S. ——, 142 S.Ct. 879, —— L.Ed.2d —— (2022).

II

The District Court found that plaintiffs demonstrated a reasonable likelihood of success on their claim that HB1 violates § 2. We affirm that determination.

A

For the past forty years, we have evaluated claims brought under § 2 using the three-part framework developed in our decision ****1503** *Thornburg v. Gingles*, 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986). *Gingles* concerned a challenge to North Carolina's multimember districting scheme, which allegedly diluted the vote of its black citizens. *Id.*, at 34–36, 106 S.Ct. 2752. The case presented the first opportunity since the 1982 amendments to address how the new § 2 would operate.

Gingles began by describing what § 2 guards against. "The essence of a § 2 claim," the Court explained, "is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters." *Id.*, at 47, 106 S.Ct. 2752. That occurs where an "electoral structure operates to ***18** minimize or cancel out" minority voters' "ability to elect their preferred candidates." *Id.*, at 48, 106 S.Ct. 2752. Such a risk is greatest "where minority and majority voters consistently prefer different candidates" and where minority voters are submerged in a majority voting population that "regularly defeat[s]" their choices. *Ibid.*

To succeed in proving a § 2 violation under *Gingles*, plaintiffs must satisfy three "preconditions." *Id.*, at 50, 106 S.Ct. 2752. First, the "minority group must be sufficiently large and [geographically] compact to constitute a majority in a reasonably configured district." *Wisconsin Legislature* v. *Wisconsin Elections Comm'n*, 595 U. S. ——, ——, 142 S.Ct. 1245, 1248, 212 L.Ed.2d 251 (2022) (*per curiam*) (citing *Gingles*, 478 U.S. at 46–51, 106 S.Ct. 2752). A district will be reasonably configured, our cases explain, if it comports with traditional districting criteria, such as being contiguous and reasonably compact. See *Alabama Legislative Black Caucus v. Alabama*, 575 U.S. 254, 272, 135 S.Ct. 1257, 191 L.Ed.2d 314 (2015). "Second, the minority group must be able to show that it is politically cohesive." *Gingles*, 478 U.S. at 51, 106 S.Ct. 2752. And third, "the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it ... to defeat the minority's preferred candidate." *Ibid.* Finally, a plaintiff who demonstrates the three preconditions must also show, under the "totality of circumstances," that the political process is not "equally open" to minority voters. *Id.*, at 45–46, 106 S.Ct. 2752; see also *id.*, at 36–38, 106 S.Ct. 2752 (identifying several factors relevant to the totality of circumstances inquiry, including "the extent of any history of official discrimination in the state ... that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process").

Each *Gingles* precondition serves a different purpose. The first, focused on geographical compactness and numerosity, is "needed to establish that the minority has the potential to elect a representative of its own choice in some single-member district." *Growe v. Emison*, 507 U.S. 25, 40, 113 S.Ct. 1075, 122 L.Ed.2d 388 (1993). The second, concerning the political cohesiveness of the minority ***19** group, shows that a representative of its choice would in fact be elected. See *ibid.* The third precondition, focused on racially polarized voting, "establish[es] that the challenged districting thwarts a distinctive minority vote" at least plausibly on account of race. *Ibid.* And finally, the totality of circumstances inquiry recognizes that application of the *Gingles* factors is "peculiarly dependent upon the facts of each case." 478 U.S. at 79, 106 S.Ct. 2752. Before courts can find a violation of § 2, therefore, they must conduct "an intensely local appraisal" of the electoral mechanism at issue, as well as a "searching practical evaluation of the 'past and present reality.' " *Ibid.*

**1504 *Gingles* has governed our Voting Rights Act jurisprudence since it was decided 37 years ago. Congress has never disturbed our understanding of § 2 as *Gingles* construed it. And we have applied *Gingles* in one § 2 case after another, to different kinds of electoral systems and to different jurisdictions in States all over the country. See *Voinovich v. Quilter*, 507 U.S. 146, 113 S.Ct. 1149, 122 L.Ed.2d 500 (1993) (Ohio); *Growe*, 507 U.S. at 25, 113 S.Ct. 1075 (Minnesota); *Johnson v. De Grandy*, 512 U.S. 997, 114 S.Ct. 2647, 129 L.Ed.2d 775 (1994) (Florida); *Holder v. Hall*, 512 U.S. 874, 114 S.Ct. 2581, 129 L.Ed.2d 687 (1994) (Georgia); *Abrams v. Johnson*, 521 U.S. 74, 117 S.Ct. 1925, 138 L.Ed.2d 285 (1997) (Georgia); *League of United Latin American Citizens v. Perry*, 548 U.S. 399, 423, 126 S.Ct. 2594, 165 L.Ed.2d 609 (2006) (*LULAC*) (Texas); *Bartlett v. Strickland*, 556 U.S. 1, 129 S.Ct. 1231, 173 L.Ed.2d 173 (2009) (plurality opinion) (North Carolina); *Cooper v. Harris*, 581 U.S. 285, 137 S.Ct. 1455, 197 L.Ed.2d 837 (2017) (North Carolina); *Abbott* v. *Perez*, 585 U. S. ——, 138 S.Ct. 2305, 201 L.Ed.2d 714 (2018) (Texas); *Wisconsin Legislature*, 595 U. S. ——, 142 S.Ct. 1245, 212 L.Ed.2d 251 (Wisconsin).

B

As noted, the District Court concluded that plaintiffs' § 2 claim was likely to succeed under *Gingles*. 582 F.Supp.3d at 1026. Based on our review of the record, we agree.

With respect to the first *Gingles* precondition, the District Court correctly found that black voters could constitute a majority in a second district that was "reasonably configured." 1 App. to Emergency Application for Stay in **20 No. 21–1086 etc., p. 253 (MSA). The plaintiffs adduced eleven illustrative maps—that is, example districting maps that Alabama could enact—each of which contained two majority-black districts that comported with traditional districting criteria. With respect to compactness, for example, the District Court explained that the maps submitted by one of plaintiffs' experts, Dr. Moon Duchin, "perform[ed] generally better on average than" did HB1. 582 F.Supp.3d at 1009. A map offered by another of plaintiffs' experts, Bill Cooper, produced districts roughly as compact as the existing plan. *Ibid.* And none of plaintiffs' maps contained any "tentacles, appendages, bizarre shapes, or any other obvious irregularities that would make it difficult to find" them sufficiently compact. *Id.*, at 1011. Plaintiffs' maps also satisfied other traditional districting criteria. They contained equal populations, were contiguous, and respected existing political subdivisions, such as counties, cities, and towns. *Id.*, at 1011, 1016. Indeed, some of plaintiffs' proposed maps split the same number of county lines as (or even *fewer* county lines than) the State's map. *Id.*, at 1011–1012. We agree with the District Court, therefore, that plaintiffs' illustrative maps "strongly suggest[ed] that Black voters in Alabama" could constitute a majority in a second, reasonably configured, district. *Id.*, at 1010.

The State nevertheless argues that plaintiffs' maps were not reasonably configured because they failed to keep together a traditional community of interest within Alabama. See, *e.g.*, *id.*, at 1012. A "community of interest," according to Alabama's districting guidelines, is an "area with recognized similarities of interests, including but not limited to ethnic, racial, economic, tribal, social, geographic, or historical identities." *Ibid.* Alabama argues that the Gulf Coast region in the southwest of the State is such a community of interest, and that plaintiffs' maps erred by separating it into two different districts. *Ibid.*

*21 **1505 We do not find the State's argument persuasive. Only two witnesses testified that the Gulf Coast was a community of interest. *Id.*, at 1015. The testimony provided by one of those witnesses was "partial, selectively informed, and poorly supported." *Ibid.* The other witness, meanwhile, justified keeping the Gulf Coast together "simply" to preserve "political advantage[ ]": "You start splitting counties," he testified, "and that county loses its influence. That's why I don't want Mobile County to be split." *Id.*, at 990, 1015. The District Court understandably found this testimony insufficient to sustain Alabama's "overdrawn argument that there can be no legitimate reason to split" the Gulf Coast region. *Id.*, at 1015.

Even if the Gulf Coast did constitute a community of interest, moreover, the District Court found that plaintiffs' maps would still be reasonably configured because they joined together a different community of interest called the Black Belt. *Id.*, at 1012–1014. Named for its fertile soil, the Black Belt contains a high proportion of black voters, who "share a rural geography, concentrated poverty, unequal access to government services, ... lack of adequate healthcare," and a lineal connection to "the many enslaved people brought there to work in the antebellum period." *Id.*, at 1012–1013; see also 1 App. 299–304. The District Court concluded—correctly, under our precedent—that it did not have to conduct a "beauty contest[ ]"

between plaintiffs' maps and the State's. There would be a split community of interest in both. 582 F.Supp.3d at 1012 (quoting *Bush v. Vera*, 517 U.S. 952, 977–978, 116 S.Ct. 1941, 135 L.Ed.2d 248 (1996) (plurality opinion)).

The State also makes a related argument based on "core retention"—a term that refers to the proportion of districts that remain when a State transitions from one districting plan to another. See, *e.g.*, Brief for Alabama 25, 61. Here, by largely mirroring Alabama's 2011 districting plan, HB1 performs well on the core retention metric. Plaintiffs' illustrative ***22** plans, by contrast, naturally fare worse because they change where the 2011 district lines were drawn. See *e.g.*, Supp. App. 164–173. But this Court has never held that a State's adherence to a previously used districting plan can defeat a § 2 claim. If that were the rule, a State could immunize from challenge a new racially discriminatory redistricting plan simply by claiming that it resembled an old racially discriminatory plan. That is not the law: § 2 does not permit a State to provide some voters "less opportunity ... to participate in the political process" just because the State has done it before. 52 U.S.C. § 10301(b).

As to the second and third *Gingles* preconditions, the District Court determined that there was "no serious dispute that Black voters are politically cohesive, nor that the challenged districts' white majority votes sufficiently as a bloc to usually defeat Black voters' preferred candidate." 582 F.Supp.3d at 1016 (internal quotation marks omitted). The Court noted that, "on average, Black voters supported their candidates of choice with 92.3% of the vote" while "white voters supported Black-preferred candidates with 15.4% of the vote." *Id.*, at 1017 (internal quotation marks omitted). Plaintiffs' experts described the evidence of racially polarized voting in Alabama as "intens[e]," "very strong," and "very clear." *Ibid.* Even Alabama's expert conceded "that the candidates preferred by white voters in the areas that he looked at regularly defeat the candidates preferred by Black voters." *Id.*, at 1018.

Finally, the District Court concluded that plaintiffs had carried their burden ****1506** at the totality of circumstances stage. The Court observed that elections in Alabama were racially polarized; that "Black Alabamians enjoy virtually zero success in statewide elections"; that political campaigns in Alabama had been "characterized by overt or subtle racial appeals"; and that "Alabama's extensive history of repugnant racial and voting-related discrimination is undeniable and well documented." *Id.*, at 1018–1024.

***23** We see no reason to disturb the District Court's careful factual findings, which are subject to clear error review and have gone unchallenged by Alabama in any event. See *Cooper*, 581 U.S. at 309, 137 S.Ct. 1455. Nor is there a basis to upset the District Court's legal conclusions. The Court faithfully applied our precedents and correctly determined that, under existing law, HB1 violated § 2.

III

The heart of these cases is not about the law as it exists. It is about Alabama's attempt to remake our § 2 jurisprudence anew.

The centerpiece of the State's effort is what it calls the "race-neutral benchmark." The theory behind it is this: Using modern computer technology, mapmakers can now generate millions of possible districting maps for a given State. The maps can be designed to comply with traditional districting criteria but to not consider race. The mapmaker can determine how many majority-minority districts exist in each map, and can then calculate the median or average number of majority-minority districts in the entire multimillion-map set. That number is called the race-neutral benchmark.

The State contends that this benchmark should serve as the point of comparison in § 2 cases. The benchmark, the State says, was derived from maps that were "race-blind"—maps that cannot have "deni[ed] or abridge[d]" anyone's right to vote "on account of race" because they never took race into "account" in the first place. 52 U.S.C. § 10301(a). Courts in § 2 cases should therefore compare the number of majority-minority districts in the State's plan to the benchmark. If those numbers are similar—if the State's map "resembles" the benchmark in this way—then, Alabama argues, the State's map also cannot have "deni[ed] or abridge[d]" anyone's right to vote "on account of race." *Ibid.*

Alabama contends that its approach should be adopted for two reasons. First, the State argues that a race-neutral ***24** benchmark best matches the text of the Voting Rights Act. Section 2 requires that the political processes be "equally open." § 10301(b). What that means, the State asserts, is that the State's map cannot impose "obstacles or burdens that block or

seriously hinder voting on account of race." Brief for Alabama 43. These obstacles do not exist, in the State's view, where its map resembles a map that never took race into "account." *Ibid.* Second, Alabama argues that the *Gingles* framework ends up requiring racial proportionality in districting. According to the State, *Gingles* demands that where "another majority-black district could be drawn, it must be drawn." Brief for Alabama 71 (emphasis deleted). And that sort of proportionality, Alabama continues, is inconsistent with the compromise that Congress struck, with the text of § 2, and with the Constitution's prohibition on racial discrimination in voting.

To apply the race-neutral benchmark in practice, Alabama would require § 2 plaintiffs to make at least three showings. First, the illustrative plan that plaintiffs adduce for the first *Gingles* precondition cannot have been "based" on race. Brief for Alabama 56. Second, plaintiffs must show at ****1507** the totality of circumstances stage that the State's enacted plan diverges from the average plan that would be drawn without taking race into account. And finally, plaintiffs must ultimately prove that any deviation between the State's plan and a race-neutral plan is explainable "only" by race—not, for example, by "the State's naturally occurring geography and demography." *Id.*, at 46.

As we explain below, we find Alabama's new approach to § 2 compelling neither in theory nor in practice. We accordingly decline to recast our § 2 case law as Alabama requests.

A

1

Section 2 prohibits States from imposing any "standard, practice, or procedure ... in a manner which results in a ***25** denial or abridgement of the right of any citizen ... to vote on account of race or color." 52 U.S.C. § 10301(a). What that means, § 2 goes on to explain, is that the political processes in the State must be "equally open," such that minority voters do not "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." § 10301(b).

We have understood the language of § 2 against the background of the hard-fought compromise that Congress struck. To that end, we have reiterated that § 2 turns on the presence of discriminatory effects, not discriminatory intent. See, *e.g.*, *Chisom v. Roemer*, 501 U.S. 380, 403–404, 111 S.Ct. 2354, 115 L.Ed.2d 348 (1991). And we have explained that "[i]t is patently clear that Congress has used the words 'on account of race or color' in the Act to mean 'with respect to' race or color, and not to connote any required purpose of racial discrimination." *Gingles*, 478 U.S. at 71, n. 34, 106 S.Ct. 2752 (plurality opinion) (some alterations omitted). Individuals thus lack an equal opportunity to participate in the political process when a State's electoral structure operates in a manner that "minimize[s] or cancel[s] out the[ir] voting strength." *Id.*, at 47, 106 S.Ct. 2752. That occurs where an individual is disabled from "enter[ing] into the political process in a reliable and meaningful manner" "in the light of past and present reality, political and otherwise." *White*, 412 U.S. at 767, 770, 93 S.Ct. 2332. A district is not equally open, in other words, when minority voters face—unlike their majority peers—bloc voting along racial lines, arising against the backdrop of substantial racial discrimination within the State, that renders a minority vote unequal to a vote by a nonminority voter.

The State's reading of § 2, by contrast, runs headlong into our precedent. Alabama asserts that a State's map does not "abridge[ ]" a person's right to vote "on account of race" if the map resembles a sufficient number of race-neutral alternatives. See Brief for Alabama 54–56. But our cases have consistently focused, for purposes of litigation, on the specific ***26** illustrative maps that a plaintiff adduces. Deviation from that map shows it is *possible* that the State's map has a disparate effect on account of race. The remainder of the *Gingles* test helps determine whether that possibility is reality by looking to polarized voting preferences and the frequency of racially discriminatory actions taken by the State, past and present.

A State's liability under § 2, moreover, must be determined "based on the totality of circumstances." 52 U.S.C. § 10301(b). Yet Alabama suggests there is only one "circumstance[ ]" that matters—how the State's map stacks up relative to the

benchmark. That single-minded view of § 2 cannot be squared with the VRA's **1508 demand that courts employ a more refined approach. And we decline to adopt an interpretation of § 2 that would "revise and reformulate the *Gingles* threshold inquiry that has been the baseline of our § 2 jurisprudence" for nearly forty years. *Bartlett*, 556 U.S. at 16, 129 S.Ct. 1231 (plurality opinion); see also *Wisconsin Legislature*, 595 U. S., at ——, 142 S.Ct., at 1250 (faulting lower court for "improperly reduc[ing] *Gingles*' totality-of-circumstances analysis to a single factor"); *De Grandy*, 512 U.S. at 1018, 114 S.Ct. 2647 ("An inflexible rule would run counter to the textual command of § 2, that the presence or absence of a violation be assessed 'based on the totality of circumstances.' ").[3]

2

Alabama also argues that the race-neutral benchmark is required because our existing § 2 jurisprudence inevitably demands racial proportionality in districting, contrary to the last sentence of § 2(b). But properly applied, the *Gingles* framework itself imposes meaningful constraints on proportionality, as our decisions have frequently demonstrated.

*27 In *Shaw* v. *Reno*, for example, we considered the permissibility of a second majority-minority district in North Carolina, which at the time had 12 seats in the U. S. House of Representatives and a 20% black voting age population. 509 U.S. 630, 633–634, 113 S.Ct. 2816, 125 L.Ed.2d 511 (1993). The second majority-minority district North Carolina drew was "160 miles long and, for much of its length, no wider than the [interstate] corridor." *Id.*, at 635, 113 S.Ct. 2816. The district wound "in snakelike fashion through tobacco country, financial centers, and manufacturing areas until it gobble[d] in enough enclaves of black neighborhoods." *Id.*, at 635–636, 113 S.Ct. 2816. Indeed, the district was drawn so imaginatively that one state legislator remarked: "[I]f you drove down the interstate with both car doors open, you'd kill most of the people in the district." *Id.*, at 636, 113 S.Ct. 2816.

Though North Carolina believed the additional district was required by § 2, we rejected that conclusion, finding instead that those challenging the map stated a claim of impermissible racial gerrymandering under the Equal Protection Clause. *Id.*, at 655, 658, 113 S.Ct. 2816. In so holding, we relied on the fact that the proposed district was not reasonably compact. *Id.*, at 647, 113 S.Ct. 2816. North Carolina had "concentrated a *dispersed* minority population in a single district by disregarding traditional districting principles such as compactness, contiguity, and respect for political subdivisions." *Ibid.* (emphasis added). And "[a] reapportionment plan that includes in one district individuals who belong to the same race, *but who are otherwise separated by geographical and political boundaries*," we said, raised serious constitutional concerns. *Ibid.* (emphasis added).

The same theme emerged in our 1995 decision *Miller* v. *Johnson*, where we upheld a district court's finding that one of Georgia's ten congressional districts was the product of an impermissible racial gerrymander. 515 U.S. 900, 906, 910–911, 115 S.Ct. 2475, 132 L.Ed.2d 762. At the time, Georgia's black voting age population was 27%, but there was only one majority-minority district. *Id.*, at 906, 115 S.Ct. 2475. To comply with the VRA, Georgia thought it necessary *28 to create two more **1509 majority-minority districts—achieving proportionality. *Id.*, at 920–921, 115 S.Ct. 2475. But like North Carolina in *Shaw*, Georgia could not create the districts without flouting traditional criteria. One district "centered around four discrete, widely spaced urban centers that ha[d] absolutely nothing to do with each other, and stretch[ed] the district hundreds of miles across rural counties and narrow swamp corridors." 515 U.S. at 908, 115 S.Ct. 2475. "Geographically," we said of the map, "it is a monstrosity." *Id.*, at 909, 115 S.Ct. 2475.

In *Bush* v. *Vera*, a plurality of the Court again explained how traditional districting criteria limited any tendency of the VRA to compel proportionality. The case concerned Texas's creation of three additional majority-minority districts. 517 U.S. at 957, 116 S.Ct. 1941. Though the districts brought the State closer to proportional representation, we nevertheless held that they constituted racial gerrymanders in violation of the Fourteenth Amendment. That was because the districts had "no integrity in terms of traditional, neutral redistricting criteria." *Id.*, at 960, 116 S.Ct. 1941. One of the majority-black districts consisted "of narrow and bizarrely shaped tentacles." *Id.*, at 965, 116 S.Ct. 1941. The proposed majority-Hispanic district resembled "a sacred Mayan bird" with "[s]pindly legs reach[ing] south" and a "plumed head ris[ing] northward." *Id.*, at 974, 116 S.Ct. 1941.

The point of all this is a simple one. Forcing proportional representation is unlawful and inconsistent with this Court's

approach to implementing § 2. The numbers bear the point out well. At the congressional level, the fraction of districts in which black-preferred candidates are likely to win "is currently below the Black share of the eligible voter population in every state but three." Brief for Professors Jowei Chen et al. as *Amici Curiae* 3 (Chen Brief). Only one State in the country, meanwhile, "has attained a proportional share" of districts in which Hispanic-preferred candidates are likely to prevail. *Id.*, at 3–4. That is because as residential segregation decreases—as it has "sharply" done since the ***29** 1970s—satisfying traditional districting criteria such as the compactness requirement "becomes more difficult." T. Crum, Reconstructing Racially Polarized Voting, 70 Duke L. J. 261, 279, and n. 105 (2020).

Indeed, as *amici* supporting the appellees emphasize, § 2 litigation in recent years has rarely been successful for just that reason. See Chen Brief 3–4. Since 2010, plaintiffs nationwide have apparently succeeded in fewer than ten § 2 suits. *Id.*, at 7. And "the *only* state legislative or congressional districts that were redrawn because of successful Section 2 challenges were a handful of state house districts near Milwaukee and Houston." *Id.*, at 7–8. By contrast, "[n]umerous lower courts" have upheld districting maps "where, due to minority populations' geographic diffusion, plaintiffs couldn't design an additional majority-minority district" or satisfy the compactness requirement. *Id.*, at 15–16 (collecting cases). The same has been true of recent litigation in this Court. See *Abbott*, 585 U. S., at —— – ——, 138 S.Ct., at 2331 (finding a Texas district did not violate § 2 because "the geography and demographics of south and west Texas do not permit the creation of any more than the seven Latino ... districts that exist under the current plan").[4]

****1510** Reapportionment, we have repeatedly observed, "is primarily the duty and responsibility of the State[s]," not the federal courts. *Id.*, at ——, 138 S.Ct., at 2324. Properly applied, the *Gingles* factors help ensure that remains the case. As respondents ***30** themselves emphasize, § 2 "never require[s] adoption of districts that violate traditional redistricting principles." Brief for Respondents in No. 21–1087, p. 3. Its exacting requirements, instead, limit judicial intervention to "those instances of intensive racial politics" where the "excessive role [of race] in the electoral process ... den[ies] minority voters equal opportunity to participate." Senate Report 33–34.

B

Although we are content to reject Alabama's invitation to change existing law on the ground that the State misunderstands § 2 and our decisions implementing it, we also address how the race-neutral benchmark would operate in practice. Alabama's approach fares poorly on that score, which further counsels against our adopting it.

1

The first change to existing law that Alabama would require is prohibiting the illustrative maps that plaintiffs submit to satisfy the first *Gingles* precondition from being "based" on race. Brief for Alabama 56. Although Alabama is not entirely clear whether, under its view, plaintiffs' illustrative plans must not take race into account at all or whether they must just not "prioritize" race, *ibid.*, we see no reason to impose such a new rule.

When it comes to considering race in the context of districting, we have made clear that there is a difference "between being aware of racial considerations and being motivated by them." *Miller*, 515 U.S. at 916, 115 S.Ct. 2475; see also *North Carolina* v. *Covington*, 585 U. S. ——, ——, 138 S.Ct. 2548, 2553, 201 L.Ed.2d 993 (2018) (*per curiam*). The former is permissible; the latter is usually not. That is because "[r]edistricting legislatures will ... almost always be aware of racial demographics," *Miller*, 515 U.S. at 916, 115 S.Ct. 2475, but such "race consciousness does not lead inevitably to impermissible race discrimination," *Shaw*, 509 U.S. at 646, 113 S.Ct. 2816. Section 2 itself "demands consideration of race." ***31** *Abbott*, 581 U. S., at ——, 138 S.Ct., at 2315. The question whether additional majority-*minority* districts can be drawn, after all, involves a "quintessentially race-conscious calculus." *De Grandy*, 512 U.S. at 1020, 114 S.Ct. 2647.

At the same time, however, race may not be "the predominant factor in drawing district lines unless [there is] a compelling reason." *Cooper*, 581 U.S. at 291, 137 S.Ct. 1455. Race predominates in the drawing of district lines, our cases explain, when

"race-neutral considerations [come] into play only after the race-based decision had been made." *Bethune-Hill v. Virginia State Bd. of Elections*, 580 U.S. 178, 189, 137 S.Ct. 788, 197 L.Ed.2d 85 (2017) (internal quotation marks omitted). That may occur where "race for its own sake is the overriding reason for choosing one map over others." *Id.*, at 190, 137 S.Ct. 788.

While the line between racial predominance and racial consciousness can be difficult ****1511** to discern, see *Miller*, 515 U.S. at 916, 115 S.Ct. 2475, it was not breached here. The *Caster* plaintiffs relied on illustrative maps produced by expert Bill Cooper. See 2 App. 591–592. Cooper testified that while it was necessary for him to *consider* race, he also took several other factors into account, such as compactness, contiguity, and population equality. *Ibid.* Cooper testified that he gave all these factors "equal weighting." *Id.*, at 594. And when asked squarely whether race predominated in his development of the illustrative plans, Cooper responded: "No. It was a consideration. This is a Section 2 lawsuit, after all. But it did not predominate or dominate." *Id.*, at 595.

The District Court agreed. It found "Cooper's testimony highly credible" and commended Cooper for "work[ing] hard to give 'equal weight[ ]' to all traditional redistricting criteria." 582 F.Supp.3d at 1005–1006; see also *id.*, at 978–979. The court also explained that Alabama's evidence of racial predominance in Cooper's maps was exceedingly thin. Alabama's expert, Thomas Bryan, "testified that he never reviewed the exhibits to Mr. Cooper's report" and "that he never reviewed" one of the illustrative plans that Cooper ***32** submitted. *Id.*, at 1006. Bryan further testified that he could offer no "conclusions or opinions as to the apparent basis of any individual line drawing decisions in Cooper's illustrative plans." 2 App. 740. By his own admission, Bryan's analysis of any race predominance in Cooper's maps "was pretty light." *Id.*, at 739. The District Court did not err in finding that race did not predominate in Cooper's maps in light of the evidence before it.[5]

The dissent contends that race nevertheless predominated in both Cooper's and Duchin's maps because they were designed to hit " 'express racial target[s]' "—namely, two "50%-plus majority-black districts." *Post*, at 1527 (opinion of THOMAS, J.) (quoting *Bethune-Hill*, 580 U.S. at 192, 137 S.Ct. 788). This argument fails in multiple ways. First, the dissent's reliance on *Bethune-Hill* is mistaken. In that case, this Court was unwilling to conclude that a State's maps were produced in a racially predominant manner. Instead, we remanded for the lower court to conduct the predominance analysis itself, explaining that "the use of an express racial target" was just one factor among others that the court would have to consider as part of "[a] holistic analysis." *Id.*, at 192, 137 S.Ct. 788. Justice ***33** THOMAS dissented in relevant part, contending that because "the legislature sought to achieve a [black voting-age population] of at least 55%," race necessarily predominated in its decisionmaking. *Id.*, at 198, 137 S.Ct. 788 (opinion concurring in part and dissenting in part). But the Court did not join in that view, and Justice THOMAS again dissents along the same lines today.

****1512** The second flaw in the dissent's proposed approach is its inescapable consequence: *Gingles* must be overruled. According to the dissent, racial predominance plagues *every single illustrative map ever adduced* at the first step of *Gingles*. For all those maps were created with an express target in mind—they were created to show, as our cases require, that an additional majority-minority district could be drawn. That is the whole point of the enterprise. The upshot of the approach the dissent urges is not to change how *Gingles* is applied, but to reject its framework outright.

The contention that mapmakers must be entirely "blind" to race has no footing in our § 2 case law. The line that we have long drawn is between consciousness and predominance. Plaintiffs adduced at least one illustrative map that comported with our precedents. They were required to do no more to satisfy the first step of *Gingles*.

2

The next condition Alabama would graft onto § 2 is a requirement that plaintiffs demonstrate, at the totality of circumstances stage, that the State's enacted plan contains fewer majority-minority districts than the race-neutral benchmark. Brief for Alabama 43. If it does not, then § 2 should drop out of the picture. *Id.*, at 44.

Alabama argues that is what should have happened here. It notes that one of plaintiffs' experts, Dr. Duchin, used an algorithm to create "2 million districting plans for Alabama ... without taking race into account in any way in the generation process." 2 App. 710. Of these two million "race-blind" ***34** plans, none contained two majority-black districts while many plans did not contain any. *Ibid.* Alabama also points to a "race-neutral" computer simulation conducted by another one of

plaintiffs' experts, Dr. Kosuke Imai, which produced 30,000 potential maps. Brief for Alabama 55. As with Dr. Duchin's maps, none of the maps that Dr. Imai created contained two majority-black districts. See 2 App. 571–572. Alabama thus contends that because HB1 sufficiently "resembles" the "race-neutral" maps created by Dr. Duchin and Dr. Imai—all of the maps lack two majority-black districts—HB1 does not violate § 2. Brief for Alabama 54.

Alabama's reliance on the maps created by Dr. Duchin and Dr. Imai is misplaced. For one, neither Duchin's nor Imai's maps accurately represented the districting process in Alabama. Dr. Duchin's maps were based on old census data—from 2010 instead of 2020—and ignored certain traditional districting criteria, such as keeping together communities of interest, political subdivisions, or municipalities.[6] And Dr. Imai's 30,000 maps failed to incorporate Alabama's own districting guidelines, including keeping together communities of interest and preserving municipal boundaries. See Supp. App. 58–59.[7]

***35 **1513** But even if the maps created by Dr. Duchin and Dr. Imai were adequate comparators, we could not adopt the map-comparison test that Alabama proposes. The test is flawed in its fundamentals. Districting involves myriad considerations—compactness, contiguity, political subdivisions, natural geographic boundaries, county lines, pairing of incumbents, communities of interest, and population equality. See *Miller*, 515 U.S. at 916, 115 S.Ct. 2475. Yet "[q]uantifying, measuring, prioritizing, and reconciling these criteria" requires map drawers to "make difficult, contestable choices." Brief for Computational Redistricting Experts as *Amici Curiae* 8 (Redistricting Brief). And "[i]t is easy to imagine how different criteria could move the median map toward different ... distributions," meaning that "the same map could be [lawful] or not depending solely on what the mapmakers said they set out to do." *Rucho* v. *Common Cause*, 588 U. S. ——, —— – ——, 139 S.Ct. 2484, 2505, 204 L.Ed.2d 931 (2019). For example, "the scientific literature contains dozens of competing metrics" on the issue of compactness. Redistricting Brief 8. Which one of these metrics should be used? What happens when the maps they produce yield different benchmark results? How are courts to decide?

Alabama does not say; it offers no rule or standard for determining which of these choices are better than others. Nothing in § 2 provides an answer either. In 1982, the computerized mapmaking software that Alabama contends plaintiffs ***36** must use to demonstrate an (unspecified) level of deviation did not even exist. See, *e.g.*, J. Chen & N. Stephanopoulos, The Race-Blind Future of Voting Rights, 130 Yale L. J. 862, 881–882 (2021) (Chen & Stephanopoulos). And neither the text of § 2 nor the fraught debate that produced it suggests that "equal access" to the fundamental right of voting turns on computer simulations that are technically complicated, expensive to produce, and available to "[o]nly a small cadre of university researchers [that] have the resources and expertise to run" them. Brief for United States as *Amicus Curiae* 28 (citing Chen & Stephanopoulos 882–884).[8]

One final point bears mentioning. Throughout these cases, Alabama has repeatedly emphasized that HB1 cannot have violated § 2 because none of plaintiffs' two million odd maps contained more than one majority-minority district. See, *e.g.*, Brief for Alabama 1, 23, 30, 31, 54–56, 70, 79. The point is that two million is a very big number and that sheer volume matters. But as elsewhere, Alabama misconceives ****1514** the math project that it expects courts to oversee. A brief submitted by three computational redistricting experts explains that the number of possible districting maps in Alabama is at least in the "trillion trillions." Redistricting Brief 6, n. 7. Another publication reports that the number of potential maps may be orders of magnitude higher: "the universe of all possible connected, population-balanced districting plans that satisfy the state's requirements," it explains, "is likely in the range of googols." Duchin & Spencer 768. Two million maps, in other words, is not many maps at all. And Alabama's insistent reliance on that number, ***37** however powerful it may sound in the abstract, is thus close to irrelevant in practice. What would the next million maps show? The next billion? The first trillion of the trillion trillions? Answerless questions all. See, *e.g.*, Redistricting Brief 2 ("[I]t is computationally intractable, and thus effectively impossible, to generate a complete enumeration of all potential districting plans. [Even] algorithms that attempt to create a manageable sample of that astronomically large universe do not consistently identify an average or median map."); Duchin & Spencer 768 ("[A] comprehensive survey of [all districting plans within a State] is impossible.").

Section 2 cannot require courts to judge a contest of computers when there is no reliable way to determine who wins, or even where the finish line is.

Alabama's final contention with respect to the race-neutral benchmark is that it requires plaintiffs to demonstrate that any deviations between the State's enacted plan and race-neutral alternatives "can be explained *only* by racial discrimination." Brief for Alabama 44 (emphasis added).

We again find little merit in Alabama's proposal. As we have already explained, our precedents and the legislative compromise struck in the 1982 amendments clearly rejected treating discriminatory intent as a requirement for liability under § 2. See, *e.g.*, *Chisom*, 501 U.S. at 403–404, 111 S.Ct. 2354; *Shaw*, 509 U.S. at 641, 113 S.Ct. 2816; *Reno v. Bossier Parish School Bd.*, 520 U.S. 471, 481–482, 117 S.Ct. 1491, 137 L.Ed.2d 730 (1997). Yet Alabama's proposal is even *more* demanding than the intent test Congress jettisoned. Demonstrating discriminatory intent, we have long held, "does not require a plaintiff to prove that the challenged action rested *solely* on racially discriminatory purpose[ ]." *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 265, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977) (emphasis added); see also *Reno*, 520 U.S. at 488, 117 S.Ct. 1491. Alabama's proposed approach stands in sharp contrast to all this, injecting into the effects test of § 2 an ***38** evidentiary standard that even our purposeful discrimination cases eschew.

C

Alabama finally asserts that the Court should outright stop applying § 2 in cases like these because the text of § 2 does not apply to single-member redistricting and because § 2 is unconstitutional as the District Court applied it here. We disagree on both counts.

Alabama first argues that § 2 does not apply to single-member redistricting. Echoing Justice THOMAS's concurrence in *Holder* v. *Hall*, Alabama reads § 2's reference to "standard, practice, or procedure" to mean only the "methods for conducting a part of the voting process that might ... be used to interfere with a citizen's ability to cast his vote." 512 U.S. at 917–918, 114 S.Ct. 2581 (opinion concurring ****1515** in judgment). Examples of covered activities would include "registration requirements, ... the locations of polling places, the times polls are open, the use of paper ballots as opposed to voting machines, and other similar aspects of the voting process." *Id.*, at 922, 114 S.Ct. 2581. But not "a single-member districting system or the selection of one set of districting lines over another." *Id.*, at 923, 114 S.Ct. 2581.

This understanding of § 2 cannot be reconciled with our precedent. As recounted above, we have applied § 2 to States' districting maps in an unbroken line of decisions stretching four decades. See *supra*, at 1503 – 1504; see also *Brnovich*, 594 U. S., at ——, n. 5, 141 S.Ct., at 2333, n. 5) (collecting cases). In doing so, we have unanimously held that § 2 and *Gingles* "[c]ertainly ... apply" to claims challenging single-member districts. *Growe*, 507 U.S. at 40, 113 S.Ct. 1075. And we have even invalidated portions of a State's single-district map under § 2. See *LULAC*, 548 U.S. at 427–429, 126 S.Ct. 2594.[9] Alabama's approach would require ***39** "abandoning" this precedent, "overruling the interpretation of § 2" as set out in nearly a dozen of our cases. *Holder*, 512 U.S. at 944, 114 S.Ct. 2581 (opinion of THOMAS, J.).

We decline to take that step. Congress is undoubtedly aware of our construing § 2 to apply to districting challenges. It can change that if it likes. But until and unless it does, statutory *stare decisis* counsels our staying the course. See, *e.g.*, *Kimble v. Marvel Entertainment, LLC*, 576 U.S. 446, 456, 135 S.Ct. 2401, 192 L.Ed.2d 463 (2015).[10]

The statutory text in any event supports the conclusion that § 2 applies to single-member districts. Alabama's own proffered definition of a "procedure is the manner or method of proceeding in a process or course of action." Brief for Alabama 51 (internal quotation marks omitted). But the manner of proceeding in the act of voting entails determining in which districts voters will vote. The fact that the term "procedure" is preceded by the phrase "qualification or prerequisite to voting," 52 U.S.C. § 10301(a), does not change its meaning. It is hard to imagine many more fundamental "prerequisites" to voting than determining where to cast your ballot or who you are eligible to vote for. Perhaps for ***40** that reason, even Alabama ****1516** does not bear the courage of its conviction on this point. It refuses to argue that § 2 is inapplicable to multimember districting, though its textual arguments apply with equal force in that context.

The dissent, by contrast, goes where even Alabama does not dare, arguing that § 2 is wholly inapplicable to districting because it "focuses on ballot access and counting" only. *Post*, at 1520 (opinion of THOMAS, J.). But the statutory text upon which the dissent relies supports the exact opposite conclusion. The relevant section provides that "[t]he terms 'vote' or

'voting' shall include *all action necessary to make a vote effective*." *Ibid.* (quoting 52 U.S.C. § 10310(c)(1); emphasis added). Those actions "includ[e], but [are] not limited to, ... action[s] required by law prerequisite to voting, casting a ballot, and having such ballot counted properly and included in the appropriate totals of votes cast." § 10310(c)(1). It would be anomalous to read the broad language of the statute—"all action necessary," "including but not limited to"—to have the crabbed reach that Justice THOMAS posits. And we have already discussed why determining where to cast a ballot constitutes a "prerequisite" to voting, as the statute requires.

The dissent also contends that "applying § 2 to districting rests on systematic neglect of ... the ballot-access focus of the 1960s' voting-rights struggles." *Post*, at 1520 (opinion of THOMAS, J.). But history did not stop in 1960. As we have explained, Congress adopted the amended § 2 in response to the 1980 decision *City of Mobile*, a case about *districting*. And—as the dissent itself acknowledges—"Congress drew § 2(b)'s current operative language" from the 1973 decision *White* v. *Regester*, *post*, at 1521, n. 3 (opinion of THOMAS, J.), a case that was also about districting (in fact, a case that invalidated two multimember districts in Texas and ordered them redrawn into single-member districts, 412 U.S. at 765, 93 S.Ct. 2332). This was not lost on anyone when § 2 was amended. Indeed, it was the precise reason that the contentious debates over ***41** proportionality raged—debates that would have made little sense if § 2 covered only poll taxes and the like, as the dissent contends.

We also reject Alabama's argument that § 2 as applied to redistricting is unconstitutional under the Fifteenth Amendment. According to Alabama, that Amendment permits Congress to legislate against only purposeful discrimination by States. See Brief for Alabama 73. But we held over 40 years ago "that, even if § 1 of the [Fifteenth] Amendment prohibits only purposeful discrimination, the prior decisions of this Court foreclose any argument that Congress may not, pursuant to § 2 [of the Fifteenth Amendment] outlaw voting practices that are discriminatory in effect." *City of Rome v. United States*, 446 U.S. 156, 173, 100 S.Ct. 1548, 64 L.Ed.2d 119 (1980). The VRA's "ban on electoral changes that are discriminatory in effect," we emphasized, "is an appropriate method of promoting the purposes of the Fifteenth Amendment." *Id.*, at 177, 100 S.Ct. 1548. As *City of Rome* recognized, we had reached the very same conclusion in *South Carolina* v. *Katzenbach*, a decision issued right after the VRA was first enacted. 383 U.S. at 308–309, 329–337, 86 S.Ct. 803; see also *Brnovich*, 594 U. S., at ——, 141 S.Ct., at 2330–2331.

Alabama further argues that, even if the Fifteenth Amendment authorizes the effects test of § 2, that Amendment does not authorize race-based redistricting as a remedy for § 2 violations. But for the last four decades, this Court and the lower federal courts have repeatedly applied the effects test of § 2 as interpreted in *Gingles* and, under certain circumstances, have authorized race-based redistricting as ****1517** a remedy for state districting maps that violate § 2. See, *e.g.*, *supra,* at 1503 – 1504; cf. *Mississippi Republican Executive Committee v. Brooks*, 469 U.S. 1002, 105 S.Ct. 416, 83 L.Ed.2d 343 (1984). In light of that precedent, including *City of Rome*, we are not persuaded by Alabama's arguments that § 2 as interpreted in *Gingles* exceeds the remedial authority of Congress.

The concern that § 2 may impermissibly elevate race in the allocation of political power within the States is, of course, ***42** not new. See, *e.g.*, *Shaw*, 509 U.S. at 657, 113 S.Ct. 2816 ("Racial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions; it threatens to carry us further from the goal of a political system in which race no longer matters."). Our opinion today does not diminish or disregard these concerns. It simply holds that a faithful application of our precedents and a fair reading of the record before us do not bear them out here.

* * *

The judgments of the District Court for the Northern District of Alabama in the *Caster* case, and of the three-judge District Court in the *Milligan* case, are affirmed.

It is so ordered.

Justice KAVANAUGH, concurring in all but Part III–B–1.

I agree with the Court that Alabama's redistricting plan violates § 2 of the Voting Rights Act as interpreted in *Thornburg v.*

Gingles, 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986). I write separately to emphasize four points.

First, the upshot of Alabama's argument is that the Court should overrule *Gingles*. But the *stare decisis* standard for this Court to overrule a statutory precedent, as distinct from a constitutional precedent, is comparatively strict. Unlike with constitutional precedents, Congress and the President may enact new legislation to alter statutory precedents such as *Gingles*. In the past 37 years, however, Congress and the President have not disturbed *Gingles*, even as they have made other changes to the Voting Rights Act. Although statutory *stare decisis* is not absolute, "the Court has ordinarily left the updating or correction of erroneous statutory precedents to the legislative process." *Ramos* v. *Louisiana*, 590 U. S. ——, ——, 140 S.Ct. 1390, 1413, 206 L.Ed.2d 583 (2020) (KAVANAUGH, J., concurring in part); see also, *e.g.*, *Kimble v. Marvel Entertainment, LLC*, 576 U.S. 446, 456, 135 S.Ct. 2401, 192 L.Ed.2d 463 (2015); ***43** *Patterson v. McLean Credit Union*, 491 U.S. 164, 172–173, 109 S.Ct. 2363, 105 L.Ed.2d 132 (1989); *Flood v. Kuhn*, 407 U.S. 258, 283–284, 92 S.Ct. 2099, 32 L.Ed.2d 728 (1972); *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406, 52 S.Ct. 443, 76 L.Ed. 815 (1932) (Brandeis, J., dissenting).[1]

Second, Alabama contends that *Gingles* inevitably requires a proportional number of majority-minority districts, which in turn contravenes the proportionality disclaimer in § 2(b) of the Voting Rights Act. 52 U.S.C. § 10301(b). But Alabama's ****1518** premise is wrong. As the Court's precedents make clear, *Gingles* does not mandate a proportional number of majority-minority districts. *Gingles* requires the creation of a majority-minority district only when, among other things, (i) a State's redistricting map cracks or packs a large and "geographically compact" minority population and (ii) a plaintiff 's proposed alternative map and proposed majority-minority district are "reasonably configured"—namely, by respecting compactness principles and other traditional districting criteria such as county, city, and town lines. See, *e.g.*, *Cooper v. Harris*, 581 U.S. 285, 301–302, 137 S.Ct. 1455, 197 L.Ed.2d 837 (2017); *Voinovich v. Quilter*, 507 U.S. 146, 153–154, 113 S.Ct. 1149, 122 L.Ed.2d 500 (1993); *ante*, at 1503 – 1505, 1507 – 1510.

If *Gingles* demanded a proportional number of majority-minority districts, States would be forced to group together geographically dispersed minority voters into unusually shaped districts, without concern for traditional districting criteria such as county, city, and town lines. But *Gingles* and this Court's later decisions have flatly rejected that approach. See, *e.g.*, *Abbott* v. *Perez*, 585 U. S. ——, —— – ——, 138 S.Ct. 2305, 2331–2332, 201 L.Ed.2d 714 (2018); *Bush v. Vera*, 517 U.S. 952, 979, 116 S.Ct. 1941, 135 L.Ed.2d 248 (1996) (plurality opinion); ***44** *Gingles*, 478 U.S. at 50, 106 S.Ct. 2752; see also *Miller v. Johnson*, 515 U.S. 900, 917–920, 115 S.Ct. 2475, 132 L.Ed.2d 762 (1995); *Shaw v. Reno*, 509 U.S. 630, 644–649, 113 S.Ct. 2816, 125 L.Ed.2d 511 (1993); *ante*, at 1507 – 1510, 113 S.Ct. 2816.[2]

Third, Alabama argues that courts should rely on race-blind computer simulations of redistricting maps to assess whether a State's plan abridges the right to vote on account of race. It is true that computer simulations might help detect the presence or absence of *intentional* discrimination. For example, if all of the computer simulations generated only one majority-minority district, it might be difficult to say that a State had intentionally discriminated on the basis of race by failing to draw a second majority-minority district.

But as this Court has long recognized—and as all Members of this Court today agree—the text of § 2 establishes an effects test, not an intent test. See *ante*, at 1507; *post*, at 1522 – 1523 (THOMAS, J., dissenting); *post*, at 1556 – 1557 (ALITO, J., dissenting). And the effects test, as applied by *Gingles* to redistricting, requires in certain circumstances that courts account for the race of voters so as to prevent the cracking or packing—whether intentional or not—of large and geographically compact minority populations. See *Abbott*, 585 U. S., at ——, 138 S.Ct., at 2314–2315; *Johnson v. De Grandy*, 512 U.S. 997, 1006–1007, 1020, 114 S.Ct. 2647, 129 L.Ed.2d 775 (1994); *Voinovich*, 507 U.S. at 153–154, 113 S.Ct. 1149; see generally *Brnovich* v. *Democratic National Committee*, 594 U. S. ——, ——, 141 S.Ct. 2321, 2341, 210 L.Ed.2d 753 (2021) ("§ 2 does not demand proof of discriminatory purpose"); *Reno v. Bossier Parish School Bd.*, 520 U.S. 471, 482, 117 S.Ct. 1491, 137 L.Ed.2d 730 (1997) (Congress "clearly expressed its desire that § 2 *not* have an intent component"); ****1519** *Holder v. Hall*, 512 U.S. 874, 923–924, 114 S.Ct. 2581, 129 L.Ed.2d 687 (1994) (THOMAS, J., concurring in judgment) (§ 2 adopts a ***45** " 'results' test, rather than an 'intent' test"); *Chisom v. Roemer*, 501 U.S. 380, 394, 404, 111 S.Ct. 2354, 115 L.Ed.2d 348 (1991) ("proof of intent is no longer required to prove a § 2 violation" as "Congress made clear that a violation of § 2 could be established by proof of discriminatory results alone"); *Gingles*, 478 U.S. at 71, n. 34, 106 S.Ct. 2752 (plurality opinion) (§ 2 does not require " 'purpose of racial discrimination' ").

Fourth, Alabama asserts that § 2, as construed by *Gingles* to require race-based redistricting in certain circumstances, exceeds Congress's remedial or preventive authority under the Fourteenth and Fifteenth Amendments. As the Court explains, the constitutional argument presented by Alabama is not persuasive in light of the Court's precedents. See *ante*, at 1516 –

1517; see also *City of Rome v. United States*, 446 U.S. 156, 177–178, 100 S.Ct. 1548, 64 L.Ed.2d 119 (1980). Justice THOMAS notes, however, that even if Congress in 1982 could constitutionally authorize race-based redistricting under § 2 for some period of time, the authority to conduct race-based redistricting cannot extend indefinitely into the future. See *post*, at 1543 – 1544 (dissenting opinion). But Alabama did not raise that temporal argument in this Court, and I therefore would not consider it at this time.

For those reasons, I vote to affirm, and I concur in all but Part III–B–1 of the Court's opinion.

Justice THOMAS, with whom Justice GORSUCH joins, with whom Justice BARRETT joins as to Parts II and III, and with whom Justice ALITO joins as to Parts II–A and II–B, dissenting.

These cases "are yet another installment in the 'disastrous misadventure' of this Court's voting rights jurisprudence." *Alabama Legislative Black Caucus v. Alabama*, 575 U.S. 254, 294, 135 S.Ct. 1257, 191 L.Ed.2d 314 (2015) (THOMAS, J., dissenting) (quoting *Holder v. Hall*, 512 U.S. 874, 893, 114 S.Ct. 2581, 129 L.Ed.2d 687 (1994) (THOMAS, J., concurring in judgment)). What distinguishes them is the uncommon clarity with which they lay bare the gulf between our "color-blind" ***46** Constitution, *Plessy v. Ferguson*, 163 U.S. 537, 559, 16 S.Ct. 1138, 41 L.Ed. 256 (1896) (Harlan, J., dissenting), and "the consciously segregated districting system currently being constructed in the name of the Voting Rights Act." *Holder*, 512 U.S. at 907, 114 S.Ct. 2581 (opinion of THOMAS, J.). The question presented is whether § 2 of the Act, as amended, requires the State of Alabama to intentionally redraw its longstanding congressional districts so that black voters can control a number of seats roughly proportional to the black share of the State's population. Section 2 demands no such thing, and, if it did, the Constitution would not permit it.

I

At the outset, I would resolve these cases in a way that would not require the Federal Judiciary to decide the correct racial apportionment of Alabama's congressional seats. Under the statutory text, a § 2 challenge must target a "voting qualification or prerequisite to voting or standard, practice, or procedure." 52 U.S.C. § 10301(a). I have long been convinced that those words reach only "enactments that regulate citizens' access to the ballot or the processes for counting a ballot"; they "do not include a State's ... choice of one districting scheme over another." *Holder*, 512 U.S. at 945, 114 S.Ct. 2581 (opinion of THOMAS, J.). "Thus, § 2 cannot provide a basis for invalidating any district." ****1520** *Abbott* v. *Perez*, 585 U. S. ——, ——, 138 S.Ct. 2305, 2335, 201 L.Ed.2d 714 (2018) (THOMAS, J., concurring).

While I will not repeat all the arguments that led me to this conclusion nearly three decades ago, see *Holder*, 512 U.S. at 914–930, 114 S.Ct. 2581 (opinion concurring in judgment), the Court's belated appeal to the statutory text is not persuasive. See *ante*, at 1515 – 1516. Whatever words like "practice" and "procedure" are capable of meaning in a vacuum, the prohibitions *of § 2* apply to practices and procedures that affect "voting" and "the right ... to vote." § 10301(a). "Vote" and "voting" are defined terms under the Act, and the Act's definition plainly focuses on ballot access and counting:

> ***47** "The terms 'vote' or 'voting' shall include all action necessary to make a vote effective in any primary, special, or general election, including, but not limited to, registration, listing pursuant to this chapter, or other action required by law prerequisite to voting, casting a ballot, and having such ballot counted properly and included in the appropriate totals of votes cast with respect to candidates for public or party office and propositions for which votes are received in an election." § 10310(c)(1).

In enacting the original Voting Rights Act in 1965, Congress copied this definition almost verbatim from Title VI of the Civil Rights Act of 1960—a law designed to protect access to the ballot in jurisdictions with patterns or practices of denying such access based on race, and which cannot be construed to authorize so-called vote-dilution claims. See 74 Stat. 91–92 (codified

in relevant part at 52 U.S.C. § 10101(e)). Title I of the Civil Rights Act of 1964, which cross-referenced the 1960 Act's definition of "vote," likewise protects ballot access alone and cannot be read to address vote dilution. See 78 Stat. 241 (codified in relevant part at 52 U.S.C. § 10101(a)). Tellingly, the 1964 Act also used the words "standard, practice, or procedure" to refer specifically to voting qualifications for individuals and the actions of state and local officials in administering such requirements.[1] Our entire enterprise of applying § 2 to districting rests on systematic neglect of these statutory antecedents and, more broadly, of the ballot-access focus of the 1960s' voting-rights struggles. See, *e.g.*, ***48** *Brnovich* v. *Democratic National Committee*, 594 U. S. ——, ——, 141 S.Ct. 2321, 2330, 210 L.Ed.2d 753 (2021) (describing the "notorious methods" by which, prior to the Voting Rights Act, States and localities deprived black Americans of the ballot: "poll taxes, literacy tests, property qualifications, white primaries, and grandfather clauses" (alterations and internal quotation marks omitted)).[2]

Moreover, the majority drastically overstates the *stare decisis* support for applying § 2 to single-member districting plans ****1521** like the one at issue here.[3] As the majority implicitly acknowledges, this Court has only applied § 2 to invalidate one single-member district in one case. See *League of United Latin American Citizens v. Perry*, 548 U.S. 399, 447, 126 S.Ct. 2594, 165 L.Ed.2d 609 (2006) (*LULAC*) (opinion of Kennedy, J.). And no party in ***49** that case argued that the plaintiffs' vote-dilution claim was not cognizable. As for *Growe v. Emison*, 507 U.S. 25, 113 S.Ct. 1075, 122 L.Ed.2d 388 (1993), it held only that the threshold preconditions for challenging multimember and at-large plans must limit challenges to single-member districts with *at least* the same force, as "[i]t would be peculiar [if] a vote-dilution challenge to the (more dangerous) multimember district require[d] a higher threshold showing than a vote-fragmentation challenge to a single-member district." *Id.*, at 40, 113 S.Ct. 1075. *Growe* did not consider (or, thus, reject) an argument that § 2 does not apply to single-member districts.

In any event, *stare decisis* should be no barrier to reconsidering a line of cases that "was based on a flawed method of statutory construction from its inception," has proved incapable of principled application after nearly four decades of experience, and puts federal courts in the business of "methodically carving the country into racially designated electoral districts." *Holder*, 512 U.S. at 945, 114 S.Ct. 2581 (opinion of THOMAS, J.). This Court has "never applied *stare decisis* mechanically to prohibit overruling our earlier decisions determining the meaning of statutes," and it should not do so here. *Monell v. New York City Dept. of Social Servs.*, 436 U.S. 658, 695, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). *Stare decisis* did not save "separate but equal," despite its repeated reaffirmation in this Court and the pervasive reliance States had placed upon it for decades. See, *e.g.*, Brief for Appellees in *Brown* v. *Board of Education*, O. T. 1953, No. 1, pp. 18–30. It should not rescue modern-day forms of *de jure* racial balkanization—which, as these cases show, is exactly where our § 2 vote-dilution jurisprudence has led.[4]

***50 **1522** II

Even if § 2 applies here, however, Alabama should prevail. The District Court found that Alabama's congressional districting map "dilutes" black residents' votes because, while it is *possible* to draw two majority-black districts, Alabama's map only has one.[5] But the critical question in all vote-dilution cases is: "Diluted relative to what benchmark?" *Gonzalez v. Aurora*, 535 F.3d 594, 598 (CA7 2008) (Easterbrook, C. J.). Neither the District Court nor the majority has any defensible answer. The text of § 2 and the logic of vote-dilution claims require a meaningfully race-neutral benchmark, and no race-neutral benchmark can justify the District Court's finding of vote dilution in these cases. The ***51** only benchmark that can justify it—and the one that the District Court demonstrably applied—is the decidedly nonneutral benchmark of proportional allocation of political power based on race.

A

As we have long recognized, "the very concept of vote dilution implies—and, indeed, necessitates—the existence of an 'undiluted' practice against which the fact of dilution may be measured." *Reno v. Bossier Parish School Bd.*, 520 U.S. 471, 480, 117 S.Ct. 1491, 137 L.Ed.2d 730 (1997). In a challenge to a districting plan, a court must be able to compare a State's enacted plan with "a hypothetical, undiluted plan," *ibid.*, ascertained by an "objective and workable standard." *Holder*, 512 U.S. at 881, 114 S.Ct. 2581 (plurality opinion); see also *id.*, at 887, 114 S.Ct. 2581 (opinion of O'Connor, J.) (noting the "general agreement" on this point).

To be sure, it is no easy task to identify an objective, "undiluted" benchmark against which to judge a districting plan. As we recently held in the analogous context of partisan gerrymandering, "federal courts are not equipped to apportion political power as a matter of fairness." *Rucho* v. *Common Cause*, 588 U. S. ——, ——, 139 S.Ct. 2484, 2499, 204 L.Ed.2d 931 (2019). Yet § 2 vote-dilution cases require nothing less. If § 2 prohibited only intentional racial discrimination, there would be no difficulty in finding a clear and workable rule of decision. But the "results test" that Congress wrote into § 2 to supersede *Mobile v. Bolden*, 446 U.S. 55, 100 S.Ct. 1519, 64 L.Ed.2d 47 (1980), eschews intent as the criterion of liability. See *Bossier Parish School Bd.*, 520 U.S. at 482, 117 S.Ct. 1491. Accordingly, a § 2 vote-dilution ****1523** claim does not simply "as[k] ... for the elimination of a racial classification." *Rucho*, 588 U. S., at ——, 139 S.Ct., at 2502. It asks, instead, "for a fair share of political power and influence, with all the justiciability conundrums that entails." *Ibid.* Nevertheless, if § 2 applies to single-member districts, we must accept that some "objective and workable standard for choosing a reasonable benchmark" exists; otherwise, single-member districts "cannot be challenged as dilutive under § 2." *Holder*, 512 U.S. at 881, 114 S.Ct. 2581 (plurality opinion).

***52** Given the diverse circumstances of different jurisdictions, it would be fanciful to expect a one-size-fits-all definition of the appropriate benchmark. Cf. *Thornburg v. Gingles*, 478 U.S. 30, 79, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986) (explaining that the vote-dilution inquiry "is peculiarly dependent upon the facts of each case and requires an intensely local appraisal" (citation and internal quotation marks omitted)). One overriding principle, however, should be obvious. A proper districting benchmark must be *race neutral*: It must not assume, *a priori*, that an acceptable plan should include any particular number or proportion of minority-controlled districts.

I begin with § 2's text. As relevant here, § 2(a) prohibits a State from "impos[ing] or appl[ying]" any electoral rule "in a manner which results in a denial or abridgement of the right ... to vote on account of race or color." § 10301(a). Section 2(b) then provides that § 2(a) is violated

> "if, based on the totality of circumstances, ... the political processes leading to nomination or election in the State ... are not equally open to participation by members of [a protected class] in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State ... is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." § 10301(b).

As we held two Terms ago in *Brnovich*, the "equal openness" requirement is "the core" and "touchstone" of § 2(b),

with "equal opportunity" serving an ancillary function.[6] ***53** 594 U. S., at ——, 141 S.Ct., at 2338. Relying significantly on § 2(b)'s disclaimer of a right to proportional representation, we also held that § 2 does not enact a "freewheeling disparate-impact regime." *Id.*, at ——, and n. 14, 141 S.Ct., at 2341, and n. 14. *Brnovich* further stressed the value of "benchmarks with which ... challenged [electoral] rule[s] can be compared," *id.*, at ——, 141 S.Ct., at 2338, and that "a meaningful comparison is essential" in judging the significance of any challenged scheme's racially disparate impact. *Id.*, at ——, 141 S.Ct., at 2339. To the extent § 2 applies to districting plans, then, it requires that they be "equally open to participation" by voters of all races, but it is not a pure disparate-impact statute and does not guarantee proportional representation.

In its main argument here, Alabama simply carries these principles to their logical conclusion: Any vote-dilution benchmark must be race neutral. See Brief for Appellants 32–46. Whatever "equal openness" means in the context of single-member ****1524** districting, no "meaningful comparison" is possible using a benchmark that builds in a presumption in favor of minority-controlled districts. Indeed, any benchmark other than a race-neutral one would render the vote-dilution inquiry fundamentally circular, allowing courts to conclude that a districting plan "dilutes" a minority's voting strength "on account of race" merely because it does not measure up to an ideal already defined in racial terms. Such a question-begging standard

would not answer our precedents' demand for an "*objective*," "reasonable benchmark." *Holder*, 512 U.S. at 881, 114 S.Ct. 2581 (plurality opinion) (emphasis added). Nor could any nonneutral benchmark be reconciled with *Brnovich*'s rejection of a disparate-impact regime or the text's disclaimer of a right to proportional representation. 594 U. S., at ——, and n. 14, 141 S.Ct., at 2341, and n. 14).

There is yet another compelling reason to insist on a race-neutral benchmark. "The Constitution abhors classifications based on race." *Grutter v. Bollinger*, 539 U.S. 306, 353, 123 S.Ct. 2325, 156 L.Ed.2d 304 (2003) (THOMAS, J., concurring in part and dissenting in part). Redistricting is no exception. "Just as the State ***54** may not, absent extraordinary justification, segregate citizens on the basis of race in its public parks, buses, golf courses, beaches, and schools," the State also "may not separate its citizens into different voting districts on the basis of race." *Miller v. Johnson*, 515 U.S. 900, 911, 115 S.Ct. 2475, 132 L.Ed.2d 762 (1995) (citations omitted). "[D]istricting maps that sort voters on the basis of race ' "are by their very nature odious." ' " *Wisconsin Legislature* v. *Wisconsin Elections Comm'n*, 595 U. S. ——, ——, 142 S.Ct. 1245, 1248, 212 L.Ed.2d 251 (2022) (*per curiam*) (quoting *Shaw v. Reno*, 509 U.S. 630, 643, 113 S.Ct. 2816, 125 L.Ed.2d 511 (1993) (*Shaw I*)). Accordingly, our precedents apply strict scrutiny whenever race was "the predominant factor motivating [the placement of] a significant number of voters within or without a particular district," *Miller*, 515 U.S. at 916, 115 S.Ct. 2475, or, put another way, whenever "[r]ace was the criterion that ... could not be compromised" in a district's formation. *Shaw v. Hunt*, 517 U.S. 899, 907, 116 S.Ct. 1894, 135 L.Ed.2d 207 (1996) (*Shaw II*).

Because "[r]acial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions" and undermine "the goal of a political system in which race no longer matters," *Shaw I*, 509 U.S. at 657, 113 S.Ct. 2816, our cases have long recognized the need to interpret § 2 to avoid "unnecessarily infus[ing] race into virtually every redistricting" plan. *LULAC*, 548 U.S. at 446, 126 S.Ct. 2594 (opinion of Kennedy, J.); accord, *Bartlett v. Strickland*, 556 U.S. 1, 21, 129 S.Ct. 1231, 173 L.Ed.2d 173 (2009) (plurality opinion). Plainly, however, that "infusion" is the inevitable result of any race-based benchmark. Any interpretation of § 2 that permits courts to condemn enacted districting plans as dilutive relative to a nonneutral benchmark "would result in a substantial increase in the number of mandatory districts drawn with race as 'the predominant factor motivating the legislature's decision,' " thus " 'raising serious constitutional questions.' " *Id.*, at 21–22, 129 S.Ct. 1231 (first quoting *Miller*, 515 U.S. at 916, 115 S.Ct. 2475, then quoting *LULAC*, 548 U.S. at 446, 126 S.Ct. 2594). To avoid setting § 2 on a collision course with the Constitution, courts must apply a race-neutral benchmark in assessing any ***55** claim that a districting plan unlawfully dilutes a racial minority's voting strength.

B

The plaintiffs in these cases seek a "proportional allocation of political power according ****1525** to race." *Holder*, 512 U.S. at 936, 114 S.Ct. 2581 (opinion of THOMAS, J.). According to the 2020 census, black Alabamians account for 27.16% of the State's total population and 25.9% of its voting-age population, both figures slightly less than two-sevenths. Of Alabama's seven existing congressional districts, one, District 7, is majority-black.[7] ***56** These cases were brought to compel "the creation of *two* majority-minority congressional districts"—roughly proportional control. 1 App. 135 (emphasis added); see also *id.*, at 314 ("Plaintiffs seek an order ... ordering a congressional redistricting plan that includes two majority-Black congressional districts").

Remarkably, the majority fails to acknowledge that two minority-controlled districts would mean proportionality, or even that black Alabamians are about two-sevenths of the State. Yet that context is critical to the issues before us, not least because it explains the extent of the racial sorting the plaintiffs' goal would require. "[A]s a matter of mathematics," single-member districting "tends to deal out representation far short of proportionality to virtually *all* minorities, from environmentalists in Alaska to Republicans in Massachusetts." M. Duchin & D. Spencer, Models, Race, and the Law, 130 Yale L. J. Forum 744, 752 (2021) (Duchin & Spencer). As such, creating two majority-black districts would require Alabama to aggressively "sort voters on the basis of race." *Wisconsin Legislature*, 595 U. S., at ——, 142 S.Ct., at 1248.

The plaintiffs' 11 illustrative maps make that clear. All 11 maps refashion existing District 2 into a majority-black district

while preserving the current black majority in District 7. They all follow the same approach: Starting with majority-black areas of populous Montgomery County, they expand District 2 east and west to encompass predominantly majority-black areas throughout the rural "Black Belt." In the process, the plans are careful to leave enough of the Black Belt for District 7 to maintain its black majority. Then—and critically—the plans have District 2 extend a southwestern tendril into Mobile County to capture a dense, high-population majority-black ****1526** cluster in urban Mobile.[8] ***57** See Supp. App. 184, 186, 188, 190, 193, 195, 197, 199, 201, 203; see also *id.*, at 149.

Those black Mobilians currently reside in the urban heart of District 1. For 50 years, District 1 has occupied the southwestern pocket of Alabama, consisting of the State's two populous Gulf Coast counties (Mobile and Baldwin) as well as some less populous areas to the immediate north and east. See *id.*, at 205–211. It is indisputable that the Gulf Coast region is the sort of community of interest that the Alabama Legislature might reasonably think a congressional district should be built around. It contains Alabama's only coastline, its fourth largest city, and the Port of Mobile. Its physical geography runs north along the Alabama and Mobile Rivers, whose paths District 1 follows. Its economy is tied to the Gulf—to shipping, shipbuilding, tourism, and commercial fishing. See Brief for Coastal Alabama Partnership as *Amicus Curiae* 13–15.

But, for the plaintiffs to secure their majority-black District 2, this longstanding, compact, and eminently sensible district must be radically transformed. In the Gulf Coast region, the newly drawn District 1 would retain only the majority-white areas that District 2 did not absorb on its path to Mobile's large majority-black population. To make up the lost population, District 1 would have to extend eastward through largely majority-white rural counties along the length of Alabama's border with the Florida panhandle. The plaintiffs do not assert that white residents on the Gulf Coast have anything special in common with white residents in those communities, and the District Court made no such finding. The plaintiffs' maps would thus reduce District 1 to the leftover white communities of the southern fringe of the State, its shape and constituents defined almost entirely ***58** by the need to make District 2 majority-black while also retaining a majority-black District 7.

The plaintiffs' mapmaking experts left little doubt that their plans prioritized race over neutral districting criteria. Dr. Moon Duchin, who devised four of the plans, testified that achieving "two majority-black districts" was a "nonnegotiable principl[e]" in her eyes, a status shared only by our precedents' "population balance" requirement. 2 App. 634; see also *id.*, at 665, 678. Only "after" those two "nonnegotiable[s]" were satisfied did Dr. Duchin then give lower priority to "contiguity" and "compactness." *Id.*, at 634. The architect of the other seven maps, William Cooper, considered "minority voting strengt[h]" a "traditional redistricting principl[e]" in its own right, *id.*, at 591, and treated "the minority population in and of itself" as the paramount community of interest in his plans, *id.*, at 601.

Statistical evidence also underscored the illustrative maps' extreme racial sorting. Another of the plaintiffs' experts, Dr. Kosuke Imai, computer generated 10,000 districting plans using a race-blind algorithm programmed to observe several objective districting criteria. Supp. App. 58–59. None of those plans contained even one majority-black district. *Id.*, at 61. Dr. Imai generated another 20,000 plans using the same algorithm, but with the additional constraint that they must contain at least one majority-black district; none of those plans contained a second majority-black ****1527** district, or even a second district with a black voting-age population above 40%. *Id.*, at 54, 67, 71–72. In a similar vein, Dr. Duchin testified about an academic study in which she had randomly "generated 2 million districting plans for Alabama" using a race-neutral algorithm that gave priority to compactness and contiguity. 2 App. 710; see Duchin & Spencer 765. She "found some [plans] with one majority-black district, but never found a second ... majority-black district in 2 million attempts." 2 App. 710. "[T]hat it is hard to draw two majority-black districts by accident," ***59** Dr. Duchin explained, "show[ed] the importance of doing so on purpose." *Id.*, at 714.[9]

The plurality of Justices who join Part III–B–I of THE CHIEF JUSTICE's opinion appear to agree that the plaintiffs could not prove the first precondition of their statewide vote-dilution claim—that black Alabamians could constitute a majority in two "reasonably configured" districts, *Wisconsin Legislature*, 595 U. S., at ——, 142 S.Ct. at 1248—by drawing an illustrative map in which race was predominant. See *ante*, at 1511 – 1512. That should be the end of these cases, as the illustrative maps here are palpable racial gerrymanders. The plaintiffs' experts clearly applied "express racial target[s]" by setting out to create 50%-plus majority-black districts in both Districts 2 and 7. *Bethune-Hill v. Virginia State Bd. of Elections*, 580 U.S. 178, 192, 137 S.Ct. 788, 197 L.Ed.2d 85 (2017). And it is impossible to conceive of *the State* adopting the illustrative maps without pursuing the same racially motivated goals. Again, the maps' key design features are: (1) making District 2 majority-black by connecting black residents in one metropolitan area (Montgomery) with parts of the rural Black Belt and black residents in another metropolitan area (Mobile); (2) leaving enough of the Black Belt's majority-black rural areas for District 7 to maintain its majority-black status; and (3) reducing District 1 to the white remainder of the

southern third of the State.

If the State did this, we would call it a racial gerrymander, and rightly so. We would have no difficulty recognizing race as "the predominant factor motivating [the placement of] significant number[s] of voters within or without" Districts 1, 2, ***60** and 7. *Miller*, 515 U.S. at 916, 115 S.Ct. 2475. The "stark splits in the racial composition of populations moved into and out of " Districts 1 and 2 would make that obvious. *Bethune-Hill*, 580 U.S. at 192, 137 S.Ct. 788. So would the manifest absence of any nonracial justification for the new District 1. And so would the State's clear intent to ensure that *both* Districts 2 and 7 hit their preordained racial targets. See *ibid.* (noting that "pursu[it of] a common redistricting policy toward multiple districts" may show predominance). That the plan delivered proportional control for a particular minority—a statistical anomaly that over 2 million race-blind simulations did not yield and 20,000 *race-conscious* simulations did not even approximate—would be still further confirmation.

The State could not justify such a plan simply by arguing that it was less bizarre to the naked eye than other, more elaborate racial gerrymanders we have encountered. See *ante*, at 1508 – 1509 (discussing ****1528** cases). As we held in *Miller*, visual "bizarreness" is not "a necessary element of the constitutional wrong," only "persuasive circumstantial evidence." 515 U.S. at 912–913, 115 S.Ct. 2475.[10]

***61** Nor could such a plan be explained by supposed respect for the Black Belt. For present purposes, I accept the District Court's finding that the Black Belt is a significant community of interest. But the entire black population of the Black Belt—some 300,000 black residents, see Supp. App. 33—is too small to provide a majority in a *single* congressional district, let alone two.[11] The black residents needed to populate majority-black versions of Districts 2 and 7 are overwhelmingly concentrated in the urban counties of Jefferson (*i.e.*, the Birmingham metropolitan area, with about 290,000 black residents), Mobile (about 152,000 black residents), and Montgomery (about 134,000 black residents). *Id.*, at 83. Of the three, only Montgomery County is in the Black Belt. The plaintiffs' maps, therefore, cannot and do not achieve their goal of two majority-black districts by "join[ing] together" the Black Belt, as the majority seems wrongly to believe. *Ante*, at 1505. Rather, their majority-black districts are anchored by three separate high-density clusters of black residents in three separate metropolitan areas, two of them outside the Black Belt. The Black Belt's largely rural remainder is then *divided* between the two districts to the extent needed to fill out their population numbers with black majorities in both. Respect for the Black Belt as a community of interest cannot explain this approach. The only ***62** explanation is the plaintiffs' express racial target: two majority-black districts and statewide proportionality.

The District Court nonetheless found that race did not predominate in the plaintiffs' illustrative maps because Dr. Duchin and Mr. Cooper "prioritized race only as necessary ... to draw two reasonably compact majority-Black congressional districts," as opposed to "maximiz[ing] the ****1529** number of majority-Black districts, or the BVAP [black voting-age population] in any particular majority-Black district." *Singleton v. Merrill*, 582 F.Supp.3d 924, 1029–1030 (ND Ala. 2022) (*per curiam*). This reasoning shows a profound misunderstanding of our racial-gerrymandering precedents. As explained above, what triggers strict scrutiny is the intentional use of a racial classification in placing "a significant number of voters within or without a particular district." *Miller*, 515 U.S. at 916, 115 S.Ct. 2475. Thus, *any* plan whose predominant purpose is to achieve a nonnegotiable, predetermined racial target in a nonnegotiable, predetermined number of districts is a racial gerrymander subject to strict scrutiny. The precise fraction used as the racial target, and the number of districts it is applied to, are irrelevant.

In affirming the District Court's nonpredominance finding, the plurality glosses over these plain legal errors,[12] and it ***63** entirely ignores Dr. Duchin's plans—presumably because her own explanation of her method sounds too much like textbook racial predominance. Compare 2 App. 634 ("[A]fter ... what I took to be *nonnegotiable* principles of population balance *and seeking two majority-black districts*, *after that*, I took contiguity as a requirement and compactness as paramount" (emphasis added)) and *id.*, at 635 ("I took ... county integrity to take precedence over the level of [black voting-age population] *once that level was past 50 percent*" (emphasis added)), with *Bethune-Hill*, 580 U.S. at 189, 137 S.Ct. 788 (explaining that race predominates when it " 'was the criterion that ... could not be compromised,' and race-neutral considerations 'came into play only after the race-based decision had been made' " (quoting *Shaw II*, 517 U.S. at 907, 116 S.Ct. 1894)), and *Miller*, 515 U.S. at 916, 115 S.Ct. 2475 (explaining that race predominates when "the [mapmaker] subordinated traditional race-neutral districting principles ... to racial considerations"). The plurality thus affirms the District Court's finding only in part and with regard to Mr. Cooper's plans alone.

In doing so, the plurality acts as if the only relevant evidence were Mr. Cooper's testimony about his own mental state and

the State's expert's analysis of Mr. Cooper's maps. See *ante*, at 1510 – 1511. Such a blinkered view of the issue is unjustifiable. All 11 illustrative maps follow the same approach to creating two majority-black districts. The essential design features of Mr. Cooper's maps are indistinguishable from Dr. Duchin's, and it is those very design features that would require race to predominate. None of the ****1530** plaintiffs' maps could possibly be drawn by a mapmaker who was merely "aware of," rather than motivated by, "racial demographics." *Miller*, 515 U.S. at 916, 115 S.Ct. 2475. They could only ever be drawn by a mapmaker whose predominant motive was ***64** hitting the "express racial target" of two majority-black districts. *Bethune-Hill*, 580 U.S. at 192, 137 S.Ct. 788.[13]

The plurality endeavors in vain to blunt the force of this obvious fact. See *ante*, at 1511 – 1512. Contrary to the plurality's apparent understanding, nothing in *Bethune-Hill* suggests that "an express racial target" is not highly probative evidence of racial predominance. 580 U.S. at 192, 137 S.Ct. 788 (placing "express racial target[s]" alongside "stark splits in the racial composition of [redistricted] populations" as "relevant districtwide evidence"). That the *Bethune-Hill* majority "decline[d]" to act as a " 'court of ... first view,' " instead leaving the ultimate issue of predominance for remand, cannot be transmuted into such an implausible holding or, in truth, any holding at all. *Id.*, at 193, 137 S.Ct. 788.

The plurality is also mistaken that my predominance analysis would doom every illustrative map a § 2 plaintiff "ever adduced." *Ante*, at 1511 – 1512 (emphasis deleted). Rather, it would mean only that—because § 2 requires a race-neutral benchmark—plaintiffs cannot satisfy their threshold burden of showing a reasonably configured alternative plan with a proposal that could only be viewed as a racial gerrymander if ***65** enacted by the State. This rule would not bar a showing, in an appropriate case, that a State could create an additional majority-minority district through a reasonable redistricting process in which race did not predominate. It would, on the other hand, screen out efforts to use § 2 to push racially proportional districting to the limits of what a State's geography and demography make possible—the approach taken by the illustrative maps here.

C

The foregoing analysis should be enough to resolve these cases: If the plaintiffs have not shown that Alabama could create two majority-black districts without resorting to a racial gerrymander, they cannot have shown that Alabama's one-majority-black-district map "dilutes" black Alabamians' voting strength relative to any meaningfully race-neutral benchmark. The inverse, however, is not true: Even if it were possible to regard the illustrative maps as not requiring racial predominance, it would not necessarily follow that a two-majority-black-district map was an appropriate benchmark. All that might follow is that the illustrative maps were reasonably configured—in other words, that they were consistent with some reasonable application ****1531** of traditional districting criteria in which race did not predominate. See *LULAC*, 548 U.S. at 433, 126 S.Ct. 2594. But, in virtually all jurisdictions, there are countless possible districting schemes that could be considered reasonable in that sense. The mere fact that a plaintiff 's illustrative map is *one* of them cannot justify making it the benchmark against which other plans should be judged. Cf. *Rucho*, 588 U. S., at —— – ——, 139 S.Ct., at 2500–2501 (explaining the lack of judicially manageable standards for evaluating the relative fairness of different applications of traditional districting criteria).

That conceptual gap—between "reasonable" and "benchmark"—is highly relevant here. Suppose, for argument's sake, that Alabama *reasonably* could decide to create two majority-black districts by (1) connecting Montgomery's ***66** black residents with Mobile's black residents, (2) dividing up the rural parts of the Black Belt between that district and another district with its population core in the majority-black parts of the Birmingham area, and (3) accepting the extreme disruption to District 1 and the Gulf Coast that this approach would require. The plaintiffs prefer that approach because it allows the creation of two majority-black districts, which they think Alabama should have. But even if that approach were reasonable, there is hardly any compelling race-neutral reason to elevate such a plan to a *benchmark* against which all other plans must be measured. Nothing in Alabama's geography or demography makes it clearly the best way, or even a particularly attractive way, to draw three of seven equally populous districts. The State has obvious legitimate, race-neutral reasons to prefer its own map—most notably, its interest in "preserving the cores of prior districts" and the Gulf Coast community of interest in District 1. *Karcher*

v. Daggett, 462 U.S. 725, 740, 103 S.Ct. 2653, 77 L.Ed.2d 133 (1983). And even *discounting* those interests would not yield a race-neutral case for treating the plaintiffs' approach as a suitable benchmark: Absent core retention, there is no apparent race-neutral reason to insist that District 7 remain a majority-black district uniting Birmingham's majority-black neighborhoods with majority-black rural areas in the Black Belt.

Finally, it is surely probative that over 2 million race-neutral simulations did not yield a single plan with two majority-black districts, and even 20,000 simulations with a one-majority-black-district floor did not yield a second district with a black voting-age population over 40%. If any plan with two majority-black districts would be an "out-out-out-outlier" within the likely universe of race-neutral districting plans, *Rucho*, 588 U. S., at ——, 139 S.Ct., at 2518 (KAGAN, J., dissenting), it is hard to see how the mere possibility of drawing two majority-black districts could show that a one-district ***67** map diluted black Alabamians' votes relative to any appropriate benchmark.[14]

****1532** D

Given all this, by what benchmark did the District Court find that Alabama's enacted plan was dilutive? The answer is as simple as it is unlawful: The District Court applied a benchmark of proportional control based on race. To be sure, that benchmark was camouflaged by the elaborate vote-dilution framework we have inherited from *Gingles*. But nothing else in that framework or in the District Court's reasoning supplies an alternative benchmark capable of explaining the District Court's bottom line: that Alabama's one-majority-black-district ***68** map dilutes black voters' fair share of political power.

Under *Gingles*, the majority explains, there are three "preconditions" to a vote-dilution claim: (1) the relevant "minority group must be sufficiently large and geographically compact to constitute a majority in a reasonably configured district"; (2) the minority group must be "politically cohesive"; and (3) the majority group must "vot[e] sufficiently as a bloc to enable it to defeat the minority's preferred candidate[s]." *Ante*, at 1503 (alterations and internal quotation marks omitted). If these preconditions are satisfied, *Gingles* instructs courts to "consider the totality of the circumstances and to determine, based upon a searching practical evaluation of the past and present reality, whether the political process is equally open to minority voters." 478 U.S. at 79, 106 S.Ct. 2752 (citation and internal quotation marks omitted).

The majority gives the impression that, in applying this framework, the District Court merely followed a set of well-settled, determinate legal principles. But it is widely acknowledged that "*Gingles* and its progeny have engendered considerable disagreement and uncertainty regarding the nature and contours of a vote dilution claim," with commentators "noting the lack of any 'authoritative resolution of the basic questions one would need to answer to make sense of [§ 2's] results test.' " *Merrill* v. *Milligan*, 595 U. S. ——, —— – ——, 142 S.Ct. 879, 883, —— L.Ed.2d —— (2022) (ROBERTS, C. J., dissenting from grant of applications for stays) (quoting C. Elmendorf, Making Sense of Section 2: Of Biased Votes, Unconstitutional Elections, and Common Law Statutes, 160 U. Pa. L. Rev. 377, 389 (2012)). If there is any "area of law notorious for its many unsolved puzzles," this is it. J. Chen & N. Stephanopoulos, The Race-Blind Future of Voting Rights, 130 Yale L. J. 862, 871 (2021); see also Duchin & Spencer 758 ("Vote dilution on the basis of group membership is a crucial instance of the lack of a prescribed ideal").

***69** The source of this confusion is fundamental: Quite simply, we have never succeeded in translating the *Gingles* framework into an objective and workable method of identifying the undiluted benchmark. The second and third preconditions are all but irrelevant to the task. They essentially collapse into one question: Is voting racially polarized such that minority-preferred candidates consistently lose ****1533** to majority-preferred ones? See *Gingles*, 478 U.S. at 51, 106 S.Ct. 2752. Even if the answer is yes, that tells a court nothing about "how hard it 'should' be for minority voters to elect their preferred candidates under an acceptable system." *Id.*, at 88, 106 S.Ct. 2752 (O'Connor, J., concurring in judgment). Perhaps an acceptable system is one in which the minority simply cannot elect its preferred candidates; it is, after all, a minority. Rejecting that outcome as "dilutive" requires a value judgment relative to a benchmark that polarization alone cannot provide.

The first *Gingles* precondition is only marginally more useful. True, the benchmark in a redistricting challenge must be "a hypothetical, undiluted plan," *Bossier Parish School Bd.*, 520 U.S. at 480, 117 S.Ct. 1491, and the first precondition at least requires plaintiffs to identify *some* hypothetical alternative plan. Yet that alternative plan need only be "reasonably configured," and—as explained above—to say that a plan is *reasonable* is a far cry from establishing an objective standard of fairness.

That leaves only the *Gingles* framework's final stage: the totality-of-circumstances determination whether a State's "political process is equally open to minority voters." 478 U.S. at 79, 106 S.Ct. 2752. But this formulation is mere verbiage unless one knows what an "equally open" system should look like—in other words, what the benchmark is. And, our cases offer no substantive guidance on how to identify the undiluted benchmark at the totality stage. The best they have to offer is a grab bag of amorphous "factors"—widely known as the Senate factors, after the Senate Judiciary Committee Report ***70** accompanying the 1982 amendments to § 2—that *Gingles* said "typically may be relevant to a § 2 claim." See *id.*, at 44–45, 106 S.Ct. 2752. Those factors, however, amount to no more than "a list of possible considerations that might be consulted by a court attempting to develop a *gestalt* view of the political and racial climate in a jurisdiction." *Holder*, 512 U.S. at 938, 114 S.Ct. 2581 (opinion of THOMAS, J.). Such a *gestalt* view is far removed from the necessary benchmark of a hypothetical, undiluted districting plan.

To see this, one need only consider the District Court's use of the Senate factors here. See 582 F.Supp.3d at 1018–1024. The court began its totality-stage analysis by reiterating what nobody disputes: that voting in Alabama is racially polarized, with black voters overwhelmingly preferring Democrats and white voters largely preferring Republicans. To rebut the State's argument that this pattern is attributable to politics, not race *per se*, the court noted that Donald Trump (who is white) prevailed over Ben Carson (who is black) in the 2016 Republican Presidential primary. Next, the court observed that black candidates rarely win statewide elections in Alabama and that black state legislators overwhelmingly come from majority-minority districts. The court then reviewed Alabama's history of racial discrimination, noted other voting-rights cases in which the State was found liable, and cataloged socioeconomic disparities between black and white Alabamians in everything from car ownership to health insurance coverage. The court attributed these disparities "at least in part" to the State's history of discrimination and found that they hinder black residents from participating in politics today, notwithstanding the fact that black and white Alabamians register and turn out to vote at similar rates. *Id.*, at 1021–1022. Last, the court interpreted a handful of comments by three white politicians as "racial campaign appeals." *Id.*, at 1023–1024.

***71 **1534** In reviewing this march through the Senate factors, it is impossible to discern any overarching standard or central question, only what might be called an impressionistic moral audit of Alabama's racial past and present. Nor is it possible to determine any logical nexus between this audit and the remedy ordered: a congressional districting plan in which black Alabamians can control more than one seat. Given the District Court's finding that two reasonably configured majority-black districts could be drawn, would Alabama's one-district map have been acceptable if Ben Carson had won the 2016 primary, or if a greater number of black Alabamians owned cars?

The idea that such factors could explain the District Court's judgment line is absurd. The plaintiffs' claims pose one simple question: What is the "right" number of Alabama's congressional seats that black voters who support Democrats "should" control? Neither the Senate factors nor the *Gingles* framework as a whole offers any principled answer.

In reality, the limits of the *Gingles* preconditions and the aimlessness of the totality-of-circumstances inquiry left the District Court only one obvious and readily administrable option: a benchmark of "allocation of seats in direct proportion to the minority group's percentage in the population." *Holder*, 512 U.S. at 937, 114 S.Ct. 2581 (opinion of THOMAS, J.). True, as discussed above, that benchmark is impossible to square with what the majority calls § 2(b)'s "robust disclaimer against proportionality," *ante*, at 1500 – 1501, and it runs headlong into grave constitutional problems. See *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701, 730, 127 S.Ct. 2738, 168 L.Ed.2d 508 (2007) (plurality opinion). Nonetheless, the intuitive pull of proportionality is undeniable. "Once one accepts the proposition that the effectiveness of votes is measured in terms of the control of seats, the core of any vote dilution claim" "is inherently based on ratios between the numbers of the minority ***72** in the population and the numbers of seats controlled," and there is no more logical ratio than direct proportionality. *Holder*, 512 U.S. at 902, 114 S.Ct. 2581 (opinion of THOMAS, J.). Combine that intuitive appeal with the "lack of any better alternative" identified in our case law to date, *id.*, at 937, 114 S.Ct. 2581, and we should not be surprised to learn that proportionality generally explains the results of § 2 cases after the *Gingles* preconditions are satisfied. See E. Katz, M. Aisenbrey, A. Baldwin, E. Cheuse, & A. Weisbrodt, Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982, 39 U. Mich. J. L. Reform 643, 730–732 (2006)

(surveying lower court cases and finding a near-perfect correlation between proportionality findings and liability results).

Thus, in the absence of an alternative benchmark, the vote-dilution inquiry has a strong and demonstrated tendency to collapse into a rough two-part test: (1) Does the challenged districting plan give the relevant minority group control of a proportional share of seats? (2) If not, has the plaintiff shown that some reasonably configured districting plan could better approximate proportional control? In this approach, proportionality is the ultimate benchmark, and the first *Gingles* precondition becomes a proxy for whether that benchmark is reasonably attainable in practice.

Beneath all the trappings of the *Gingles* framework, that two-part test describes how the District Court applied § 2 here. The gravitational force of proportionality is obvious throughout its opinion. At the front end, the District Court even built proportionality into its understanding of **1535 *Gingles*' first precondition, finding the plaintiffs' illustrative maps to be reasonably configured in part *because* they "provide[d] a number of majority-Black districts ... roughly proportional to the Black percentage of the population." 582 F.Supp.3d at 1016. At the back end, the District Court concluded its "totality" analysis by revisiting proportionality and finding that it "weigh[ed] decidedly in favor of the plaintiffs." *73 *Id.*, at 1025. While the District Court disclaimed giving overriding significance to proportionality, the fact remains that nothing else in its reasoning provides a logical nexus to its finding of a districting wrong and a need for a districting remedy. Finally, as if to leave no doubt about its implicit benchmark, the court admonished the State that "any remedial plan will need to include two districts in which Black voters either comprise a voting-age majority or something quite close." *Id.*, at 1033. In sum, the District Court's thinly disguised benchmark was proportionality: Black Alabamians are about two-sevenths of the State's population, so they should control two of the State's seven congressional seats.

That was error—perhaps an understandable error given the limitations of the *Gingles* framework, but error nonetheless. As explained earlier, any principled application of § 2 to cases such as these requires a meaningfully race-neutral benchmark. The benchmark cannot be an *a priori* thumb on the scale for racially proportional control.

E

The majority opinion does not acknowledge the District Court's express proportionality-based reasoning. That omission is of a piece with its earlier noted failures to acknowledge the well-known indeterminacy of the *Gingles*framework, that black Alabamians are about two-sevenths of the State's population, and that the plaintiffs here are thus seeking statewide proportionality. Through this pattern of omissions, the majority obscures the burning question in these cases. The District Court's vote-dilution finding can be justified only by a racially loaded benchmark—specifically, a benchmark of proportional control based on race. Is that the benchmark the statute demands? The majority fails to confront this question head on, and it studiously avoids mentioning anything that would require it to do so.

The same nonresponsiveness infects the majority's analysis, which is largely devoted to rebutting an argument nobody *74 makes. Contrary to the majority's telling, Alabama does not equate the "race-neutral benchmark" with "the median or average number of majority-minority districts" in a large computer-generated set of race-blind districting plans. *Ante*, at 1506. The State's argument for a race-neutral benchmark is rooted in the text of § 2, the logic of vote-dilution claims, and the constitutional problems with any nonneutral benchmark. See Brief for Appellants 32–46. It then relies on the computer evidence in these cases, among other facts, to argue that the plaintiffs have not shown dilution relative to any race-neutral benchmark. See *id.*, at 54–56. But the idea that "race-neutral benchmark" *means* the composite average of many computer-generated plans is the majority's alone.

After thus straw-manning Alabama's arguments at the outset, the majority muddles its own response. In a perfunctory footnote, it disclaims any holding that "algorithmic map making" evidence "is categorically irrelevant" in § 2 cases. *Ante*, at 1513, n. 8. That conclusion, however, is the obvious implication of the majority's reasoning and rhetoric. See *ante*, at 1513 (decrying a "map-comparison test" as "flawed in its fundamentals" even if it involves **1536 concededly "adequate comparators"); see also *ante*, at 1507 (stating that the "focu[s]" of § 2 analysis is "on the specific illustrative maps that a

plaintiff adduces," leaving unstated the implication that other algorithmically generated maps are irrelevant). The majority in effect, if not in word, thus forecloses any meaningful use of computer evidence to help locate the undiluted benchmark.

There are two critical problems with this fiat. The first, which the majority seems to recognize yet fails to resolve, is that excluding such computer evidence from view cannot be reconciled with § 2's command to consider "the totality of circumstances."[15] Second—and more fundamentally—the ***75** reasons that the majority gives for downplaying the relevance of computer evidence would more logically support a holding that there is no judicially manageable way of applying § 2's results test to single-member districts. The majority waxes about the "myriad considerations" that go into districting, the "difficult, contestable choices" those considerations require, and how "[n]othing in § 2 provides an answer" to the question of how well any given algorithm approximates the correct benchmark. *Ante*, at 1513 – 1514 (internal quotation marks omitted). In the end, it concludes, "Section 2 cannot require courts to judge a contest of computers" in which "there is no reliable way to determine who wins, or even where the finish line is." *Ante*, at 1514.

The majority fails to recognize that *whether* vote-dilution claims require an undiluted benchmark is not up for debate. If § 2 applies to single-member districting plans, courts cannot dispense with an undiluted benchmark for comparison, ascertained by an objective and workable method. *Bossier Parish School Bd.*, 520 U.S. at 480, 117 S.Ct. 1491; *Holder*, 512 U.S. at 881, 114 S.Ct. 2581 (plurality opinion). Of course, I would be the last person to deny that defining the undiluted benchmark is difficult. See *id.*, at 892, 114 S.Ct. 2581 (opinion of THOMAS, J.) (arguing that it "immerse[s] the federal courts in a hopeless project of weighing questions of political theory"). But the "myriad considerations" and "[a]nswerless questions" the majority frets about, *ante*, at 1513, 1514, are inherent in the very enterprise of applying § 2 to single-member districts. Everything the majority says ***76** about the difficulty of defining the undiluted benchmark *with* computer evidence applies with equal or greater force to the task of defining it *without* such evidence. At their core, the majority's workability concerns are an isolated demand for rigor against the backdrop of a legal regime that has long been " 'inherently standardless,' " and must remain so until the Court either discovers a principled and objective method of identifying the undiluted benchmark, *Holder*, 512 U.S. at 885, 114 S.Ct. 2581 (plurality opinion), or abandons this enterprise altogether, see *id.*, at 945, 114 S.Ct. 2581 (opinion of THOMAS, J.).

****1537** Ultimately, the majority has very little to say about the appropriate benchmark. What little it does say suggests that the majority sees no real alternative to the District Court's proportional-control benchmark, though it appears unwilling to say so outright. For example, in a nod to the statutory text and its "equal openness" requirement, the majority asserts that "[a] district is not equally open ... when minority voters face—unlike their majority peers—bloc voting along racial lines, arising against the backdrop of substantial racial discrimination within the State, that renders a minority vote unequal to a vote by a nonminority voter." *Ante*, at 1507. But again, we have held that dilution cannot be shown without an objective, undiluted benchmark, and this verbiage offers no guidance for how to determine it.[16] Later, the majority asserts that "the *Gingles* framework itself imposes meaningful constraints on proportionality." *Ante*, at 1508. But the only constraint on proportionality the majority articulates is that it is often *difficult to* ***77** *achieve*—which, quite obviously, is no principled limitation at all. *Ante*, at 1508 – 1510.

Thus, the end result of the majority's reasoning is no different from the District Court's: The ultimate benchmark is a racially proportional allocation of seats, and the main question on which liability turns is whether a closer approximation to proportionality is possible under any reasonable application of traditional districting criteria.[17] This approach, moreover, is consistent with how the majority describes the role of plaintiffs' illustrative maps, as well as an unjustified practical asymmetry to which its rejection of computer evidence gives rise. Courts are to "focu[s] ... on the specific illustrative maps that a plaintiff adduces," *ante*, at 1507 – 1508, by which the majority means that courts should *not* "focu[s]" on statistical evidence showing those maps to be outliers. Thus, plaintiffs may use an algorithm to generate any number of maps that meet specified districting criteria and a preferred racial target; then, they need only produce one of those maps to "sho[w] it is *possible* that the State's map" is dilutive. *Ante*, at 1507 (emphasis in original). But the State may not use algorithmic evidence to suggest that the plaintiffs' map is an unsuitable benchmark for comparison—not even, apparently, if it can prove that the illustrative map ***78** is an outlier among "billion[s]" or "trillion[s]" of concededly "adequate comparators." *Ante*, at 1513, 1514; see also ****1538** *ante*, at 1514 (rejecting sampling algorithms). This arbitrary restriction amounts to a thumb on the scale for § 2 plaintiffs—an unearned presumption that any "reasonable" map they put forward constitutes a benchmark against which the State's map can be deemed dilutive. And, once the comparison is framed in that way, the only workable rule of decision is proportionality. See *Holder*, 512 U.S. at 941–943, 114 S.Ct. 2581 (opinion of THOMAS, J.).

By affirming the District Court, the majority thus approves its benchmark of proportional control limited only by feasibility,

and it entrenches the most perverse tendencies of our vote-dilution jurisprudence. It guarantees that courts will continue to approach vote-dilution claims just as the District Court here did: with no principled way of determining how many seats a minority "should" control and with a strong temptation to bless every incremental step toward a racially proportional allocation that plaintiffs can pass off as consistent with any reasonable map.

III

As noted earlier, the Court has long recognized the need to avoid interpretations of § 2 that " 'would unnecessarily infuse race into virtually every redistricting, raising serious constitutional questions.' " *Bartlett*, 556 U.S. at 21, 129 S.Ct. 1231 (plurality opinion) (quoting *LULAC*, 548 U.S. at 446, 126 S.Ct. 2594 (opinion of Kennedy, J.)). Today, however, by approving the plaintiffs' racially gerrymandered maps as reasonably configured, refusing to ground § 2 vote-dilution claims in a race-neutral benchmark, and affirming a vote-dilution finding that can only be justified by a benchmark of proportional control, the majority holds, in substance, that race belongs in virtually every redistricting. It thus drives headlong into the very constitutional problems that the Court has long sought to avoid. The result of this collision is unmistakable: If the ***79** District Court's application of § 2 was correct as a statutory matter, § 2 is unconstitutional as applied here.

Because the Constitution "restricts consideration of race and the [Voting Rights Act] demands consideration of race," *Abbott*, 585 U. S., at ——, 138 S.Ct., at 2315, strict scrutiny is implicated wherever, as here, § 2 is applied to require a State to adopt or reject any districting plan on the basis of race. See *Bartlett*, 556 U.S. at 21–22, 129 S.Ct. 1231 (plurality opinion). At this point, it is necessary to confront directly one of the more confused notions inhabiting our redistricting jurisprudence. In several cases, we have "assumed" that compliance with § 2 of the Voting Rights Act could be a compelling state interest, before proceeding to *reject* race-predominant plans or districts as insufficiently tailored to that asserted interest. See, *e.g.*, *Wisconsin Legislature*, 595 U. S., at ——, 142 S.Ct., at 1248; *Cooper v. Harris*, 581 U.S. 285, 292, 137 S.Ct. 1455, 197 L.Ed.2d 837 (2017); *Shaw II*, 517 U.S. at 915, 116 S.Ct. 1894; *Miller*, 515 U.S. at 921, 115 S.Ct. 2475. But we have never applied this assumption to *uphold* a districting plan that would otherwise violate the Constitution, and the slightest reflection on first principles should make clear why it would be problematic to do so.[18] The Constitution ****1539** is supreme over statutes, not vice versa. *Marbury v. Madison*, 1 Cranch 137, 178, 2 L.Ed. 60 (1803). Therefore, if complying with a federal statute would require a State to engage in unconstitutional racial discrimination, the proper conclusion is not that the statute excuses the State's discrimination, but that the statute is invalid.

If Congress has any power at all to require States to sort voters into congressional districts based on race, that power must flow from its authority to "enforce" the Fourteenth and ***80** Fifteenth Amendments "by appropriate legislation." Amdt. 14, § 5; Amdt. 15, § 2. Since Congress in 1982 replaced intent with effects as the criterion of liability, however, "a violation of § 2 is no longer *a fortiori* a violation of " either Amendment. *Bossier Parish School Bd.*, 520 U.S. at 482, 117 S.Ct. 1491. Thus, § 2 can be justified only under Congress' power to "enact reasonably prophylactic legislation to deter constitutional harm." *Allen* v. *Cooper*, 589 U. S. ——, ——, 140 S.Ct. 994, 1004, 206 L.Ed.2d 291 (2020) (alteration and internal quotation marks omitted); see *City of Boerne v. Flores*, 521 U.S. 507, 517–529, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997). Because Congress' prophylactic-enforcement authority is "remedial, rather than substantive," "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[19] *Id.*, at 520, 117 S.Ct. 2157. Congress' chosen means, moreover, must " 'consist with the letter and spirit of the constitution.' " *Shelby County v. Holder*, 570 U.S. 529, 555, 133 S.Ct. 2612, 186 L.Ed.2d 651 (2013) (quoting *McCulloch v. Maryland*, 4 Wheat. 316, 421, 4 L.Ed. 579 (1819)); accord, *Miller*, 515 U.S. at 927, 115 S.Ct. 2475.

Here, as with everything else in our vote-dilution jurisprudence, the task of sound analysis is encumbered by the lack of clear principles defining § 2 liability in districting. It is awkward to examine the "congruence" and "proportionality" of a statutory rule whose very meaning exists in a perpetual state of uncertainty. The majority makes clear, however, that the primary factual predicate of a vote-dilution claim is "bloc voting along racial lines" that results in majority-preferred candidates defeating minority-preferred ones. *Ante*, at 1507; accord, *Gingles*, 478 U.S. at 48, 106 S.Ct. 2752 ("The theoretical basis for [vote-dilution claims] is that where minority and majority voters consistently prefer different candidates, the majority, by

virtue of its numerical superiority, will regularly ***81** defeat the choices of minority voters"). And, as I have shown, the remedial logic with which the District Court's construction of § 2 addresses that "wrong" rests on a proportional-control benchmark limited only by feasibility. Thus, the relevant statutory rule may be approximately stated as follows: If voting is racially polarized in a jurisdiction, and if there exists any more or less reasonably configured districting plan that would enable the minority group to constitute a majority in a number of districts roughly proportional to its share of the population, then the jurisdiction must ensure that its districting plan includes that number of majority-minority districts "or something quite close."[20] 582 F.Supp.3d at 1033. Thus construed ****1540** and applied, § 2 is not congruent and proportional to any provisions of the Reconstruction Amendments.

To determine the congruence and proportionality of a measure, we must begin by "identify[ing] with some precision the scope of the constitutional right at issue." *Board of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 365, 121 S.Ct. 955, 148 L.Ed.2d 866 (2001). The Reconstruction Amendments "forbi[d], so far as civil and political rights are concerned, discrimination ... against any citizen because of his race," ensuring that "[a]ll citizens are equal before the law." *Gibson v. Mississippi*, 162 U.S. 565, 591, 16 S.Ct. 904, 40 L.Ed. 1075 (1896) (Harlan, J.). They dictate "that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class." *Miller*, 515 U.S. at 911, 115 S.Ct. 2475 (internal quotation marks omitted). These principles are why the Constitution presumptively forbids race-predominant districting, "even for remedial purposes." *Shaw I*, 509 U.S. at 657, 113 S.Ct. 2816.

These same principles foreclose a construction of the Amendments that would entitle members of racial minorities, ***82** *qua* racial minorities, to have their preferred candidates win elections. Nor do the Amendments limit the rights of members of a racial majority to support *their* preferred candidates—regardless of whether minorities prefer different candidates and of whether "the majority, by virtue of its numerical superiority," regularly prevails. *Gingles*, 478 U.S. at 48, 106 S.Ct. 2752. Nor, finally, do the Amendments establish a norm of proportional control of elected offices on the basis of race. See *Parents Involved*, 551 U.S. at 730–731, 127 S.Ct. 2738 (plurality opinion); *Shaw I*, 509 U.S. at 657, 113 S.Ct. 2816. And these notions are not merely *foreign to* the Amendments. Rather, they are *radically inconsistent* with the Amendments' command that government treat citizens as individuals and their "goal of a political system in which race no longer matters." *Ibid.*

Those notions are, however, the values at the heart of § 2 as construed by the District Court and the majority. As applied here, the statute effectively considers it a legal wrong by the State if white Alabamians vote for candidates from one political party at high enough rates, provided that black Alabamians vote for candidates from the other party at a still higher rate. And the statute remedies that wrong by requiring the State to engage in race-based redistricting in the direction of proportional control.

I am not certain that Congress' enforcement power could *ever* justify a statute so at odds " 'with the letter and spirit of the constitution.' " *Shelby County*, 570 U.S. at 555, 133 S.Ct. 2612. If it could, it must be because Congress "identified a history and pattern" of actual constitutional violations that, for some reason, required extraordinary prophylactic remedies. *Garrett*, 531 U.S. at 368, 121 S.Ct. 955. But the legislative record of the 1982 amendments is devoid of any showing that might justify § 2's blunt approximation of a "racial register for allocating representation on the basis of race." *Holder*, 512 U.S. at 908, 114 S.Ct. 2581 (opinion of THOMAS, J.). To be sure, the Senate Judiciary Committee Report that accompanied the 1982 amendment to the Voting Rights Act "listed many examples of what ***83** the Committee *took to be* unconstitutional vote dilution." ****1541** *Brnovich*, 594 U. S., at ——, 141 S.Ct., at 2333 (emphasis added). But the Report also showed the Committee's fundamental lack of "concern with whether" those examples reflected the "intentional" discrimination required "to raise a constitutional issue." *Allen*, 589 U. S., at ——, 140 S.Ct., at 1006. The Committee's "principal reason" for rejecting discriminatory purpose was simply that it preferred an alternative legal standard; it thought *Mobile*'s intent test was "the wrong question," and that courts should instead ask whether a State's election laws offered minorities "a fair opportunity to participate" in the political process. S. Rep. No. 97–417, p. 36.

As applied here, the amended § 2 thus falls on the wrong side of "the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law." *City of Boerne*, 521 U.S. at 519, 117 S.Ct. 2157. It replaces the constitutional right against intentionally discriminatory districting with an amorphous race-based right to a "fair" distribution of political power, a "right" that cannot be implemented without requiring the very evils the Constitution forbids.

If that alone were not fatal, § 2's "reach and scope" further belie any congruence and proportionality between its districting-related commands, on the one hand, and actionable constitutional wrongs, on the other. *Id.*, at 532, 117 S.Ct. 2157.

Its "[s]weeping coverage ensures its intrusion at every level of government" and in every electoral system. *Ibid.* It "has no termination date or termination mechanism." *Ibid.* Thus, the amended § 2 is not spatially or temporally "limited to those cases in which constitutional violations [are] most likely." *Id.*, at 533, 117 S.Ct. 2157. Nor does the statute limit its reach to "attac[k] a particular type" of electoral mechanism "with a long history as a 'notorious means to deny and abridge voting rights on racial grounds.' " *Ibid.* (quoting *South Carolina v. Katzenbach*, 383 U.S. 301, 355, 86 S.Ct. 803, 15 L.Ed.2d 769 (1966) (Black, J., concurring and dissenting)). In view of this "indiscriminate ***84** scope," "it simply cannot be said that 'many of [the districting plans] affected by the congressional enactment have a significant likelihood of being unconstitutional.' " *Florida Prepaid Postsecondary Ed. Expense Bd. v. College Savings Bank*, 527 U.S. 627, 647, 119 S.Ct. 2199, 144 L.Ed.2d 575 (1999) (quoting *City of Boerne*, 521 U.S. at 532, 117 S.Ct. 2157).

Of course, under the logically unbounded totality-of-circumstances inquiry, a court applying § 2 can always embroider its vote-dilution determination with findings about past or present unconstitutional discrimination. But this possibility does nothing to heal either the fundamental contradictions between § 2 and the Constitution or its extreme overbreadth relative to actual constitutional wrongs. "A generalized assertion of past discrimination" cannot justify race-based redistricting, "because it provides no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy." *Shaw II*, 517 U.S. at 909, 116 S.Ct. 1894 (internal quotation marks omitted). To justify a statute tending toward the proportional allocation of political power by race throughout the Nation, it cannot be enough that a court can recite some indefinite quantum of discrimination in the relevant jurisdiction. If it were, courts "could uphold [race-based] remedies that are ageless in their reach into the past, and timeless in their ability to affect the future." *Wygant v. Jackson Bd. of Ed.*, 476 U.S. 267, 276, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986) (plurality opinion). That logic "would effectively assure that race will always be relevant in [redistricting], and that the ultimate goal of eliminating entirely from governmental decisionmaking ****1542** such irrelevant factors as a human being's race will never be achieved." *Parents Involved*, 551 U.S. at 730, 127 S.Ct. 2738 (plurality opinion) (alteration and internal quotation marks omitted).

For an example of these baleful results, we need look no further than the congressional districts at issue here. In 1992, Alabama and a group of § 2 plaintiffs, whom a federal court chose to regard as the representatives "of all African-American ***85** citizens of the State of Alabama," stipulated that the State's black population was " 'sufficiently compact and contiguous to comprise a single member significant majority (65% or more) African American Congressional district,' " and that, " '[c]onsequently,' " such a " 'district should be created.' " *Wesch v. Hunt*, 785 F.Supp. 1491, 1493, 1498 (SD Ala.). Accepting that stipulation, the court reworked District 7 into an irregularly shaped supermajority-black district—one that scooped up populous clusters of black voters in the disparate urban centers of Birmingham and Montgomery to connect them across a swath of largely majority-black rural areas—without even "decid[ing] whether the creation of a majority African-American district [was] mandated by either § 2 or the Constitution." *Id.*, at 1499; see n. 7, *supra*. It did not occur to the court that the Constitution might *forbid* such an extreme racial gerrymander, as it quite obviously did. But, once District 7 had come into being as a racial gerrymander thought necessary to satisfy § 2, it became an all-but-immovable fixture of Alabama's districting scheme.

Now, 30 years later, the plaintiffs here demand that Alabama carve up not two but three of its main urban centers on the basis of race, and that it configure those urban centers' black neighborhoods with the outlying majority-black rural areas so that black voters can control not one but two of the State's seven districts. The Federal Judiciary now upholds their demand—overriding the State's undoubted interest in preserving the core of its existing districts, its plainly reasonable desire to maintain the Gulf Coast region as a cohesive political unit, and its persuasive arguments that a race-neutral districting process would not produce anything like the districts the plaintiffs seek. Our reasons for doing so boil down to these: that the plaintiffs' proposed districts are more or less within the vast universe of reasonable districting outcomes; that Alabama's white voters do not support the black minority's preferred candidates; that Alabama's racial climate, taken as a rarefied whole, crosses some indefinable ***86** line justifying our interference; and, last but certainly not least, that black Alabamians are about two-sevenths of the State's overall population.

By applying § 2 in this way to claims of this kind, we encourage a conception of politics as a struggle for power between "competing racial factions." *Shaw I*, 509 U.S. at 657, 113 S.Ct. 2816. We indulge the pernicious tendency of assigning Americans to "creditor" and "debtor race[s]," even to the point of redistributing political power on that basis. *Adarand Constructors, Inc.* v. *Peña*, 515 U.S. 200, 239, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995) (Scalia, J., concurring in part and concurring in judgment). We ensure that the race-based redistricting we impose on Alabama now will bear divisive consequences long into the future, just as the initial creation of District 7 segregated Jefferson County for decades and minted the template for crafting black "political homelands" in Alabama. *Holder*, 512 U.S. at 905, 114 S.Ct. 2581 (opinion of

THOMAS, J.). We place States in the impossible position of having to weigh just how much racial sorting is necessary to avoid the "competing hazards" of violating § 2 and violating the Constitution. *Abbott*, 585 U. S., at ——, 138 S.Ct., at 2315 (internal quotation ****1543** marks omitted). We have even put ourselves in the ridiculous position of "assuming" that compliance with a statute can excuse disobedience to the Constitution. Worst of all, by making it clear that there are political dividends to be gained in the discovery of new ways to sort voters along racial lines, we prolong immeasurably the day when the "sordid business" of "divvying us up by race" is no more. *LULAC*, 548 U.S. at 511, 126 S.Ct. 2594 (ROBERTS, C. J., concurring in part, concurring in judgment in part, and dissenting in part). To the extent § 2 requires any of this, it is unconstitutional.

The majority deflects this conclusion by appealing to two of our older Voting Rights Act cases, *City of Rome v. United States*, 446 U.S. 156, 100 S.Ct. 1548, 64 L.Ed.2d 119 (1980), and *South Carolina v. Katzenbach*, 383 U.S. 301, 86 S.Ct. 803, 15 L.Ed.2d 769, that did not address § 2 at all and, indeed, predate Congress' adoption of the results test. *Ante*, at 1516 – 1517. That maneuver is untenable. *Katzenbach* upheld § 5's preclearance ***87** requirements, § 4(b)'s original coverage formula, and other related provisions aimed at "a small number of States and political subdivisions" where "systematic resistance to the Fifteenth Amendment" had long been flagrant. 383 U.S. at 328, 86 S.Ct. 803; see also *id.*, at 315–317, 86 S.Ct. 803 (describing the limited issues presented). Fourteen years later, *City of Rome* upheld the 1975 Act extending § 5's preclearance provisions for another seven years. See 446 U.S. at 172–173, 100 S.Ct. 1548. The majority's reliance on these cases to validate a statutory rule not there at issue could make sense only if we assessed the congruence and proportionality of the Voting Rights Act's rules wholesale, without considering their individual features, or if *Katzenbach* and *City of Rome* meant that Congress has plenary power to enact whatever rules it chooses to characterize as combating "discriminatory ... effect[s]." *Ante*, at 1516 (internal quotation marks omitted). Neither proposition makes any conceptual sense or is consistent with our cases. See, *e.g.*, *Shelby County*, 570 U.S. at 550–557, 133 S.Ct. 2612 (holding the 2006 preclearance coverage formula unconstitutional); *Northwest Austin Municipal Util. Dist. No. One v. Holder*, 557 U.S. 193, 203, 129 S.Ct. 2504, 174 L.Ed.2d 140 (2009) (emphasizing the distinctness of §§ 2 and 5); *City of Boerne*, 521 U.S. at 533, 117 S.Ct. 2157 (discussing *City of Rome* as a paradigm case of congruence-and-proportionality review of remedial legislation); *Miller*, 515 U.S. at 927, 115 S.Ct. 2475 (stressing that construing § 5 to require "that States engage in presumptively unconstitutional race-based districting" would raise "troubling and difficult constitutional questions," notwithstanding *City of Rome*).

In fact, the majority's cases confirm the very limits on Congress' enforcement powers that are fatal to the District Court's construction of § 2. *City of Rome*, for example, immediately after one of the sentences quoted by the majority, explained the remedial rationale for its approval of the 1975 preclearance extension: "Congress could rationally have concluded that, because electoral changes *by jurisdictions with a demonstrable history of intentional racial discrimination* ***88** *in voting create the risk of purposeful discrimination*, it was proper to prohibit changes that have a discriminatory impact." 446 U.S. at 177, 100 S.Ct. 1548 (emphasis added; footnote omitted). The next section of *City of Rome* then separately examined and upheld the reasonableness of the extension's 7-year time period. See *id.*, at 181–182, 100 S.Ct. 1548. *City of Rome* thus stands for precisely the propositions for which *City of Boerne* cited it: Congress may adopt "[p]reventive measures ... when there is reason to believe that many of the laws ****1544** affected by the congressional enactment have a significant likelihood of being unconstitutional," 521 U.S. at 532, 117 S.Ct. 2157, particularly when it employs "termination dates, geographic restrictions, or egregious predicates" that "tend to ensure Congress' means are proportionate to ends legitimate," *id.*, at 533, 117 S.Ct. 2157; see also *id.*, at 532–533, 117 S.Ct. 2157 (analyzing *Katzenbach* in similar terms); *Shelby County*, 570 U.S. at 535, 545–546, 133 S.Ct. 2612 (same). Again, however, the amended § 2 lacks any such salutary limiting principles; it is unbounded in time, place, and subject matter, and its districting-related commands have no nexus to any likely constitutional wrongs.

In short, as construed by the District Court, § 2 does not remedy or deter unconstitutional discrimination in districting in any way, shape, or form. On the contrary, it *requires* it, hijacking the districting process to pursue a goal that has no legitimate claim under our constitutional system: the proportional allocation of political power on the basis of race. Such a statute "cannot be considered remedial, preventive legislation," and the race-based redistricting it would command cannot be upheld under the Constitution. *City of Boerne*, 521 U.S. at 532, 117 S.Ct. 2157.[21]

***89** IV

These cases are not close. The plaintiffs did not prove that Alabama's districting plan "impose[s] or applie[s]" any "voting qualification or prerequisite to voting or standard, practice, or procedure" that effects "a denial or abridgement of the[ir] right ... to vote on account of race or color." § 10301(a). Nor did they prove that Alabama's congressional districts "are not equally open to participation" by black Alabamians. § 10301(b). The plaintiffs did not even prove that it is possible to achieve two majority-black districts without resorting to a racial gerrymander. The most that they can be said to have shown is that sophisticated mapmakers can proportionally allocate Alabama's congressional districts based on race in a way that exceeds the Federal Judiciary's ability to recognize as a racial gerrymander with the naked eye. The District Court held that this showing, plus racially polarized voting and its *gestalt* view of Alabama's racial climate, was enough to require the State to redraw its districting plan on the basis of race. If that is the benchmark for vote dilution under § 2, then § 2 is nothing more than a racial entitlement to roughly proportional control of elective offices—limited only by feasibility—wherever different racial groups consistently prefer different candidates.

If that is what § 2 means, the Court should hold that it is unconstitutional. If that is not what it means, but § 2 applies to districting, then the Court should hold that vote-dilution challenges require a race-neutral benchmark that bears no resemblance to unconstitutional racial registers. On the other hand, if the Court believes that finding a race-neutral benchmark is as impossible as much of its rhetoric suggests, it should hold that ****1545** § 2 cannot be applied to single-member districting plans for want of an "objective and ***90** workable standard for choosing a reasonable benchmark." *Holder*, 512 U.S. at 881, 114 S.Ct. 2581 (plurality opinion). Better yet, it could adopt the correct interpretation of § 2 and hold that a single-member districting plan is not a "voting qualification," a "prerequsite to voting," or a "standard, practice, or procedure," as the Act uses those terms. One way or another, the District Court should be reversed.

The majority goes to great lengths to decline all of these options and, in doing so, to fossilize all of the worst aspects of our long-deplorable vote-dilution jurisprudence. The majority recites *Gingles*' shopworn phrases as if their meaning were self-evident, and as if it were not common knowledge that they have spawned intractable difficulties of definition and application. It goes out of its way to reaffirm § 2's applicability to single-member districting plans both as a purported original matter and on highly exaggerated *stare decisis* grounds. It virtually ignores Alabama's primary argument—that, whatever the benchmark is, it must be race neutral—choosing, instead, to quixotically joust with an imaginary adversary. In the process, it uses special pleading to close the door on the hope cherished by some thoughtful observers, see *Gonzalez*, 535 F.3d at 599–600, that computational redistricting methods might offer a principled, race-neutral way out of the thicket *Gingles* carried us into. Finally, it dismisses grave constitutional questions with an insupportably broad holding based on demonstrably inapposite cases.[22]

I find it difficult to understand these maneuvers except as proceeding from a perception that what the District Court did here is essentially no different from what many courts ***91** have done for decades under this Court's superintendence, joined with a sentiment that it would be unthinkable to disturb that approach to the Voting Rights Act in any way. I share the perception, but I cannot understand the sentiment. It is true that, "under our direction, federal courts [have been] engaged in methodically carving the country into racially designated electoral districts" for decades now. *Holder*, 512 U.S. at 945, 114 S.Ct. 2581 (opinion of THOMAS, J.). But that fact should inspire us to repentance, not resignation. I am even more convinced of the opinion that I formed 29 years ago:

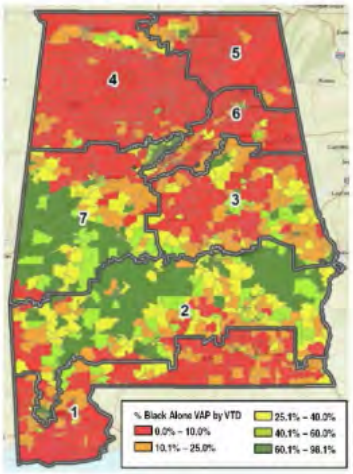
> "In my view, our current practice should not continue. Not for another Term, not until the next case, not for another day. The disastrous implications of the policies we have adopted under the Act are too grave; the dissembling in our approach to the Act too damaging to the credibility of the Federal Judiciary. The 'inherent tension'—indeed, I would call it an irreconcilable conflict—between the standards we have adopted for evaluating vote dilution claims and the text of the Voting Rights Act would itself be sufficient in my view to warrant overruling the interpretation of § 2 set out in *Gingles*. When that obvious conflict is combined with the destructive effects our expansive reading of the Act has had in involving the Federal Judiciary in the project of dividing the Nation into racially segregated electoral districts, I can see no reasonable alternative to abandoning our current unfortunate ****1546** understanding of the Act." *Id.*, at 944, 114 S.Ct. 2581.

I respectfully dissent.

APPENDIX

***92**

Duchin Plan 1



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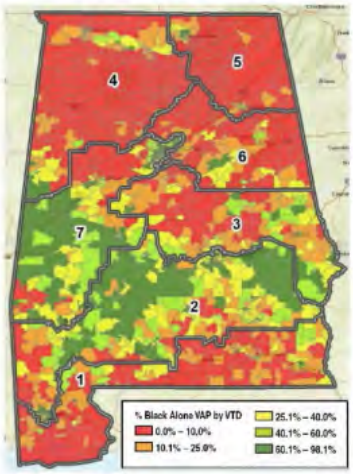

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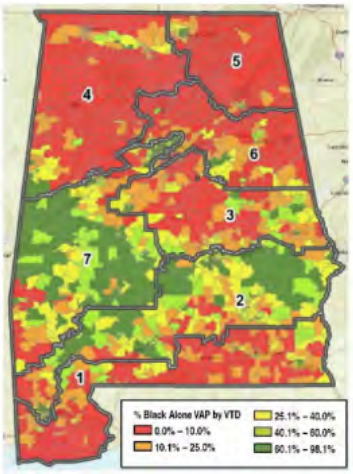

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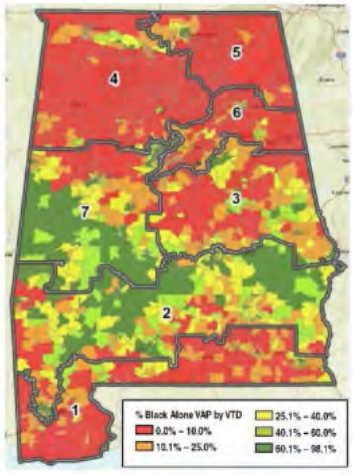

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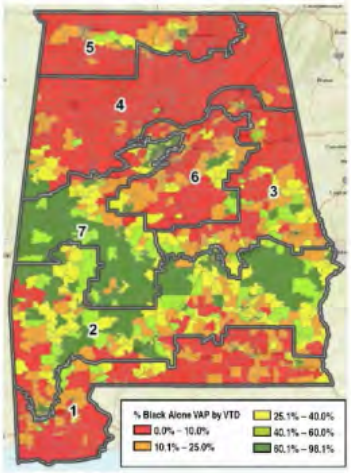
****1547**

Cooper Plan 1



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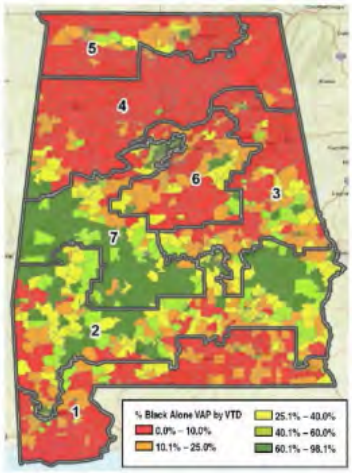

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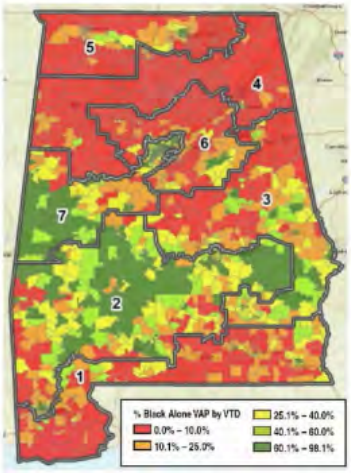

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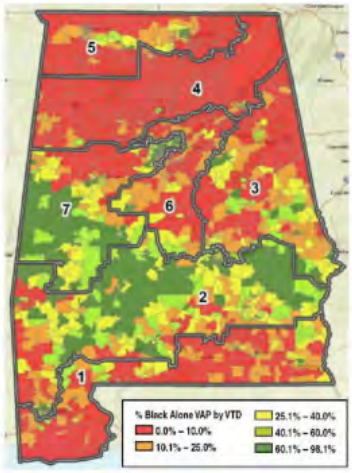
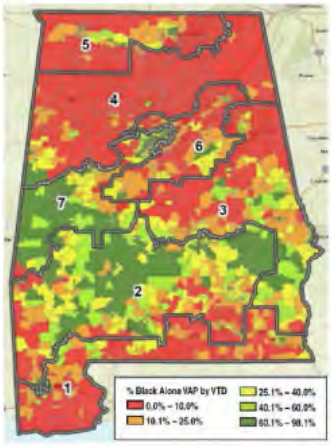


***94**
****1548**

Cooper Plan 5



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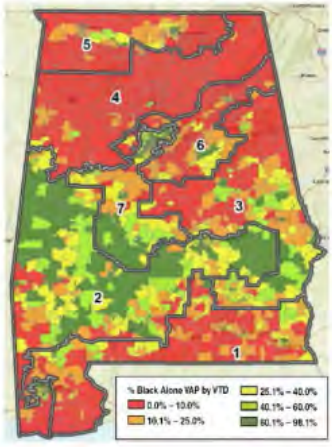
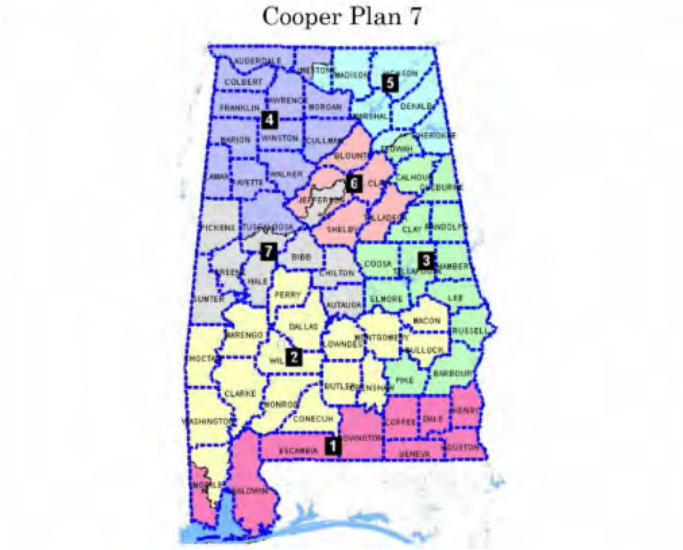


Cooper Plan 7



Justice ALITO, with whom Justice GORSUCH joins, dissenting.

***95** Based on a flawed understanding of the framework adopted in *Thornburg v. Gingles*, 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986), the Court now holds that the congressional districting map adopted by the Alabama Legislature violates § 2 of the Voting Rights Act. Like the Court, I am happy to apply *Gingles* in these cases. But I would interpret that precedent in a way that heeds what § 2 actually says, and I would take constitutional requirements into account. When ****1549** the *Gingles* framework is viewed in this way, it is apparent that the decisions below must be vacated.

I

A

Gingles marked the Court's first encounter with the amended version of § 2 that Congress enacted in 1982, and the Court's opinion set out an elaborate framework that has since been used to analyze a variety of § 2 claims. Under that framework, a plaintiff must satisfy three "preconditions." *Id.*, at 50, 106 S.Ct. 2752. As summarized in more recent opinions, they are as follows:

> "First, [the] 'minority group' [whose interest the plaintiff represents] must be 'sufficiently large and geographically compact to constitute a majority' in some reasonably configured legislative district. Second, the minority group must be 'politically cohesive.' And third, a district's white majority must 'vote[ ] sufficiently as a bloc' to usually 'defeat the minority's preferred candidate.' " *Cooper v. Harris*, 581 U.S. 285, 301–302, 137 S.Ct. 1455, 197 L.Ed.2d 837 (2017) (citations omitted).

See also *Wisconsin Legislature* v. *Wisconsin Elections Comm'n*, 595 U. S. ——, ——, 142 S.Ct. 1245, 1248, 212 L.Ed.2d 251 (2022) (*per curiam*); ***96** *Merrill* v. *Milligan*, 595 U. S. ——, ——, 142 S.Ct. 879, 886–888, —— L.Ed.2d —— (2022) (KAGAN, J., dissenting from grant of applications for stays).

If a § 2 plaintiff can satisfy all these preconditions, the court must then decide whether, based on the totality of the circumstances, the plaintiff 's right to vote was diluted. See *Gingles*, 478 U.S. at 46–48, 79, 106 S.Ct. 2752. And to aid in that inquiry, *Gingles* approved consideration of a long list of factors set out in the Senate Judiciary Committee's Majority Report on the 1982 VRA amendments. *Id.*, at 44–45, 106 S.Ct. 2752 (citing S. Rep. No. 97–417, pp. 28–30 (1982)).

B

My fundamental disagreement with the Court concerns the first *Gingles* precondition. In cases like these, where the claim is that § 2 requires the creation of an additional majority-minority district, the first precondition means that the plaintiff must produce an additional illustrative majority-minority district that is "reasonably configured." *Cooper*, 581 U.S. at 301, 137 S.Ct. 1455; *Wisconsin Legislature*, 595 U. S., at ——, 142 S.Ct., at 1248; see also *Gingles*, 478 U.S. at 50, 106 S.Ct. 2752.

The Court's basic error is that it misunderstands what it means for a district to be "reasonably configured." Our cases make it clear that "reasonably configured" is not a synonym for "compact." We have explained that the first precondition also takes into account other traditional districting criteria like attempting to avoid the splitting of political subdivisions and "communities of interest." *League of United Latin American Citizens v. Perry*, 548 U.S. 399, 433–434, 126 S.Ct. 2594, 165 L.Ed.2d 609 (2006) (*LULAC*).

To its credit, the Court recognizes that compactness is not enough and that a district is not reasonably configured if it flouts other "traditional districting criteria." *Ante*, at 1503. At various points in its opinion it names quite a few: minimizing the splitting of counties and other political subdivisions, keeping "communities of interest" together where possible, and avoiding the creation of new districts that require ***97** two incumbents to run against each other. *Ante*, at 1504 – 1505, 1512 – 1513. In addition, the Court acknowledges that a district is not "reasonably configured" if it does not comport with the Equal Protection ****1550** Clause's one-person, one-vote requirement. *Ante*, at 1513. But the Court fails to explain why compliance with "traditional districting criteria" matters under § 2 or why the only relevant equal protection principle is the one-person, one-vote requirement. If the Court had attempted to answer these questions, the defect in its understanding of the first *Gingles* precondition would be unmistakable.

To explain this, I begin with what is probably the most frequently mentioned traditional districting criterion and ask why it should matter under § 2 whether a proposed majority-minority district is "compact." Neither the Voting Rights Act (VRA) nor the Constitution imposes a compactness requirement. The Court notes that we have struck down bizarrely shaped districts, *ante*, at 1508 – 1509, but we did not do that for esthetic reasons. Compactness in and of itself is not a legal requirement—or even necessarily an esthetic one. (Some may find fancifully shaped districts more pleasing to the eye than

boring squares.)

The same is true of departures from other traditional districting criteria. Again, nothing in the Constitution or the VRA demands compliance with these criteria. If a whimsical state legislature cavalierly disregards county and municipal lines and communities of interest, draws weirdly shaped districts, departs radically from a prior map solely for the purpose of change, and forces many incumbents to run against each other, neither the Constitution nor the VRA would make any of that illegal *per se*. Bizarrely shaped districts and other marked departures from traditional districting criteria matter because mapmakers usually heed these criteria, and when it is evident that they have not done so, there is reason to suspect that something untoward—specifically, unconstitutional racial gerrymandering—is afoot. ***98** See, *e.g.*, *Shaw v. Reno*, 509 U.S. 630, 643–644, 113 S.Ct. 2816, 125 L.Ed.2d 511 (1993); *Bush v. Vera*, 517 U.S. 952, 979, 116 S.Ct. 1941, 135 L.Ed.2d 248 (1996) (plurality opinion); cf. *LULAC*, 548 U.S. at 433–435, 126 S.Ct. 2594.

Conspicuous violations of traditional districting criteria constitute strong *circumstantial evidence* of unconstitutionality. And when it is shown that the configuration of a district is attributable predominantly to race, that is more than circumstantial evidence that the district is unlawful. That is *direct evidence* of illegality because, as we have often held, race may not "predominate" in the drawing of district lines. See, *e.g.*, *Cooper*, 581 U.S. at 292, 137 S.Ct. 1455; *Bethune-Hill v. Virginia State Bd. of Elections*, 580 U.S. 178, 191–192, 137 S.Ct. 788, 197 L.Ed.2d 85 (2017); *Shaw v. Hunt*, 517 U.S. 899, 906–907, 116 S.Ct. 1894, 135 L.Ed.2d 207 (1996) (*Shaw II*); *Miller v. Johnson*, 515 U.S. 900, 920, 115 S.Ct. 2475, 132 L.Ed.2d 762 (1995).[1]

Because non-predominance is a longstanding and vital feature of districting law, it must be honored in a *Gingles* plaintiff 's illustrative district. If race predominated in the creation of such a district, the plaintiff has failed to satisfy both our precedent, which requires "reasonably configured" districts, and the terms of § 2, which demand equal openness. Two Terms ago, we engaged in a close analysis of the text of § 2 and explained that its "key requirement" is that the political processes leading to nomination or election must be " 'equally open to participation' by members of a protected class." ****1551** *Brnovich* v. *Democratic National Committee*, 594 U. S. ——, ——, 141 S.Ct. 2321, 2332, 2337, 210 L.Ed.2d 753 (2021) (quoting 52 U.S.C. § 10301(b); emphasis deleted). "[E]qual openness," we stressed, must be our "touchstone" in interpreting and applying that provision. 594 U. S., at ——, 141 S.Ct., at 2338.

When the race of one group is the predominant factor in the creation of a district, that district goes beyond making the electoral process equally open to the members of the group in question. It gives the members of that group an ***99** advantage that § 2 does not require and that the Constitution may forbid. And because the creation of majority-minority districts is something of a zero-sum endeavor, giving an advantage to one minority group may disadvantage others.

C

What all this means is that a § 2 plaintiff who claims that a districting map violates § 2 because it fails to include an additional majority-minority district must show at the outset that such a district can be created without making race the predominant factor in its creation. The plaintiff bears both the burden of production and the burden of persuasion on this issue, see *Voinovich v. Quilter*, 507 U.S. 146, 155–156, 113 S.Ct. 1149, 122 L.Ed.2d 500 (1993); *White v. Regester*, 412 U.S. 755, 766, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973), but a plaintiff can satisfy the former burden simply by adducing evidence—in any acceptable form—that race did not predominate.

A plaintiff need not offer computer-related evidence. Once upon a time, legislative maps were drawn without using a computer, and nothing prevents a § 2 plaintiff from taking this old-school approach in creating an illustrative district. See, *e.g.*, M. Altman, K. McDonald, & M. McDonald, From Crayons to Computers: The Evolution of Computer Use in Redistricting, 23 Soc. Sci. Computer Rev. 334, 335–336 (2005). In that event, the plaintiff can simply call upon the mapmaker to testify about the process he or she used and the role, if any, that race played in that process. The defendant may seek to refute that testimony in any way that the rules of civil procedure and evidence allow.

If, as will often be the case today, a § 2 plaintiff 's mapmaker uses a computer program, the expert can testify about the weight, if any, that the program gives to race. The plaintiff will presumably argue that any role assigned to race was not predominant, and the defendant can contest this by cross-examining the plaintiff 's expert, seeking the actual program in discovery, and calling its own expert to testify ***100** about the program's treatment of race. After this, the trial court will be in a position to determine whether the program gave race a "predominant" role.

This is an entirely workable scheme. It does not obligate either party to offer computer evidence, and it minimizes the likelihood of a clash between what § 2 requires and what the Constitution forbids. We have long assumed that § 2 is consistent with the Constitution. See, *e.g.*, *Cooper*, 581 U.S. at 301, 137 S.Ct. 1455 (assuming States have a compelling interest in complying with § 2); *Shaw II*, 517 U.S. at 915, 116 S.Ct. 1894 (same); *Vera*, 517 U.S. at 977, 116 S.Ct. 1941 (plurality opinion) (same). But that cannot mean that every conceivable interpretation of § 2 is constitutional, and I do not understand the majority's analysis of Alabama's constitutional claim to suggest otherwise. *Ante*, at 1516 – 1517; *ante*, at 1518 – 1519 (KAVANAUGH, J., concurring in part).

Our cases make it perfectly clear that using race as a "predominant factor" in drawing legislative districts is unconstitutional unless the stringent requirements of ****1552** strict scrutiny can be satisfied,[2] and therefore if § 2 can be found to require the adoption of an additional majority-minority district that was created under a process that assigned race a "predominant" role, § 2 and the Constitution would be headed for a collision.

II

When the meaning of a "reasonably configured" district is properly understood, it is apparent that the decisions below must be vacated and that the cases must be remanded for the application of the proper test. In its analysis of whether the plaintiffs satisfied the first *Gingles* precondition, the District Court gave much attention to some traditional districting criteria—specifically, compactness and avoiding the splitting of political subdivisions and communities of interest—but ***101** it failed to consider whether the plaintiffs had shown that their illustrative districts were created without giving race a "predominant role." *Singleton v. Merrill*, 582 F.Supp.3d 924, 1008–1016 (ND Ala. 2022). For this reason, the District Court's § 2 analysis was deficient.

It is true that the District Court addressed the question of race-predominance when it discussed and rejected the State's argument that the plaintiffs' maps violated the Equal Protection Clause, but the court's understanding of predominance was deeply flawed. The court began this part of its opinion with this revealing statement:

> "Dr. Duchin and Mr. Cooper [plaintiffs' experts] testified that they *prioritized race* only for the purpose of determining and to the extent necessary to determine whether it was possible for the *Milligan* plaintiffs and the *Caster* plaintiffs to state a Section Two claim. As soon as they determined the answer to that question, they assigned greater weight to other traditional redistricting criteria." *Id.*, at 1029–1030 (emphasis added).

This statement overlooks the obvious point that by "prioritiz[ing] race" at the outset, Dr. Duchin and Mr. Cooper gave race a predominant role.

The next step in the District Court's analysis was even more troubling. The court wrote, "Dr. Duchin's testimony that she considered two majority-Black districts as 'nonnegotiable' does not" show that race played a predominant role in her districting process. *Id.*, at 1030. But if achieving a certain objective is "non-negotiable," then achieving that objective will necessarily play a predominant role. Suppose that a couple are relocating to the Washington, D. C., metropolitan area, and suppose that one says to the other, "I'm flexible about where we live, but it has to be in Maryland. That's non-negotiable." Could anyone say that finding a home in Maryland was not a "predominant" factor in the couple's search? Or suppose that a person looking for ***102** a flight tells a travel agent, "It has to be non-stop. That's non-negotiable." Could it be said that the number of stops between the city of origin and the destination was not a "predominant" factor in the search for a good flight?

The obvious answer to both these questions is no, and the same is true about the role of race in the creation of a new district. If it is "non-negotiable" that the district be majority black, then race is given a predominant role.

The District Court wrapped up this portion of its opinion with a passage that highlighted its misunderstanding of the first *Gingles* precondition. The court ****1553** thought that a § 2 plaintiff cannot proffer a reasonably configured majority-minority district without first attempting to see if it is possible to create such a district—that is, by first making the identification of such a district "non-negotiable." *Ibid.* But that is simply not so. A plaintiff 's expert can first create maps using only criteria that do not give race a predominant role and then determine how many contain the desired number of majority-minority districts.

One final observation about the District Court's opinion is in order. The opinion gives substantial weight to the disparity between the percentage of majority-black House districts in the legislature's plan (14%) and the percentage of black voting-age Alabamians (27%), while the percentage in the plaintiffs' plan (29%) came closer to that 27% mark. See, *e.g.*, *id.*, at 946, 1016, 1018, 1025–1026; see also *id.*, at 958–959, 969, 976, 982, 991–992, 996–997. Section 2 of the VRA, however, states expressly that no group has a right to representation "in numbers equal to their proportion in the population." 52 U.S.C. § 10301(b). This provision was a critical component of the compromise that led to the adoption of the 1982 amendments, as the Court unanimously agreed two Terms ago. See *Brnovich*, 594 U. S., at ——, and n. 14, 141 S.Ct., at 2341, and n. 14); *id.*, at ——, n. 6, 141 S.Ct., at 2360, n. 6 (KAGAN, J., dissenting). The District Court's reasoning contravened this statutory proviso. See *ante*, at 1524 – 1525, 1534 – 1535 (THOMAS, J., dissenting).

***103** III

The Court spends much of its opinion attacking what it takes to be the argument that Alabama has advanced in this litigation. I will not debate whether the Court's characterization of that argument is entirely correct, but as applied to the analysis I have just set out, the Court's criticisms miss the mark.

A

The major theme of this part of the Court's opinion is that Alabama's argument, in effect, is that "*Gingles* must be overruled." *Ante*, at 1512. But as I wrote at the beginning of this opinion, I would decide these cases under the *Gingles* framework. We should recognize, however, that the *Gingles* framework is not the same thing as a statutory provision, and it is a mistake to regard it as such. *National Pork Producers Council* v. *Ross*, 598 U. S. ——, ——, 143 S.Ct. 1142, 1155, —— L.Ed.2d —— (2023) ("[T]he language of an opinion is not always to be parsed as though we were dealing with language of a statute" (quoting *Reiter v. Sonotone Corp.*, 442 U.S. 330, 341, 99 S.Ct. 2326, 60 L.Ed.2d 931 (1979))). In applying that framework today, we should keep in mind subsequent developments in our case law.

One important development has been a sharpening of the methodology used in interpreting statutes. *Gingles* was decided at a time when the Court's statutory interpretation decisions sometimes paid less attention to the actual text of the statute than to its legislative history, and *Gingles* falls into that category. The Court quoted § 2 but then moved briskly to the Senate Report. See 478 U.S. at 36–37, 43, and n. 7, 106 S.Ct. 2752. Today, our statutory interpretation decisions focus squarely on the statutory text. *National Assn. of Mfrs.* v. *Department of Defense*, 583 U. S. 109, 127, 138 S.Ct. 617, 199 L.Ed.2d 501 (2018); *Puerto Rico v. Franklin Cal. Tax-Free Trust*, 579 U.S. 115, 125, 136 S.Ct. 1938, 195 L.Ed.2d 298 (2016); cf. *Brnovich*, 594 U. S., at ——, 141 S.Ct., at 2337. And as we held in *Brnovich*, "[t]he key requirement" set out in the text of § 2 is that a State's electoral process must be " 'equally ****1554** open' " ***104** to members of all racial groups. *Id.*, at ——, 141 S.Ct., at

2337. The *Gingles* framework should be interpreted in a way that gives effect to this standard.

Another development that we should not ignore concerns our case law on racial predominance. Post-*Gingles* decisions like *Miller*, 515 U.S. at 920, 115 S.Ct. 2475, *Shaw II*, 517 U.S. at 906–907, 116 S.Ct. 1894, and *Vera*, 517 U.S. at 979, 116 S.Ct. 1941 (plurality opinion), made it clear that it is unconstitutional to use race as a "predominant" factor in legislative districting. "[W]hen statutory language is susceptible of multiple interpretations, a court may shun an interpretation that raises serious constitutional doubts and instead may adopt an alternative that avoids those problems." *Jennings* v. *Rodriguez*, 583 U. S. ——, ——, 138 S.Ct. 830, 836, 200 L.Ed.2d 122 (2018). This same principle logically applies with even greater force when we interpret language in one of our prior opinions. It therefore goes without question that we should apply the *Gingles* framework in a way that does not set up a confrontation between § 2 and the Constitution, and understanding the first *Gingles* precondition in the way I have outlined achieves that result.[3]

B

The Court's subsidiary criticisms of Alabama's arguments are likewise inapplicable to my analysis. The Court suggests that the "centerpiece" of Alabama's argument regarding the role race can permissibly play in a plaintiff 's illustrative map seeks the imposition of "a new rule." *Ante*, at 1506, 1510. But I would require only what our cases already demand: ***105** that all legislative districts be produced without giving race a "predominant" role.[4]

The Court maintains that Alabama's benchmark scheme would be unworkable because of the huge number of different race-neutral maps that could be drawn. As the Court notes, there are apparently numerous "competing metrics on the issue of compactness" alone, and each race-neutral computer program may assign different values to each traditional districting criterion. *Ante*, at 1513 (internal quotation marks omitted).

My analysis does not create such problems. If a § 2 plaintiff chooses to use a computer program to create an illustrative district, the court need ask only whether *that program* assigned race a predominant role.

The Court argues that Alabama's focus on race-neutral maps cannot be squared with a totality-of-the-circumstances test because "Alabama suggests there is only one 'circumstance[ ]' that matters—how the State's map stacks up relative to the ****1555** benchmark" maps. *Ante*, at 1507. My analysis, however, simply follows the *Gingles* framework, under which a court must first determine whether a § 2 plaintiff has satisfied three "preconditions" before moving on to consider the remainder of relevant circumstances. See *Growe v. Emison*, 507 U.S. 25, 40–41, 113 S.Ct. 1075, 122 L.Ed.2d 388 (1993) (unless plaintiffs establish all three preconditions, there "neither has been a wrong nor can be a remedy").

***106** IV

As noted, I would vacate and remand for the District Court to apply the correct understanding of *Gingles* in the first instance. Such a remand would require the District Court to determine whether the plaintiffs have shown that their illustrative maps did not give race a predominant role, and I will therefore comment briefly on my understanding of the relevant evidence in the record as it now stands.

A

In my view, there is strong evidence that race played a predominant role in the production of the plaintiffs' illustrative maps and that it is most unlikely that a map with more than one majority-black district could be created without giving race such a role. An expert hired by the *Milligan* plaintiffs, Dr. Kosuke Imai, used a computer algorithm to create 30,000 potential maps, none of which contained two majority-black districts. See 2 App. 571–572; Supp. App. 59, 72. In fact, in 20,000 of those simulations, Dr. Imai intentionally created one majority-minority district, and yet even with one majority-minority district guaranteed as a baseline, none of those 20,000 attempts produced a second one. See 2 App. 571–572; Supp. App. 72.

Similarly, Dr. Moon Duchin, another expert hired by the *Milligan* plaintiffs, opined that "it is hard to draw two majority-black districts by accident." 2 App. 714. Dr. Duchin also referred to a study where she generated two million maps of potential district configurations in Alabama, none of which contained a second majority-minority district. *Id.*, at 710. And the first team of trained mapmakers that plaintiff Milligan consulted was literally unable to draw a two-majority-black-district map, even when they tried. *Id.*, at 511–512. Milligan concluded at the time that the feat was impossible. *Id.*, at 512.

The majority quibbles about the strength of this evidence, protesting that Dr. Imai's studies failed to include as controls ***107** certain redistricting criteria and that Dr. Duchin's two-million-map study was based on 2010 census data, see *ante*, at 1512 – 1513, and nn. 6–7, but this is unconvincing for several reasons. It is plaintiffs' burden to produce evidence and satisfy the *Gingles* preconditions, so if their experts' maps were deficient, that is no strike against Alabama. And the racial demographics of the State changed little between 2010 and 2020, Supp. App. 82, which is presumably why Dr. Duchin herself raised the older study in answering questions about her work in this litigation, see 2 App. 710. If it was impossible to draw two such districts in 2010, it surely at least requires a great deal of intentional effort now.

The Court suggests that little can be inferred from Dr. Duchin's two-million-map study because two million maps are not that many in comparison to the "trillion trillion" maps that are possible. See *ante*, at 1513 – 1514, and n. 9. In making this argument, the Court relies entirely on an *amicus* brief submitted by three computational redistricting experts in support of the appellees. See Brief for Computational Redistricting Experts 2, 6, n. 7. These experts' argument concerns a complicated statistical issue, and I think it is ****1556** unwise for the Court to make their argument part of our case law based solely on this brief. By the time this *amicus* brief was submitted, the appellants had already filed their main brief, and it was too late for any experts with contrary views to submit an *amicus* brief in support of appellants. Computer simulations are widely used today to make predictions about many important matters, and I would not place stringent limits on their use in VRA litigation without being quite sure of our ground. If the cases were remanded, the parties could take up this issue if they wished and call experts to support their positions on the extent to which the two million maps in the study are or can be probative of the full universe of maps.

In sum, based on my understanding of the current record, I am doubtful that the plaintiffs could get by the first *Gingles* ***108** precondition, but I would let the District Court sort this matter out on remand.

B

Despite the strong evidence that two majority-minority districts cannot be drawn without singular emphasis on race, a plurality nonetheless concludes that race did not predominate in the drawing of the plaintiffs' illustrative maps. See *ante*, at 1510 – 1512. Their conclusion, however, rests on a faulty view of what non-predominance means.

The plurality's position seems to be that race does not predominate in the creation of a districting map so long as the map does not violate other traditional districting criteria such as compactness, contiguity, equally populated districts, minimizing county splits, etc. *Ibid*. But this conclusion is irreconcilable with our cases. In *Miller*, for instance, we acknowledged that the particular district at issue was not "shape[d] ... bizarre[ly] on its face," but we nonetheless held that race predominated

because of the legislature's "overriding desire to assign black populations" in a way that would create an additional "majority-black district." 515 U.S. at 917, 115 S.Ct. 2475.

Later cases drove home the point that conformity with traditional districting principles does not necessarily mean that a district was created without giving race a predominant role. In *Cooper*, we held that once it was shown that race was " 'the overriding reason' " for the selection of a particular map, "a further showing of 'inconsistency between the enacted plan and traditional redistricting criteria' is unnecessary to a finding of racial predominance." 581 U.S. at 301, n. 3, 137 S.Ct. 1455 (quoting *Bethune-Hill*, 580 U.S. at 190, 137 S.Ct. 788). We noted that the contrary argument was "foreclosed almost as soon as it was raised in this Court." *Cooper*, 581 U.S. at 301, n. 3, 137 S.Ct. 1455; see also *Vera*, 517 U.S. at 966, 116 S.Ct. 1941 (plurality opinion) (race may still predominate even if "traditional districting principle[s] do correlate to some extent with the district's layout"). "Traditional redistricting principles ... are numerous and ***109** malleable.... By deploying those factors in various combinations and permutations, a [mapmaker] could construct a plethora of potential maps that look consistent with traditional, race-neutral principles." *Bethune-Hill*, 580 U.S. at 190, 137 S.Ct. 788. Here, a plurality allows plaintiffs to do precisely what we warned against in *Bethune-Hill*.

The plurality's analysis of predominance contravenes our precedents in another way. We have been sensitive to the gravity of " 'trapp[ing]' " States " 'between the competing hazards of liability' " imposed by the Constitution and the VRA. *Id.*, at 196, 137 S.Ct. 788 (quoting *Vera*, 517 U.S. at 977, 116 S.Ct. 1941). The VRA's demand that States not unintentionally "dilute" the ****1557** votes of particular groups must be reconciled with the Constitution's demand that States generally avoid intentional augmentation of the political power of any one racial group (and thus the diminution of the power of other groups). The plurality's predominance analysis shreds that prudential concern. If a private plaintiff can demonstrate § 2 liability based on the production of a map that the State has every reason to believe it could not constitutionally draw, we have left "state legislatures too little breathing room" and virtually guaranteed that they will be on the losing end of a federal court's judgment. *Bethune-Hill*, 580 U.S. at 196, 137 S.Ct. 788.

* * *

The Court's treatment of *Gingles* is inconsistent with the text of § 2, our precedents on racial predominance, and the fundamental principle that States are almost always prohibited from basing decisions on race. Today's decision unnecessarily sets the VRA on a perilous and unfortunate path. I respectfully dissent.

All Citations

599 U.S. 1, 143 S.Ct. 1487, 216 L.Ed.2d 60, 23 Cal. Daily Op. Serv. 5172, 29 Fla. L. Weekly Fed. S 905

Footnotes

[*] Together with No. 21–1087, *Allen, Alabama Secretary of State, et al*. v. *Caster et al.*, on certiorari before judgment to the United States Court of Appeals for the Eleventh Circuit.

[*] The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

[*] Justice KAVANAUGH joins all but Part III–B–1 of this opinion.

[1] As originally enacted, § 2 provided that "[n]o voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color." 42 U.S.C. § 1973 (1970 ed.).

2 Judge Manasco, presiding in *Caster*, also preliminarily enjoined Alabama from using HB1. Her opinion was based on the same evidentiary record as was before the three-judge Court, and it adopted in full that Court's "recitation of the evidence, legal analysis, findings of fact and conclusions of law." 1 App. to Emergency Application for Stay in No. 2:21–cv–1536, p. 4; see also 582 F.Supp.3d at 942–943, and n. 4. Any reference to the "District Court" in this opinion applies to the *Caster* Court as well as to the three-judge Court.

3 The principal dissent complains that "what the District Court did here is essentially no different from what many courts have done for decades under this Court's superintendence." *Post*, at 1545 (opinion of THOMAS, J.). That is not such a bad definition of *stare decisis*.

4 Despite this all, the dissent argues that courts have apparently been "methodically carving the country into racially designated electoral districts" for decades. *Post*, at 1545 (opinion of THOMAS, J.). And that, the dissent inveighs, "should inspire us to repentance." *Ibid.* But proportional representation of minority voters is absent from nearly every corner of this country despite § 2 being in effect for over 40 years. And in case after case, we have rejected districting plans that would bring States closer to proportionality when those plans violate traditional districting criteria. See *supra*, at 1508 – 1509. It seems it is the dissent that is "quixotically joust[ing] with an imaginary adversary." *Post*, at 1545 (opinion of THOMAS, J.).

5 The dissent claims that Cooper "treated 'the minority population in and of itself' as the paramount community of interest in his plans." *Post*, at 1526 (opinion of THOMAS, J.) (quoting 2 App. 601). But Cooper testified that he was "aware that the minority population in and of itself *can* be a community of interest." *Id.,* at 601 (emphasis added). Cooper then explained that the relevant community of interest here—the Black Belt—was a "*historical* feature" of the State, not a demographic one. *Ibid.* (emphasis added). The Black Belt, he emphasized, was defined by its "historical boundaries"—namely, the group of "rural counties plus Montgomery County in the central part of the state." *Ibid.* The District Court treated the Black Belt as a community of interest for the same reason.

The dissent also protests that Cooper's "plans prioritized race over neutral districting criteria." *Post*, at 1526 (opinion of THOMAS, J.). But as the District Court found, and as Alabama does not contest, Cooper's maps satisfied other traditional criteria, such as compactness, contiguity, equal populations, and respect for political subdivisions.

6 Dr. Duchin created her two million map sample as part of an academic article that she helped author, not for her work on this case, and the article was neither entered into evidence below nor made part of the record here. See 2 App. 710; see also M. Duchin & D. Spencer, Models, Race, and the Law, 130 Yale L. J. Forum 744, 763–764 (2021) (Duchin & Spencer).

7 The principal dissent decrees that Dr. Duchin's and Dr. Imai's maps are "surely probative," forgiving the former's use of stale census data as well as both mapmakers' collective failure to incorporate many traditional districting guidelines. *Post*, at 1531 – 1532, and n. 14 (opinion of THOMAS, J.); see also *post*, at 1527, n. 9, 1527 – 1528. In doing so, that dissent ignores Dr. Duchin's testimony that—when using the correct census data—the "randomized algorithms" she employed "found plans with two majority-black districts in literally thousands of different ways." MSA 316–317. The principal dissent and the dissent by Justice ALITO also ignore Duchin's testimony that "it is certainly possible" to draw the illustrative maps she produced in a race-blind manner. 2 App. 713. In that way, even the race-blind standard that the dissents urge would be satisfied here. See *post*, at 1530 (opinion of THOMAS, J.); *post*, at 1551 (opinion of ALITO, J.). So too could that standard be satisfied in every § 2 case; after all, as Duchin explained, any map produced in a deliberately race-predominant manner would necessarily emerge at some point in a random, race-neutral process. 2 App. 713. And although Justice ALITO voices support for an "old-school approach" to § 2, even that approach cannot be squared with his understanding of *Gingles*. *Post*, at 1551. The very reason a plaintiff adduces a map at the first step of *Gingles* is precisely *because of* its racial composition—that is, because it creates an additional majority-minority district that does not then exist.

8 None of this is to suggest that algorithmic mapmaking is categorically irrelevant in voting rights cases. Instead, we note only that, in light of the difficulties discussed above, courts should exercise caution before treating results produced by algorithms as all but dispositive of a § 2 claim. And in evaluating algorithmic evidence more generally in this context, courts should be attentive to the concerns we have discussed.

9 The dissent suggests that *Growe* does not support the proposition that § 2 applies to single-member redistricting. *Post*, at 1520 – 1521 (opinion of THOMAS, J.). The Court has understood *Growe* much differently. See, *e.g.*, *Abrams v. Johnson*, 521 U.S. 74, 90, 117 S.Ct. 1925, 138 L.Ed.2d 285 (1997) ("Our decision in [*Gingles*] set out the basic framework for establishing a vote dilution claim against at-large, multimembers districts; we have since extended the framework to single-member districts." (citing *Growe*, 507 U.S. at 40–41, 113 S.Ct. 1075)); *Johnson v. De Grandy*, 512 U.S. 997, 1006, 114 S.Ct. 2647, 129 L.Ed.2d 775 (1994) ("In *Growe*, we held that a claim of vote dilution in a single-member district requires proof meeting *the same* three threshold conditions for a dilution challenge to a multimember district ...."); *Bartlett v. Strickland*, 556 U.S. 1, 12, 129 S.Ct. 1231, 173 L.Ed.2d 173 (plurality opinion) ("The Court later held that the three *Gingles* requirements apply equally in § 2 cases involving single-member districts ...." (citing *Growe*, 507 U.S. at 40–41, 113 S.Ct. 1075)).

10 Justice ALITO argues that "[t]he *Gingles* framework should be [re]interpreted" in light of changing methods in statutory interpretation. *Post*, at 1554 (dissenting opinion). But as we have explained, *Gingles* effectuates the delicate legislative bargain that § 2 embodies. And statutory *stare decisis* counsels strongly in favor of not "undo[ing] ... the compromise that was reached between the House and Senate when § 2 was amended in 1982." *Brnovich*, 594 U. S., at ——, 141 S.Ct., at 2341.

1 Unlike ordinary statutory precedents, the "Court's precedents applying common-law statutes and pronouncing the Court's own interpretive methods and principles typically do not fall within that category of stringent statutory *stare decisis*." *Ramos*, 590 U. S., at ——, n. 2, 140 S.Ct., at 1413, n. 2 (opinion of KAVANAUGH, J.); see also, *e.g.*, *Kisor* v. *Wilkie*, 588 U. S. ——, —— – ——, 139 S.Ct. 2400, 2443–2445, 204 L.Ed.2d 841 (2019) (GORSUCH, J., concurring in judgment); *id.*, at —— – ——, 139 S.Ct., at 2448–2449 (KAVANAUGH, J., concurring in judgment); *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877, 899–907, 127 S.Ct. 2705, 168 L.Ed.2d 623 (2007); *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 510–516, 126 S.Ct. 1235, 163 L.Ed.2d 1097 (2006).

2 To ensure that *Gingles* does not improperly morph into a proportionality mandate, courts must rigorously apply the "geographically compact" and "reasonably configured" requirements. See *ante*, at 1510 (§ 2 requirements under *Gingles* are "exacting"). In this case, for example, it is important that at least some of the plaintiffs' proposed alternative maps respect county lines at least as well as Alabama's redistricting plan. See *ante*, at 1504 – 1505.

1 "No person acting under color of law shall ... in determining whether any individual is qualified under State law or laws to vote in any election, apply any standard, practice, or procedure different from the standards, practices, or procedures applied under such law or laws to other individuals within the same county, parish, or similar political subdivision who have been found by State officials to be qualified to vote." 52 U.S.C. § 10101(a)(2)(A).

2 The majority suggests that districting lines are a " 'prerequisite to voting' " because they "determin[e] where" voters "cast [their] ballot[s]." *Ante*, at 1515. But, of course, a voter's polling place is a separate matter from the district to which he is assigned, and communities are often moved between districts without changing where their residents go to vote. The majority's other example ("who [voters] are eligible to vote for," *ibid.*) is so far a stretch from the Act's focus on voting qualifications and voter action that it speaks for itself.

3 The majority chides Alabama for declining to specifically argue that § 2 is inapplicable to multimember and at-large districting plans. But these cases are about a single-member districting plan, and it is hardly uncommon for parties to limit their arguments to the question presented. Further, while I do not myself believe that the text of § 2 applies to multimember or at-large plans, the idea

that such plans might be especially problematic from a vote-dilution standpoint is hardly foreign to the Court's precedents, see *Johnson v. De Grandy*, 512 U.S. 997, 1012, 114 S.Ct. 2647, 129 L.Ed.2d 775 (1994); *Growe v. Emison*, 507 U.S. 25, 40, 113 S.Ct. 1075, 122 L.Ed.2d 388 (1993); cf. *Holder v. Hall*, 512 U.S. 874, 888, 114 S.Ct. 2581, 129 L.Ed.2d 687 (1994) (O'Connor, J., concurring in part and concurring in judgment) (explaining that single-member districts may provide the benchmark when multimember or at-large systems are challenged, but suggesting no benchmark for challenges to single-member districts), or to the historical evolution of vote-dilution claims. Neither the case from which the 1982 Congress drew § 2(b)'s current operative language, see *White v. Regester*, 412 U.S. 755, 766, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973), nor the one it was responding to, *Mobile v. Bolden*, 446 U.S. 55, 100 S.Ct. 1519, 64 L.Ed.2d 47 (1980), involved single-member districts.

4 Justice KAVANAUGH's partial concurrence emphasizes the supposedly enhanced *stare decisis* force of statutory-interpretation precedents. See *ante*, at 1517 – 1518. This emphasis is puzzling in several respects. As an initial matter, I can perceive no conceptual "basis for applying a heightened version of *stare decisis* to statutory-interpretation decisions"; rather, "our judicial duty is to apply the law to the facts of the case, regardless of how easy it is for the law to change." *Gamble* v. *United States*, 587 U. S. ——, ——, 139 S.Ct. 1960, 1987, 204 L.Ed.2d 322 (2019) (THOMAS, J., concurring). Nor does that approach appear to have any historical foundation in judicial practice at the founding or for more than a century thereafter. See T. Lee, Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court, 52 Vand. L. Rev. 647, 708–732 (1999). But, even putting those problems aside, any appeal to heightened statutory *stare decisis* is particularly misplaced in this context. As the remainder of this dissent explains in depth, the Court's § 2 precedents differ from "ordinary statutory precedents" in two vital ways. *Ante*, at 1517, n. 1 (opinion of KAVANAUGH, J.). The first is their profound tension with the Constitution's hostility to racial classifications, a tension that Justice KAVANAUGH acknowledges and that makes every § 2 question the reverse side of a corresponding constitutional question. See *ante*, at 1518 – 1519. The second is that, to whatever extent § 2 applies to districting, it can only "be understood as a delegation of authority to the courts to develop a common law of racially fair elections." C. Elmendorf, Making Sense of Section 2: Of Biased Votes, Unconstitutional Elections, and Common Law Statutes, 160 U. Pa. L. Rev. 377, 383 (2012). It would be absurd to maintain that this Court's "notoriously unclear and confusing" § 2 case law follows, in any straightforward way, from the statutory text's high-flown language about the equal openness of political processes. *Merrill* v. *Milligan*, 595 U. S. ——, ——, 142 S.Ct. 879, 881, —— L.Ed.2d —— (2022) (KAVANAUGH, J., concurring in grant of applications for stays).

5 Like the majority, I refer to both courts below as "the District Court" without distinction.

6 While *Brnovich* involved a time-place-and-manner voting rule, not a vote-dilution challenge to a districting plan, its analysis logically must apply to vote-dilution cases if the text of § 2 covers such claims at all.

7 District 7 owes its majority-black status to a 1992 court order. See *Wesch v. Hunt*, 785 F.Supp. 1491, 1493–1494, 1496–1497, 1501–1502 (SD Ala.), aff 'd *sub nom. Camp v. Wesch*, 504 U.S. 902, 112 S.Ct. 1926, 118 L.Ed.2d 535 (1992). At the time, the Justice Department's approach to preclearance under § 5 of the Act followed the "so-called 'max-black' policy," which "required States, including Alabama, to create supermajority-black voting districts or face denial of preclearance." *Alabama Legislative Black Caucus v. Alabama*, 575 U.S. 254, 298, 135 S.Ct. 1257, 191 L.Ed.2d 314 (2015) (THOMAS, J., dissenting). Although *Wesch* was a § 2 case and the court-imposed plan that resulted was not subject to preclearance, see 785 F.Supp. at 1499–1500, there can be little doubt that a similar ethos dominated that litigation, in which all parties stipulated to the desirability of a *65%-plus* majority-black district. See *id.*, at 1498–1499. To satisfy that dubious need, the *Wesch* court aggressively adjusted the northeast and southeast corners of the previous District 7. In the northeast, where District 7 once encompassed all of Tuscaloosa County and the more or less rectangular portion of Jefferson County not included in District 6, the 1992 plan drew a long, thin "finger" that traversed the southeastern third of Tuscaloosa County to reach deep into the heart of urban Birmingham. See Supp. App. 207–208. Of the Jefferson County residents captured by the "finger," 75.48% were black. *Wesch*, 785 F.Supp. at 1569. In the southeast, District 7 swallowed a jigsaw-shaped portion of Montgomery County, the residents of which were 80.18% black. *Id.*, at 1575. Three years later, in *Miller v. Johnson*, 515 U.S. 900, 923–927, 115 S.Ct. 2475, 132 L.Ed.2d 762 (1995), we rejected the "max-black" policy as unwarranted by § 5 and inconsistent with the Constitution. But "much damage to the States' congressional and legislative district maps had already been done," including in Alabama. *Alabama Legislative Black Caucus*, 575 U.S. at 299, 135 S.Ct. 1257 (THOMAS, J., dissenting).

[8] I have included an Appendix, *infra*, illustrating the plaintiffs' 11 proposed maps. The first 10 images display the "black-only" voting-age population of census-designated voting districts in relation to the maps' hypothetical district lines. The record does not contain a similar illustration for the 11th map, but a simple visual comparison with the other maps suffices.

[9] The majority notes that this study used demographic data from the 2010 census, not the 2020 one. That is irrelevant, since the black population share in Alabama changed little (from 26.8% to 27.16%) between the two censuses. To think that this minor increase might have changed Dr. Duchin's results would be to entirely miss her point: that proportional representation for *any* minority, unless achieved "by design," is a statistical anomaly in almost all single-member-districting systems. Duchin & Spencer 764.

[10] Of course, bizarreness is in the eye of the beholder, and, while labels like " 'tentacles' " or " 'appendages' " have no ultimate legal significance, it is far from clear that they do not apply here. See *ante*, at 1504 – 1505. The tendrils with which the various versions of illustrative District 2 would capture black Mobilians are visually striking and are easily recognized as a racial grab against the backdrop of the State's demography. The District 7 "finger," which encircles the black population of the Birmingham metropolitan area in order to separate them from their white neighbors and link them with black rural areas in the west of the State, also stands out to the naked eye. The District Court disregarded the "finger" because it has been present in every districting plan since 1992, including the State's latest enacted plan. *Singleton v. Merrill*, 582 F.Supp.3d 924, 1011 (ND Ala. 2022) (*per curiam*). But that reasoning would allow plaintiffs to bootstrap one racial gerrymander as a reason for permitting a second. Because the question is not before us, I express no opinion on whether existing District 7 is constitutional as enacted by the State. It is indisputable, however, that race predominated in the original creation of the district, see n. 7, *supra*, and it is plain that the primary race-neutral justification for the district today must be the State's legitimate interest in "preserving the cores of prior districts" and the fact that the areas constituting District 7's core have been grouped together for decades. *Karcher v. Daggett*, 462 U.S. 725, 740, 103 S.Ct. 2653, 77 L.Ed.2d 133 (1983); see also *id.*, at 758, 103 S.Ct. 2653 (Stevens, J., concurring) (explaining that residents of a political unit "often develop a community of interest"). The plaintiffs' maps, however, necessarily would require the State to assign little weight to core retention with respect to other districts. There could then be no principled race-neutral justification for prioritizing core retention only when it preserved an existing majority-black district, while discarding it when it stood in the way of creating a new one.

[11] The equal-population baseline for Alabama's seven districts is 717,154 persons per district.

[12] The plurality's somewhat elliptical discussion of "the line between racial predominance and racial consciousness," *ante*, at 1510, suggests that it may have fallen into a similar error. To the extent the plurality supposes that, under our precedents, a State may purposefully sort voters based on race to some indefinite extent without crossing the line into predominance, it is wrong, and its predominance analysis would water down decades of racial-gerrymandering jurisprudence. Our constitutional precedents' line between racial awareness and racial predominance simply tracks the distinction between awareness of consequences, on the one hand, and discriminatory *purpose*, on the other. See *Miller*, 515 U.S. at 916, 115 S.Ct. 2475 (" 'Discriminatory purpose implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker selected or reaffirmed a particular course of action at least in part "because of," not merely "in spite of," its adverse effects' " (alterations and some internal quotation marks omitted)); accord, *Shaw I*, 509 U.S. 630, 646, 113 S.Ct. 2816, 125 L.Ed.2d 511 (1993). And our statements that § 2 "demands consideration of race," *Abbott* v. *Perez*, 585 U. S. ——, ——, 138 S.Ct. 2305, 2315, 201 L.Ed.2d 714 (2018), and uses a "race-conscious calculus," *De Grandy*, 512 U.S. at 1020, 114 S.Ct. 2647, did not imply that a State can ever purposefully sort voters on a race-predominant basis without triggering strict scrutiny.

[13] The plurality's reasoning does not withstand scrutiny even on its own terms. Like Dr. Duchin, Mr. Cooper found it "necessary to consider race" to construct two majority-black districts, 2 App. 591, and he frankly acknowledged "reconfigur[ing]" the southern part of the State "to create the second African-American majority district," *id.*, at 610. Further, his conclusory statement that race did not "predominate" in his plans, *id.*, at 595, must be interpreted in light of the rest of his testimony and the record as a whole. Mr. Cooper recognized communities of interest as a traditional districting principle, but he applied that principle in a nakedly race-focused manner, explaining that "the minority population in and of itself " was the community of interest that was "top of mind as [he] was drawing the plan[s]." *Id.*, at 601. As noted, he also testified that he considered "minority voting strengt[h]" to be a "traditional redistricting principl[e]" in its own right. *Id.*, at 591. His testimony therefore buttresses, rather than undermines, the

conclusion already obvious from the maps themselves: Only a mapmaker pursuing a fixed racial target would produce them.

14 The majority points to limitations of Dr. Duchin's and Dr. Imai's algorithms that do not undermine the strong inference from their results to the conclusion that no two-majority-black-district plan could be an appropriate proxy for the undiluted benchmark. *Ante*, at 1512, 1513 – 1514. I have already explained why the fact that Dr. Duchin's study used 2010 census data is irrelevant. See n. 9, *supra*. As for the algorithms' inability to incorporate all possible districting considerations, the absence of additional *constraints* cannot explain their failure to produce any maps hitting the plaintiffs' preferred racial target. Next, while it is true that the number of possible districting plans is extremely large, that does not mean it is impossible to generate a statistically significant sample. Here, for instance, Dr. Imai explained that "10,000 simulated plans" was sufficient to "yield statistically precise conclusions" and that any higher number would "not materially affect" the results. Supp. App. 60. Finally, the majority notes Dr. Duchin's testimony that her "exploratory algorithms" found "thousands" of possible two-majority-black-district maps. 2 App. 622; see *ante*, at 1512 – 1513, n. 7. Setting aside that Dr. Duchin never provided the denominator of which those "thousands" were the numerator, it is no wonder that the algorithms in question generated such maps; as Dr. Duchin explained, she programmed them with "an algorithmic preference" for "plans in which there would be a second majority-minority district." 2 App. 709. Thus, all that those algorithmic results prove is that it is *possible* to draw two majority-black districts in Alabama if one sets out to do so, especially with the help of sophisticated mapmaking software. What is still lacking is any justification for treating a two-majority-black-district map as a proxy for the undiluted benchmark.

15 The majority lodges a similar accusation against the State's arguments (or what it takes to be the State's arguments). See *ante*, at 1507 ("Alabama suggests there is only one 'circumstance' that matters—how the State's map stacks up relative to the benchmark" (alteration omitted)). But its rebuke is misplaced. The "totality of circumstances" means that courts must consider all circumstances relevant to an issue. It does not mean that they are forbidden to attempt to define the substantive standard that governs that issue. In arguing that a vote-dilution claim requires judging a State's plan relative to an undiluted benchmark to be drawn from the totality of circumstances—including, where probative, the results of districting simulations—the State argues little more than what we have long acknowledged. See *Reno v. Bossier Parish School Bd.*, 520 U.S. 471, 480, 117 S.Ct. 1491, 137 L.Ed.2d 730 (1997).

16 To the extent it is any sort of answer to the benchmark question, it tends inevitably toward proportionality. By equating a voting minority's inability to win elections with a vote that has been "render[ed] ... unequal," *ante*, at 1507, the majority assumes "that members of [a] minority are denied a fully effective use of the franchise unless they are able to control seats in an elected body." *Holder*, 512 U.S. at 899, 114 S.Ct. 2581 (opinion of THOMAS, J.). That is precisely the assumption that leads to the proportional-control benchmark. See *id.*, at 902, 937, 114 S.Ct. 2581.

17 Indeed, the majority's attempt to deflect this analysis only confirms its accuracy. The majority stresses that its understanding of *Gingles* permits the rejection of "plans that would bring States closer to proportionality *when those plans violate traditional districting criteria*." *Ante*, at 1509 – 1510, n. 4 (emphasis added). Justice KAVANAUGH, similarly, defends *Gingles* against the charge of "mandat[ing] a proportional number of majority-minority districts" by emphasizing that it requires only the creation of majority-minority districts that are compact and reasonably configured. *Ante*, at 1518 (opinion concurring in part). All of this precisely tracks my point: As construed by the District Court and the majority, § 2 mandates an ever closer approach to proportional control that stops only when a court decides that a further step in that direction would no longer be consistent with any reasonable application of traditional districting criteria.

18 In *Bethune-Hill v. Virginia State Bd. of Elections*, 580 U.S. 178, 137 S.Ct. 788, 197 L.Ed.2d 85 (2017), the Court upheld a race-predominant district based on the assumed compelling interest of complying with § 5 of the Voting Rights Act. *Id.*, at 193–196, 137 S.Ct. 788. There, the Court was explicit that it was still merely "assum[ing], without deciding," that the asserted interest was compelling, as the plaintiffs "d[id] not dispute that compliance with § 5 was a compelling interest at the relevant time." *Id.*, at 193, 137 S.Ct. 788.

19 While our congruence-and-proportionality cases have focused primarily on the Fourteenth Amendment, they make clear that the

same principles govern "Congress' parallel power to enforce the provisions of the Fifteenth Amendment." *City of Boerne*, 521 U.S. at 518, 117 S.Ct. 2157.

20 This formulation does not specifically account for the District Court's findings under the Senate factors, which, as I have explained, lack any traceable logical connection to the finding of a districting wrong or the need for a districting remedy.

21 Justice KAVANAUGH, at least, recognizes that § 2's constitutional footing is problematic, for he agrees that "race-based redistricting cannot extend indefinitely into the future." *Ante*, at 1519 (opinion concurring in part). Nonetheless, Justice KAVANAUGH votes to sustain a system of institutionalized racial discrimination in districting—under the aegis of a statute that applies nationwide and has no expiration date—and thus to prolong the "lasting harm to our society" caused by the use of racial classifications in the allocation of political power. *Shaw I*, 509 U.S. at 657, 113 S.Ct. 2816. I cannot agree with that approach. The Constitution no more tolerates this discrimination today than it will tolerate it tomorrow.

22 The Court does not address whether § 2 contains a private right of action, an issue that was argued below but was not raised in this Court. See *Brnovich* v. *Democratic National Committee*, 594 U. S. ——, ——, 141 S.Ct. 2321, 2350, 210 L.Ed.2d 753 (2021) (GORSUCH, J., concurring).

1 Alabama's districting guidelines explicitly incorporate this nonpredominance requirement. See *Singleton v. Merrill*, 582 F.Supp.3d 924, 1036 (ND Ala. 2022).

2 Although our cases have posited that racial predominance may be acceptable if strict scrutiny is satisfied, the Court does not contend that it is satisfied here.

3 The second and third *Gingles* preconditions, which concern racially polarized voting, cannot contribute to avoiding a clash between § 2 and the Constitution over racial predominance in the drawing of lines. Those preconditions do not concern the drawing of lines in plaintiffs' maps, and in any event, because voting in much of the South is racially polarized, they are almost always satisfied anyway. Alabama does not contest that they are satisfied here.

4 The Court appears to contend that it does not matter if race predominated in the drawing of these maps because the maps *could have* been drawn without race predominating. See *ante*, at 1512 – 1513, n. 7. But of course, many policies *could be* selected for race-neutral reasons. They nonetheless must be assessed under the relevant standard for intentional reliance on race if their imposition was in fact motivated by race. See, *e.g.*, *Hunter v. Underwood*, 471 U.S. 222, 227–231, 105 S.Ct. 1916, 85 L.Ed.2d 222 (1985); *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 264–266, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977); *Washington v. Davis*, 426 U.S. 229, 241–248, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976).

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135 S.Ct. 1378
Supreme Court of the United States

Richard ARMSTRONG et al., Petitioners
v.
EXCEPTIONAL CHILD CENTER, INC., et al.

No. 14–15
|
Argued Jan. 20, 2015.
|
Decided March 31, 2015.

Synopsis

Background: Providers of residential habilitation services to Medicaid-eligible individuals brought action against Director and Deputy Director of Idaho's Department of Health and Welfare (IDHW) and former IDHW Division of Medicaid Administrator, challenging IDHW's failure to amend existing Medicaid reimbursement rates, and seeking injunctive relief. The United States District Court for the District of Idaho, B. Lynn Winmill, Chief Judge, 835 F.Supp.2d 960, granted summary judgment to providers. Defendants appealed. The United States Court of Appeals for the Ninth Circuit, 567 Fed.Appx. 496, affirmed. Certiorari was granted in part.

Holdings: The Supreme Court, Justice Scalia, held that:

the ability to sue to enjoin unconstitutional actions by state officers does not rest upon an implied right of action contained in the Supremacy Clause, and

Medicaid Act did not authorize providers' private action for injunctive relief to enforce against a State the Act's reimbursement-rate standard.

Reversed.

Justice Breyer filed an opinion concurring in part and concurring in the judgment.

Justice Sotomayor filed a dissenting opinion, in which Justices Kennedy, Ginsburg, and Kagan joined.

****1380** *Syllabus*[*]

Providers of "habilitation services" under Idaho's Medicaid plan are reimbursed by the State's Department of Health and Welfare. Section 30(A) of the Medicaid Act requires Idaho's plan to "assure that payments are consistent with efficiency, economy, and quality of care" while "safeguard[ing] against unnecessary utilization of ... care and services." 42 U.S.C. § 1396a(a)(30)(A). Respondents, providers of habilitation services, sued petitioners, Idaho Health and Welfare Department officials, claiming that Idaho reimbursed them at rates lower than § 30(A) permits, and seeking to enjoin petitioners to increase these rates. The District Court entered summary judgment for the providers. The Ninth Circuit affirmed, concluding that the Supremacy Clause gave the providers an implied right of action, and that they could sue under this implied right of action to seek an injunction ****1381** requiring Idaho to comply with § 30(a).

Held : The judgment is reversed.

567 Fed.Appx. 496, reversed.

Justice SCALIA delivered the opinion of the Court, except as to Part IV, concluding that the Supremacy Clause does not confer a private right of action, and that Medicaid providers cannot sue for an injunction requiring compliance with § 30(a). Pp. 1383 – 1387.

(a) The Supremacy Clause instructs courts to give federal law priority when state and federal law clash. *Gibbons v. Ogden,* 9 Wheat. 1, 210, 6 L.Ed. 23. But it is not the " 'source of any federal rights,' " *Golden State Transit Corp. v. Los Angeles,* 493 U.S. 103, 107, 110 S.Ct. 444, 107 L.Ed.2d 420, and certainly does not create a cause of action. Nothing in the Clause's text suggests otherwise, and nothing suggests it was ever understood as conferring a private right of action. Article I vests Congress with broad discretion over the manner of implementing its enumerated powers. Art I., § 8; *McCulloch v. Maryland,* 4 Wheat. 316, 421, 4 L.Ed. 579. It is unlikely that the Constitution gave Congress broad discretion with regard to the enactment of laws, while simultaneously limiting Congress's power over the manner of their implementation, making it impossible to leave the enforcement of federal law to federal actors. Pp. 1383 – 1384.

(b) Reading the Supremacy Clause not to confer a private right of action is consistent with this Court's preemption jurisprudence. The ability to sue to enjoin unconstitutional actions by state and federal officers is the creation of courts of equity, and reflects a long history of judicial review of illegal executive action, tracing back to England. This Court has never held nor suggested that this judge-made remedy, in its application to state officers, rests upon an implied right of action contained in the Supremacy Clause. Pp. 1384 – 1385.

(c) Respondents' suit cannot proceed in equity. The power of federal courts of equity to enjoin unlawful executive action is subject to express and implied statutory limitations. See, *e.g., Seminole Tribe of Fla. v. Florida,* 517 U.S. 44, 74, 116 S.Ct. 1114, 134 L.Ed.2d 252. Here, the express provision of a single remedy for a State's failure to comply with Medicaid's requirements—the withholding of Medicaid funds by the Secretary of Health and Human Services, 42 U.S.C. § 1396c—and the sheer complexity associated with enforcing § 30(A) combine to establish Congress's "intent to foreclose" equitable relief, *Verizon Md., Inc. v. Public Serv. Comm'n of Md.,* 535 U.S. 635, 647, 122 S.Ct. 1753, 152 L.Ed.2d 871. Pp. 1384 – 1387.

SCALIA, J., delivered the opinion of the Court with respect to Parts I, II, and III, in which ROBERTS, C.J., and THOMAS, BREYER, and ALITO, JJ., joined, and an opinion with respect to Part IV, in which ROBERTS, C.J., and THOMAS and ALITO, JJ., joined. BREYER, J., filed an opinion concurring in part and concurring in the judgment. SOTOMAYOR, J., filed a dissenting opinion, in which KENNEDY, GINSBURG, and KAGAN, JJ., joined.

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Opinion

Justice SCALIA delivered the opinion of the Court, except as to Part IV.

***322** We consider whether Medicaid providers can sue to enforce § (30)(A) of the Medicaid Act. 81 Stat. 911 (codified as amended at 42 U.S.C. § 1396a(a)(30)(A)).

I

***323** Medicaid is a federal program that subsidizes the States' provision of medical services to "families with dependent children and of aged, blind, or disabled individuals, whose income and resources are insufficient to meet the costs of necessary medical services." § 1396–1. Like other Spending Clause legislation, Medicaid offers the States a bargain: Congress provides federal funds in exchange for the States' agreement to spend them in accordance with congressionally imposed conditions.

In order to qualify for Medicaid funding, the State of Idaho adopted, and the Federal Government approved, a Medicaid "plan," § 1396a(a), which Idaho administers through its Department of Health and Welfare. Idaho's plan includes "habilitation services"—in-home care for individuals who, "but for the provision of such services ... would require the level of care provided in a hospital or a nursing facility or intermediate care facility for the mentally retarded the cost of which could be reimbursed under the State plan," § 1396n(c) and (c)(1). Providers of these services are reimbursed by the Department of Health and Welfare.

Section 30(A) of the Medicaid Act requires Idaho's plan to:

> "provide such methods and procedures relating to the utilization of, and the payment for, care and services available under the plan ... as may be necessary to safeguard against unnecessary utilization of such care and services and to assure that payments are consistent with efficiency, economy, and quality of care and are sufficient to enlist enough providers so that care and services are available under the plan at least to the extent that such care and services are available to the general population in the geographic area...." 42 U.S.C. § 1396a(a)(30)(A).

Respondents are providers of habilitation services to persons covered by Idaho's Medicaid plan. They sued petitioners—two ***324** officials in Idaho's Department of Health and Welfare—in the United States District Court for the District of Idaho, claiming that Idaho violates § 30(A) by reimbursing providers of habilitation services at rates lower than § 30(A) permits. They asked the court to enjoin petitioners to increase these rates.

The District Court entered summary judgment for the providers, holding that Idaho had not set rates in a manner consistent with § 30(A). *Inclusion, Inc. v. Armstrong,* 835 F.Supp.2d 960 (2011). The Ninth Circuit affirmed. ****1383** 567 Fed.Appx. 496 (2014). It said that the providers had "an implied right of action under the Supremacy Clause to seek injunctive relief against the enforcement or implementation of state legislation." *Id.,* at 497 (citing *Independent Living Center of Southern Cal. v. Shewry,* 543 F.3d 1050, 1065 (C.A.9 2008)). We granted certiorari. 573 U.S. ——, 135 S.Ct. 44, 189 L.Ed.2d 897 (2014).

II

The Supremacy Clause, Art. VI, cl. 2, reads:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in

every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." It is apparent that this Clause creates a rule of decision: Courts "shall" regard the "Constitution," and all laws "made in Pursuance thereof," as "the supreme Law of the Land." They must not give effect to state laws that conflict with federal laws. *Gibbons v. Ogden,* 9 Wheat. 1, 210, 6 L.Ed. 23 (1824). It is equally apparent that the Supremacy Clause is not the " 'source of any federal rights,' " *Golden State Transit Corp. v. Los Angeles,* 493 U.S. 103, 107, 110 S.Ct. 444, 107 L.Ed.2d 420 (1989) (quoting ***325** *Chapman v. Houston Welfare Rights Organization,* 441 U.S. 600, 613, 99 S.Ct. 1905, 60 L.Ed.2d 508 (1979)), and certainly does not create a cause of action. It instructs courts what to do when state and federal law clash, but is silent regarding who may enforce federal laws in court, and in what circumstances they may do so.

Hamilton wrote that the Supremacy Clause "only declares a truth, which flows immediately and necessarily from the institution of a Federal Government." The Federalist No. 33, p. 207 (J. Cooke ed.1961). And Story described the Clause as "a positive affirmance of that, which is necessarily implied." 3 Commentaries on the Constitution of the United States § 1831, p. 693 (1833). These descriptions would have been grossly inapt if the Clause were understood to give affected parties a constitutional (and hence congressionally unalterable) right to enforce federal laws against the States. And had it been understood to provide such significant private rights against the States, one would expect to find that mentioned in the preratification historical record, which contained ample discussion of the Supremacy Clause by both supporters and opponents of ratification. See C. Drahozal, The Supremacy Clause: A Reference Guide to the United States Constitution 25 (2004); The Federalist No. 44, at 306 (J. Madison). We are aware of no such mention, and respondents have not provided any. Its conspicuous absence militates strongly against their position.

Additionally, it is important to read the Supremacy Clause in the context of the Constitution as a whole. Article I vests Congress with broad discretion over the manner of implementing its enumerated powers, giving it authority to "make all Laws which shall be necessary and proper for carrying [them] into Execution." Art. I, § 8. We have said that this confers upon the Legislature "that discretion, with respect to the means by which the powers [the Constitution] confers are to be carried into execution, which will enable that body to perform the high duties assigned to it," *McCulloch v. Maryland,* 4 Wheat. 316, 421, 4 L.Ed. 579 (1819). It is unlikely that the Constitution gave Congress such broad discretion with regard ***326** to the enactment of laws, while simultaneously limiting Congress's ****1384** power over the manner of their implementation, making it impossible to leave the enforcement of federal law to federal actors. If the Supremacy Clause includes a private right of action, then the Constitution *requires* Congress to permit the enforcement of its laws by private actors, significantly curtailing its ability to guide the implementation of federal law. It would be strange indeed to give a clause that makes federal law supreme a reading that *limits* Congress's power to enforce that law, by imposing mandatory private enforcement—a limitation unheard-of with regard to state legislatures.

To say that the Supremacy Clause does not confer a right of action is not to diminish the significant role that courts play in assuring the supremacy of federal law. For once a case or controversy properly comes before a court, judges are bound by federal law. Thus, a court may not convict a criminal defendant of violating a state law that federal law prohibits. See, *e.g., Pennsylvania v. Nelson,* 350 U.S. 497, 499, 509, 76 S.Ct. 477, 100 L.Ed. 640 (1956). Similarly, a court may not hold a civil defendant liable under state law for conduct federal law requires. See, *e.g., Mutual Pharmaceutical Co. v. Bartlett,* 570 U.S. ——, —— – ——, 133 S.Ct. 2466, 2476–2477, 186 L.Ed.2d 607 (2013). And, as we have long recognized, if an individual claims federal law immunizes him from state regulation, the court may issue an injunction upon finding the state regulatory actions preempted. *Ex parte Young,* 209 U.S. 123, 155–156, 28 S.Ct. 441, 52 L.Ed. 714 (1908).

Respondents contend that our preemption jurisprudence—specifically, the fact that we have regularly considered whether to enjoin the enforcement of state laws that are alleged to violate federal law—demonstrates that the Supremacy Clause creates a cause of action for its violation. They are incorrect. It is true enough that we have long held that federal courts may in some circumstances grant injunctive relief against state officers who are violating, or planning to violate, federal law. See, *e.g.,* ***327** *Osborn v. Bank of United States,* 9 Wheat. 738, 838–839, 844, 6 L.Ed. 204 (1824); *Ex parte Young, supra,* at 150–151, 28 S.Ct. 441 (citing *Davis v. Gray,* 16 Wall. 203, 220, 21 L.Ed. 447 (1873)). But that has been true not only with respect to violations of federal law by state officials, but also with respect to violations of federal law by federal officials. See *American School of Magnetic Healing v. McAnnulty,* 187 U.S. 94, 110, 23 S.Ct. 33, 47 L.Ed. 90 (1902); see generally L. Jaffe, Judicial Control of Administrative Action 152–196 (1965). Thus, the Supremacy Clause need not be (and in light of our textual analysis above, cannot be) the explanation. What our cases demonstrate is that, "in a proper case, relief may be given in a court of equity ... to prevent an injurious act by a public officer." *Carroll v. Safford,* 3 How. 441, 463, 11 L.Ed. 671 (1845).

The ability to sue to enjoin unconstitutional actions by state and federal officers is the creation of courts of equity, and reflects a long history of judicial review of illegal executive action, tracing back to England. See Jaffe & Henderson, Judicial

Review and the Rule of Law: Historical Origins, 72 L.Q. Rev. 345 (1956). It is a judge-made remedy, and we have never held or even suggested that, in its application to state officers, it rests upon an implied right of action contained in the Supremacy Clause. That is because, as even the dissent implicitly acknowledges, *post,* at 1391 – 1392 (opinion of SOTOMAYOR, J.) it does not. The Ninth Circuit erred in holding otherwise.

****1385** III

A

We turn next to respondents' contention that, quite apart from any cause of action conferred by the Supremacy Clause, this suit can proceed against Idaho in equity.

The power of federal courts of equity to enjoin unlawful executive action is subject to express and implied statutory limitations. See, *e.g., Seminole Tribe of Fla. v. Florida,* 517 U.S. 44, 74, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996). " 'Courts of equity can no more disregard statutory and constitutional requirements and provisions ***328** than can courts of law.' " *I.N.S. v. Pangilinan,* 486 U.S. 875, 883, 108 S.Ct. 2210, 100 L.Ed.2d 882 (1988) (quoting *Hedges v. Dixon County,* 150 U.S. 182, 192, 14 S.Ct. 71, 37 L.Ed. 1044 (1893); brackets omitted). In our view the Medicaid Act implicitly precludes private enforcement of § 30(A), and respondents cannot, by invoking our equitable powers, circumvent Congress's exclusion of private enforcement. See *Douglas v. Independent Living Center of Southern Cal., Inc.,* 565 U.S. ——, —— – ——, 132 S.Ct. 1204, 1212–1213, 182 L.Ed.2d 101 (2012) (ROBERTS, C.J., dissenting).

Two aspects of § 30(A) establish Congress's "intent to foreclose" equitable relief. *Verizon Md., Inc. v. Public Serv. Comm'n of Md.,* 535 U.S. 635, 647, 122 S.Ct. 1753, 152 L.Ed.2d 871 (2002). First, the sole remedy Congress provided for a State's failure to comply with Medicaid's requirements—for the State's "breach" of the Spending Clause contract—is the withholding of Medicaid funds by the Secretary of Health and Human Services. 42 U.S.C. § 1396c. As we have elsewhere explained, the "express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others." *Alexander v. Sandoval,* 532 U.S. 275, 290, 121 S.Ct. 1511, 149 L.Ed.2d 517 (2001).

The provision for the Secretary's enforcement by withholding funds might not, *by itself,* preclude the availability of equitable relief. See *Virginia Office for Protection and Advocacy v. Stewart,* 563 U.S. 247, —— – ——, n. 3, 131 S.Ct. 1632, 1638–1639, n. 3, 179 L.Ed.2d 675 (2011). But it does so when combined with the judicially unadministrable nature of § 30(A)'s text. It is difficult to imagine a requirement broader and less specific than § 30(A)'s mandate that state plans provide for payments that are "consistent with efficiency, economy, and quality of care," all the while "safeguard[ing] against unnecessary utilization of ... care and services." Explicitly conferring enforcement of this judgment-laden standard upon the Secretary alone establishes, we think, that Congress "wanted to make the agency remedy that it provided exclusive," thereby achieving "the expertise, uniformity, widespread consultation, and resulting administrative guidance that can accompany agency ***329** decisionmaking," and avoiding "the comparative risk of inconsistent interpretations and misincentives that can arise out of an occasional inappropriate application of the statute in a private action." *Gonzaga Univ. v. Doe,* 536 U.S. 273, 292, 122 S.Ct. 2268, 153 L.Ed.2d 309 (2002) (BREYER, J., concurring in judgment). The sheer complexity associated with enforcing § 30(A), coupled with the express provision of an administrative remedy, § 1396c, shows that the Medicaid Act precludes private enforcement of § 30(A) in the courts.

B

The dissent agrees with us that the Supremacy Clause does not provide an implied right of action, and that Congress may displace the equitable relief that is traditionally available to enforce federal ****1386** law. It disagrees only with our conclusion that such displacement has occurred here.

The dissent insists that, "because Congress is undoubtedly aware of the federal courts' long-established practice of enjoining preempted state action, it should generally be presumed to contemplate such enforcement unless it *affirmatively* manifests a contrary intent." *Post,* at 1392 (emphasis added). But a "long-established practice" does not justify a rule that denies statutory text its fairest reading. Section 30(A), fairly read in the context of the Medicaid Act, "display[s] a[n] intent to foreclose" the availability of equitable relief. *Verizon, supra,* at 647, 122 S.Ct. 1753. We have no warrant to revise Congress's scheme simply because it did not "affirmatively" preclude the availability of a judge-made action at equity. See *Seminole Tribe, supra,* at 75, 116 S.Ct. 1114 (inferring, in the absence of an "affirmative" statement by Congress, that equitable relief was unavailable).

Equally unavailing is the dissent's reliance on § 30(A)'s history. Section 30(A) was amended, on December 19, 1989, to include what the dissent calls the "equal access mandate," *post,* at 1394—the requirement that reimbursement rates be "sufficient to enlist enough providers so that care and services are available under the plan at least to the extent that ***330** such care and services are available to the general population in the geographic area." § 6402(a), 103 Stat. 2260. There existed at the time another provision, known as the "Boren Amendment," that likewise imposed broad requirements on state Medicaid plans. 42 U.S.C. § 1396a(a)(13)(A) (1982 ed., Supp. V). Lower courts had interpreted the Boren Amendment to be privately enforceable under § 1983. From this, the dissent infers that, when Congress amended § 30(A), it could not "have failed to anticipate" that § 30(A)'s broad language—or at least that of the equal access mandate—would be interpreted as enforceable in a private action. Thus, concludes the dissent, Congress's failure to *expressly* preclude the private enforcement of § 30(A) suggests it intended *not to* preclude private enforcement. *Post,* at 1395.

This argument appears to rely on the prior-construction canon; the rule that, when "judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute" is presumed to incorporate that interpretation. *Bragdon v. Abbott,* 524 U.S. 624, 645, 118 S.Ct. 2196, 141 L.Ed.2d 540 (1998). But that canon has no application here. The language of the two provisions is nowhere near identical; and even if it had been, the question whether the Boren Amendment permitted private actions was far from "settled." When Congress amended § 30(A) in 1989, this Court had already granted certiorari to decide, but had not yet decided, whether the Boren Amendment could be enforced through a § 1983 suit. See *Baliles v. Virginia Hospital Assn.,* 493 U.S. 808, 110 S.Ct. 49, 107 L.Ed.2d 18 (1989) (granting certiorari). Our decision permitting a § 1983 action did not issue until June 14, 1990—almost six months after the amendment to § 30(A). *Wilder v. Virginia Hospital Assn.,* 496 U.S. 498, 110 S.Ct. 2510.* ***331** The existence of a granted petition for ****1387** certiorari demonstrates quite clearly that the question whether the Boren Amendment could be privately enforced was *un* settled at the time of § 30(A)'s 1989 amendment—so that if Congress was aware of the parallel (which is highly doubtful) the course that awareness would have prompted (if any) would not have been legislative silence but rather express specification of the availability of private enforcement (if that was what Congress intended).

Finally, the dissent speaks as though we leave these plaintiffs with no resort. That is not the case. Their relief must be sought initially through the Secretary rather than through the courts. The dissent's complaint that the sanction available to the Secretary (the cut-off of funding) is too massive to be a realistic source of relief seems to us mistaken. We doubt that the Secretary's notice to a State that its compensation scheme is inadequate will be ignored.

IV

The last possible source of a cause of action for respondents is the Medicaid Act itself. They do not claim that, and rightly so. Section 30(A) lacks the sort of rights-creating language needed to imply a private right of action. *Sandoval, supra* at 286–287, 121 S.Ct. 1511. It is phrased as a directive to the federal agency charged with approving state Medicaid plans, not as a conferral of the right to sue upon the beneficiaries of the State's decision to participate in Medicaid. The Act says that the "Secretary shall approve any plan which fulfills the conditions specified in subsection (a)," the subsection that includes § 30(A). 42 U.S.C. § 1396a(b). We have held that such language "reveals no congressional intent to create a private right of action." *Sandoval, supra* at 289, 121 S.Ct. 1511; see also *Universities Research Assn., Inc. v. Coutu,* 450 U.S. 754, 772, 101 S.Ct. 1451, 67 L.Ed.2d 662 (1981). And again, the explicitly conferred means of enforcing ***332** compliance with § 30(A) by the Secretary's withholding funding, § 1396c, suggests that other means of enforcement are precluded, *Sandoval, supra,* at 290, 121 S.Ct. 1511.

Spending Clause legislation like Medicaid "is much in the nature of a contract." *Pennhurst State School and Hospital v. Halderman,* 451 U.S. 1, 17, 101 S.Ct. 1531, 67 L.Ed.2d 694 (1981). The notion that respondents have a right to sue derives, perhaps, from the fact that they are beneficiaries of the federal-state Medicaid agreement, and that intended beneficiaries, in modern times at least, can sue to enforce the obligations of private contracting parties. See 13 R. Lord, Williston on Contracts §§ 37:12–37.13, pp. 123–135 (4th ed.2013). We doubt, to begin with, that providers are intended beneficiaries (as opposed to mere incidental beneficiaries) of the Medicaid agreement, which was concluded for the benefit of the infirm whom the providers were to serve, rather than for the benefit of the providers themselves. See *Pharmaceutical Research and Mfrs. of America v. Walsh,* 538 U.S. 644, 683, 123 S.Ct. 1855, 155 L.Ed.2d 889 (2003) (Thomas, J., concurring in judgment). More fundamentally, however, the modern jurisprudence permitting intended beneficiaries to sue does not generally apply to contracts between a private party and the government, *Astra USA, Inc. v. Santa Clara County,* 563 U.S. ——, ——, 131 S.Ct. 1342, 1347–1348, 179 L.Ed.2d 457 (2011); see Williston, *supra,* at §§ 37:35–37:36, at 256–271; 9 J. Murray, Corbin on Contracts § 45.6, p. 92 (rev. ed.2007)—much less to contracts between two governments. Our precedents establish that a private right of action under federal law is not created by mere implication, but must ****1388** be "unambiguously conferred," *Gonzaga,* 536 U.S., at 283, 122 S.Ct. 2268. Nothing in the Medicaid Act suggests that Congress meant to change that for the commitments made under § 30(A).

* * *

The judgment of the Ninth Circuit Court of Appeals is reversed.

It is so ordered.

***333** Justice BREYER, concurring in part and concurring in the judgment.

I join Parts I, II, and III of the Court's opinion.

Like all other Members of the Court, I would not characterize the question before us in terms of a Supremacy Clause "cause of action." Rather, I would ask whether "federal courts may in [these] circumstances grant injunctive relief against state officers who are violating, or planning to violate, federal law." *Ante,* at 1384; *post,* at 1391 – 1392 (SOTOMAYOR, J., dissenting). I believe the answer to this question is no.

That answer does not follow from the application of a simple, fixed legal formula separating federal statutes that may underlie this kind of injunctive action from those that may not. "[T]he statute books are too many, the laws too diverse, and their purposes too complex, for any single legal formula to offer" courts "more than general guidance." *Gonzaga Univ. v. Doe,* 536 U.S. 273, 291, 122 S.Ct. 2268, 153 L.Ed.2d 309 (2002) (BREYER, J., concurring in judgment). Rather, I believe that several characteristics of the federal statute before us, when taken together, make clear that Congress intended to foreclose respondents from bringing this particular action for injunctive relief.

For one thing, as the majority points out, § 30(A) of the Medicaid Act, 42 U.S.C. § 1396a(a)(30)(A), sets forth a federal mandate that is broad and nonspecific. See *ante,* at 1385. But, more than that, § 30(A) applies its broad standards to the setting of rates. The history of ratemaking demonstrates that administrative agencies are far better suited to this task than judges. More than a century ago, Congress created the Interstate Commerce Commission, the first great federal regulatory rate-setting agency, and endowed it with authority to set "reasonable" railroad rates. Ch. 104, 24 Stat. 379 (1887). It did so in part because judicial efforts to maintain reasonable rate levels had proved inadequate. See I. Sharfman, Railway Regulation: An Analysis of the Underlying Problems in Railway Economics from the Standpoint of Government Regulation 43–44 (1915).

***334** Reading § 30(A) underscores the complexity and nonjudicial nature of the rate-setting task. That provision requires State Medicaid plans to " assure that payments are consistent with efficiency, economy, and quality of care and are sufficient to enlist enough providers" to assure "care and services" equivalent to that "available to the general population in the geographic area." § 1396a(a)(30)(A). The methods that a state agency, such as Idaho's Department of Health and Welfare, uses to make this kind of determination may involve subsidiary determinations of, for example, the actual cost of providing

quality services, including personnel and total operating expenses; changes in public expectations with respect to delivery of services; inflation; a comparison of rates paid in neighboring States for comparable services; and a comparison of any rates paid for comparable services in other public or private capacities. See App. to Reply to Brief in Opposition 16; Idaho Code Ann. § 56–118 (2012).

At the same time, § 30(A) applies broadly, covering reimbursements provided to approximately 1.36 million doctors, serving ****1389** over 69 million patients across the Nation. See Dept. of Health and Human Servs., Office of Inspector General, Access to Care: Provider Availability in Medicaid Managed Care 1, 5 (Dec.2014). And States engage in time-consuming efforts to obtain public input on proposed plan amendments. See, *e.g.,* Kansas Medicaid: Design and Implementation of a Public Input and Stakeholder Consult Process (Sept. 16, 2011) (prepared by Deloitte Consulting, LLP) (describing public input on Kansas' proposed Medicaid amendments).

I recognize that federal courts have long become accustomed to reviewing for reasonableness or constitutionality the rate-setting determinations made by agencies. See 5 U.S.C. § 706; *FPC v. Hope Natural Gas Co.,* 320 U.S. 591, 602–606, 64 S.Ct. 281, 88 L.Ed. 333 (1944). But this is not such an action. Instead, the lower courts here, relying on the rate-setting standard articulated in *Orthopaedic Hospital v. Belshe,* 103 F.3d 1491 (C.A.9 1997), required the State to set rates that "approximate the ***335** cost of quality care provided efficiently and economically." *Id.,* at 1496. See *Inclusion, Inc. v. Armstrong,* 835 F.Supp.2d 960, 963–964 (D.Idaho 2011), aff'd, 567 Fed.Appx. 496 (C.A.9 2014). To find in the law a basis for courts to engage in such direct rate-setting could set a precedent for allowing other similar actions, potentially resulting in rates set by federal judges (of whom there are several hundred) outside the ordinary channel of federal judicial review of agency decisionmaking. The consequence, I fear, would be increased litigation, inconsistent results, and disorderly administration of highly complex federal programs that demand public consultation, administrative guidance and coherence for their success. I do not believe Congress intended to allow a statute-based injunctive action that poses such risks (and that has the other features I mention).

I recognize that courts might in particular instances be able to resolve rate-related requests for injunctive relief quite easily. But I see no easy way to separate in advance the potentially simple sheep from the more harmful rate-making goats. In any event, this case, I fear, belongs in the latter category. See *Belshe, supra,* at 1496. Compare Brief for Respondents 2, n. 1 (claiming that respondents seek only to enforce federally approved methodology), with Brief for United States as *Amicus Curiae* 5, n. 2 (the relevant methodology has not been approved). See also Idaho Code Ann. § 56–118 (describing in general terms what appears to be a complex rate-setting methodology, while leaving unclear the extent to which Idaho is bound to use, rather than merely consider, actual provider costs).

For another thing, like the majority, I would ask why, in the complex rate-setting area, other forms of relief are inadequate. If the Secretary of Health and Human Services concludes that a State is failing to follow legally required federal rules, the Secretary can withhold federal funds. See *ante,* at 1385 (citing 42 U.S.C. § 1396c). If withholding funds does not work, the federal agency may be able to sue a State to compel compliance with federal rules. See Tr. of Oral Arg. ***336** 23, 52 (Solicitor General and respondents acknowledging that the Federal Government might be able to sue a State to enjoin it from paying less than what § 30(A) requires). Cf., *e.g., Arizona v. United States,* 567 U.S. ——, 132 S.Ct. 2492, 183 L.Ed.2d 351 (2012) (allowing similar action in another context).

Moreover, why could respondents not ask the federal agency to interpret its rules to respondents' satisfaction, to modify those rules, to promulgate new rules or to enforce old ones? See ****1390** 5 U.S.C. § 553(e). Normally, when such requests are denied, an injured party can seek judicial review of the agency's refusal on the grounds that it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." §§ 702, 706(2)(A). And an injured party can ask the court to "compel agency action unlawfully withheld or unreasonably delayed." §§ 702, 706(1). See also Tr. of Oral Arg. 15–16 (arguing that providers can bring an action under the Administrative Procedure Act (APA) whenever a waiver program is renewed or can seek new agency rulemaking); *Japan Whaling Assn. v. American Cetacean Soc.,* 478 U.S. 221, 230, n. 4, 231, 106 S.Ct. 2860, 92 L.Ed.2d 166 (1986) (APA challenge to the Secretary of Commerce's failure to act).

I recognize that the law may give the federal agency broad discretionary authority to decide when and how to exercise or to enforce statutes and rules. See *Massachusetts v. EPA,* 549 U.S. 497, 527, 127 S.Ct. 1438, 167 L.Ed.2d 248 (2007). As a result, it may be difficult for respondents to prevail on an APA claim unless it stems from an agency's particularly egregious failure to act. But, if that is so, it is because Congress decided to vest broad discretion in the agency to interpret and to enforce § 30(A). I see no reason for this Court to circumvent that congressional determination by allowing this action to

proceed.

Justice SOTOMAYOR, with whom Justice KENNEDY, Justice GINSBURG, and Justice KAGAN join, dissenting.

Suits in federal court to restrain state officials from executing laws that assertedly conflict with the Constitution or ***337** with a federal statute are not novel. To the contrary, this Court has adjudicated such requests for equitable relief since the early days of the Republic. Nevertheless, today the Court holds that Congress has foreclosed private parties from invoking the equitable powers of the federal courts to require States to comply with § 30(A) of the Medicaid Act, 42 U.S.C. § 1396a(a)(30)(A). It does so without pointing to the sort of detailed remedial scheme we have previously deemed necessary to establish congressional intent to preclude resort to equity. Instead, the Court relies on Congress' provision for agency enforcement of § 30(A)—an enforcement mechanism of the sort we have already definitively determined *not* to foreclose private actions—and on the mere fact that § 30(A) contains relatively broad language. As I cannot agree that these statutory provisions demonstrate the requisite congressional intent to restrict the equitable authority of the federal courts, I respectfully dissent.

I

A

That parties may call upon the federal courts to enjoin unconstitutional government action is not subject to serious dispute. Perhaps the most famous exposition of this principle is our decision in *Ex parte Young,* 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), from which the doctrine derives its usual name. There, we held that the shareholders of a railroad could seek an injunction preventing the Minnesota attorney general from enforcing a state law setting maximum railroad rates because the Eleventh Amendment did not provide the officials with immunity from such an action and the federal court had the "power" in equity to "grant a temporary injunction." *Id.,* at 148, 28 S.Ct. 441. This Court had earlier recognized similar equitable authority in *Osborn v. Bank of United States,* 9 Wheat. 738, 6 L.Ed. 204 (1824), in which a federal court issued an injunction prohibiting an Ohio official from ****1391** executing a state law taxing the ***338** Bank of the United States. *Id.,* at 838–839. We affirmed in relevant part, concluding that the case was "cognizable in a Court of equity," and holding it to be "proper" to grant equitable relief insofar as the state tax was "repugnant" to the federal law creating the national bank. *Id.,* at 839, 859. More recently, we confirmed the vitality of this doctrine in *Free Enterprise Fund v. Public Company Accounting Oversight Bd.,* 561 U.S. 477, 130 S.Ct. 3138, 177 L.Ed.2d 706 (2010). There, we found no support for the argument that a challenge to " 'governmental action under the Appointments Clause or separation-of-powers principles' " should be treated "differently than every other constitutional claim" for which "equitable relief 'has long been recognized as the proper means for preventing entities from acting unconstitutionally.' " *Id.,* at 491, n. 2, 130 S.Ct. 3138.

A suit, like this one, that seeks relief against state officials acting pursuant to a state law allegedly preempted by a federal statute falls comfortably within this doctrine. A claim that a state law contravenes a federal statute is "basically constitutional in nature, deriving its force from the operation of the Supremacy Clause," *Douglas v. Seacoast Products, Inc.,* 431 U.S. 265, 271–272, 97 S.Ct. 1740, 52 L.Ed.2d 304 (1977), and the application of preempted state law is therefore "unconstitutional," *Crosby v. National Foreign Trade Council,* 530 U.S. 363, 388, 120 S.Ct. 2288, 147 L.Ed.2d 352 (2000); accord, *e.g., McCulloch v. Maryland,* 4 Wheat. 316, 436, 4 L.Ed. 579 (1819) (that States have "no power" to enact laws interfering with

"the operations of the constitutional laws enacted by Congress" is the "unavoidable consequence of that supremacy which the constitution has declared"; such a state law "is unconstitutional and void"). We have thus long entertained suits in which a party seeks prospective equitable protection from an injurious and preempted state law without regard to whether the federal statute at issue itself provided a right to bring an action. See, *e.g., Foster v. Love,* 522 U.S. 67, 118 S.Ct. 464, 139 L.Ed.2d 369 (1997) (state election law that permitted the winner of a state primary to be deemed the winner of election to Congress held preempted by federal statute setting date of congressional ***339** elections); *Shaw v. Delta Air Lines, Inc.,* 463 U.S. 85, 103 S.Ct. 2890, 77 L.Ed.2d 490 (1983) (state law preempted in part by the federal Employee Retirement Income Security Act of 1974); *Railroad Transfer Service, Inc. v. Chicago,* 386 U.S. 351, 87 S.Ct. 1095, 18 L.Ed.2d 143 (1967) (city ordinance imposing licensing requirements on motor carrier transporting railroad passengers held preempted by federal Interstate Commerce Act); *Campbell v. Hussey,* 368 U.S. 297, 82 S.Ct. 327, 7 L.Ed.2d 299 (1961) (state law requiring labeling of certain strains of tobacco held preempted by the federal Tobacco Inspection Act); *Railway Co. v. McShane,* 22 Wall. 444, 22 L.Ed. 747 (1875) (state taxation of land possessed by railroad company held invalid under federal Act of July 2, 1864). Indeed, for this reason, we have characterized "the availability of prospective relief of the sort awarded in *Ex parte Young* " as giving "life to the Supremacy Clause." *Green v. Mansour,* 474 U.S. 64, 68, 106 S.Ct. 423, 88 L.Ed.2d 371 (1985).

Thus, even though the Court is correct that it is somewhat misleading to speak of "an implied right of action contained in the Supremacy Clause," *ante,* at 1384, that does not mean that parties may not enforce the Supremacy Clause by bringing suit to enjoin preempted state action. As the Court also recognizes, we "have long held that federal courts may in some circumstances grant injunctive relief against state officers who are violating, or planning ****1392** to violate, federal law." *Ante,* at 1384.

B

Most important for purposes of this case is not the mere existence of this equitable authority, but the fact that it is exceedingly well established—supported, as the Court puts it, by a "long history." *Ante,* at 1384 – 1385. Congress may, if it so chooses, either expressly or implicitly preclude *Ex parte Young* enforcement actions with respect to a particular statute or category of lawsuit. See, *e.g.,* 28 U.S.C. § 1341 (prohibiting federal judicial restraints on the collection of state taxes); *Seminole Tribe of Fla. v. Florida,* 517 U.S. 44, 75–76, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996) (comprehensive alternative remedial scheme can ***340** establish Congress' intent to foreclose *Ex parte Young* actions). But because Congress is undoubtedly aware of the federal courts' long-established practice of enjoining preempted state action, it should generally be presumed to contemplate such enforcement unless it affirmatively manifests a contrary intent. "Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied." *Porter v. Warner Holding Co.,* 328 U.S. 395, 398, 66 S.Ct. 1086, 90 L.Ed. 1332 (1946).

In this respect, equitable preemption actions differ from suits brought by plaintiffs invoking 42 U.S.C. § 1983 or an implied right of action to enforce a federal statute. Suits for "redress designed to halt or prevent the constitutional violation rather than the award of money damages" seek "traditional forms of relief." *United States v. Stanley,* 483 U.S. 669, 683, 107 S.Ct. 3054, 97 L.Ed.2d 550 (1987). By contrast, a plaintiff invoking § 1983 or an implied statutory cause of action may seek a variety of remedies—including damages—from a potentially broad range of parties. Rather than simply pointing to background equitable principles authorizing the action that Congress presumably has not overridden, such a plaintiff must demonstrate specific congressional intent to *create* a statutory right to these remedies. See *Gonzaga Univ. v. Doe,* 536 U.S. 273, 290, 122 S.Ct. 2268, 153 L.Ed.2d 309 (2002); *Alexander v. Sandoval,* 532 U.S. 275, 286, 121 S.Ct. 1511, 149 L.Ed.2d 517 (2001); see also *Golden State Transit Corp. v. Los Angeles,* 493 U.S. 103, 114, 110 S.Ct. 444, 107 L.Ed.2d 420 (1989) (KENNEDY, J., dissenting) (Because a preemption claim does not seek to enforce a statutory right, "[t]he injured party does not need § 1983 to vest in him a right to assert that an attempted exercise of jurisdiction or control violates the proper distribution of powers within the federal system"). For these reasons, the principles that we have developed to determine whether a statute creates an implied right of action, or is enforceable through § 1983, are not transferable to the *Ex parte Young* context.

II

***341** In concluding that Congress has "implicitly preclude[d] private enforcement of § 30(A)," *ante,* at 1384 – 1385, the Court ignores this critical distinction and threatens the vitality of our *Ex parte Young* jurisprudence. The Court identifies only a single prior decision—*seMinole tRIbe*—in which we have ever discerned such congressional intent to foreclose equitable enforcement of a statutory mandate. *Ante,* at 1384 – 1385. Even the most cursory review of that decision reveals how far afield it is from this case.

In *Seminole Tribe,* the plaintiff Indian Tribe had invoked *Ex parte Young* in seeking to compel the State of Florida to ****1393** "negotiate in good faith with [the] tribe toward the formation of a compact" governing certain gaming activities, as required by a provision of the Indian Gaming Regulatory Act, 25 U.S.C. § 2710(d)(3). 517 U.S., at 47, 116 S.Ct. 1114. We rejected this effort, observing that "Congress passed § 2710(d)(3) in conjunction with the carefully crafted and intricate remedial scheme set forth in § 2710(d)(7)." *Id.,* at 73–74, 116 S.Ct. 1114. That latter provision allowed a tribe to sue for violations of the duty to negotiate 180 days after requesting such negotiations, but specifically limited the remedy that a court could grant to "an order directing the State and the Indian tribe to conclude a compact within 60 days," and provided that the only sanction for the violation of such an order would be to require the parties to "submit a proposed compact to a mediator." *Id.,* at 74, 116 S.Ct. 1114; §§ 2710(d)(7)(B)(i), (iii), (iv). The statute further directed that if the State should fail to abide by the mediator's selected compact, the sole remedy would be for the Secretary of the Interior, in consultation with the tribe, to prescribe regulations governing gaming. See 517 U.S., at 74–75, 116 S.Ct. 1114; § 2710(d)(7)(B)(vii). We concluded that Congress must have intended this procedural route to be the exclusive means of enforcing § 2710(d)(3). As we explained: "If § 2710(d)(3) could be enforced in a suit under *Ex parte Young,* § 2710(d)(7) would have been superfluous; it is difficult to see why an ***342** Indian tribe would suffer through the intricate scheme of § 2710 (d)(7) when more complete and more immediate relief would be available under *Ex parte Young*." 517 U.S., at 75, 116 S.Ct. 1114.

What is the equivalent "carefully crafted and intricate remedial scheme" for enforcement of § 30(A)? The Court relies on two aspects of the Medicaid Act, but, whether considered separately or in combination, neither suffices.

First, the Court cites 42 U.S.C. § 1396c, which authorizes the Secretary of Health and Human Services (HHS) to withhold federal Medicaid payments to a State in whole or in part if the Secretary determines that the State has failed to comply with the obligations set out in § 1396a, including § 30(A). See *ante,* at 1385 – 1386. But in striking contrast to the remedial provision set out in the Indian Gaming Regulatory Act, § 1396c provides no specific procedure that parties actually affected by a State's violation of its statutory obligations may invoke in lieu of *Ex parte Young*—leaving them without any other avenue for seeking relief from the State. Nor will § 1396c always provide a particularly effective means for redressing a State's violations: If the State has violated § 30(A) by refusing to reimburse medical providers at a level "sufficient to enlist enough providers so that care and services are available" to Medicaid beneficiaries to the same extent as they are available to "the general population," agency action resulting in a reduced flow of federal funds to that State will often be self-defeating. § 1396a(30)(A); see Brief for Former HHS Officials as *Amici Curiae* 18 (noting that HHS is often reluctant to initiate compliance actions because a "state's non-compliance creates a damned-if-you-do, damned-if-you-don't scenario where the withholding of state funds will lead to depriving the poor of essential medical assistance"). Far from rendering § 1396c "superfluous," then, *Ex parte Young* actions would seem to be an anticipated and possibly necessary supplement to this limited agency-enforcement mechanism. *Seminole Tribe,* 517 U.S., at 75, 116 S.Ct. 1114. Indeed, presumably for these reasons, we recently rejected ***343** the very contention the Court now accepts, holding that "[t]he fact that the Federal Government can exercise oversight of a federal spending program ****1394** and even withhold or withdraw funds ... does not demonstrate that Congress has displayed an intent not to provide the more complete and more immediate relief that would otherwise be available under *Ex parte Young*." *Virginia Office for Protection and Advocacy v. Stewart,* 563 U.S. 247, —— – ——, n. 3, 131 S.Ct. 1632, 1638–1639, n. 3, 179 L.Ed.2d 675 (2011) (internal quotation marks omitted).

Section 1396c also parallels other provisions scattered throughout the Social Security Act that likewise authorize the

withholding of federal funds to States that fail to fulfill their obligations. See, *e.g.,* §§ 609(a), 1204, 1354. Yet, we have consistently authorized judicial enforcement of the Act. See *Maine v. Thiboutot,* 448 U.S. 1, 6, 100 S.Ct. 2502, 65 L.Ed.2d 555 (1980) (collecting cases). *Rosado v. Wyman,* 397 U.S. 397, 90 S.Ct. 1207, 25 L.Ed.2d 442 (1970), provides a fitting illustration. There, we considered a provision of the Social Security Act mandating that, in calculating benefits for participants in the Aid to Families with Dependent Children Program, States make adjustments " 'to reflect fully changes in living costs.' " *Id.,* at 412, 90 S.Ct. 1207 (quoting § 602(a)(23) (1964 ed., Supp. IV)). We expressed no hesitation in concluding that federal courts could require compliance with this obligation, explaining: "It is ... peculiarly part of the duty of this tribunal, no less in the welfare field than in other areas of the law, to resolve disputes as to whether federal funds allocated to the States are being expended in consonance with the conditions that Congress has attached to their use." *Id.,* at 422–423, 90 S.Ct. 1207. We so held notwithstanding the existence of an enforcement provision permitting a federal agency to "make a total or partial cutoff of federal funds." See *id.,* at 406, n. 8, 90 S.Ct. 1207 (citing § 1316).

Second, perhaps attempting to reconcile its treatment of § 1396c (2012 ed.) with this longstanding precedent, the Court focuses on the particular language of § 30(A), contending that this provision, at least, is so "judicially unadministrable" ***344** that Congress must have intended to preclude its enforcement in private suits. *Ante,* at 1385. Admittedly, the standard set out in § 30(A) is fairly broad, requiring that a state Medicaid plan:

> "provide such methods and procedures relating to the utilization of, and the payment for, care and services available under the plan ... as may be necessary to safeguard against unnecessary utilization of such care and services and to assure that payments are consistent with efficiency, economy, and quality of care and are sufficient to enlist enough providers so that care and services are available under the plan at least to the extent that such care and services are available to the general population in the geographic area." § 1396a(a)(30)(A).

But mere breadth of statutory language does not require the Court to give up all hope of judicial enforcement—or, more important, to infer that Congress must have done so.

In fact, the contention that § 30(A)'s language was intended to foreclose private enforcement actions entirely is difficult to square with the provision's history. The specific equal access mandate invoked by the plaintiffs in this case—that reimbursement rates be "sufficient to enlist enough providers so that care and services are available under the plan at least to the extent that such care and services are available to the general population in the geographic area"—was added to § 30(A) in 1989. 103 Stat. 2260. At that time, multiple Federal Courts of Appeals had held that the so-called Boren Amendment to the Medicaid Act was enforceable pursuant ****1395** to § 1983—as we soon thereafter concluded it was. See *Wilder v. Virginia Hospital Assn.,* 496 U.S. 498, 504–505, 524, 110 S.Ct. 2510, 110 L.Ed.2d 455 (1990). The Boren Amendment employed language quite similar to that used in § 30(A), requiring that a state plan:

> "provide ... for payment ... of the hospital services, nursing facility services, and services in an intermediate care facility for the mentally retarded provided under ***345** the plan through the use of rates ... which the State finds, and makes assurances satisfactory to the Secretary, are reasonable and adequate to meet the costs which must be incurred by efficiently and economically operated facilities in order to provide care and services in conformity with applicable State and Federal laws, regulations, and quality and safety standards and to assure that individuals eligible for medical assistance have reasonable access ... to inpatient hospital services of adequate quality." § 1396a(a)(13)(A) (1982 ed., Supp. V).

It is hard to believe that the Congress that enacted the operative version of § 30(A) could have failed to anticipate that it might be similarly enforceable. Even if, as the Court observes, the question whether the Boren Amendment was enforceable under § 1983 was "unsettled at the time," *ante,* at 1386 (emphasis deleted), surely Congress would have spoken with far more clarity had it actually intended to preclude private enforcement of § 30(A) through not just § 1983 but also *Ex parte Young*.

Of course, the broad scope of § 30(A)'s language is not irrelevant. But rather than compelling the conclusion that the provision is wholly unenforceable by private parties, its breadth counsels in favor of interpreting § 30(A) to provide substantial leeway to States, so that only in rare and extreme circumstances could a State actually be held to violate its mandate. The provision's scope may also often require a court to rely on HHS, which is "comparatively expert in the statute's subject matter." *Douglas v. Independent Living Center of Southern Cal., Inc.,* 565 U.S. ——, ——, 132 S.Ct. 1204, 1214, 182 L.Ed.2d 101 (2012). When the agency has made a determination with respect to what legal standard should apply, or the validity of a State's procedures for implementing its Medicaid plan, that determination should be accorded the appropriate deference. See, *e.g., Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984); *Skidmore v. Swift & Co.,* 323 U.S. 134, 65 S.Ct. 161, 89 L.Ed. 124 (1944). And if faced with a question that presents ***346** a special demand for agency expertise, a court might call for the views of the agency, or refer the question

to the agency under the doctrine of primary jurisdiction. See *Rosado,* 397 U.S., at 406–407, 90 S.Ct. 1207; *Pharmaceutical Research and Mfrs. of America v. Walsh,* 538 U.S. 644, 673, 123 S.Ct. 1855, 155 L.Ed.2d 889 (2003) (BREYER, J., concurring in part and concurring in judgment). Finally, because the authority invoked for enforcing § 30(A) is equitable in nature, a plaintiff is not entitled to relief as of right, but only in the sound discretion of the court. See *Amoco Production Co. v. Gambell,* 480 U.S. 531, 542, 107 S.Ct. 1396, 94 L.Ed.2d 542 (1987). Given the courts' ability to both respect States' legitimate choices and defer to the federal agency when necessary, I see no basis for presuming that Congress believed the Judiciary to be completely incapable of enforcing § 30(A).*

* * *

****1396 *347** In sum, far from identifying a "carefully crafted ... remedial scheme" demonstrating that Congress intended to foreclose *Ex parte Young* enforcement of § 30(A), *Seminole Tribe,* 517 U.S., at 73–74, 116 S.Ct. 1114 the Court points only to two provisions. The first is § 1396c, an agency-enforcement provision that, given our precedent, cannot preclude private actions. The second is § 30(A) itself, which, while perhaps broad, cannot be understood to manifest congressional intent to preclude judicial involvement.

The Court's error today has very real consequences. Previously, a State that set reimbursement rates so low that providers were unwilling to furnish a covered service for those who need it could be compelled by those affected to respect the obligation imposed by § 30(A). Now, it must suffice that a federal agency, with many programs to oversee, has authority to address such violations through the drastic and often counterproductive measure of withholding the funds that pay for such services. Because a faithful application of our precedents would have led to a contrary result, I respectfully dissent.

All Citations

575 U.S. 320, 135 S.Ct. 1378, 191 L.Ed.2d 471, 83 USLW 4231, 15 Cal. Daily Op. Serv. 3122, 2015 Daily Journal D.A.R. 3598, 25 Fla. L. Weekly Fed. S 184

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

* Respondents do not claim that *Wilder* establishes precedent for a private cause of action in this case. They do not assert a § 1983 action, since our later opinions plainly repudiate the ready implication of a § 1983 action that *Wilder* exemplified. See *Gonzaga Univ. v. Doe,* 536 U.S. 273, 283, 122 S.Ct. 2268, 153 L.Ed.2d 309 (2002) (expressly "reject[ing] the notion," implicit in *Wilder,* "that our cases permit anything short of an unambiguously conferred right to support a cause of action brought under § 1983").

* That is not to say that the Court of Appeals in this case necessarily applied § 30(A) correctly. Indeed, there are good reasons to think the court construed § 30(A) to impose an overly stringent obligation on the States. While the Ninth Circuit has understood § 30(A) to compel States to "rely on responsible cost studies," and to reimburse for services at rates that "approximate the cost of quality care provided efficiently and economically," *Orthopaedic Hospital v. Belshe,* 103 F.3d 1491, 1496 (1997), other courts have read § 30(A) to require only that rates be high enough to ensure that services are *available* to Medicaid participants. See *Pennsylvania Pharmacists Assn. v. Houstoun,* 283 F.3d 531, 538 (C.A.3 2002); *Evergreen Presbyterian Ministries, Inc. v. Hood,* 235 F.3d 908, 928–929 (C.A.5 2000); *Methodist Hospitals, Inc. v. Sullivan,* 91 F.3d 1026, 1030 (C.A.7 1996). This Court declined to grant certiorari to address whether the Ninth Circuit's reading of § 30(A) is correct. See 573 U.S. ——, 135 S.Ct. 44, 189 L.Ed.2d 897 (2014). But Justice BREYER, in his concurrence, appears to mistake that question about the merits of the Ninth Circuit's standard for the question this Court actually granted certiorari to address—that is, whether § 30 is judicially enforceable at all. See *ante,* at 1389 – 1390 (opinion concurring in part and concurring in judgment). To answer that question, one need only recognize, as Justice BREYER does, that "federal courts have long become accustomed to reviewing for reasonableness or constitutionality the rate-setting determinations made by agencies." *Ante,* at 1389. A private party who invokes the jurisdiction of the federal courts in order to enjoin a state agency's implementation of rates that are so unreasonably low as to violate § 30(A) seeks a determination of exactly this sort.

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129 S.Ct. 1231
Supreme Court of the United States

Gary BARTLETT, Executive Director of North Carolina State Board of Elections, et al., Petitioners,
v.
Dwight STRICKLAND et al.

No. 07–689
|
Argued Oct. 14, 2008.
|
Decided March 9, 2009.

Synopsis
Background: County and county commissioners brought action against the Governor of North Carolina, the Director of the State Board of Elections, and other state officials, alleging that legislative redistricting plan violated Whole County Provision of state constitution. A three-judge panel of the Superior Court, Wake County, entered summary judgment in favor of defendants, finding that redistricting plan complied, to the maximum extent practicable, with the Whole County Provision. The North Carolina Supreme Court, Edmunds, J., 361 N.C. 491, 649 S.E.2d 364, reversed and ordered state legislature to redraw the district at issue. State defendants' petition for writ of certiorari was granted.

The Supreme Court, Justice Kennedy, announced the judgment of the court and delivered an opinion which held that crossover districts do not meet *Gingles* requirement that minority is sufficiently large and geographically compact enough to constitute majority in a single-member district, for purpose of claim under Voting Rights Act's vote dilution provision.

Affirmed.

Justice Thomas concurred in the judgment and filed opinion in which Justice Scalia joined.

Justice Souter filed dissenting opinion in which Justice Stevens, Justice Ginsburg, and Justice Breyer joined.

Justice Ginsburg filed dissenting opinion.

Justice Breyer filed dissenting opinion.

****1235** *Syllabus*[*]

Despite the North Carolina Constitution's "Whole County Provision" prohibiting the General Assembly from dividing counties when drawing its own legislative districts, in 1991 the legislature drew House District 18 to include portions of four counties, including Pender County, for the asserted purpose of satisfying § 2 of the Voting Rights Act of 1965. At that time, District 18 was a geographically compact majority-minority district. By the time the district was to be redrawn in 2003, the African–American voting-age population in District 18 had fallen below 50 percent. Rather than redrawing the district to keep Pender County whole, the legislators split portions of it and another county. District 18's African–American voting-age population is now 39.36 percent. Keeping Pender County whole would have resulted in an African–American voting-age

population of 35.33 percent. The legislators' rationale was that splitting Pender County gave African–American voters the potential to join with majority voters to elect the minority group's candidate of choice, while leaving Pender County whole would have violated § 2 of the Voting Rights Act.

Pender County and others filed suit, alleging that the redistricting plan violated the Whole County Provision. The state-official defendants answered that dividing Pender County was required by § 2. The trial court first considered whether the defendants had established the three threshold requirements for § 2 liability under *Thornburg v. Gingles,* 478 U.S. 30, 51, 106 S.Ct. 2752, 92 L.Ed.2d 25, only the first of which is relevant here: whether the minority group "is sufficiently large and geographically compact to constitute a majority in a single-member district." The court concluded that although African–Americans were not a majority of District 18's voting-age population, the district was a "de facto" majority-minority district because African–Americans could get enough support from crossover majority voters to elect their preferred candidate. ****1236** The court ultimately determined, based on the totality of the circumstances, that § 2 required that Pender County be split, and it sustained District 18's lines on that rationale. The State Supreme Court reversed, holding that a minority group must constitute a numerical majority of the voting-age population in an area before § 2 requires the creation of a legislative district to prevent dilution of that group's votes. Because African–Americans did not have such a numerical majority in District 18, the court ordered the legislature to redraw the district.

Held: The judgment is affirmed.

361 N.C. 491, 649 S.E.2d 364, affirmed.

Justice KENNEDY, joined by THE CHIEF JUSTICE and Justice ALITO, concluded that § 2 does not require state officials to draw election-district lines to allow a racial minority that would make up less than 50 percent of the voting-age population in the redrawn district to join with crossover voters to elect the minority's candidate of choice. Pp. 1240 – 1250.

1. As amended in 1982, § 2 provides that a violation "is established if, based on the totality of circumstances, it is shown that the [election] processes ... in the State or political subdivision are not equally open to participation by members of a [protected] class [who] have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b). Construing the amended § 2 in *Gingles, supra,* at 50–51, 106 S.Ct. 2752, the Court identified three "necessary preconditions" for a claim that the use of multimember districts constituted actionable vote dilution. It later held that those requirements apply equally in § 2 cases involving single-member districts. *Growe v. Emison,* 507 U.S. 25, 40–41, 113 S.Ct. 1075, 122 L.Ed.2d 388. Only when a party has established the requirements does a court proceed to analyze whether a § 2 violation has occurred based on the totality of the circumstances. See, *e.g., Johnson v. De Grandy,* 512 U.S. 997, 1013, 114 S.Ct. 2647, 129 L.Ed.2d 775. Pp. 1240 – 1242.

2. Only when a geographically compact group of minority voters could form a majority in a single-member district has the first *Gingles* requirement been met. Pp. 1241 – 1250.

(a) A party asserting § 2 liability must show by a preponderance of the evidence that the minority population in the potential election district is greater than 50 percent. The Court has held both that § 2 can require the creation of a "majority-minority" district, in which a minority group composes a numerical, working majority of the voting-age population, see, *e.g., Voinovich v. Quilter,* 507 U.S. 146, 154–155, 113 S.Ct. 1149, 122 L.Ed.2d 500, and that § 2 does not require the creation of an "influence" district, in which a minority group can influence the outcome of an election even if its preferred candidate cannot be elected, see *League of United Latin American Citizens v. Perry,* 548 U.S. 399, 445, 126 S.Ct. 2594, 165 L.Ed.2d 609 (*LULAC).* This case involves an intermediate, "crossover" district, in which the minority makes up less than a majority of the voting-age population, but is large enough to elect the candidate of its choice with help from majority voters who cross over to support the minority's preferred candidate. Petitioners' theory that such districts satisfy the first *Gingles* requirement is contrary to § 2, which requires a showing that minorities "have less opportunity than other members of the electorate to ... elect representatives of their choice," 42 U.S.C. § 1973(b). Because they form only 39 percent of District 18's voting-age population, African–Americans **1237 standing alone have no better or worse opportunity to elect a candidate than any other group with the same relative voting strength. Recognizing a § 2 claim where minority voters cannot elect their candidate of choice based on their own votes and without assistance from others would grant special protection to their right to form political coalitions that is not authorized by the section. Nor does the reasoning of this Court's cases support petitioners' claims. In *Voinovich,* for example, the Court stated that the first *Gingles* requirement "would have to be modified or eliminated" to allow crossover-district claims. 507 U.S., at 158, 113 S.Ct. 1149. Indeed, mandatory recognition of such

claims would create serious tension with the third *Gingles* requirement, that the majority votes as a bloc to defeat minority-preferred candidates, see 478 U.S., at 50–51, 106 S.Ct. 2752, and would call into question the entire *Gingles* framework. On the other hand, the plurality finds support for the clear line drawn by the majority-minority requirement in the need for workable standards and sound judicial and legislative administration. By contrast, if § 2 required crossover districts, determining whether a § 2 claim would lie would require courts to make complex political predictions and tie them to race-based assumptions. Heightening these concerns is the fact that because § 2 applies nationwide to every jurisdiction required to draw election-district lines under state or local law, crossover-district claims would require courts to make predictive political judgments not only about familiar, two-party contests in large districts but also about regional and local elections. Unlike any of the standards proposed to allow crossover claims, the majority-minority rule relies on an objective, numerical test: Do minorities make up more than 50 percent of the voting-age population in the relevant geographic area? Given § 2's text, the Court's cases interpreting that provision, and the many difficulties in assessing § 2 claims without the restraint and guidance provided by the majority-minority rule, all of the Federal Courts of Appeals that have interpreted the first *Gingles* factor have required a majority-minority standard. The plurality declines to depart from that uniform interpretation, which has stood for more than 20 years. Because this case does not involve allegations of intentional and wrongful conduct, the Court need not consider whether intentional discrimination affects the *Gingles* analysis. Pp. 1241 – 1246.

(b) Arguing for a less restrictive interpretation, petitioners point to § 2's guarantee that political processes be "equally open to participation" to protect minority voters' "opportunity ... to elect representatives of their choice," 42 U.S.C. § 1973(b), and assert that such "opportunit[ies]" occur in crossover districts and require protection. But petitioners emphasize the word "opportunity" at the expense of the word "equally." The statute does not protect any possible opportunity through which minority voters could work with other constituencies to elect their candidate of choice. Section 2 does not guarantee minority voters an electoral advantage. Minority groups in crossover districts have the same opportunity to elect their candidate as any other political group with the same relative voting strength. The majority-minority rule, furthermore, is not at odds with § 2's totality-of-the-circumstances test. See, *e.g., Growe, supra,* at 40, 113 S.Ct. 1075. Any doubt as to whether § 2 calls for this rule is resolved by applying the canon of constitutional avoidance to steer clear of serious constitutional concerns under the Equal Protection Clause. See *Clark v. Martinez,* 543 U.S. 371, 381–382, 125 S.Ct. 716, 160 L.Ed.2d 734. Such concerns would be ****1238** raised if § 2 were interpreted to require crossover districts throughout the Nation, thereby "unnecessarily infus[ing] race into virtually every redistricting." *LULAC, supra,* at 446, 126 S.Ct. 2594. Pp. 1246 – 1248.

(c) This holding does not consider the permissibility of crossover districts as a matter of legislative choice or discretion. Section 2 allows States to choose their own method of complying with the Voting Rights Act, which may include drawing crossover districts. See *Georgia v. Ashcroft,* 539 U.S. 461, 480–482, 123 S.Ct. 2498, 156 L.Ed.2d 428. Moreover, the holding should not be interpreted to entrench majority-minority districts by statutory command, for that, too, could pose constitutional concerns. See, *e.g., Miller v. Johnson,* 515 U.S. 900, 115 S.Ct. 2475, 132 L.Ed.2d 762. Such districts are only required if all three *Gingles* factors are met and if § 2 applies based on the totality of the circumstances. A claim similar to petitioners' assertion that the majority-minority rule is inconsistent with § 5 was rejected in *LULAC, supra,* at 446, 126 S.Ct. 2594. Pp. 1248 – 1250.

Justice THOMAS, joined by Justice SCALIA, adhered to his view in *Holder v. Hall,* 512 U.S. 874, 891, 893, 114 S.Ct. 2581, 129 L.Ed.2d 687 (opinion concurring in judgment), that the text of § 2 of the Voting Rights Act of 1965 does not authorize any vote dilution claim, regardless of the size of the minority population in a given district. The *Thornburg v. Gingles,* 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25, framework for analyzing such claims has no basis in § 2's text and "has produced ... a disastrous misadventure in judicial policymaking," *Holder, supra,* at 893, 114 S.Ct. 2581. P. 1250.

KENNEDY, J., announced the judgment of the Court and delivered an opinion, in which ROBERTS, C.J., and ALITO, J., joined. THOMAS, J., filed an opinion concurring in the judgment, in which SCALIA, J., joined, *post*, p. 1250. SOUTER, J., filed a dissenting opinion, in which STEVENS, GINSBURG, and BREYER, JJ., joined, *post*, pp. 1250 – 1260. GINSBURG, J., *post*, p. 1260, and BREYER, J., *post*, pp. 1260 – 1262, filed dissenting opinions.

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Opinion

Justice KENNEDY announced the judgment of the Court and delivered an opinion, in which THE CHIEF JUSTICE and Justice ALITO join.

***6** This case requires us to interpret § 2 of the Voting Rights Act of 1965, 79 Stat. 437, as amended, 42 U.S.C. § 1973 (2000 ed.). The question is whether the statute can be invoked to require state officials to draw election-district lines to allow a racial minority to join with other voters to elect the minority's candidate of choice, even where the racial minority is less than 50 percent of the voting-age population in the district to be drawn. To use election-law terminology: In a district that is not a majority-minority district, if a racial minority could elect its candidate of choice with support from crossover majority voters, can § 2 require the district to be drawn to accommodate this potential?

****1239** I

The case arises in a somewhat unusual posture. State authorities who created a district now invoke the Voting Rights ***7** Act as a defense. They argue that § 2 required them to draw the district in question in a particular way, despite state laws to the contrary. The state laws are provisions of the North Carolina Constitution that prohibit the General Assembly from dividing counties when drawing legislative districts for the State House and Senate. Art. II, §§ 3, 5. We will adopt the term used by the state courts and refer to both sections of the State Constitution as the Whole County Provision. See *Pender County v. Bartlett,* 361 N.C. 491, 493, 649 S.E.2d 364, 366 (2007) (case below).

It is common ground that state election-law requirements like the Whole County Provision may be superseded by federal law—for instance, the one-person, one-vote principle of the Equal Protection Clause of the United States Constitution. See *Reynolds v. Sims,* 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964). Here the question is whether § 2 of the Voting Rights Act requires district lines to be drawn that otherwise would violate the Whole County Provision. That, in turn, depends on how the statute is interpreted.

We begin with the election district. The North Carolina House of Representatives is the larger of the two chambers in the State's General Assembly. District 18 of that body lies in the southeastern part of North Carolina. Starting in 1991, the General Assembly drew District 18 to include portions of four counties, including Pender County, in order to create a district with a majority African–American voting-age population and to satisfy the Voting Rights Act. Following the 2000 census, the North Carolina Supreme Court, to comply with the Whole County Provision, rejected the General Assembly's first two statewide redistricting plans. See *Stephenson v. Bartlett,* 355 N.C. 354, 375, 562 S.E.2d 377, 392, stay denied, 535 U.S. 1301, 122 S.Ct. 1751, 152 L.Ed.2d 1015 (2002) (Rehnquist, C. J., in chambers); *Stephenson v. Bartlett,* 357 N.C. 301, 314, 582 S.E.2d 247, 254 (2003).

District 18 in its present form emerged from the General Assembly's third redistricting attempt, in 2003. By that ***8** time the African–American voting-age population had fallen below 50 percent in the district as then drawn, and the General Assembly no longer could draw a geographically compact majority-minority district. Rather than draw District 18 to keep Pender County whole, however, the General Assembly drew it by splitting portions of Pender and New Hanover counties. District 18 has an African–American voting-age population of 39.36 percent. App. 139. Had it left Pender County whole, the General Assembly could have drawn District 18 with an African–American voting-age population of 35.33 percent. *Id.,* at 73. The General Assembly's reason for splitting Pender County was to give African–American voters the potential to join with

majority voters to elect the minority group's candidate of its choice. *Ibid.* Failure to do so, state officials now submit, would have diluted the minority group's voting strength in violation of § 2.

In May 2004, Pender County and the five members of its board of commissioners filed the instant suit in North Carolina state court against the Governor of North Carolina, the Director of the State Board of Elections, and other state officials. The plaintiffs alleged that the 2003 plan violated the Whole County Provision by splitting Pender County into two House districts. *Id.*, at 5–14. The state-official defendants answered that dividing Pender County was required by § 2. *Id.,* at 25. As the trial court recognized, the procedural posture of ****1240** this case differs from most § 2 cases. Here the defendants raise § 2 as a defense. As a result, the trial court stated, they are "in the unusual position" of bearing the burden of proving that a § 2 violation would have occurred absent splitting Pender County to draw District 18. App. to Pet. for Cert. 90a.

The trial court first considered whether the defendant state officials had established the three threshold requirements for § 2 liability under *Thornburg v. Gingles,* 478 U.S. 30, 50–51, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986)—namely, (1) that the minority group "is sufficiently ***9** large and geographically compact to constitute a majority in a single-member district," (2) that the minority group is "politically cohesive," and (3) "that the white majority votes sufficiently as a bloc to enable it ... usually to defeat the minority's preferred candidate."

As to the first *Gingles* requirement, the trial court concluded that, although African–Americans were not a majority of the voting-age population in District 18, the district was a "de facto" majority-minority district because African–Americans could get enough support from crossover majority voters to elect the African–Americans' preferred candidate. The court ruled that African–Americans in District 18 were politically cohesive, thus satisfying the second requirement. And later, the plaintiffs stipulated that the third *Gingles* requirement was met. App. to Pet. for Cert. 102a–103a, 130a. The court then determined, based on the totality of the circumstances, that § 2 required the General Assembly to split Pender County. The court sustained the lines for District 18 on that rationale. *Id.,* at 116a–118a.

Three of the Pender County Commissioners appealed the trial court's ruling that the defendants had established the first *Gingles* requirement. The Supreme Court of North Carolina reversed. It held that a "minority group must constitute a numerical majority of the voting population in the area under consideration before Section 2 ... requires the creation of a legislative district to prevent dilution of the votes of that minority group." 361 N.C., at 502, 649 S.E.2d, at 371. On that premise the State Supreme Court determined District 18 was not mandated by § 2 because African–Americans do not "constitute a numerical majority of citizens of voting age." *Id.,* at 507, 649 S.E.2d, at 374. It ordered the General Assembly to redraw District 18. *Id.,* at 510, 649 S.E.2d, at 376.

We granted certiorari, 552 U.S. 1256, 128 S.Ct. 1648, 170 L.Ed.2d 352 (2008), and now affirm.

***10** II

Passage of the Voting Rights Act of 1965 was an important step in the struggle to end discriminatory treatment of minorities who seek to exercise one of the most fundamental rights of our citizens: the right to vote. Though the Act as a whole was the subject of debate and controversy, § 2 prompted little criticism. The likely explanation for its general acceptance is that, as first enacted, § 2 tracked, in part, the text of the Fifteenth Amendment. It prohibited practices "imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color." 79 Stat. 437; cf. U.S. Const., Amdt. 15 ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude"); see also S.Rep. No. 162, 89th Cong., 1st Sess., pt. 3, pp. 19–20 (1965). In *Mobile v. Bolden,* 446 U.S. 55, 60–61, 100 S.Ct. 1490, 64 L.Ed.2d 47 (1980), this Court held that § 2, as it ****1241** then read, "no more than elaborates upon ... the Fifteenth Amendment" and was "intended to have an effect no different from that of the Fifteenth Amendment itself."

In 1982, after the *Mobile* ruling, Congress amended § 2, giving the statute its current form. The original Act had employed an intent requirement, prohibiting only those practices "imposed or applied ... to deny or abridge" the right to vote. 79 Stat. 437. The amended version of § 2 requires consideration of effects, as it prohibits practices "imposed or applied ... in a manner which results in a denial or abridgment" of the right to vote. 96 Stat. 134, 42 U.S.C. § 1973(a) (2000 ed.). The 1982

amendments also added a subsection, § 2(b), providing a test for determining whether a § 2 violation has occurred. The relevant text of the statute now states:

> "(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or ***11** applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color [or membership in a language minority group], as provided in subsection (b) of this section.
>
> "(b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973.

This Court first construed the amended version of § 2 in *Thornburg v. Gingles,* 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986). In *Gingles,* the plaintiffs were African–American residents of North Carolina who alleged that multimember districts diluted minority voting strength by submerging black voters into the white majority, denying them an opportunity to elect a candidate of their choice. The Court identified three "necessary preconditions" for a claim that the use of multimember districts constituted actionable vote dilution under § 2:(1) The minority group must be "sufficiently large and geographically compact to constitute a majority in a single-member district," (2) the minority group must be "politically cohesive," and (3) the majority must vote "sufficiently as a bloc to enable it ... usually to defeat the minority's preferred candidate." *Id.,* at 50–51, 106 S.Ct. 2752.

The Court later held that the three *Gingles* requirements apply equally in § 2 cases involving single-member districts, such as a claim alleging vote dilution because a geographically compact minority group has been split between two or more single-member districts. *Growe v. Emison,* 507 U.S. 25, 40–41, 113 S.Ct. 1075, 122 L.Ed.2d 388 (1993). In a § 2 case, only when a party has established ***12** the *Gingles* requirements does a court proceed to analyze whether a violation has occurred based on the totality of the circumstances. *Gingles, supra,* at 79, 106 S.Ct. 2752; see also *Johnson v. De Grandy,* 512 U.S. 997, 1013, 114 S.Ct. 2647, 129 L.Ed.2d 775 (1994).

III

A

This case turns on whether the first *Gingles* requirement can be satisfied when the minority group makes up less than 50 percent of the voting-age population in the potential election district. The parties ****1242** agree on all other parts of the *Gingles* analysis, so the dispositive question is: What size minority group is sufficient to satisfy the first *Gingles* requirement?

At the outset the answer might not appear difficult to reach, for the *Gingles* Court said the minority group must "demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district." 478 U.S., at 50, 106 S.Ct. 2752. This would seem to end the matter, as it indicates the minority group must demonstrate it can constitute "a majority." But in *Gingles* and again in *Growe* the Court reserved what it considered to be a separate question—whether, "when a plaintiff alleges that a voting practice or procedure impairs a minority's ability to influence, rather than alter, election results, a showing of geographical compactness of a minority group not sufficiently large to constitute a majority will suffice." *Growe, supra,* at 41, n. 5, 113 S.Ct. 1075; see also *Gingles, supra,* at 46–47, n. 12, 106 S.Ct. 2752. The Court has since applied the *Gingles* requirements in § 2 cases but has declined to decide the minimum size minority group necessary to satisfy the first requirement. See *Voinovich v. Quilter,* 507 U.S. 146, 154, 113 S.Ct. 1149, 122 L.Ed.2d 500 (1993); *De Grandy, supra,* at 1009, 114 S.Ct. 2647; *League of United Latin American Citizens v. Perry,* 548 U.S. 399, 443, 126 S.Ct. 2594, 165 L.Ed.2d 609 (2006) *(LULAC)* (opinion of KENNEDY, J.). We must consider the minimum-size question in this case.

***13** It is appropriate to review the terminology often used to describe various features of election districts in relation to the requirements of the Voting Rights Act. In majority-minority districts, a minority group composes a numerical, working majority of the voting-age population. Under present doctrine, § 2 can require the creation of these districts. See, *e.g., Voinovich, supra,* at 154, 113 S.Ct. 1149 ("Placing black voters in a district in which they constitute a sizeable and therefore 'safe' majority ensures that they are able to elect their candidate of choice"); but see *Holder v. Hall,* 512 U.S. 874, 922–923, 114 S.Ct. 2581, 129 L.Ed.2d 687 (1994) (THOMAS, J., concurring in judgment). At the other end of the spectrum are influence districts, in which a minority group can influence the outcome of an election even if its preferred candidate cannot be elected. This Court has held that § 2 does not require the creation of influence districts. *LULAC, supra,* at 445, 126 S.Ct. 2594 (opinion of KENNEDY, J.).

The present case involves an intermediate type of district—a so-called crossover district. Like an influence district, a crossover district is one in which minority voters make up less than a majority of the voting-age population. But in a crossover district, the minority population, at least potentially, is large enough to elect the candidate of its choice with help from voters who are members of the majority and who cross over to support the minority's preferred candidate. 361 N.C., at 501–502, 649 S.E.2d, at 371 (case below). This Court has referred sometimes to crossover districts as "coalitional" districts, in recognition of the necessary coalition between minority and crossover majority voters. See *Georgia v. Ashcroft,* 539 U.S. 461, 483, 123 S.Ct. 2498, 156 L.Ed.2d 428 (2003); see also Pildes, Is Voting Rights Law Now at War With Itself? Social Science and Voting Rights in the 2000s, 80 N.C.L.Rev. 1517, 1539 (2002) (hereinafter Pildes). But that term risks confusion with coalition-district claims in which two minority groups form a coalition to elect the candidate of the coalition's choice. See, *e.g., Nixon v. Kent County,* 76 F.3d 1381, 1393 (C.A.6 1996) (en banc). We do not address ****1243** that type of coalition ***14** district here. The petitioners in the present case (the state officials who were the defendants in the trial court) argue that § 2 requires a crossover district, in which minority voters might be able to persuade some members of the majority to cross over and join with them.

Petitioners argue that although crossover districts do not include a numerical majority of minority voters, they still satisfy the first *Gingles* requirement because they are "effective minority districts." Under petitioners' theory keeping Pender County whole would have violated § 2 by cracking the potential crossover district that they drew as District 18. See *Gingles, supra,* at 46, n. 11, 106 S.Ct. 2752 (vote dilution "may be caused by the dispersal of blacks into districts in which they constitute an ineffective minority of voters"). So, petitioners contend, § 2 required them to override state law and split Pender County, drawing District 18 with an African–American voting-age population of 39.36 percent rather than keeping Pender County whole and leaving District 18 with an African–American voting-age population of 35.33 percent. We reject that claim.

First, we conclude, petitioners' theory is contrary to the mandate of § 2. The statute requires a showing that minorities "have less opportunity than other members of the electorate to ... elect representatives of their choice." 42 U.S.C. § 1973(b) (2000 ed.). But because they form only 39 percent of the voting-age population in District 18, African–Americans standing alone have no better or worse opportunity to elect a candidate than does any other group of voters with the same relative voting strength. That is, African–Americans in District 18 have the opportunity to join other voters—including other racial minorities, or whites, or both—to reach a majority and elect their preferred candidate. They cannot, however, elect that candidate based on their own votes and without assistance from others. Recognizing a § 2 claim in this circumstance would grant minority voters "a right to preserve their strength for the purposes ***15** of forging an advantageous political alliance." *Hall v. Virginia,* 385 F.3d 421, 431 (C.A.4 2004); see also *Voinovich,* 507 U.S., at 154, 113 S.Ct. 1149 (minorities in crossover districts "could not dictate electoral outcomes independently"). Nothing in § 2 grants special protection to a minority group's right to form political coalitions. "[M]inority voters are not immune from the obligation to pull, haul, and trade to find common political ground." *De Grandy,* 512 U.S., at 1020, 114 S.Ct. 2647.

Although the Court has reserved the question we confront today and has cautioned that the *Gingles* requirements "cannot be applied mechanically," *Voinovich, supra,* at 158, 113 S.Ct. 1149, the reasoning of our cases does not support petitioners' claims. Section 2 does not impose on those who draw election districts a duty to give minority voters the most potential, or the best potential, to elect a candidate by attracting crossover voters. In setting out the first requirement for § 2 claims, the *Gingles* Court explained that "[u]nless minority voters possess the *potential* to elect representatives in the absence of the challenged structure or practice, they cannot claim to have been injured by that structure or practice." 478 U.S., at 50, n. 17, 106 S.Ct. 2752. The *Growe* Court stated that the first *Gingles* requirement is "needed to establish that the minority has the potential to elect a representative of its own choice in some single-member district." 507 U.S., at 40, 113 S.Ct. 1075. Without such a showing, "there neither has been a wrong nor can be a remedy." *Id.,* at 41, 113 S.Ct. 1075. ****1244** There is a

difference between a racial minority group's "own choice" and the choice made by a coalition. In *Voinovich,* the Court stated that the first *Gingles* requirement "would have to be modified or eliminated" to allow crossover-district claims. 507 U.S., at 158, 113 S.Ct. 1149. Only once, in dicta, has this Court framed the first *Gingles* requirement as anything other than a majority-minority rule. See *De Grandy,* 512 U.S., at 1008, 114 S.Ct. 2647 (requiring "a sufficiently large minority population to elect candidates of its choice"). And in the same case, the Court rejected the proposition, inherent in petitioners' claim here, that § 2 entitles ***16** minority groups to the maximum possible voting strength:

> "[R]eading § 2 to define dilution as any failure to maximize tends to obscure the very object of the statute and to run counter to its textually stated purpose. One may suspect vote dilution from political famine, but one is not entitled to suspect (much less infer) dilution from mere failure to guarantee a political feast." *Id.,* at 1016–1017, 114 S.Ct. 2647.

Allowing crossover-district claims would require us to revise and reformulate the *Gingles* threshold inquiry that has been the baseline of our § 2 jurisprudence. Mandatory recognition of claims in which success for a minority depends upon crossover majority voters would create serious tension with the third *Gingles* requirement that the majority votes as a bloc to defeat minority-preferred candidates. It is difficult to see how the majority-bloc-voting requirement could be met in a district where, by definition, white voters join in sufficient numbers with minority voters to elect the minority's preferred candidate. (We are skeptical that the bloc-voting test could be satisfied here, for example, where minority voters in District 18 cannot elect their candidate of choice without support from almost 20 percent of white voters. We do not confront that issue, however, because for some reason respondents conceded the third *Gingles* requirement in state court.)

As the *Gingles* Court explained, "in the absence of significant white bloc voting it cannot be said that the ability of minority voters to elect their chosen representatives is inferior to that of white voters." 478 U.S., at 49, n. 15, 106 S.Ct. 2752. Were the Court to adopt petitioners' theory and dispense with the majority-minority requirement, the ruling would call in question the *Gingles* framework the Court has applied under § 2. See *LULAC,* 548 U.S., at 490, n. 8, 126 S.Ct. 2594. (SOUTER, J., concurring in part and dissenting in part) ("All aspects of our established analysis for majority-minority districts in *Gingles* and ***17** its progeny may have to be rethought in analyzing ostensible coalition districts"); cf. *Metts v. Murphy,* 363 F.3d 8, 12 (C.A.1 2004) (en banc) *(per curiam)* (allowing influence-district claim to survive motion to dismiss but noting "there is tension in this case for plaintiffs in any effort to satisfy both the first and third prong of *Gingles* ").

We find support for the majority-minority requirement in the need for workable standards and sound judicial and legislative administration. The rule draws clear lines for courts and legislatures alike. The same cannot be said of a less exacting standard that would mandate crossover districts under § 2. Determining whether a § 2 claim would lie—*i.e.,* determining whether potential districts could function as crossover districts—would place courts in the untenable position of predicting many political variables and tying them to race-based assumptions. The Judiciary would be directed to make predictions or adopt premises that even experienced polling ****1245** analysts and political experts could not assess with certainty, particularly over the long term. For example, courts would be required to pursue these inquiries: What percentage of white voters supported minority-preferred candidates in the past? How reliable would the crossover votes be in future elections? What types of candidates have white and minority voters supported together in the past and will those trends continue? Were past crossover votes based on incumbency and did that depend on race? What are the historical turnout rates among white and minority voters and will they stay the same? Those questions are speculative, and the answers (if they could be supposed) would prove elusive. A requirement to draw election districts on answers to these and like inquiries ought not to be inferred from the text or purpose of § 2. Though courts are capable of making refined and exacting factual inquiries, they "are inherently ill-equipped" to "make decisions based on highly political judgments" of the sort that crossover-district claims would require. *Holder,* 512 U.S., at 894, 114 S.Ct. 2581 ***18** THOMAS, J., concurring in judgment). There is an underlying principle of fundamental importance: We must be most cautious before interpreting a statute to require courts to make inquiries based on racial classifications and race-based predictions. The statutory mandate petitioners urge us to find in § 2 raises serious constitutional questions. See *infra,* at 1246 – 1248.

Heightening these concerns even further is the fact that § 2 applies nationwide to every jurisdiction that must draw lines for election districts required by state or local law. Crossover-district claims would require courts to make predictive political judgments not only about familiar, two-party contests in large districts but also about regional and local jurisdictions that often feature more than two parties or candidates. Under petitioners' view courts would face the difficult task of discerning crossover patterns in nonpartisan contests for a city commission, a school board, or a local water authority. The political data necessary to make such determinations are nonexistent for elections in most of those jurisdictions. And predictions would be

speculative at best given that, especially in the context of local elections, voters' personal affiliations with candidates and views on particular issues can play a large role.

Unlike any of the standards proposed to allow crossover-district claims, the majority-minority rule relies on an objective, numerical test: Do minorities make up more than 50 percent of the voting-age population in the relevant geographic area? That rule provides straightforward guidance to courts and to those officials charged with drawing district lines to comply with § 2. See *LULAC, supra,* at 485, 126 S.Ct. 2594 (opinion of SOUTER, J.) (recognizing need for "clear-edged rule"). Where an election district could be drawn in which minority voters form a majority but such a district is not drawn, or where a majority-minority district is cracked by assigning some voters elsewhere, then—assuming the other *Gingles* factors are also satisfied—denial of the opportunity to elect ***19** a candidate of choice is a present and discernible wrong that is not subject to the high degree of speculation and prediction attendant upon the analysis of crossover claims. Not an arbitrary invention, the majority-minority rule has its foundation in principles of democratic governance. The special significance, in the democratic process, of a majority means it is a special wrong when a minority group has 50 percent or more of the voting population and could constitute a compact voting majority but, despite racially polarized ****1246** bloc voting, that group is not put into a district.

Given the text of § 2, our cases interpreting that provision, and the many difficulties in assessing § 2 claims without the restraint and guidance provided by the majority-minority rule, no federal court of appeals has held that § 2 requires creation of coalition districts. Instead, all to consider the question have interpreted the first *Gingles* factor to require a majority-minority standard. See *Hall,* 385 F.3d, at 427–430 (C.A.4 2004), cert. denied, 544 U.S. 961, 125 S.Ct. 1725, 161 L.Ed.2d 602 (2005); *Valdespino v. Alamo Heights Independent School Dist.,* 168 F.3d 848, 852–853 (C.A.5 1999), cert. denied, 528 U.S. 1114, 120 S.Ct. 931, 145 L.Ed.2d 811 (2000); *Cousin v. Sundquist,* 145 F.3d 818, 828–829 (C.A.6 1998), cert. denied, 525 U.S. 1138, 119 S.Ct. 1026, 143 L.Ed.2d 37 (1999); *Sanchez v. Colorado,* 97 F.3d 1303, 1311–1312 (C.A.10 1996), cert. denied, 520 U.S. 1229, 117 S.Ct. 1820, 137 L.Ed.2d 1028 (1997); *Romero v. Pomona,* 883 F.2d 1418, 1424, n. 7, 1425–1426 (C.A.9 1989), overruled on other grounds, 914 F.2d 1136, 1141 (C.A.9 1990); *McNeil v. Springfield Park Dist.,* 851 F.2d 937, 947 (C.A.7 1988), cert. denied, 490 U.S. 1031, 109 S.Ct. 1769, 104 L.Ed.2d 204 (1989). Cf. *Metts, supra,* at 11 (expressing unwillingness "at the complaint stage to foreclose the *possibility* " of influence-district claims). We decline to depart from the uniform interpretation of § 2 that has guided federal courts and state and local officials for more than 20 years.

To be sure, the *Gingles* requirements "cannot be applied mechanically and without regard to the nature of the claim." *Voinovich,* 507 U.S., at 158, 113 S.Ct. 1149. It remains the rule, however, that a party asserting § 2 liability must show by a preponderance ***20** of the evidence that the minority population in the potential election district is greater than 50 percent. No one contends that the African–American voting-age population in District 18 exceeds that threshold. Nor does this case involve allegations of intentional and wrongful conduct. We therefore need not consider whether intentional discrimination affects the *Gingles* analysis. Cf. Brief for United States as *Amicus Curiae* 14 (evidence of discriminatory intent "tends to suggest that the jurisdiction is not providing an equal opportunity to minority voters to elect the representative of their choice, and it is therefore unnecessary to consider the majority-minority requirement before proceeding to the ultimate totality-of-the-circumstances analysis"); see also *Garza v. County of Los Angeles,* 918 F.2d 763, 771 (C.A.9 1990). Our holding does not apply to cases in which there is intentional discrimination against a racial minority.

B

In arguing for a less restrictive interpretation of the first *Gingles* requirement petitioners point to the text of § 2 and its guarantee that political processes be "equally open to participation" to protect minority voters' "opportunity ... to elect representatives of their choice." 42 U.S.C. § 1973(b) (2000 ed.). An "opportunity," petitioners argue, occurs in crossover districts as well as majority-minority districts; and these extended opportunities, they say, require § 2 protection.

But petitioners put emphasis on the word "opportunity" at the expense of the word "equally." The statute does not protect any possible opportunity or mechanism through which minority voters could work with other constituencies to elect their candidate of choice. Section 2 does not guarantee minority voters an electoral advantage. Minority groups in crossover districts cannot form a voting majority without crossover voters. In those districts minority voters have the same opportunity

to elect their candidate as any **1247 other political group with the same relative voting strength.

*21 The majority-minority rule, furthermore, is not at odds with § 2's totality-of-the-circumstances test. The Court in *De Grandy* confirmed "the error of treating the three *Gingles* conditions as exhausting the enquiry required by § 2." 512 U.S., at 1013, 114 S.Ct. 2647. Instead the *Gingles* requirements are preconditions, consistent with the text and purpose of § 2, to help courts determine which claims could meet the totality-of-the-circumstances standard for a § 2 violation. See *Growe,* 507 U.S., at 40, 113 S.Ct. 1075 (describing the "*Gingles* threshold factors").

To the extent there is any doubt whether § 2 calls for the majority-minority rule, we resolve that doubt by avoiding serious constitutional concerns under the Equal Protection Clause. See *Clark v. Martinez,* 543 U.S. 371, 381–382, 125 S.Ct. 716, 160 L.Ed.2d 734 (2005) (canon of constitutional avoidance is "a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts"). Of course, the "moral imperative of racial neutrality is the driving force of the Equal Protection Clause," and racial classifications are permitted only "as a last resort." *Richmond v. J.A. Croson Co.,* 488 U.S. 469, 518, 519, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989) (KENNEDY, J., concurring in part and concurring in judgment). "Racial classifications with respect to voting carry particular dangers. Racial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions; it threatens to carry us further from the goal of a political system in which race no longer matters—a goal that the Fourteenth and Fifteenth Amendments embody, and to which the Nation continues to aspire." *Shaw v. Reno,* 509 U.S. 630, 657, 113 S.Ct. 2816, 125 L.Ed.2d 511 (1993). If § 2 were interpreted to require crossover districts throughout the Nation, "it would unnecessarily infuse race into virtually every redistricting, raising serious constitutional questions." *LULAC,* 548 U.S., at 446, 126 S.Ct. 2594 (opinion of KENNEDY, J.); see also *Ashcroft,* 539 U.S., at 491, 123 S.Ct. 2498 (KENNEDY, J., concurring). That interpretation would result in a substantial increase in the number of mandatory *22 districts drawn with race as "the predominant factor motivating the legislature's decision." *Miller v. Johnson,* 515 U.S. 900, 916, 115 S.Ct. 2475, 132 L.Ed.2d 762 (1995).

On petitioners' view of the case courts and legislatures would need to scrutinize every factor that enters into districting to gauge its effect on crossover voting. Injecting this racial measure into the nationwide districting process would be of particular concern with respect to consideration of party registration or party influence. The easiest and most likely alliance for a group of minority voters is one with a political party, and some have suggested using minority voters' strength within a particular party as the proper yardstick under the first *Gingles* requirement. See, *e.g., LULAC, supra,* at 485–486, 126 S.Ct. 2594 (opinion of SOUTER, J.) (requiring only "that minority voters ... constitute a majority of those voting in the primary of ... the party tending to win in the general election"). That approach would replace an objective, administrable rule with a difficult "judicial inquiry into party rules and local politics" to determine whether a minority group truly "controls" the dominant party's primary process. McLoughlin, *Gingles* in Limbo: Coalitional Districts, Party Primaries and Manageable Vote Dilution Claims, 80 N.Y.U.L.Rev. 312, 349 (2005). More troubling still is the inquiry's **1248 fusion of race and party affiliation as a determinant when partisan considerations themselves may be suspect in the drawing of district lines. See *Vieth v. Jubelirer,* 541 U.S. 267, 317, 124 S.Ct. 1769, 158 L.Ed.2d 546 (2004) (STEVENS, J., dissenting); *id.,* at 316, 124 S.Ct. 1769 (KENNEDY, J., concurring in judgment); see also Pildes 1565 (crossover-district requirement would essentially result in political party "entitlement to ... a certain number of seats"). Disregarding the majority-minority rule and relying on a combination of race and party to presume an effective majority would involve the law and courts in a perilous enterprise. It would rest on judicial predictions, as a matter of law, that race and party would hold together as an effective majority over time—at least for the decennial apportionment *23 cycles and likely beyond. And thus would the relationship between race and party further distort and frustrate the search for neutral factors and principled rationales for districting.

Petitioners' approach would reverse the canon of avoidance. It invites the divisive constitutional questions that are both unnecessary and contrary to the purposes of our precedents under the Voting Rights Act. Given the consequences of extending racial considerations even further into the districting process, we must not interpret § 2 to require crossover districts.

C

Our holding that § 2 does not require crossover districts does not consider the permissibility of such districts as a matter of

legislative choice or discretion. Assuming a majority-minority district with a substantial minority population, a legislative determination, based on proper factors, to create two crossover districts may serve to diminish the significance and influence of race by encouraging minority and majority voters to work together toward a common goal. The option to draw such districts gives legislatures a choice that can lead to less racial isolation, not more. And as the Court has noted in the context of § 5 of the Voting Rights Act, "various studies have suggested that the most effective way to maximize minority voting strength may be to create more influence or [crossover] districts." *Ashcroft,* 539 U.S., at 482, 123 S.Ct. 2498. Much like § 5, § 2 allows States to choose their own method of complying with the Voting Rights Act, and we have said that may include drawing crossover districts. See *id.,* at 480–483, 123 S.Ct. 2498. When we address the mandate of § 2, however, we must note it is not concerned with maximizing minority voting strength, *De Grandy, supra*, at 1022, 114 S.Ct. 2647; and, as a statutory matter, § 2 does not mandate creating or preserving crossover districts.

Our holding also should not be interpreted to entrench majority-minority districts by statutory command, for that, ***24** too, could pose constitutional concerns. See *Miller v. Johnson, supra*; *Shaw v. Reno,* 509 U.S. 630. States that wish to draw crossover districts are free to do so where no other prohibition exists. Majority-minority districts are only required if all three *Gingles* factors are met and if § 2 applies based on a totality of the circumstances. In areas with substantial crossover voting it is unlikely that the plaintiffs would be able to establish the third *Gingles* precondition—bloc voting by majority voters. See *supra,* at 1244. In those areas majority-minority districts would not be required in the first place; and in the exercise of lawful discretion States could draw crossover districts as they deemed appropriate. See Pildes 1567 ("Districts could still be designed in such places that encouraged coalitions across racial lines, ****1249** but these districts would result from legislative choice, not ... obligation"). States can—and in proper cases should—defend against alleged § 2 violations by pointing to crossover voting patterns and to effective crossover districts. Those can be evidence, for example, of diminished bloc voting under the third *Gingles* factor or of equal political opportunity under the § 2 totality-of-the-circumstances analysis. And if there were a showing that a State intentionally drew district lines in order to destroy otherwise effective crossover districts, that would raise serious questions under both the Fourteenth and Fifteenth Amendments. See *Reno v. Bossier Parish School Bd.,* 520 U.S. 471, 481–482, 117 S.Ct. 1491, 137 L.Ed.2d 730 (1997); Brief for United States as *Amicus Curiae* 13–14. There is no evidence of discriminatory intent in this case, however. Our holding recognizes only that there is no support for the claim that § 2 can require the creation of crossover districts in the first instance.

Petitioners claim the majority-minority rule is inconsistent with § 5, but we rejected a similar argument in *LULAC,* 548 U.S., at 446, 126 S.Ct. 2594 (opinion of KENNEDY, J.). The inquiries under §§ 2 and 5 are different. Section 2 concerns minority ***25** groups' opportunity "to elect representatives of their choice," 42 U.S.C. § 1973(b) (2000 ed.), while the more stringent § 5 asks whether a change has the purpose or effect of "denying or abridging the right to vote," § 1973c. See *LULAC, supra,* at 446, 126 S.Ct. 2594; *Bossier Parish, supra,* at 476–480, 117 S.Ct. 1491. In *LULAC,* we held that although the presence of influence districts is relevant for the § 5 retrogression analysis, "the lack of such districts cannot establish a § 2 violation." 548 U.S., at 446, 126 S.Ct. 2594 (opinion of KENNEDY, J.); see also *Ashcroft,* 539 U.S., at 482–483, 123 S.Ct. 2498. The same analysis applies for crossover districts: Section 5 "leaves room" for States to employ crossover districts, *id.,* at 483, 123 S.Ct. 2498, but § 2 does not require them.

IV

Some commentators suggest that racially polarized voting is waning—as evidenced by, for example, the election of minority candidates where a majority of voters are white. See Note, The Future of Majority–Minority Districts in Light of Declining Racially Polarized Voting, 116 Harv. L.Rev. 2208, 2209 (2003); see also *id.,* at 2216–2222; Pildes 1529–1539; Bullock & Dunn, The Demise of Racial Districting and the Future of Black Representation, 48 Emory L.J. 1209 (1999). Still, racial discrimination and racially polarized voting are not ancient history. Much remains to be done to ensure that citizens of all races have equal opportunity to share and participate in our democratic processes and traditions; and § 2 must be interpreted to ensure that continued progress.

It would be an irony, however, if § 2 were interpreted to entrench racial differences by expanding a "statute meant to hasten the waning of racism in American politics." *De Grandy,* 512 U.S., at 1020, 114 S.Ct. 2647. Crossover districts are, by definition, the result of white voters joining forces with minority voters to elect their preferred candidate. The Voting Rights Act was passed to foster this cooperation. We decline now to expand the reaches of § 2 to require, by force of ***26** law, the

voluntary cooperation our society has achieved. Only when a geographically compact group of minority voters could form a majority in a single-member district has the first *Gingles* requirement been met.

****1250** The judgment of the Supreme Court of North Carolina is affirmed.

It is so ordered.

Justice THOMAS, with whom Justice SCALIA joins, concurring in the judgment.

I continue to adhere to the views expressed in my opinion in *Holder v. Hall,* 512 U.S. 874, 891, 114 S.Ct. 2581, 129 L.Ed.2d 687 (1994) (opinion concurring in judgment). The text of § 2 of the Voting Rights Act of 1965 does not authorize any vote dilution claim, regardless of the size of the minority population in a given district. See 42 U.S.C. § 1973(a) (2000 ed.) (permitting only a challenge to a "voting qualification or prerequisite to voting or standard, practice, or procedure"); see also *Holder, supra,* at 893, 114 S.Ct. 2581 (stating that the terms " 'standard, practice, or procedure' " "reach only state enactments that limit citizens' access to the ballot"). I continue to disagree, therefore, with the framework set forth in *Thornburg v. Gingles,* 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986), for analyzing vote dilution claims because it has no basis in the text of § 2. I would not evaluate any Voting Rights Act claim under a test that "has produced such a disastrous misadventure in judicial policymaking." *Holder, supra,* at 893, 114 S.Ct. 2581. For these reasons, I concur only in the judgment.

Justice SOUTER, with whom Justice STEVENS, Justice GINSBURG, and Justice BREYER join, dissenting.

The question in this case is whether a minority with under 50% of the voting population of a proposed voting district can ever qualify under § 2 of the Voting Rights Act of 1965(VRA) as residents of a putative district whose minority voters ***27** would have an opportunity "to elect representatives of their choice." 42 U.S.C. § 1973(b) (2000 ed.). If the answer is no, minority voters in such a district will have no right to claim relief under § 2 from a statewide districting scheme that dilutes minority voting rights. I would hold that the answer in law as well as in fact is sometimes yes: a district may be a minority-opportunity district so long as a cohesive minority population is large enough to elect its chosen candidate when combined with a reliable number of crossover voters from an otherwise polarized majority.

In the plurality's view, only a district with a minority population making up 50% or more of the citizen voting age population (CVAP) can provide a remedy to minority voters lacking an opportunity "to elect representatives of their choice." This is incorrect as a factual matter if the statutory phrase is given its natural meaning; minority voters in districts with minority populations under 50% routinely "elect representatives of their choice." The effects of the plurality's unwillingness to face this fact are disturbing by any measure and flatly at odds with the obvious purpose of the VRA. If districts with minority populations under 50% can never count as minority-opportunity districts to remedy a violation of the States' obligation to provide equal electoral opportunity under § 2, States will be required under the plurality's rule to pack black voters into additional majority-minority districts, contracting the number of districts where racial minorities are having success in transcending racial divisions in securing their preferred representation. The object of the VRA will now be promoting racial blocs, and the role of race in districting decisions as a proxy for political identification will be heightened by any measure.

I

Recalling the basic premises of vote-dilution claims under § 2 will show just ****1251** how far astray the plurality has gone. ***28** Section 2 of the VRA prohibits districting practices that "resul[t] in a denial or abridgement of the right of any citizen of the United States to vote on account of race." 42 U.S.C. § 1973(a). A denial or abridgment is established if, "based on the totality of circumstances," it is shown that members of a racial minority "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." § 1973(b).

Since § 2 was amended in 1982, 96 Stat. 134, we have read it to prohibit practices that result in "vote dilution," see *Thornburg v. Gingles,* 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986), understood as distributing politically cohesive minority voters through voting districts in ways that reduce their potential strength. See *id.,* at 47–48, 106 S.Ct. 2752. There are two classic patterns. Where voting is racially polarized, a districting plan can systemically discount the minority vote either "by the dispersal of blacks into districts in which they constitute an ineffective minority of voters" or from "the concentration of blacks into districts where they constitute an excessive majority," so as to eliminate their influence in neighboring districts. *Id.,* at 46, n. 11, 106 S.Ct. 2752. Treating dilution as a remediable harm recognizes that § 2 protects not merely the right of minority voters to put ballots in a box, but to claim a fair number of districts in which their votes can be effective. See *id.,* at 47, 106 S.Ct. 2752.

Three points follow. First, to speak of a fair chance to get the representation desired, there must be an identifiable baseline for measuring a group's voting strength. *Id.,* at 88, 106 S.Ct. 2752 (O'Connor, J., concurring in judgment) ("In order to evaluate a claim that a particular multimember district or single-member district has diluted the minority group's voting strength to a degree that violates § 2, ... it is ... necessary to construct a measure of 'undiluted' minority voting strength"). Several baselines can be imagined; one could, for example, compare a minority's voting strength under a particular districting plan with the maximum strength possible ***29** under any alternative.[1] Not surprisingly, we have conclusively rejected this approach; the VRA was passed to guarantee minority voters a fair game, not a killing. See *Johnson v. De Grandy,* 512 U.S. 997, 1016–1017, 114 S.Ct. 2647, 129 L.Ed.2d 775 (1994). We have held that the better baseline for measuring opportunity to elect under § 2, although not dispositive, is the minority's rough proportion of the relevant population. *Id.,* at 1013–1023, 114 S.Ct. 2647. Thus, in assessing § 2 claims under a totality of the circumstances, including the facts of history and geography, the starting point is a comparison of the number of districts where minority voters can elect their chosen candidate with the group's population percentage. *Ibid.;* see also ****1252** *League of United Latin American Citizens v. Perry,* 548 U.S. 399, 436, 126 S.Ct. 2594, 165 L.Ed.2d 609 (2006) *(LULAC)* ("We proceed now to the totality of the circumstances, and first to the proportionality inquiry, comparing the percentage of total districts that are [minority] opportunity districts with the [minority] share of the citizen voting-age population").[2]

***30** Second, the significance of proportionality means that a § 2 claim must be assessed by looking at the overall effect of a multidistrict plan. A State with one congressional seat cannot dilute a minority's congressional vote, and only the systemic submergence of minority votes where a number of single-member districts could be drawn can be treated as harm under § 2. So a § 2 complaint must look to an entire districting plan (normally, statewide), alleging that the challenged plan creates an insufficient number of minority-opportunity districts in the territory as a whole. See *id.,* at 436–437, 126 S.Ct. 2594.

Third, while a § 2 violation ultimately results from the dilutive effect of a districting plan as a whole, a § 2 plaintiff must also be able to place himself in a reasonably compact district that could have been drawn to improve upon the plan actually selected. See, *e.g., De Grandy, supra,* at 1001–1002, 114 S.Ct. 2647. That is, a plaintiff must show both an overall deficiency and a personal injury open to redress.

Our first essay at understanding these features of statutory vote dilution was *Thornburg v. Gingles,* which asked whether a multimember district plan for choosing representatives by at-large voting deprived minority voters of an equal opportunity to elect their preferred candidates. In answering, we set three now-familiar conditions that a § 2 claim must meet at the threshold before a court will analyze it under the totality of circumstances:

> "First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district .... Second, the minority group must be able to show that it is politically cohesive .... Third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it ... usually to defeat the minority's preferred candidate." 478 U.S., at 50–51, 106 S.Ct. 2752.

***31** As we have emphasized over and over, the *Gingles* conditions do not state the ultimate standard under § 2, nor could they, since the totality of the circumstances standard has been set explicitly by Congress. See *LULAC, supra,* at 425–426, 126

S.Ct. 2594; *De Grandy, supra,* at 1011, 114 S.Ct. 2647. Instead, each condition serves as a gatekeeper, ensuring that a plaintiff who proceeds to plenary review has a real chance to show a redressable violation of the ultimate § 2 standard. The third condition, majority racial bloc voting, is necessary to establish the premise of vote-dilution claims: that the minority as a whole is placed at a disadvantage owing to race, not the happenstance of independent politics. *Gingles,* 478 U.S., at 51, 106 S.Ct. 2752. The second, minority cohesion, is there to show that minority voters will vote together to elect a distinct representative of choice. *Ibid*. And the ****1253** first, a large and geographically compact minority population, is the condition for demonstrating that a dilutive plan injures the § 2 plaintiffs by failing to draw an available remedial district that would give them a chance to elect their chosen candidate. *Growe v. Emison,* 507 U.S. 25, 40–41, 113 S.Ct. 1075, 122 L.Ed.2d 388 (1993); *Gingles, supra,* at 50, 106 S.Ct. 2752.

II

Though this case arose under the Constitution of North Carolina, the dispositive issue is one of federal statutory law: whether a district with a minority population under 50%, but large enough to elect its chosen candidate with the help of majority voters disposed to support the minority favorite, can ever count as a district where minority voters have the opportunity "to elect representatives of their choice" for purposes of § 2. I think it clear from the nature of a vote-dilution claim and the text of § 2 that the answer must be yes. There is nothing in the statutory text to suggest that Congress meant to protect minority opportunity to elect solely by the creation of majority-minority districts. See *Voinovich v. Quilter,* 507 U.S. 146, 155, 113 S.Ct. 1149, 122 L.Ed.2d 500 (1993) ("[Section 2] ***32** says nothing about majority-minority districts"). On the contrary, § 2 "focuses exclusively on the consequences of apportionment," *ibid.,* as Congress made clear when it explicitly prescribed the ultimate functional approach: a totality of the circumstances test. See 42 U.S.C. § 1973(b) ("[a] violation ... is established if, based on the totality of circumstances, it is shown ..."). And a functional analysis leaves no doubt that crossover districts vindicate the interest expressly protected by § 2: the opportunity to elect a desired representative.

It has been apparent from the moment the Court first took up § 2 that no reason exists in the statute to treat a crossover district as a less legitimate remedy for dilution than a majority-minority one (let alone to rule it out). See *Gingles, supra,* at 90, n. 1, 106 S.Ct. 2752 (O'Connor, J., concurring in judgment) ("[I]f a minority group that is not large enough to constitute a voting majority in a single-member district can show that white support would probably ... enable the election of the candidates its members prefer, that minority group would appear to have demonstrated that, at least under this measure of its voting strength, it would be able to elect some candidates of its choice"); see also Pildes, Is Voting–Rights Law Now at War With Itself? Social Science and Voting Rights in the 2000s, 80 N.C.L.Rev. 1517, 1553 (2002) (hereinafter Pildes) ("What should be so magical, then, about whether there are enough black voters to become a formal majority so that a conventional 'safe' district can be created? If a safe and a coalitional district have the same probability of electing a black candidate, are they not functionally identical, by definition, with respect to electing such candidates?").

As these earlier comments as much as say, whether a district with a minority population under 50% of the CVAP may redress a violation of § 2 is a question of fact with an obvious answer: of course minority voters constituting less than 50% of the voting population can have an opportunity to elect the ***33** candidates of their choice, as amply shown by empirical studies confirming that such minority groups regularly elect their preferred candidates with the help of modest crossover by members of the majority. See, *e.g., id.,* at 1531–1534, 1538. The North Carolina Supreme Court, for example, determined that voting districts with a black voting age population of as little as 38.37% have an opportunity to elect black candidates, ****1254** *Pender Cty. v. Bartlett,* 361 N.C. 491, 494–495, 649 S.E.2d 364, 366–367 (2007), a factual finding that has gone unchallenged and is well supported by electoral results in North Carolina. Of the nine House districts in which blacks make up more than 50% of the voting age population (VAP), all but two elected a black representative in the 2004 election. See App. 109. Of the 12 additional House districts in which blacks are over 39% of the VAP, all but one elected a black representative in the 2004 election. *Ibid*. It would surely surprise legislators in North Carolina to suggest that black voters in these 12 districts cannot possibly have an opportunity to "elect [the] representatives of their choice."

It is of course true that the threshold population sufficient to provide minority voters with an opportunity to elect their

candidates of choice is elastic, and the proportions will likely shift in the future, as they have in the past. See Pildes 1527–1532 (explaining that blacks in the 1980s required well over 50% of the population in a district to elect the candidates of their choice, but that this number has gradually fallen to well below 50%); *id.,* at 1527, n. 26 (stating that some courts went so far as to refer to 65% "as a 'rule of thumb' for the black population required to constitute a safe district"). That is, racial polarization has declined, and if it continues downward the first *Gingles* condition will get easier to satisfy.

But this is no reason to create an arbitrary threshold; the functional approach will continue to allow dismissal of claims for districts with minority populations too small to demonstrate ***34** an ability to elect, and with "crossovers" too numerous to allow an inference of vote dilution in the first place. No one, for example, would argue based on the record of experience in this case that a district with a 25% black population would meet the first *Gingles* condition. And the third *Gingles* requirement, majority-bloc voting, may well provide an analytical limit to claims based on crossover districts. See *LULAC,* 548 U.S., at 490, n. 8, 126 S.Ct. 2594 (SOUTER, J., concurring in part and dissenting in part) (noting the interrelationship of the first and third *Gingles* factors); see also *post,* at 1260 – 1262 (BREYER, J., dissenting) (looking to the third *Gingles* condition to suggest a mathematical limit to the minority population necessary for a cognizable crossover district). But whatever this limit may be, we have no need to set it here, since the respondent state officials have stipulated to majority-bloc voting, App. to Pet. for Cert. 130a. In sum, § 2 addresses voting realities, and for practical purposes a 39%-minority district in which we know minorities have the potential to elect their preferred candidate is every bit as good as a 50%-minority district.

In fact, a crossover district is better. Recognizing crossover districts has the value of giving States greater flexibility to draw districting plans with a fair number of minority-opportunity districts, and this in turn allows for a beneficent reduction in the number of majority-minority districts with their "quintessentially race-conscious calculus," *De Grandy,* 512 U.S., at 1020, 114 S.Ct. 2647, thereby moderating reliance on race as an exclusive determinant in districting decisions, cf. *Shaw v. Reno,* 509 U.S. 630, 113 S.Ct. 2816, 125 L.Ed.2d 511 (1993). See also Pildes 1547–1548 ("In contrast to the Court's concerns with bizarrely designed safe districts, it is hard to see how coalitional districts could 'convey the message that political identity is, or should be, predominantly racial.' ... Coalitional districts would seem to encourage and require a kind of integrative, cross-racial political alliance that might be thought consistent with, even the very ideal of, both the VRA and the U.S. Constitution" (quoting ****1255** *Bush v. Vera,* 517 U.S. 952, 980, 116 S.Ct. 1941, 135 L.Ed.2d 248 (1996))). A crossover ***35** is thus superior to a majority-minority district precisely because it requires polarized factions to break out of the mold and form the coalitions that discourage racial divisions.

III

A

The plurality's contrary conclusion that § 2 does not recognize a crossover claim is based on a fundamental misunderstanding of vote-dilution claims, a mistake epitomized in the following assessment of the crossover district in question:

> "[B]ecause they form only 39 percent of the voting-age population in District 18, African–Americans standing alone have no better or worse opportunity to elect a candidate than does any other group of voters with the same relative voting strength [in District 18]." *Ante,* at 1242 – 1243.

See also *ante,* at 1246 ("[In crossover districts,] minority voters have the same opportunity to elect their candidate as any other political group with the same relative voting strength").

The claim that another political group in a particular district might have the same relative voting strength as the minority if it

had the same share of the population takes the form of a tautology: the plurality simply looks to one district and says that a 39% group of blacks is no worse off than a 39% group of whites would be. This statement might be true, or it might not be, and standing alone it demonstrates nothing.

Even if the two 39% groups were assumed to be comparable in fact because they will attract sufficient crossover (and so should be credited with satisfying the first *Gingles* condition), neither of them could prove a § 2 violation without looking beyond the 39% district and showing a disproportionately small potential for success in the State's overall configuration of districts. As this Court has explained before, the ultimate question in a § 2 case (that is, whether the ***36** minority group in question is being denied an equal opportunity to participate and elect) can be answered only by examining the broader pattern of districts to see whether the minority is being denied a roughly proportionate opportunity. See *LULAC, supra,* at 436–437, 126 S.Ct. 2594. Hence, saying one group's 39% equals another's, even if true in particular districts where facts are known, does not mean that either, both, or neither group could show a § 2 violation. The plurality simply fails to grasp that an alleged § 2 violation can only be proved or disproved by looking statewide.

B

The plurality's more specific justifications for its counterfactual position are no more supportable than its 39% tautology.

1

The plurality seems to suggest that our prior cases somehow require its conclusion that a minority population under 50% will never support a § 2 remedy, emphasizing that *Gingles* spoke of a majority and referred to the requirement that minority voters have " 'the *potential* to elect' " their chosen representatives. *Ante,* at 1243 (quoting *Gingles,* 478 U.S., at 50, n. 17, 106 S.Ct. 2752). It is hard to know what to make of this point since the plurality also concedes that we have explicitly and repeatedly reserved decision on today's question. See *LULAC, supra*, at 443, 126 S.Ct. 2594 (plurality opinion); *De Grandy, supra*, at 1009, 114 S.Ct. 2647; *Voinovich,* 507 U.S., at 154, 113 S.Ct. 1149; *Growe,* 507 U.S., at 41, n. 5, 113 S.Ct. 1075; *Gingles, supra,* at 46–47, n. 12, 106 S.Ct. 2752. In fact, in our more recent cases applying ****1256** § 2, Court majorities have formulated the first *Gingles* prong in a way more consistent with a functional approach. See *LULAC, supra,* at 430, 126 S.Ct. 2594 ("[I]n the context of a challenge to the drawing of district lines, 'the first *Gingles* condition requires the possibility of creating more than the existing number of reasonably compact districts with a sufficiently large minority population to elect candidates of its choice' " (quoting ***37** *De Grandy, supra,* at 1008, 114 S.Ct. 2647)). These Court majorities get short shrift from today's plurality.

In any event, even if we ignored *Gingles'*s reservation of today's question and looked to *Gingles'*s "*potential* to elect" as if it were statutory text, I fail to see how that phrase dictates that a minority's ability to compete must be singlehanded in order to count under § 2. As explained already, a crossover district serves the same interest in obtaining representation as a majority-minority district; the potential of 45% with a 6% crossover promises the same result as 51% with no crossover, and there is nothing in the logic of § 2 to allow a distinction between the two types of district.

In fact, the plurality's distinction is artificial on its own terms. In the past, when black voter registration and black voter turnout were relatively low, even black voters with 55% of a district's CVAP would have had to rely on crossover voters to elect their candidate of choice. See Pildes 1527–1528. But no one on this Court (and, so far as I am aware, any other court addressing it) ever suggested that reliance on crossover voting in such a district rendered minority success any less significant under § 2, or meant that the district failed to satisfy the first *Gingles* factor. Nor would it be any answer to say that black

voters in such a district, assuming unrealistic voter turnout, theoretically had the "potential" to elect their candidate without crossover support; that would be about as relevant as arguing in the abstract that a black CVAP of 45% is potentially successful, on the assumption that black voters could turn out en masse to elect the candidate of their choice without reliance on crossovers if enough majority voters stay home.

2

The plurality is also concerned that recognizing the "potential" of anything under 50% would entail an exponential expansion of special minority districting; the plurality goes so far as to suggest that recognizing crossover districts as possible minority-opportunity districts would inherently "entitl[e] ***38** minority groups to the maximum possible voting strength." *Ante,* at 1244. But this conclusion again reflects a confusion of the gatekeeping function of the *Gingles* conditions with the ultimate test for relief under § 2. See *ante,* at 1242 – 1243 ("African–Americans standing alone have no better or worse opportunity to elect a candidate than does any other group of voters with the same relative voting strength").

As already explained, *supra,* at 1252 – 1253, the mere fact that all threshold *Gingles* conditions could be met and a district could be drawn with a minority population sufficiently large to elect the candidate of its choice does not require drawing such a district. This case simply is about the first *Gingles* condition, not about the number of minority-opportunity districts needed under § 2, and accepting Bartlett's position would in no way imply an obligation to maximize districts with minority voter potential. Under any interpretation of the first *Gingles* factor, the State must draw districts in a way that provides minority voters with a fair number of districts in ****1257** which they have an opportunity to elect candidates of their choice; the only question here is which districts will count toward that total.

3

The plurality's fear of maximization finds a parallel in the concern that treating crossover districts as minority-opportunity districts would "create serious tension" with the third *Gingles* prerequisite of majority-bloc voting. *Ante,* at 1244. The plurality finds "[i]t ... difficult to see how the majority-bloc-voting requirement could be met in a district where, by definition, white voters join in sufficient numbers with minority voters to elect the minority's preferred candidate." *Ibid.*

It is not difficult to see. If a minority population with 49% of the CVAP can elect the candidate of its choice with crossover by 2% of white voters, the minority "by definition" relies on white support to elect its preferred candidate. But this fact alone would raise no doubt, as a matter of definition ***39** or otherwise, that the majority-bloc-voting requirement could be met, since as much as 98% of the majority may have voted against the minority's candidate of choice. As explained above, *supra,* at 1254, the third *Gingles* condition may well impose an analytical floor to the minority population and a ceiling on the degree of crossover allowed in a crossover district; that is, the concept of majority-bloc voting requires that majority voters tend to stick together in a relatively high degree. The precise standard for determining majority-bloc voting is not at issue in this case, however; to refute the plurality's 50% rule, one need only recognize that racial cohesion of 98% would be bloc voting by any standard.[3]

4

The plurality argues that qualifying crossover districts as minority-opportunity districts would be less administrable than demanding 50%, forcing courts to engage with the various factual and predictive questions that would come up in determining what percentage of majority voters would provide the voting minority with a chance at electoral success. *Ante,* at 1244 – 1245. But claims based on a State's failure to draw majority-minority districts raise the same issues of judicial judgment; even when the 50% threshold is satisfied, a court will still have to engage in factually messy enquiries about ***40** the "potential" such a district may afford, the degree of minority cohesion and majority-bloc voting, and the existence of vote dilution under a totality of the circumstances. See *supra,* at 1252 – 1253, 1254. The plurality's rule, therefore, conserves an uncertain amount of judicial resources, and only at the expense of ignoring a class of § 2 claims that this Court has no authority to strike from the statute's coverage.

5

The plurality again misunderstands the nature of § 2 in suggesting that its rule ****1258** does not conflict with what the Court said in *Georgia v. Ashcroft,* 539 U.S. 461, 480–482, 123 S.Ct. 2498, 156 L.Ed.2d 428 (2003): that crossover districts count as minority-opportunity districts for the purpose of assessing whether minorities have the opportunity "to elect their preferred candidates of choice" under § 5 of the VRA, 42 U.S.C. § 1973c(b) (2006 ed.). While the plurality is, of course, correct that there are differences between the enquiries under §§ 2 and 5, *ante,* at 1249, those differences do not save today's decision from inconsistency with the prior pronouncement. A districting plan violates § 5 if it diminishes the ability of minority voters to "elect their preferred candidates of choice," § 1973c(b), as measured against the minority's previous electoral opportunity, *Ashcroft, supra,* at 477, 123 S.Ct. 2498. A districting plan violates § 2 if it diminishes the ability of minority voters to "elect representatives of their choice," 42 U.S.C. § 1973(b) (2000 ed.), as measured under a totality of the circumstances against a baseline of rough proportionality. It makes no sense to say that a crossover district counts as a minority-opportunity district when comparing the past and the present under § 5, but not when comparing the present and the possible under § 2.

6

Finally, the plurality tries to support its insistence on a 50% threshold by invoking the policy of constitutional avoidance, which calls for construing a statute so as to avoid a ***41** possibly unconstitutional result. The plurality suggests that allowing a lower threshold would "require crossover districts throughout the Nation," *ante,* at 1247, thereby implicating the principle of *Shaw v. Reno* that districting with an excessive reliance on race is unconstitutional ("excessive" now being equated by the plurality with the frequency of creating opportunity districts). But the plurality has it precisely backwards. A State will inevitably draw some crossover districts as the natural byproduct of districting based on traditional factors. If these crossover districts count as minority-opportunity districts, the State will be much closer to meeting its § 2 obligation without any reference to race, and fewer minority-opportunity districts will, therefore, need to be created purposefully. But if, as a matter of law, only majority-minority districts provide a minority seeking equality with the opportunity to elect its preferred candidates, the State will have much further to go to create a sufficient number of minority-opportunity districts, will be required to bridge this gap by creating exclusively majority-minority districts, and will inevitably produce a districting plan that reflects a greater focus on race. The plurality, however, seems to believe that any reference to race in districting poses a constitutional concern, even a State's decision to reduce racial blocs in favor of crossover districts. A judicial position with these consequences is not constitutional avoidance.

IV

More serious than the plurality opinion's inconsistency with prior cases construing § 2 is the perversity of the results it portends. Consider the effect of the plurality's rule on North Carolina's districting scheme. Black voters make up approximately 20% of North Carolina's VAP[4] and are distributed ***42** throughout 120 State ****1259** House districts, App. to Pet. for Cert. 58a. As noted before, black voters constitute more than 50% of the VAP in 9 of these districts and over 39% of the VAP in an additional 12. *Supra,* at 1253 – 1254. Under a functional approach to § 2, black voters in North Carolina have an opportunity to elect (and regularly do elect) the representative of their choice in as many as 21 House districts, or 17.5% of North Carolina's total districts. See App. 109–110. North Carolina's districting plan is therefore close to providing black voters with proportionate electoral opportunity. According to the plurality, however, the remedy of a crossover district cannot provide opportunity to minority voters who lack it, and the requisite opportunity must therefore be lacking for minority voters already living in districts where they must rely on crossover. By the plurality's reckoning, then, black voters have an opportunity to elect representatives of their choice in, at most, nine North Carolina House districts. See *ibid*. In the plurality's view, North Carolina must have a long way to go before it satisfies the § 2 requirement of equal electoral opportunity.[5]

***43** A State like North Carolina faced with the plurality's opinion, whether it wants to comply with § 2 or simply to avoid litigation, will, therefore, have no reason to create crossover districts. Section 2 recognizes no need for such districts, from which it follows that they can neither be required nor be created to help the State meet its obligation of equal electoral opportunity under § 2. And if a legislature were induced to draw a crossover district by the plurality's encouragement to create them voluntarily, *ante,* at 1249 – 1250, it would open itself to attack by the plurality based on the pointed suggestion that a policy favoring crossover districts runs counter to *Shaw*. The plurality has thus boiled § 2 down to one option: the best way to avoid suit under § 2, and the only way to comply with § 2, is by drawing district lines in a way that packs minority voters into majority-minority districts, probably eradicating crossover districts in the process.

Perhaps the plurality recognizes this aberrant implication, for it eventually attempts to disavow it. It asserts that "§ 2 allows States to choose their own method of complying with the Voting Rights Act, and we have said that may include drawing crossover districts.... [But] § 2 does not mandate creating or preserving crossover districts." *Ante,* at 1248. See also, *ante,* at 1249 (crossover districts "can be evidence ... of equal political opportunity ..."). But this is judicial fiat, not legal reasoning; the plurality does not even attempt to explain how a crossover district can be a minority-opportunity district when assessing the compliance of a districting plan with § 2, but cannot be one when sought as a remedy to a § 2 violation. The plurality cannot have it both ways. If voluntarily drawing a crossover ****1260** district brings a State into compliance with § 2, then requiring creation of a crossover district must be a way to remedy a violation of § 2, and eliminating a crossover district must in some cases take a State out of compliance with the statute. And when the elimination of a crossover district does cause a violation of ***44** § 2, I cannot fathom why a voter in that district should not be able to bring a claim to remedy it.

In short, to the extent the plurality's holding is taken to control future results, the plurality has eliminated the protection of § 2 for the districts that best vindicate the goals of the statute, and has done all it can to force the States to perpetuate racially concentrated districts, the quintessential manifestations of race consciousness in American politics.

I respectfully dissent.

Justice GINSBURG, dissenting.

I join Justice SOUTER's powerfully persuasive dissenting opinion, and would make concrete what is implicit in his exposition. The plurality's interpretation of § 2 of the Voting Rights Act of 1965 is difficult to fathom and severely

undermines the statute's estimable aim. Today's decision returns the ball to Congress' court. The Legislature has just cause to clarify beyond debate the appropriate reading of § 2.

Justice BREYER, dissenting.

I join Justice SOUTER's opinion in full. I write separately in light of the plurality's claim that a bright-line 50% rule (used as a *Thornburg v. Gingles,* 478 U.S. 30 (1986), gateway) serves administrative objectives. In the plurality's view, that rule amounts to a relatively simple administrative device that will help separate at the outset those cases that are more likely meritorious from those that are not. Even were that objective as critically important as the plurality believes, however, it is not difficult to find other numerical gateway rules that would work better.

Assume that a basic purpose of a gateway number is to separate (1) districts where a minority group can "elect representatives of their choice," from (2) districts where the minority, because of the need to obtain majority crossover votes, can only "elect representatives" that are consensus candidates. 42 U.S.C. § 1973(b) (2000 ed.); ***45** *League of United Latin American Citizens v. Perry,* 548 U.S. 399, 445, 126 S.Ct. 2594, 165 L.Ed.2d 609 (2006) (plurality opinion). At first blush, one might think that a 50% rule will work in this respect. After all, if a 50% minority population votes as a bloc, can it not always elect the candidate of its choice? And if a minority population constitutes less than 50% of a district, is not any candidate elected from that district always a consensus choice of minority and majority voters? The realities of voting behavior, however, make clear that the answer to both these questions is "no." See, *e.g.,* Brief for Nathaniel Persily et al. as *Amici Curiae* 5–6 ("Fifty percent is seen as a magic number by some because under conditions of complete racial polarization and equal rates of voting eligibility, registration, and turnout, the minority community will be able to elect its candidate of choice. *In practice, such extreme conditions are never present* .... [S]ome districts must be more than 50% minority, while others can be less than 50% minority, in order for the minority community to have an equal opportunity to elect its candidate of choice" (emphasis added)); see also *ante,* at 1254 (SOUTER, J., dissenting).

No voting group is 100% cohesive. Except in districts with overwhelming minority populations, some crossover votes are often necessary. The question is how likely it is that the need for crossover votes will force a minority to reject its "preferred ****1261** choice" in favor of a "consensus candidate." A 50% number does not even try to answer that question. To the contrary, it includes, say, 51% minority districts, where imperfect cohesion may, in context, prevent election of the "minority-preferred" candidate, while it excludes, say, 45% districts where a smaller but more cohesive minority can, with the help of a small and reliable majority crossover vote, elect its preferred candidate.

Why not use a numerical gateway rule that looks more directly at the relevant question: Is the minority bloc large enough, is it cohesive enough, is the necessary majority crossover vote small enough, so that the minority (tending ***46** to vote cohesively) can likely vote its preferred candidate (rather than a consensus candidate) into office? See *ante,* at 1253 (SOUTER, J., dissenting) ("[E]mpirical studies confir[m] that ... minority groups" constituting less than 50% of the voting population "regularly elect their preferred candidates with the help of modest crossover by members of the majority"); see also Pildes, Is Voting–Rights Law Now at War With Itself? Social Science and Voting Rights in the 2000s, 80 N.C.L.Rev. 1517, 1529–1535 (2002) (reviewing studies showing small but reliable crossover voting by whites in districts where minority voters have demonstrated the ability to elect their preferred candidates without constituting 50% of the population in that district). We can likely find a reasonably administrable mathematical formula more directly tied to the factors in question.

To take a possible example: Suppose we pick a numerical ratio that requires the minority voting age population to be twice as large as the percentage of majority crossover votes needed to elect the minority's preferred candidate. We would calculate the latter (the percentage of majority crossover votes the minority voters need) to take account of both the percentage of minority voting age population in the district and the cohesiveness with which they vote. Thus, if minority voters account for 45% of the voters in a district and 89% of those voters tend to vote cohesively as a group, then the minority needs a crossover vote of about 20% of the majority voters to elect its preferred candidate. (Such a district with 100 voters would have 45 minority voters and 55 majority voters; 40 minority voters would vote for the minority group's preferred candidate at election time; the minority voters would need 11 more votes to elect their preferred candidate; and 11 is about 20% of the majority's 55.) The larger the minority population, the greater its cohesiveness, and thus the smaller the crossover vote needed to assure

success, the greater the likelihood that the minority can ***47** elect its preferred candidate and the smaller the likelihood that the cohesive minority, in order to find the needed majority crossover vote, must support a consensus, rather than its preferred, candidate.

In reflecting the reality that minority voters can elect the candidate of their choice when they constitute less than 50% of a district by relying on a small majority crossover vote, this approach is in no way contradictory to, or even in tension with, the third *Gingles* requirement. Since *Gingles* itself, we have acknowledged that the requirement of majority-bloc voting can be satisfied even when some small number of majority voters cross over to support a minority-preferred candidate. See 478 U.S., at 59, 106 S.Ct. 2752, 92 L.Ed.2d 25 (finding majority-bloc voting where the majority group supported African–American candidates in the general election at a rate of between 26% and 49%, with an average support of one-third). Given the difficulty of obtaining totally accurate statistics about cohesion, or even voting age ****1262** population, the district courts should administer the numerical ratio flexibly, opening (or closing) the *Gingles* gate (in light of the probable merits of a case) where only small variances are at issue (*e.g.,* where the minority group is 39% instead of 40% of a district). But the same is true with a 50% number (*e.g.,* where the minority group is 49% instead of 50% of a district). See, *e.g.,* Brief for United States as *Amicus Curiae* 15.

I do not claim that the 2–to–1 ratio is a perfect rule; I claim only that it is better than the plurality's 50% rule. After all, unlike 50%, a 2–to–1 ratio (of voting age minority population to necessary nonminority crossover votes) focuses directly upon the problem at hand, better reflects voting realities, and consequently far better separates at the gateway likely sheep from likely goats. See *Gingles, supra,* at 45, 106 S.Ct. 2752 (The § 2 inquiry depends on a " 'functional' view of the political process" and " 'a searching practical evaluation of the past and present reality' ") (quoting S.Rep. No. 97–417, p. 30, and n. 120 (1982))); *Gingles, supra,* at 94–95, 106 S.Ct. 2752 (O'Connor, J., ***48** concurring in judgment) ("[T]here is no indication that Congress intended to mandate a single, universally applicable standard for measuring undiluted minority voting strength, regardless of local conditions ... "). In most cases, the 50% rule and the 2–to–1 rule would have roughly similar effects. Most districts where the minority voting age population is greater than 50% will almost always satisfy the 2–to–1 rule; and most districts where the minority population is below 40% will almost never satisfy the 2–to–1 rule. But in districts with minority voting age populations that range from 40% to 50%, the divergent approaches of the two standards can make a critical difference—as well they should.

In a word, Justice SOUTER well explains why the majority's test is ill suited to the statute's objectives. I add that the test the majority adopts is ill suited to its own administrative ends. Better gateway tests, if needed, can be found.

With respect, I dissent.

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Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

1 We have previously illustrated this in stylized fashion:

"Assume a hypothetical jurisdiction of 1,000 voters divided into 10 districts of 100 each, where members of a minority group make up 40 percent of the voting population and voting is totally polarized along racial lines. With the right geographic dispersion to satisfy the compactness requirement, and with careful manipulation of district lines, the minority voters might be placed in control of as many as 7 of the 10 districts. Each such district could be drawn with at least 51 members of the minority group, and whether the remaining minority voters were added to the groupings of 51 for safety or scattered in the other three districts, minority voters would be able to elect candidates of their choice in all seven districts." *Johnson v. De Grandy,* 512 U.S. 997, 1016, 114 S.Ct. 2647, 129 L.Ed.2d 775 (1994).

[2] Of course, this does not create an entitlement to proportionate minority representation. Nothing in the statute promises electoral success. Rather, § 2 simply provides that, subject to qualifications based on a totality of circumstances, minority voters are entitled to a practical chance to compete in a roughly proportionate number of districts. *Id.,* at 1014, n. 11, 114 S.Ct. 2647. "[M]inority voters are not immune from the obligation to pull, haul, and trade to find common political ground." *Id.,* at 1020, 114 S.Ct. 2647.

[3] This case is an entirely inappropriate vehicle for speculation about a more exact definition of majority-bloc voting. See *supra,* at 1254 – 1255. The political science literature has developed statistical methods for assessing the extent of majority-bloc voting that are far more nuanced than the plurality's 50% rule. See, *e.g.,* Pildes 1534–1535 (describing a "falloff rate" that social scientists use to measure the comparative rate at which whites vote for black Democratic candidates compared to white Democratic candidates and noting that the falloff rate for congressional elections during the 1990s in North Carolina was 9%). But this issue was never briefed in this case and is not before us, the respondents having stipulated to the existence of majority-bloc voting, App. to Pet. for Cert. 130a, and there is no reason to attempt to accomplish in this case through the first *Gingles* factor what would actually be a quantification of the third.

[4] Compare Dept. of Commerce, Bureau of Census, 2000 Voting Age Population and Voting–Age Citizens (PHC–T–31) (Table 1–1), online at http:/ /www.census.gov/population/www /cen2000/briefs/phc-t31/index.html (as visited Mar. 5, 2009, and available in Clerk of Court's case file) (total VAP in North Carolina is 6,087,996), with *id.,* Table 1–3 (black or African–American VAP is 1,216,622).

[5] Under the same logic, North Carolina could fracture and submerge in majority-dominated districts the 12 districts in which black voters constitute between 35% and 49% of the voting population and routinely elect the candidates of their choice without ever implicating § 2, and could do so in districts not covered by § 5 without implicating the VRA at all. The untenable implications of the plurality's rule do not end there. The plurality declares that its holding "does not apply to cases in which there is intentional discrimination against a racial minority." *Ante,* at 1246. But the logic of the plurality's position compels the absurd conclusion that the invidious and intentional fracturing of crossover districts in order to harm minority voters would not state a claim under § 2. After all, if the elimination of a crossover district can never deprive minority voters in the district of the opportunity "to elect representatives of their choice," minorities in an invidiously eliminated district simply cannot show an injury under § 2.

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137 S.Ct. 788
Supreme Court of the United States

Golden BETHUNE–HILL, et al., Appellants
v.
VIRGINIA STATE BOARD OF ELECTIONS, et al.

No. 15–680
|
Argued Dec. 5, 2016.
|
Decided March 1, 2017.

Synopsis

Background: Registered voters brought action against Virginia Board of Elections, Virginia Department of Elections, and various members thereof in their official capacities, challenging redistricting of 12 Virginia House of Delegates districts as racial gerrymandering in violation of Equal Protection Clause. House of Delegates and House Speaker intervened to defend the redistricting plan. A three-judge District Court was convened. After a bench trial, the United States District Court for the Eastern District of Virginia, Robert E. Payne, Senior District Judge, 141 F.Supp.3d 505, entered judgment for defendants and intervenors. Probable jurisdiction was noted.

Holdings: The Supreme Court, Justice Kennedy, held that:

a conflict between an enacted redistricting plan and traditional redistricting criteria is not a threshold requirement for racial gerrymandering claim;

a court's analysis of a racial gerrymandering claim should not be confined to portions of district lines that conflict with traditional redistricting criteria; and

for one district, Virginia had strong basis in evidence for believing that use of 55 percent of black voting-age population (BVAP), as target for redistricting, was necessary.

Affirmed in part, vacated in part, and remanded.

Justice Alito filed an opinion concurring in part and concurring in the judgment.

Justice Thomas filed an opinion concurring in the judgment in part and dissenting in part.

West Codenotes

Recognized as Unconstitutional
Voting Rights Act of 1965, § 4(b), 52 U.S.C.A. § 10303(b)

****791** *Syllabus**

***178** After the 2010 census, the Virginia State Legislature drew new lines for 12 state legislative districts, with a goal of ensuring that each district would have a black voting-age population (BVAP) of at least 55%. Certain voters filed suit, claiming that the new districts violated the Fourteenth Amendment's Equal Protection Clause. State legislative officials (State) intervened to defend the plan. A three-judge District Court rejected the challenges. As to 11 of the districts, the court concluded that the voters had not shown, as this Court's precedent requires, "that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district," *Miller v. Johnson,* 515 U.S. 900, 916, 115 S.Ct. 2475, 132 L.Ed.2d 762. In so doing, the court held that race predominates only where there is an " '*actual* conflict between traditional redistricting criteria and race.' " 141 F.Supp.3d 505, 524. It thus confined the predominance analysis to the portions of the new lines that appeared to deviate from traditional criteria. As to the remaining district, District 75, the court found that race did predominate, but that the lines were constitutional because the legislature's use of race was narrowly tailored to a compelling state interest. In particular, the court found the legislature had good reasons to believe that a 55% racial target was necessary in District 75 to avoid diminishing the ability of black voters to elect their preferred candidates, which at the time would have violated § 5 of the Voting Rights Act of 1965, see *Alabama Legislative Black Caucus v. Alabama,* 575 U.S. 257, 278, 135 S.Ct. 1257, 1274, 191 L.Ed.2d 314.

Held :

1. The District Court employed an incorrect legal standard in determining ****792** that race did not predominate in 11 of the 12 districts. Pp. 796 – 801.

(a) The Equal Protection Clause prohibits a State, without sufficient justification, from "separat[ing] its citizens into different voting districts on the basis of race." *Miller,* 515 U.S., at 911, 115 S.Ct. 2475. Courts must "exercise extraordinary caution in adjudicating claims" of racial gerrymandering, *id.,* at 916, 115 S.Ct. 2475 since a legislature is always "*aware* of race when it draws district lines, just as it is aware of ... other demographic factors," *Shaw v. Reno,* 509 U.S. 630, 646, 113 S.Ct. 2816, 125 L.Ed.2d 511 (*Shaw I*). A plaintiff alleging racial gerrymandering thus bears the burden "to show, either through ***179** circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that race was the predominant factor motivating the legislature's [districting] decision," which requires proving "that the legislature subordinated traditional race-neutral districting principles ... to racial considerations." *Miller, supra,* at 916, 115 S.Ct. 2475. Here, the District Court misapplied controlling law in two principal ways. Pp. 796 – 797.

(b) First, the District Court misunderstood relevant precedents when it required the challengers to establish, as a prerequisite to showing racial predominance, an actual conflict between the enacted plan and traditional redistricting principles. This Court has made clear that parties may show predominance "either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose," *Miller, supra,* at 916, 115 S.Ct. 2475 and that race may predominate even when a plan respects traditional principles, *Shaw v. Hunt,* 517 U.S. 899, 907, 116 S.Ct. 1894, 135 L.Ed.2d 207 (*Shaw II*).

The State's theory in this case is irreconcilable with *Miller* and *Shaw II*. The State insists, *e.g.,* that the harm from racial gerrymandering lies not in racial line-drawing *per se* but in grouping voters of the same race together when they otherwise lack shared interests. But "the constitutional violation" in racial gerrymandering cases stems from the "racial purpose of state action, not its stark manifestation." *Miller, supra,* at 913, 115 S.Ct. 2475. The State also contends that race does not have a prohibited effect on a district's lines if the legislature could have drawn the same lines in accordance with traditional criteria. The proper inquiry, however, concerns the actual considerations that provided the essential basis for the lines drawn, not *post hoc* justifications that the legislature could have used but did not. A legislature could construct a plethora of potential maps that look consistent with traditional, race-neutral principles, but if race is the overriding reason for choosing one map over others, race still may predominate. A conflict or inconsistency may be persuasive circumstantial evidence tending to show racial predomination, but no rule requires challengers to present this kind of evidence in every case. As a practical matter, this kind of evidence may be necessary in many or even most cases. But there may be cases where challengers can establish racial predominance without evidence of an actual conflict. Pp. 797 – 800.

(c) The District Court also erred in considering the legislature's racial motive only to the extent that the challengers identified deviations from traditional redistricting criteria attributable to race and not to some other factor. Racial gerrymandering claims proceed "district-by-district," *Alabama, supra,* at 262, 135 S.Ct., at 1265, 1266 and courts should not divorce any portion of a district's lines—whatever ****793** their relationship to traditional principles—from the rest of the district. Courts may consider evidence ***180** pertaining to an area that is larger or smaller than the district at issue. But the ultimate object of

the inquiry is the legislature's predominant motive for the district's design as a whole, and any explanation for a particular portion of the lines must take account of the districtwide context. A holistic analysis is necessary to give the proper weight to districtwide evidence, such as stark splits in the racial composition of populations moved into and out of a district, or the use of a racial target. Pp. 799 – 800.

(d) The District Court is best positioned to determine on remand the extent to which, under the proper standard, race directed the shape of these 11 districts, and if race did predominate, whether strict scrutiny is satisfied. Pp. 800 – 801.

2. The District Court's judgment regarding District 75 is consistent with the basic narrow tailoring analysis explained in *Alabama*. Where a challenger succeeds in establishing racial predominance, the burden shifts to the State to "demonstrate that its districting legislation is narrowly tailored to achieve a compelling interest." *Miller, supra,* at 920, 115 S.Ct. 2475. Here, it is assumed that the State's interest in complying with the Voting Rights Act was a compelling interest. When a State justifies the predominant use of race in redistricting on the basis of the need to comply with the Voting Rights Act, "the narrow tailoring requirement insists only that the legislature have a 'strong basis in evidence' in support of the (race-based) choice that it has made." *Alabama,* 575 U.S., at —— – ——, 135 S.Ct., at 1274. The State must show not that its action was actually necessary to avoid a statutory violation, but only that the legislature had " '*good reasons* to believe' " its use of race was needed in order to satisfy the Voting Rights Act. *Ibid.* There was no error in the District Court's conclusion that the legislature had sufficient grounds to determine that the race-based calculus it employed in District 75 was necessary to avoid violating § 5. Under the facts found by that court, the legislature performed the kind of functional analysis of District 75 necessary under § 5, and the result reflected the good-faith efforts of legislators to achieve an informed bipartisan consensus. In contesting the sufficiency of that evidence and the evidence justifying the 55% BVAP floor, the challengers ask too much from state officials charged with the sensitive duty of reapportioning legislative districts. As to the claim that the BVAP floor is akin to the "mechanically numerical view" of § 5 rejected in *Alabama, supra,* at ——, 135 S.Ct., at 1273 the record here supports the State's conclusion that this was an instance where a 55% BVAP was necessary for black voters to have a functional working majority. Pp. 800 – 802.

141 F.Supp.3d 505, affirmed in part, vacated in part, and remanded.

KENNEDY, J., delivered the opinion of the Court, in which ROBERTS, C.J., and GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. ALITO, J., filed an opinion concurring in part and concurring in the judgment post p.——. THOMAS, J., filed an opinion concurring in the judgment in part and dissenting in part post p.——.

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Opinion

Justice KENNEDY delivered the opinion of the Court.

***181** This case addresses whether the Virginia state legislature's consideration of race in drawing new lines for 12 state legislative districts violated the Equal Protection Clause of the Fourteenth Amendment. After the 2010 census, some ***182** redistricting was required to ensure proper numerical apportionment for the Virginia House of Delegates. It is undisputed that the boundary lines for the 12 districts at issue were drawn with a goal of ensuring that each district would have a black voting-age population (BVAP) of at least 55%.

Certain voters challenged the new districts as unconstitutional racial gerrymanders. The United States District Court for the Eastern District of Virginia, constituted as a three-judge district court, rejected the challenges as to each of the 12 districts. As to 11 of the districts, the District Court concluded that the voters had not shown, as this Court's precedent requires, "that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district." *Miller v. Johnson,* 515 U.S. 900, 916, 115 S.Ct. 2475, 132 L.Ed.2d 762 (1995). The District Court held that race predominates only where there is an " '*actual* conflict between traditional redistricting criteria and race,' " 141 F.Supp.3d 505, 524 (E.D.Va.2015), so it confined the predominance analysis to the portions of the new lines that appeared to deviate from traditional criteria, and found no violation. As to the remaining district, District 75, the District Court found that race did predominate. It concluded, however, that the lines were constitutional because the legislature's use of race was narrowly tailored to a compelling state interest. In particular, the District Court determined that the legislature had "good reasons to believe" that a 55% racial target was necessary in District 75 to avoid diminishing the ability of black voters to elect their preferred candidates, which at the time would have violated § 5 of the Voting Rights Act of 1965. *Alabama Legislative Black Caucus v. Alabama,* 575 U.S. 254, 278, 135 S.Ct. 1257, 1274, 191 L.Ed.2d 314 (2015) (internal quotation marks omitted and emphasis deleted).

On appeal to this Court, the challengers contend that the District Court employed an incorrect legal standard for racial predominance ****795** and that the legislature lacked good reasons for its use of race in District 75. This Court now ***183** affirms as to District 75 and vacates and remands as to the remaining 11 districts.

I

After the 2010 census, the Virginia General Assembly set out to redraw the legislative districts for the State Senate and House of Delegates in time for the 2011 elections. In February 2011, the House Committee on Privileges and Elections adopted a resolution establishing criteria to guide the redistricting process. Among those criteria were traditional redistricting factors such as compactness, contiguity of territory, and respect for communities of interest. But above those traditional objectives, the committee gave priority to two other goals. First, in accordance with the principle of one person, one vote, the committee resolved that "[t]he population of each district shall be as nearly equal to the population of every other district as practicable," with any deviations falling "within plus-or-minus one percent." 141 F.Supp.3d, at 518. Second, the committee resolved that the new map must comply with the "protections against ... unwarranted retrogression" contained in § 5 of the Voting Rights Act. *Ibid.* At the time, § 5 required covered jurisdictions, including Virginia, to preclear any change to a voting standard, practice, or procedure by showing federal authorities that the change would not have the purpose or effect of "diminishing the ability of [members of a minority group] to elect their preferred candidates of choice." § 5, 120 Stat. 580–581, 52 U.S.C. § 10304(b). After the redistricting process here was completed, this Court held that the coverage formula in § 4(b) of the Voting Rights Act no longer may be used to require preclearance under § 5. See *Shelby County v. Holder,* 570 U.S. 529, 557, 133 S.Ct. 2612, 2631, 186 L.Ed.2d 651 (2013).

The committee's criteria presented potential problems for 12 House districts. Under § 5 as Congress amended it in 2006, "[a] plan leads to impermissible retrogression when, compared to the plan currently in effect (typically called a 'benchmark plan'), the new plan diminishes the number of ***184** districts in which minority groups can 'elect their preferred candidates of choice' (often called 'ability-to-elect' districts)." *Harris v. Arizona Independent Redistricting Comm'n,* 578 U.S. 253, 260, 136 S.Ct. 1301, 1307, 194 L.Ed.2d 497 (2016) (quoting 52 U.S.C. § 10304(b)). The parties agree that the 12 districts at issue here, where minorities had constituted a majority of the voting-age population for many past elections, qualified as "ability-to-elect" districts. Most of the districts were underpopulated, however, so any new plan required moving significant numbers of new voters into these districts in order to comply with the principle of one person, one vote. Under the benchmark plan, the districts had BVAPs ranging from 62.7% down to 46.3%. Three districts had BVAPs below 55%.

Seeking to maintain minority voters' ability to elect their preferred candidates in these districts while complying with the one-person, one-vote criterion, legislators concluded that each of the 12 districts "needed to contain a BVAP of at least 55%." 141 F.Supp.3d, at 519. At trial, the parties disputed whether the 55% figure "was an aspiration or a target or a rule." *Ibid.* But they did not dispute "the most important question—whether [the 55%] figure was used in drawing the Challenged Districts." *Ibid.* The parties agreed, and the District Court found, "that the 55% BVAP figure was used in structuring the districts." *Ibid.* In the enacted plan all 12 ****796** districts contained a BVAP greater than 55%.

Who first suggested the 55% BVAP criterion and how the legislators agreed upon it was less clear from the evidence. See *id.,* at 521 (describing the "[t]estimony on this question" as "a muddle"). In the end, the District Court found that the 55% criterion emerged from discussions among certain members of the House Black Caucus and the leader of the redistricting effort in the House, Delegate Chris Jones, "based largely on concerns pertaining to the re-election of Delegate Tyler in [District] 75." *Id.,* at 522. The 55% figure "was then applied across the board to all twelve" districts. *Ibid.*

***185** In April 2011, the General Assembly passed Delegate Jones' plan with broad support from both parties and members of the Black Caucus. One of only two dissenting members of the Black Caucus was Delegate Tyler of District 75, who objected solely on the ground that the 55.4% BVAP in her district was too low. In June 2011, the U.S. Department of Justice precleared the plan.

Three years later, before this suit was filed, a separate District Court struck down Virginia's third federal congressional district (not at issue here), based in part on the legislature's use of a 55% BVAP threshold. See *Page v. Virginia State Bd. of Elections,* 58 F.Supp.3d 533, 553 (E.D.Va.2014), vacated and remanded *sub nom. Cantor v. Personhuballah,* 575 U.S. 931, 135 S.Ct. 1699, 191 L.Ed.2d 671 (2015), judgt. entered *sub nom. Page v. Virginia State Bd. of Elections,* 2015 WL 3604029 (June 5, 2015), appeal dism'd *sub nom. Wittman v. Personhuballah,* 578 U.S. 539, 136 S.Ct. 1732, 195 L.Ed.2d 37 (2016). After that decision, 12 voters registered in the 12 districts here at issue filed this action challenging the district lines under the Equal Protection Clause. Because the claims "challeng[ed] the constitutionality of ... the apportionment of [a] statewide legislative body," the case was heard by a three-judge District Court. 28 U.S.C. § 2284(a). The Virginia House of Delegates and its Speaker, William Howell (together referred to hereinafter as the State), intervened and assumed responsibility for defending the plan, both before the District Court and now before this Court.

After a 4–day bench trial, a divided District Court ruled for the State. With respect to each challenged district, the court first assessed whether "racial considerations predominated over—or 'subordinated'—traditional redistricting criteria." 141 F.Supp.3d, at 523. An essential premise of the majority opinion was that race does not predominate unless there is an "*actual* conflict between traditional redistricting criteria and race that leads to the subordination of the former." *Id.,* at 524. To implement that standard, moreover, ***186** the court limited its inquiry into racial motive to those portions of the district lines that appeared to deviate from traditional criteria. The court thus "examine[d] those aspects of the [district] that appear[ed] to constitute 'deviations' from neutral criteria" to ascertain whether the deviations were attributable to race or to other considerations, "such as protection of incumbents." *Id.,* at 534. Only if the court found a deviation attributable to race did it proceed to "determine whether racial considerations qualitatively subordinated all other non-racial districting criteria." *Ibid.* Under that analysis, the court found that race did not predominate in 11 of the 12 districts.

When it turned to District 75, the District Court found that race did predominate. The court reasoned that "[a]chieving a 55% BVAP floor required 'drastic maneuvering' that is reflected on the face ****797** of the district." *Id.,* at 557. Applying strict scrutiny, the court held that compliance with § 5 was a compelling state interest and that the legislature's consideration of race in District 75 was narrowly tailored. As to narrow tailoring, the court explained that the State had "a strong basis in evidence" to believe that its actions were "reasonably necessary" to avoid retrogression. *Id.,* at 548. In particular, the court found that Delegate Jones had considered "precisely the kinds of evidence that legislators are encouraged to use" in achieving compliance with § 5, including turnout rates, the district's large disenfranchised prison population, and voting patterns in the contested 2005 primary and general elections. *Id.,* at 558.

Judge Keenan dissented as to all 12 districts. She concluded that the majority applied an incorrect understanding of racial predominance and that Delegate Jones' analysis of District 75 was too "general and conclusory." *Id.,* at 578. This appeal followed, and probable jurisdiction was noted. 578 U.S. 321 (2016); see 28 U.S.C. § 1253.

***187** II

Against the factual and procedural background set out above, it is now appropriate to consider the controlling legal principles in this case. The Equal Protection Clause prohibits a State, without sufficient justification, from "separat[ing] its citizens into different voting districts on the basis of race." *Miller,* 515 U.S., at 911, 115 S.Ct. 2475. The harms that flow from racial sorting "include being personally subjected to a racial classification as well as being represented by a legislator who believes his primary obligation is to represent only the members of a particular racial group." *Alabama,* 575 U.S., at 263, 135 S.Ct., at 1265 (alterations, citation, and internal quotation marks omitted). At the same time, courts must "exercise extraordinary caution in adjudicating claims that a State has drawn district lines on the basis of race." *Miller,* 515 U.S., at 916, 115 S.Ct. 2475. "Electoral districting is a most difficult subject for legislatures," requiring a delicate balancing of competing considerations. *Id.,* at 915, 115 S.Ct. 2475. And "redistricting differs from other kinds of state decisionmaking in that the legislature always is *aware* of race when it draws district lines, just as it is aware of ... a variety of other demographic factors." *Shaw v. Reno,* 509 U.S. 630, 646, 113 S.Ct. 2816, 125 L.Ed.2d 511 (1993) (*Shaw I*).

In light of these considerations, this Court has held that a plaintiff alleging racial gerrymandering bears the burden "to show, either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district." *Miller,* 515 U.S. at 916, 115 S.Ct. 2475. To satisfy this burden, the plaintiff "must prove that the legislature subordinated traditional race-neutral districting principles ... to racial considerations." *Ibid.* The challengers contend that, in finding that race did not predominate in 11 of the 12 districts, the District ***188** Court misapplied controlling law in two principal ways. This Court considers them in turn.

A

The challengers first argue that the District Court misunderstood the relevant precedents when it required the challengers to establish, as a prerequisite to showing racial predominance, an actual conflict between the enacted plan and traditional ****798** redistricting principles. The Court agrees with the challengers on this point.

A threshold requirement that the enacted plan must conflict with traditional principles might have been reconcilable with this Court's case law at an earlier time. In *Shaw I,* the Court recognized a claim of racial gerrymandering for the first time. See 509 U.S., at 652, 113 S.Ct. 2816. Certain language in *Shaw I* can be read to support requiring a challenger who alleges racial gerrymandering to show an actual conflict with traditional principles. The opinion stated, for example, that strict scrutiny applies to "redistricting legislation that is so bizarre on its face that it is unexplainable on grounds other than race." *Id.,* at 644, 113 S.Ct. 2816 (internal quotation marks omitted). The opinion also stated that "reapportionment is one area in which appearances do matter." *Id.,* at 647, 113 S.Ct. 2816.

The Court's opinion in *Miller,* however, clarified the racial predominance inquiry. In particular, it rejected the argument that, "regardless of the legislature's purposes, a plaintiff must demonstrate that a district's shape is so bizarre that it is unexplainable other than on the basis of race." 515 U.S., at 910–911, 115 S.Ct. 2475. The Court held to the contrary in language central to the instant case: "Shape is relevant not because bizarreness is a necessary element of the constitutional wrong or a threshold requirement of proof, but because it may be persuasive circumstantial evidence that race for its own sake, and not other districting principles, was the legislature's dominant and controlling rationale." *Id.,* at 913, 115 S.Ct. 2475. Parties therefore "may rely on evidence other than bizarreness ***189** to establish race-based districting," and may show predominance "either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose." *Id.,* at 913, 916, 115 S.Ct. 2475.

The Court addressed racial gerrymandering and traditional redistricting factors again in *Shaw v. Hunt,* 517 U.S. 899, 116 S.Ct. 1894, 135 L.Ed.2d 207 (1996) (*Shaw II*). The Court there rejected the view of one of the dissents that "strict scrutiny does not apply where a State 'respects' or 'complies with traditional districting principles.' " *Id.,* at 906, 116 S.Ct. 1894 (quoting *id.,* at 931–932, 116 S.Ct. 1894 (Stevens, J., dissenting); alteration omitted). Race may predominate even when a reapportionment plan respects traditional principles, the Court explained, if "[r]ace was the criterion that, in the State's view, could not be compromised," and race-neutral considerations "came into play only after the race-based decision had been

made." *Id.,* at 907, 116 S.Ct. 1894.

The State's theory in this case is irreconcilable with *Miller* and *Shaw II*. The State insists, for example, that the harm from racial gerrymandering lies not in racial line-drawing *per se* but in grouping voters of the same race together when they otherwise lack shared interests. But "the constitutional violation" in racial gerrymandering cases stems from the "racial purpose of state action, not its stark manifestation." *Miller, supra,* at 913, 115 S.Ct. 2475. The Equal Protection Clause does not prohibit misshapen districts. It prohibits unjustified racial classifications.

The State contends further that race does not have a prohibited effect on a district's lines if the legislature could have drawn the same lines in accordance with traditional criteria. That argument parallels the District Court's reasoning that a reapportionment plan is not an express racial classification unless a racial purpose is apparent from the face of the plan based on the irregular nature of the lines themselves. ****799** See 141 F.Supp.3d, at 524–526. This is incorrect. The racial predominance inquiry concerns the actual considerations that provided the essential basis for the lines drawn, not *post* ***190** *hoc* justifications the legislature in theory could have used but in reality did not.

Traditional redistricting principles, moreover, are numerous and malleable. The District Court here identified no fewer than 11 race-neutral redistricting factors a legislature could consider, some of which are "surprisingly ethereal" and "admi[t] of degrees." *Id.,* at 535, 537. By deploying those factors in various combinations and permutations, a State could construct a plethora of potential maps that look consistent with traditional, race-neutral principles. But if race for its own sake is the overriding reason for choosing one map over others, race still may predominate.

For these reasons, a conflict or inconsistency between the enacted plan and traditional redistricting criteria is not a threshold requirement or a mandatory precondition in order for a challenger to establish a claim of racial gerrymandering. Of course, a conflict or inconsistency may be persuasive circumstantial evidence tending to show racial predomination, but there is no rule requiring challengers to present this kind of evidence in every case.

As a practical matter, in many cases, perhaps most cases, challengers will be unable to prove an unconstitutional racial gerrymander without evidence that the enacted plan conflicts with traditional redistricting criteria. In general, legislatures that engage in impermissible race-based redistricting will find it necessary to depart from traditional principles in order to do so. And, in the absence of a conflict with traditional principles, it may be difficult for challengers to find other evidence sufficient to show that race was the overriding factor causing neutral considerations to be cast aside. In fact, this Court to date has not affirmed a predominance finding, or remanded a case for a determination of predominance, without evidence that some district lines deviated from traditional principles. See *Alabama,* 575 U.S., at 273, 135 S.Ct., at 1265–1266; *Hunt v. Cromartie,* 526 U.S. 541, 547, 119 S.Ct. 1545, 143 L.Ed.2d 731 (1999); *Bush v. Vera,* 517 U.S. 952, 962, 966, 974, 116 S.Ct. 1941, 135 L.Ed.2d 248 (1996) (plurality opinion); ***191** *Shaw II, supra,* at 905–906, 116 S.Ct. 1894; *Miller, supra,* at 917, 115 S.Ct. 2475; *Shaw I, supra,* at 635–636, 113 S.Ct. 2816. Yet the law responds to proper evidence and valid inferences in ever-changing circumstances, as it learns more about ways in which its commands are circumvented. So there may be cases where challengers will be able to establish racial predominance in the absence of an actual conflict by presenting direct evidence of the legislative purpose and intent or other compelling circumstantial evidence.

B

The challengers submit that the District Court erred further when it considered the legislature's racial motive only to the extent that the challengers identified deviations from traditional redistricting criteria that were attributable to race and not to some other factor. In the challengers' view, this approach foreclosed a holistic analysis of each district and led the District Court to give insufficient weight to the 55% BVAP target and other relevant evidence that race predominated. Again, this Court agrees.

As explained, showing a deviation from, or conflict with, traditional redistricting principles is not a necessary prerequisite to establishing racial predominance. *Supra,* at 9-10. But even where a challenger alleges a conflict, or succeeds in ****800** showing one, the court should not confine its analysis to the conflicting portions of the lines. That is because the basic unit of analysis for racial gerrymandering claims in general, and for the racial predominance inquiry in particular, is the district.

Racial gerrymandering claims proceed "district-by-district." *Alabama,* 575 U.S., at 262, 135 S.Ct., at 1265. "We have consistently described a claim of racial gerrymandering as a claim that race was improperly used in the drawing of the boundaries of one or more *specific electoral districts*." *Id.*, at 262-263. And *Miller* 's basic predominance test scrutinizes the legislature's motivation for placing "a significant number of voters within or without a particular district." 515 U.S., at 916, 115 S.Ct. 2475. Courts evaluating racial predominance ***192** therefore should not divorce any portion of the lines—whatever their relationship to traditional principles—from the rest of the district.

This is not to suggest that courts evaluating racial gerrymandering claims may not consider evidence pertaining to an area that is larger or smaller than the district at issue. The Court has recognized that "[v]oters, of course, can present statewide evidence in order to prove racial gerrymandering in a particular district." *Alabama, supra,* at 263, 135 S.Ct., at 1265 (emphasis deleted). Districts share borders, after all, and a legislature may pursue a common redistricting policy toward multiple districts. Likewise, a legislature's race-based decisionmaking may be evident in a notable way in a particular part of a district. It follows that a court may consider evidence regarding certain portions of a district's lines, including portions that conflict with traditional redistricting principles.

The ultimate object of the inquiry, however, is the legislature's predominant motive for the design of the district as a whole. A court faced with a racial gerrymandering claim therefore must consider all of the lines of the district at issue; any explanation for a particular portion of the lines, moreover, must take account of the districtwide context. Concentrating on particular portions in isolation may obscure the significance of relevant districtwide evidence, such as stark splits in the racial composition of populations moved into and out of disparate parts of the district, or the use of an express racial target. A holistic analysis is necessary to give that kind of evidence its proper weight.

C

The challengers ask this Court not only to correct the District Court's racial predominance standard but also to apply that standard and conclude that race in fact did predominate in the 11 districts where the District Court held that it did not. For its part, the State asks the Court to hold that, ***193** even if race did predominate in these districts, the State's predominant use of race was narrowly tailored to the compelling interest in complying with § 5.

The Court declines these requests. "[O]urs is a court of final review and not first view." *Department of Transportation v. Association of American Railroads,* 575 U.S. 43, 56, 135 S.Ct. 1225, 1234, 191 L.Ed.2d 153 (2015) (internal quotation marks omitted). The District Court is best positioned to determine in the first instance the extent to which, under the proper standard, race directed the shape of these 11 districts. And if race did predominate, it is proper for the District Court to determine in the first instance whether strict scrutiny is satisfied. These matters are left for the District Court on remand.

III

The Court now turns to the arguments regarding District 75. Where a ****801** challenger succeeds in establishing racial predominance, the burden shifts to the State to "demonstrate that its districting legislation is narrowly tailored to achieve a compelling interest." *Miller, supra,* at 920, 115 S.Ct. 2475. The District Court here determined that the State's predominant use of race in District 75 was narrowly tailored to achieve compliance with § 5. The challengers contest the finding of narrow tailoring, but they do not dispute that compliance with § 5 was a compelling interest at the relevant time. As in previous cases, therefore, the Court assumes, without deciding, that the State's interest in complying with the Voting Rights Act was compelling. *E.g., Alabama, supra,* at 276–279, 135 S.Ct., at 1272–1274; *Shaw II,* 517 U.S., at 915, 116 S.Ct. 1894.

Turning to narrow tailoring, the Court explained the contours of that requirement in *Alabama*. When a State justifies the predominant use of race in redistricting on the basis of the need to comply with the Voting Rights Act, "the narrow tailoring requirement insists only that the legislature have a strong basis in evidence in support of the (race-based) choice that it has made." 575 U.S., at 278, 135 S.Ct., at 1274 (internal quotation ***194** marks omitted). That standard does not require the State

to show that its action was "actually ... necessary" to avoid a statutory violation, so that, but for its use of race, the State would have lost in court. *Ibid.* (internal quotation marks omitted). Rather, the requisite strong basis in evidence exists when the legislature has "*good reasons* to believe" it must use race in order to satisfy the Voting Rights Act, "even if a court does not find that the actions were necessary for statutory compliance." *Ibid.* (internal quotation marks omitted).

The Court now finds no error in the District Court's conclusion that the State had sufficient grounds to determine that the race-based calculus it employed in District 75 was necessary to avoid violating § 5. As explained, § 5 at the time barred Virginia from adopting any districting change that would "have the effect of diminishing the ability of [members of a minority group] to elect their preferred candidates of choice." 52 U.S.C. § 10304(b). Determining what minority population percentage will satisfy that standard is a difficult task requiring, in the view of the Department of Justice, a "functional analysis of the electoral behavior within the particular ... election district." Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act, 76 Fed. Reg. 7471 (2011).

Under the facts found by the District Court, the legislature performed that kind of functional analysis of District 75 when deciding upon the 55% BVAP target. Redrawing this district presented a difficult task, and the result reflected the good-faith efforts of Delegate Jones and his colleagues to achieve an informed bipartisan consensus. Delegate Jones met with Delegate Tyler "probably half a dozen times to configure her district" in order to avoid retrogression. 141 F.Supp.3d, at 558 (internal quotation marks omitted). He discussed the district with incumbents from other majority-minority districts. He also considered turnout rates, the results of the recent contested primary and general elections ***195** in 2005, and the district's large population of disenfranchised black prisoners. The challengers, moreover, do not dispute that District 75 was an ability-to-elect district, or that white and black voters in the area tend to vote as blocs. See *id.,* at 557–559. In light of Delegate Jones' careful assessment of local conditions and structures, the State had a strong basis in evidence to believe a 55% BVAP floor was required to avoid retrogression.

****802** The challengers' responses ask too much from state officials charged with the sensitive duty of reapportioning legislative districts. First, the challengers contest the sufficiency of the evidence showing that Delegate Jones in fact performed a functional analysis, in part because that analysis was not memorialized in writing. But the District Court's factual findings are reviewed only for clear error. See *Easley v. Cromartie,* 532 U.S. 234, 242, 121 S.Ct. 1452, 149 L.Ed.2d 430 (2001). The findings regarding how the legislature arrived at the 55% BVAP target are well supported, and "we do not ... require States engaged in redistricting to compile a comprehensive administrative record." *Vera,* 517 U.S., at 966, 116 S.Ct. 1941 (internal quotation marks omitted).

The challengers argue further that the drafters of the plan had insufficient evidence to justify a 55% BVAP floor. The 2005 elections were idiosyncratic, the challengers contend; moreover, demographic information about the prison in the district is absent from the record, and Delegate Tyler's perspective was influenced by a personal interest in reelection. That may have been so, and for those reasons, it is possible that, if the State had drawn District 75 with a BVAP below 55% and had sought judicial preclearance, a court would have found no § 5 violation. But that is not the question here. "The law cannot insist that a state legislature, when redistricting, determine *precisely* what percent minority population § 5 demands." *Alabama,* 575 U.S., at 278, 135 S.Ct., at 1273. The question is whether the State had "*good reasons* " to believe a 55% BVAP floor was necessary to avoid liability under § 5. ***196** *Ibid.* (internal quotation marks omitted). The State did have good reasons under these circumstances. Holding otherwise would afford state legislatures too little breathing room, leaving them "trapped between the competing hazards of liability" under the Voting Rights Act and the Equal Protection Clause. *Vera, supra,* at 977, 116 S.Ct. 1941 (internal quotation marks omitted).

As a final point, the challengers liken the 55% BVAP floor here to the "mechanically numerical view" of § 5 this Court rejected in *Alabama*. 575 U.S., at 277, 135 S.Ct., at 1273. But *Alabama* did not condemn the use of BVAP targets to comply with § 5 in every instance. Rather, this Court corrected the "misperception" that § 5 required a State to "maintai[n] the same population percentages in majority-minority districts as in the prior plan." *Id.,* at 275-276, 135 S.Ct., at 1273. "[I]t would seem highly unlikely," the Court explained, that reducing a district's BVAP "from, say, 70% to 65% would have a significant impact on the black voters' ability to elect their preferred candidate." *Id.,* at 277, 135 S.Ct., at 1273. Yet reducing the BVAP below 55% well might have that effect in some cases. The record here supports the legislature's conclusion that this was one instance where a 55% BVAP was necessary for black voters to have a functional working majority.

IV

The Court's holding in this case is controlled by precedent. The Court reaffirms the basic racial predominance analysis explained in *Miller* and *Shaw II,* and the basic narrow tailoring analysis explained in *Alabama*. The District Court's judgment as to District 75 is consistent with these principles. Applying these principles to the remaining 11 districts is entrusted to the District Court in the first instance.

The judgment of the District Court is affirmed in part and vacated in part. The case is remanded for further proceedings consistent with this opinion.

It is so ordered.

****803** Justice ALITO, concurring in part and concurring in the judgment.

***197** I join the opinion of the Court insofar as it upholds the constitutionality of District 75. *Ante,* at 800 – 802. The districting plan at issue here was adopted prior to our decision in *Shelby County v. Holder,* 570 U.S. 529, 133 S.Ct. 2612, 186 L.Ed.2d 651 (2013), and therefore it is appropriate to apply the body of law in effect at that time. What is more, appellants have never contested the District Court's holding that compliance with § 5 of the Voting Rights Act was a compelling government interest for covered jurisdictions before our decision in *Shelby County*. See 141 F.Supp.3d 505, 545–547 (E.D.Va.2015).

I concur in the judgment of the Court insofar as it vacates and remands the judgment below with respect to all the remaining districts. Unlike the Court, however, I would hold that all these districts must satisfy strict scrutiny. See *post,* at 803 – 804 (THOMAS, J., concurring in judgment in part and dissenting in part); see also *League of United Latin American Citizens v. Perry,* 548 U.S. 399, 517, 126 S.Ct. 2594, 165 L.Ed.2d 609 (2006) (Scalia, J., concurring in judgment in part and dissenting in part) ("[W]hen a legislature intentionally creates a majority-minority district, race is necessarily its predominant motivation and strict scrutiny is therefore triggered").

Justice THOMAS, concurring in the judgment in part and dissenting in part.

Appellants contend that 12 of Virginia's state legislative districts are unconstitutional racial gerrymanders. The three-judge District Court rejected their challenge, holding that race was not the legislature's predominant motive in drawing 11 of the districts and that the remaining district survives strict scrutiny. I would reverse the District Court as to all 12 districts. I therefore concur in the judgment in part and dissent in part.

***198** I

I concur in the Court's judgment reversing the District Court's decision to uphold 11 of the 12 districts at issue in this case—House Districts 63, 69, 70, 71, 74, 77, 80, 89, 90, 92, and 95. I do not agree, however, with the Court's decision to leave open the question whether race predominated in those districts and, thus, whether they are subject to strict scrutiny. *Ante,* at 800 – 801. Appellees (hereinafter State) concede that the legislature intentionally drew all 12 districts as majority-black districts. See, *e.g.,* Brief for Appellees 1 ("[T]he legislature sought to achieve a [black voting-age population] of at least 55% in adjusting the lines of the 12 majority-minority districts"). That concession, in my view, mandates strict scrutiny as to each district. See *Bush v. Vera,* 517 U.S. 952, 1000, 116 S.Ct. 1941, 135 L.Ed.2d 248 (1996) (THOMAS, J.,

concurring in judgment) (A State's "concession that it intentionally created majority-minority districts [i]s sufficient to show that race was a predominant, motivating factor in its redistricting"); *League of United Latin American Citizens v. Perry,* 548 U.S. 399, 517, 126 S.Ct. 2594, 165 L.Ed.2d 609 (2006) (*LULAC*) (Scalia, J., concurring in judgment in part and dissenting in part) ("[W]hen a legislature intentionally creates a majority-minority district, race is necessarily its predominant motivation and strict scrutiny is therefore triggered"). I would therefore hold that the District Court must apply strict scrutiny to Districts 63, 69, 70, 71, 74, 77, 80, 89, 90, 92, and 95 on remand.

II

I disagree with the Court's judgment with respect to the remaining district, District ****804** 75. The majority affirms the District Court's holding that District 75 is subject to strict scrutiny. With this I agree, because, as with the other 11 districts, the State conceded that it intentionally drew District 75 as a majority-black district.

I disagree, however, with the majority's determination that District 75 satisfies strict scrutiny. This Court has held ***199** that a State may draw distinctions among its citizens based on race only when it "is pursuing a compelling state interest" and has chosen "narrowly tailored" means to accomplish that interest. *Shaw v. Hunt,* 517 U.S. 899, 908, 116 S.Ct. 1894, 135 L.Ed.2d 207 (1996) (internal quotation marks omitted). The State asserts that it used race in drawing District 75 to further a "compelling interest in complying with Section 5 of the [Voting Rights Act of 1965]." Brief for Appellees 50.[1] And it argues that, based on its "good-faith functional analysis" of the district, it narrowly tailored its use of race to achieve that interest. *Id.,* at 56. In my view, the State has neither asserted a compelling state interest nor narrowly tailored its use of race.

A

As an initial matter, the majority errs by "assum[ing], without deciding, that the State's interest in complying with the Voting Rights Act was compelling." *Ante,* at 801. To be sure, this Court has previously assumed that a State has a compelling interest in complying with the Voting Rights Act. But it has done so only in cases in which it has not upheld the redistricting plan at issue. See, *e.g., Miller v. Johnson,* 515 U.S. 900, 921, 115 S.Ct. 2475, 132 L.Ed.2d 762 (1995) (leaving open the question "[w]hether or not in some cases compliance with the [Voting Rights] Act, standing alone, can provide a compelling interest independent of any interest in remedying past discrimination").[2] This Court has never, before today, assumed a ***200** compelling state interest while upholding a state redistricting plan. Indeed, I know of no other case, in any context, in which the Court has assumed away part of the State's burden to justify its intentional use of race. This should not be the first. I would hold that complying with § 5 of the Voting Rights Act is not a compelling interest.

"[C]ompliance with federal antidiscrimination laws cannot justify race-based districting where the challenged district was not reasonably necessary under a *constitutional* ****805** reading and application of those laws." *Id.,* at 921, 115 S.Ct. 2475 (emphasis added). More than a decade ago, I joined Justice Scalia's opinion in *LULAC,* which noted that this Court had "upheld the constitutionality of § 5 as a proper exercise of Congress's authority under § 2 of the Fifteenth Amendment to enforce that Amendment's prohibition on the denial or abridgment of the right to vote." 548 U.S., at 518, 126 S.Ct. 2594. I therefore agreed that, "[i]n the proper case, ... a covered jurisdiction may have a compelling interest in complying with § 5." *Id.,* at 519, 126 S.Ct. 2594.

I have since concluded that § 5 is "unconstitutional." *Northwest Austin Municipal Util. Dist. No. One v. Holder,* 557 U.S. 193, 216, 129 S.Ct. 2504, 174 L.Ed.2d 140 (2009) (THOMAS, J., concurring in judgment in part and dissenting in part). "[T]he violence, intimidation, and subterfuge that led Congress to pass § 5 and this Court to uphold it no longer remains," *id.,*

at 229, 129 S.Ct. 2504 so § 5 "can no longer be justified as an appropriate mechanism for enforcement of the Fifteenth Amendment," *id.,* at 216, 129 S.Ct. 2504. Because, in my view, § 5 is unconstitutional, I would hold that ***201** a State does not have a compelling interest in complying with it.

B

Even if compliance with § 5 were a compelling interest, the State failed to narrowly tailor its use of race to further that interest.

1

This Court has explained that "[a]ny preference based on racial or ethnic criteria must necessarily receive a most searching examination." *Wygant v. Jackson Bd. of Ed.,* 476 U.S. 267, 273, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986) (plurality opinion) (internal quotation marks omitted); accord, *Adarand Constructors, Inc. v. Peã,* 515 U.S. 200, 223, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995); *Grutter v. Bollinger,* 539 U.S. 306, 378, 123 S.Ct. 2325, 156 L.Ed.2d 304 (2003) (Rehnquist, C. J., dissenting). This exacting scrutiny makes sense because "[d]iscrimination on the basis of race" is "odious in all aspects." *Rose v. Mitchell,* 443 U.S. 545, 555, 99 S.Ct. 2993, 61 L.Ed.2d 739 (1979). Accordingly, a State's use of race must bear " 'the most exact connection' " to the compelling state interest. *Wygant, supra,* at 280, 106 S.Ct. 1842 (opinion of Powell, J.). In the context of redistricting, the redistricting map must, "at a minimum," actually "remedy the anticipated violation" or "achieve compliance" with the Voting Rights Act. *Shaw,* 517 U.S., at 916, 116 S.Ct. 1894.

I have serious doubts about the Court's standard for narrow tailoring, as characterized today and in *Alabama Legislative Black Caucus v. Alabama,* 575 U.S. 254, 135 S.Ct. 1257, 191 L.Ed.2d 314 (2015). Relying on *Alabama,* the majority explains that narrow tailoring in the redistricting context requires "only that the legislature have a strong basis in evidence in support of the (race-based) choice that it has made." *Ante,* at 801 (internal quotation marks omitted). That standard "does not demand that a State's actions actually be necessary to achieve a compelling state interest in order to be constitutionally valid." *Alabama, supra,* at 278, 135 S.Ct., at 1274 (internal quotation marks omitted); see also *ante,* at 801. Instead, under that standard, a state ***202** legislature needs only "*good reasons* to believe" that the use of race is required, even if the use of race is not "actually ... necessary." *Alabama, supra,* at 278, 135 S.Ct., at 1274 (internal quotation marks omitted).

That approach to narrow tailoring—deferring to a State's belief that it has good reasons to use race—is "strict" in name only. To the extent the Court applies ****806** *Alabama* to dilute the well-settled standard established by our precedents, I demur.

2

Applying the proper narrow-tailoring standard for state classifications based on race, I conclude that the State did not narrowly tailor its use of race to comply with § 5. As the majority recognizes, § 5 requires a state redistricting plan to maintain the black population's ability to elect the candidate of its choice in the district at issue—in other words, the State

must "avoid retrogression" in the new district. *Ante,* at 801.

The majority observes that the redistricting plan's architect, Delegate Chris Jones, performed a "functional analysis" in deciding that District 75 required a 55% black voting-age population—as opposed to some other percentage—to avoid retrogression. *Ibid.* The Court notes that, in arriving at the 55% threshold, Delegate Jones considered turnout rates, the results of the primary and general elections in 2005, and the district's "large population of disenfranchised black prisoners." *Ante,* at 801 – 802. He also met with the incumbent delegate for District 75 "probably half a dozen times" and "discussed the district with incumbents from other majority-minority districts." *Ante,* at 801 (internal quotation marks omitted). Those efforts add up, in the majority's view, to a "careful assessment of local conditions and structures." *Ante,* at 801.

I do not agree that those efforts satisfy narrow tailoring. Delegate Jones admitted that he was "not aware" of "any retrogress[ion] analysis" performed by "h[im] or any persons that worked with him in the development of the [redistricting] ***203** plan." App. 288–289. Instead, he merely "look[ed] at" the "percentage of black population and the percentage of black voting age population," "looked at what happened over the last 10 year period given the existing population and demographic shifts," and "tried to restore back" the levels of black voting-age population from the previous maps. *Id.,* at 290. That approach was misguided, because § 5 "does not require maintaining the same population percentages in majority-minority districts as in the prior plan." *Alabama, supra,* at 276, 135 S.Ct., at 1273. And in any event, that back-of-the-envelope calculation does not qualify as rigorous analysis. I do not think we would permit so imprecise an approach with regard to any other instance of racial discrimination.

The other evidence cited by the majority is similarly weak. The majority points to the " 'half a dozen' " meetings between Delegate Jones and the incumbent delegate for District 75, *ante,* at 801, but it is not apparent from the record whether District 75's incumbent is the current black population's candidate of choice. Moreover, the incumbent delegate may well have wanted her district to be electorally safer than the Voting Rights Act requires. It also is not obvious to me that Delegate Jones was seeking to avoid retrogression in District 75 when he met with incumbent delegates from *other* majority-black districts. *Ibid.* In my view, those efforts fall far short of establishing that a 55% black voting-age population bears a more " 'exact connection' " to the State's interest than any alternative percentage. *Wygant,* 476 U.S. at 280, 106 S.Ct. 1842 (opinion of Powell, J.). Accordingly, I would hold that the State failed to narrowly tailor its use of race to avoid retrogression in District 75.

* * *

In reaching these conclusions, I recognize that this Court is at least as responsible as the state legislature for these racially gerrymandered districts. As explained above, this Court has repeatedly failed to decide whether compliance with the Voting ****807** Rights Act is a compelling governmental ***204** interest. See *supra,* at 804, and n. 2. Indeed, this Court has refused even to decide whether § 5 is constitutional, despite having twice taken cases to decide that question. Compare Juris. Statement in *Northwest Austin,* O.T. 2008, No. 08–322, p. i (presenting the question "[w]hether ... the § 5 preclearance requirement can be applied as a valid exercise of Congress's remedial powers under the Reconstruction Amendments"), and *Shelby County v. Holder,* 568 U.S. 1006, 133 S.Ct. 594, 184 L.Ed.2d 389 (2012) (granting certiorari on the question "[w]hether Congress' decision in 2006 to reauthorize Section 5 of the Voting Rights Act under the pre-existing coverage formula of 4(b) ... violated the Tenth Amendment and Article IV of the United States Constitution"), with *Northwest Austin,* 557 U.S., at 197, 129 S.Ct. 2504 (holding that the district at issue was eligible to seek bailout under the Voting Rights Act and therefore "not reach[ing] the constitutionality of § 5"), and *Shelby County v. Holder,* 570 U.S. 529, 557, 133 S.Ct. 2612, 2631, 186 L.Ed.2d 651 (2013) (holding only that the coverage formula under § 4(b) was unconstitutional and "issu[ing] no holding on § 5 itself"). As a result, the Court has left the State without clear guidance about its redistricting obligations under § 5.

This Court has put the State in a similar bind with respect to narrow tailoring. To comply with § 5, a State necessarily must make a deliberate and precise effort to sort its citizens on the basis of their race. But that result is fundamentally at odds with our "color-blind" Constitution, which "neither knows nor tolerates classes among citizens." *Plessy v. Ferguson,* 163 U.S. 537, 559, 16 S.Ct. 1138, 41 L.Ed. 256 (1896) (Harlan, J., dissenting). That contradiction illustrates the perversity of the Court's jurisprudence in this area as well as the uncomfortable position in which the State might find itself.

Despite my sympathy for the State, I cannot ignore the Constitution's clear prohibition on state-sponsored race discrimination. "The Constitution abhors classifications based on race, not only because those classifications can harm favored races or are based on illegitimate motives, but also ***205** because every time the government places citizens on racial

registers ..., it demeans us all." *Grutter,* 539 U.S., at 353, 123 S.Ct. 2325 (THOMAS, J., concurring in part and dissenting in part). This prohibition was "[p]urchased at the price of immeasurable human suffering," and it "reflects our Nation's understanding that such classifications ultimately have a destructive impact on the individual and our society." *Adarand Constructors,* 515 U.S., at 240, 115 S.Ct. 2097 (THOMAS, J., concurring in part and concurring in judgment). I respectfully dissent from the Court's judgment as to District 75.

All Citations

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Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

1 It is unclear from the record whether the State sought to justify its use of race on other grounds. I would leave it to the District Court to evaluate in the first instance any other asserted compelling interest, including whether such interest has been forfeited.

2 See also *Shaw v. Hunt,* 517 U.S. 899, 911, 116 S.Ct. 1894, 135 L.Ed.2d 207 (1996) ("In *Miller,* we expressly left open the question whether under the proper circumstances compliance with the Voting Rights Act, on its own, could be a compelling [state] interest.... Here once again we do not reach that question because we find that creating an additional majority-black district was not required under a correct reading of § 5"); *id.,* at 915, 115 S.Ct. 2475 ("We assume, *arguendo,* for the purpose of resolving this suit, that compliance with § 2 could be a compelling interest" but hold that the remedy "is not narrowly tailored to the asserted end"); *Bush v. Vera,* 517 U.S. 952, 977, 979, 116 S.Ct. 1941, 135 L.Ed.2d 248 (1996) (plurality opinion) ("[W]e assume without deciding that compliance with [the Voting Rights Act], as interpreted by our precedents, can be a compelling state interest" but hold that the districts at issue are not "narrowly tailored" to achieve that interest (citation omitted)); *Alabama Legislative Black Caucus v. Alabama,* 575 U.S. 254, 279, 135 S.Ct. 1257, 1274, 191 L.Ed.2d 314 (2015) ("[W]e do not here decide whether ... continued compliance with § 5 remains a compelling interest" because "we conclude that the District Court and the legislature asked the wrong question with respect to narrow tailoring").

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United States District Court, E.D. New York.

Bruce A. BLAKEMAN, in his official capacity as County Executive of the County of Nassau; County of Nassau; Marc Mullen, as parent and natural guardian of K.E.M., an infant under the age of eighteen years; and Jeanine Mullen, as parent and natural guardian of K.E.M., an infant under the age of eighteen years, Plaintiffs,
v.
Letitia JAMES, as Attorney General of the State of New York; State of New York Office of the Attorney General; and State of New York, Defendants.

2:24-cv-1655 (NJC) (LGD)
|
Signed April 4, 2024

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OPINION AND ORDER

NUSRAT J. CHOUDHURY, District Judge:

***1** Plaintiffs Bruce A. Blakeman ("Blakeman") and Nassau County (together "County Plaintiffs"), and Marc and Jeanine Mullen (together "Individual Plaintiffs") filed a Complaint for declaratory and injunctive relief against the State of New York ("New York"), the State of New York Office of the Attorney General ("OAG"),[1] and Letitia James ("James"), in her capacity as the Attorney General of the State of New York ("NY Attorney General," collectively, "Defendants"). (Compl., ECF No. 1.) The Complaint brings a single claim under the Declaratory Judgment Act, 28 U.S.C. § 2201, and the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. (Compl. ¶¶ 33–35.) Plaintiffs' claim concerns a cease-and-desist letter from the OAG to Nassau County asserting that Nassau County Executive Order 2-2024 ("Executive Order") violates the New York Human Rights Law's prohibition against discrimination on the bases of sex and gender identity and expression. (OAG Ltr., ECF No. 10-3 (citing N.Y. Exec. Law §§ 296(2), (6)).) The letter calls for the County Plaintiffs to rescind the Executive Order and produce the documents that supported its issuance, or else face further legal action by the OAG. (*Id.* at 9.) The Complaint alleges that the OAG's action to enforce the New York Human Rights Law as applied to the Executive Order violates the rights of women and girl athletes in Nassau County to equal protection under the law. (Compl. ¶¶ 35, 38–41.)

On March 7, 2024, the County Plaintiffs filed an Order to Show Cause seeking an order "temporarily restrain[ing] and enjoin[ing]" Defendants "from initiating any legal proceedings and/or actions" against Blakeman "related to [the Executive Order]." (ECF No. 10 at 2.) The County Plaintiffs' supporting brief asks for an order "staying AG James' demand for document production, preventing her from taking further legal action and declaring Executive Order Number 2-2024 valid under the U.S. Constitution, Federal Law, and State Law." (Cnty. Pls.' Br. at 5, ECF No. 10-5.) On March 11, 2024, following the reassignment of this case to this Court's docket, the County Plaintiffs filed a proposed Temporary Restraining Order ("TRO") reiterating these requests for a temporary restraining order and preliminary injunction. (*See* Proposed TRO, ECF No. 17 at 3–4.) The Court construes the Order to Show Cause as the County Plaintiffs' Motion for a Temporary Restraining Order and/or Preliminary Injunction ("TRO/PI Motion").[2]

***2** The Court has reviewed the parties' submissions on the fully briefed TRO/PI Motion: (1) the Complaint (ECF No. 1); (2) the County Plaintiffs' Order to Show Cause and Proposed Temporary Restraining Order (ECF Nos. 10, 17); (3) the County Plaintiffs' Memorandum of Law (ECF No. 10-5); (4) the Affidavit of Bruce A. Blakeman (ECF No. 10-4); (5) the Declaration of County Plaintiffs' counsel, Victoria LaGreca, and attached exhibits (ECF Nos. 10-1–10-3); (6) the Defendants' opposition brief (ECF No. 18); and (7) the County Plaintiffs' reply brief (ECF No. 21). The Individual Plaintiffs did not join in the County Plaintiffs' TRO/PI Motion. (*See* ECF Nos. 10, 17.) Although the Court provided the Individual Plaintiffs an opportunity to present their position on the TRO/PI Motion, they elected not to do so.[3]

At a conference with the Court on March 12, 2024, the County Plaintiffs requested an expedited resolution of the TRO Motion. (Conf., Mar. 12, 2024.) No party requested discovery or an evidentiary hearing on the PI Motion, whether during the conference or in their submissions to the Court. (*Id.*; *see also* ECF Nos. 1, 10, 10-1–10-5, 17, 18, 21.)

The County Plaintiffs' TRO/PI Motion falls far short of meeting the high bar for securing the extraordinary relief of a temporary restraining order from this Court. Plaintiffs' claims are nonjusticiable for multiple reasons: (1) Eleventh Amendment sovereign immunity bars the declaratory and injunctive relief claim against Defendants New York and the OAG, as well as any claim for retrospective declaratory relief against Defendant James in her official capacity; (2) the County Plaintiffs lack capacity to bring the equal protection claim under Rule 17(b), Fed. R. Civ. P., and New York's capacity-to-sue rule; and (3) the record does not establish Plaintiffs' standing to bring the equal protection claim pled in the Complaint. Moreover, the County Plaintiffs' submission fails to demonstrate irreparable harm—a critical prerequisite for the issuance of a temporary restraining order. For the reasons addressed below, the Court denies the County Plaintiffs' TRO Motion and reserves decision on the PI Motion following the resolution of Defendants' Motion to Dismiss (ECF No. 20).

BACKGROUND

The NY Attorney General is New York's chief legal officer. *See* N.Y. Const. art. V, § 4; N.Y. Exec. Law § 63(1). Under New York law, the Attorney General:

> [p]rosecut[es] and defend[s] all actions and proceedings in which the state is interested, and ha[s] charge and control of all the legal business of the departments and bureaus of the state, or of any office thereof which requires the services of attorney or counsel, in order to protect the interest of the state ....

N.Y. Exec. Law § 63(1). The New York Legislature has granted the Attorney General a central role in ensuring the consistent application and enforcement of laws enacted by the legislature, including New York's anti-discrimination laws. The New York Executive Law empowers the Attorney General to "[b]ring and prosecute or defend upon request of the commissioner of labor or the state division of human rights, any civil action or proceeding ... necessary for effective enforcement of the laws of this state against discrimination ...." *Id.* § 63(9). It also grants the Attorney General authority to prosecute people for criminal violations of state anti-discrimination laws in certain circumstances, *id.* § 63(10), to file a complaint of Human Rights Law violations, *id.* § 297(1), and to play a role in the investigation and handling of Human Rights Law complaints, *id.* § 297. The New York Civil Rights Law requires notice to be served upon the Attorney General prior to the commencement of any private litigation alleging the violation of state civil rights laws. N.Y. Civ. Rts. Law § 40-d.

***3** On February 22, 2024, Blakeman signed into law Executive Order 2024-2, titled "An Executive Order for Fairness for

Women and Girls in Sports." (E.O., ECF No. 10-2.) The Executive Order relates to the process for securing a permit to use Nassau County Parks property[4] for "organizing a sporting event or competition" and does three main things. (E.O. at 1.) First, it requires that any permit applicant seeking to use Nassau County Parks property for a sporting event or competition "must expressly designate" whether the activity relates to (1) "[m]ales, men, or boys," (2) "[f]emales, women, or girls," or (3) "[c]oed or mixed, including both males and females" "based on [participants'] biological sex at birth." (*Id.*) Second, the Executive Order prohibits the Nassau County Department of Parks, Recreation and Museums (the "Parks Department") from issuing a permit for any sporting event or competition designated for "females, women, or girls" that allows "biological males" to participate, but allows the Parks Department to issue permits for sporting events or competitions designated for "males, men, or boys" that include participation by "biological females." (*Id.* at 1–2.)[5] Third, the Executive Order defines "gender" as "the individual's biological sex at birth" and permits the Parks Department to consider a birth certificate as identification of a participant's sex only when the birth certificate was "filed at or near the time" of the participant's birth. (*Id.* at 2.)

The plain text of the Executive Order prohibits transgender[6] women and girls, as well as any women and girls' sports teams that include them, from participating in women and girls' sporting events on Nassau County Parks property. (*Id.* at 1–2.) Transgender women and girls are only permitted to participate in sporting events designated as "male" or "coed." (*Id.*) By contrast, the plain text of the Executive Order permits transgender men and boys to participate in any sporting events on Nassau County Parks property, whether the events are designated as "female," "male," or "coed." (*Id.* at 2.) The Executive Order does not address people who may identify as intersex or nonbinary. (*See* Defs.' Br. at 4.)

***4** On March 1, 2024, the OAG's Civil Rights Bureau sent a letter to Blakeman indicating that the office had reviewed the Executive Order and concluded that it is "in clear violation of New York State anti-discrimination laws." (OAG Ltr. at 1, ECF No. 10-3.) In the letter, the OAG demands rescission of the Executive Order within five business days and that Blakeman "immediately produce any and all documents constituting the record supporting [his] decision to issue the Order." (*Id.* at 3.) The OAG also states that "[f]ailure to comply with this directive may result in further legal action by the OAG." (*Id.*)

According to the March 1, 2024 letter, facilities covered by the Executive Order "rang[e] from general playing fields in parks to baseball, football, and soccer fields, basketball and tennis courts, indoor and outdoor swimming pools, as well as ice rinks and shooting ranges" and "would apply to approximately 100 venues." (*Id.* at 2.) The OAG asserts that the immediate effect of the Order is "to force sports leagues to make an impossible choice: discriminate against transgender women and girls, in violation of New York law, or find somewhere else to play." (*Id.*) It argues that the Executive Order violates the New York Human Rights Law's prohibition against discrimination on the bases of "sex" and "gender identity or expression" in places of public accommodation, N.Y. Exec. Law §§ 292(9), 296(2), and its prohibition against " 'compel[ling]' others to discriminate in ways that will violate the Human Rights Law" under N.Y. Exec. Law § 296(6). (OAG Ltr. at 2.) The OAG further argues that the Executive Order violates the New York Civil Rights Law, which provides that "no person shall be subjected to any discrimination in [their] civil rights" based on "sex ... [or] gender expression or identity," N.Y. Civ. Rts. Law § 40-c, as well as the Equal Protection Clause of the New York State Constitution. (OAG Ltr. at 2–3.)

Rather than respond to the letter, Plaintiffs filed suit in this Court on March 5, 2024. (*See* Compl.) The Complaint pleads a single cause of action alleging that the OAG's March 1, 2024 letter, as well as any other actions by Defendants "to prevent enforcement of" the Executive Order, violates the rights of "biological girls and women" under the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. (Compl. ¶¶ 33–43.) Plaintiffs bring this claim under the Declaratory Judgment Act, 28 U.S.C. § 2201, but do not cite 42 U.S.C. § 1983 ("Section 1983") or any other basis for the cause of action. (*Id.*) The Complaint alleges that the Executive Order advances the important government interest of "ensuring equality in women's athletics," and that the OAG's position "effectively vitiates biological females' right to equal opportunities in athletics as well as the right to a safe playing field by exposing biological females to the risk of injury by transgender women (i.e., biological males) as well as unfair competitive advantage." (*Id.* ¶¶ 29, 38.) It alleges that the New York Human Rights Law "is unconstitutional" as applied to the Executive Order because it purportedly "elevates transgender women to a level not recognized by Federal law in the athletics context all to the detriment of biological girls and women." (*Id.* ¶ 40.) Plaintiffs seek relief in the form of: (1) a declaration that Defendants' application of the New York Human Rights Law against the Executive Order violates the Equal Protection Clause;[7] (2) a declaration that the Executive Order "is valid under the United States Constitution, Federal law, and state law"; (3) a permanent injunction preventing "Defendants from taking any action to prevent" the County Plaintiffs "from implementing and enforcing" the Executive Order; and (4) costs, disbursements, reasonable attorney fees, and any further relief. (Compl. at 12.)

***5** On March 7, 2024, the County Plaintiffs filed the TRO/PI Motion (ECF No. 10), seeking to bar Defendants from "taking further action" relating to the Executive Order, including by "initiating any legal proceedings and/or actions" against the County Plaintiffs. (Cnty. Pls.' Br. at 27; TRO/PI Mot. at 2.) The County Plaintiffs' supporting brief also requests an order "staying AG James' demand for document production ... and declaring [the Executive Order] valid under the U.S. Constitution, Federal Law, and State Law." (Cnty. Pls.' Br. at 5.)[8] Blakeman attests that, without immediate injunctive relief, Nassau County "will suffer immediate and irreparable injury, loss, and damage in that women and girls in Nassau County will be discriminated against and their constitutional rights under the United States Constitution will be violated." (Blakeman Aff. ¶ 3, ECF No. 10-4.) According to Blakeman, without the Executive Order:

> [W]omen and girls will not receive equal and fair opportunities to obtain recognition and accolades, college scholarships, and numerous other long-term benefits that result from participating and competing in athletic endeavors; women and girls will not have access to a supportive and safe environment for the purpose of engaging in sports; and biological males will have an unfair advantage over women and girls in sports.

(*Id.* ¶ 4.)

The Court permitted Defendants and the Individual Plaintiffs to respond to the County Plaintiffs' TRO/PI Motion by March 22, 2024. (Elec. Order, Mar. 23, 2024.) Defendants opposed the Motion (Defs.' Br.), but the Individual Plaintiffs did not provide a brief or factual submissions addressing any position on the Motion (*see* Elec. Order, Mar. 23, 2024). The Court further permitted the County Plaintiffs the opportunity to submit a reply brief addressing the arguments raised in Defendants' opposition brief by March 28, 2024. (*Id.*; Elec. Order, Mar. 26, 2024.) The County Plaintiffs filed a timely reply. (Cnty. Pls.' Reply, ECF No. 21.)

The County Plaintiffs have not provided any factual submissions addressing how the Executive Order is implemented in practice. Their brief asserts that permit applicants must "merely indicate whether said [athletic] competition is male, female, or coed and ... supply a copy of the applicants['] 'athlete participation policy.' " (Cnty. Pls.' Br. at 6.) The "athlete participation policy" has not been introduced into evidence; nor have the County Plaintiffs provided any sworn statements about what information applicants must provide on this document to ensure compliance with the terms of the Executive Order or how applicants procure that information from their participants. The record is further silent as to whether any athletic/sports entity has applied for a permit to use Nassau County Parks property since the enactment of the Executive Order. The County Plaintiffs' brief asserts that "[n]o permit has been denied since the County's Executive Order was executed." (*Id.*)

VENUE AND JURISDICTION

Venue is proper under 28 U.S.C. § 1391(b)(2) because, as described above, a substantial part of the events or omissions giving rise to this action occurred in this judicial district.

There is no dispute that this Court has personal jurisdiction over Defendants. New York State and the OAG are clearly state entities and James is sued in her role as NY Attorney General—a state official.

Plaintiffs assert that this Court has federal question jurisdiction over Plaintiffs' claim under the Declaratory Judgment Act, 28 U.S.C. § 2201, and the Fourteenth Amendment pursuant to 18 U.S.C. § 1331. (Compl. ¶¶ 12, 34–35.) Defendants challenge Plaintiffs' standing to bring this claim under Article III of the U.S. Constitution. (Defs.' Br. at 13–14.) "If plaintiffs lack Article III standing, a court has no subject matter jurisdiction to hear their claim." *Bohnak v. Marsh & McLennan Cos., Inc.*, 79 F.4th 276, 283 (2d Cir. 2023) (quotation marks omitted). As discussed in detail below, this Court lacks subject matter jurisdiction because Plaintiffs lack standing to bring the sole claim pled in the Complaint (Compl. ¶¶ 33–34). *Bohnak*, 79 F.4th at 283; *see infra*, Section I.C.

STANDARD OF REVIEW

***6** The Second Circuit has long established that a party seeking a preliminary injunction must show three things: (1) irreparable harm in the absence of an injunction pending resolution of the action, (2) either a likelihood of success on the merits or both serious questions on the merits and a balance of hardships decidedly favoring the moving party, and (3) that a preliminary injunction is in the public interest. *See N. Am. Soccer League, LLC v. U.S. Soccer Fed'n*, 883 F.3d 32, 37 (2d Cir. 2018). The Second Circuit has "consistently applied the likelihood-of-success standard to cases challenging government actions taken in the public interest pursuant to a statutory or regulatory scheme," in lieu of the lower standard requiring a showing only of serious questions on the merits and a balance of hardships decidedly favoring the moving party. *We the Patriots USA, Inc. v. Hochul*, 17 F.4th 266, 279 n.13 (2d Cir. 2021), *opinion clarified*, 17 F.4th 368 (2d Cir. 2021); *N. Am. Soccer League*, 883 F.3d at 37; *see, e.g.*, *Gazzola v. Hochul*, 88 F.4th 186, 194 (2d Cir. 2023) (requiring showing of a likelihood of success on the merits on preliminary injunction motion against New York commercial regulations on firearms and ammunition sales and related state licensing scheme and background-check and training requirements), *petition for cert. filed*, No. 23-995 (Mar. 12, 2024). Courts apply the same standard when considering an application for a TRO. *See e.g.*, *Dukes v. Cold Spring Harbor Cent. Sch. Dist. Bd. of Educ.*, No. 20CV4532JMAST, 2021 WL 308341, at *4 (E.D.N.Y. Jan. 29, 2021); *Hopkins Hawley LLC v. Cuomo*, No. 20-CV-10932 (PAC), 2021 WL 8200607, at *1 (S.D.N.Y. Jan. 8, 2021).

The Second Circuit has made clear that when a party seeks "mandatory" rather than "prohibitory" preliminary relief, "the likelihood-of-success and irreparable-harm requirements become more demanding still, requiring that the plaintiff show a *clear or substantial* likelihood of success on the merits and make a *strong showing* of irreparable harm." *Daileader v. Certain Underwriters at Lloyds London Syndicate 1861*, No. 23-690, 2024 WL 1145347, at *3 (2d Cir. Mar. 18, 2024) (citing *New York ex rel. Schneiderman v. Actavis PLC*, 787 F.3d 638, 650 (2d Cir. 2015)) (quotation marks and citations omitted). A mandatory temporary restraining order typically requires the non-movant to take some action, whereas a prohibitory temporary restraining order "typically requires the non-movant to refrain from taking some action." *Id.* "This higher standard is particularly appropriate when a plaintiff seeks a preliminary injunction against a government body ...." *Weinstein v. Krumpter*, 120 F. Supp. 3d 289, 297 (E.D.N.Y. 2015) (citations omitted); *see also C.C. v. New York City Dep't of Educ.*, No. 22-0459, 2023 WL 2545665, at *2 (2d Cir. Mar. 17, 2023) (recognizing that this higher standard applies to a request for a mandatory injunction against governmental action) (citing *Hester v. French*, 985 F.3d 165, 176 (2d Cir. 2021)). Determining whether requested preliminary relief is mandatory or prohibitory "is sometimes unclear":

> In borderline cases, essentially identical injunctions can be phrased either in mandatory or prohibitory terms. We have therefore explained that [p]rohibitory injunctions maintain the status quo pending resolution of the case; mandatory injunctions alter it. In this context, the status quo is really the status quo *ante* – that is, the last actual, peaceable[,] uncontested status which preceded the pending controversy.

Daileader, 2024 WL 1145347, at *3 (citing *N. Am. Soccer League*, 883 F.3d at 36 n.4, 37 n.5) (quotation marks and citations omitted).

The County Plaintiffs contend, without explanation, that they may secure a temporary restraining order by meeting the lowest standard, which requires showing only "sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly in the plaintiff's favor." (Cnty. Pls.' Br. at 23.) Defendants argue that the highest standard applicable to mandatory injunctions—requiring a showing of a "clear or substantial likelihood of success on the merits"—applies because the requested relief "will affect government action taken in the public interest pursuant to a statutory or regulatory scheme." (Defs.' Br. at 6.) Defendants do not explicitly address, however, whether the requested preliminary relief is mandatory or prohibitory in nature.

***7** The lesser "serious questions" standard is inapplicable here because the requested temporary restraining order will affect the OAG and James' enforcement of the New York Human Rights Law, which constitutes "government action taken in the public interest pursuant to a statutory or regulatory scheme." *We the Patriots USA, Inc.*, 17 F.4th at 279 n.13; *see* N.Y. Exec. Law § 292 *et seq.*; *id.* § 63(1). The Court does not resolve at this time, however, whether the TRO/PI Motion seeks mandatory or prohibitory relief. The status quo *ante*—the last actual, peaceable, uncontested status that preceded the pending controversy—was shortly after Blakeman issued the Executive Order and before the OAG issued the March 1, 2024 letter calling for the Executive Order's rescission and requesting the documents supporting its issuance. At that time, James and the OAG could exercise discretion under New York law to bring an enforcement action against the County Plaintiffs under the New York Human Rights Law. *See* N.Y. Exec. Law § 63(1). On the one hand, the County Plaintiffs' requested temporary restraining order is prohibitory because it would require the "non-movant to refrain from taking some action"—here, OAG

and James' action to enforce state anti-discrimination laws. *Daileader*, 2024 WL 1145347, at *3. On the other hand, the requested temporary restraining order is mandatory because it would upend the status quo in which the New York Legislature has granted the NY Attorney General broad discretion to enforce the state's anti-discrimination laws. *See* N.Y. Exec. Law § 63. There is an additional question about whether the requested order may "provide the movant with substantially all the relief sought" and whether "that relief cannot be undone even if the defendant prevails at a trial on the merits," factors that weigh in favor of framing the requested TRO as mandatory. *Yang v. Kosinski*, 960 F.3d 119, 127–28 (2d Cir. 2020).

The Court need not resolve these questions at this time because, as explained in this opinion, the County Plaintiffs fail to meet the lower "likelihood of success on the merits" standard applied to a motion for a temporary restraining order seeking prohibitory relief against government actions taken in the public interest pursuant to a statutory or regulatory scheme. *See, e.g.*, *We the Patriots USA, Inc.*, 17 F.4th at 279; *Gazzola*, 88 F.4th at 194.

DISCUSSION

The County Plaintiffs fail to meet the standard for securing the "extraordinary remedy" of a temporary restraining order for two principal reasons. *Benisek v. Lamone*, 138 S. Ct. 1942, 1943 (2018) (per curiam) ("[A] preliminary injunction is an extraordinary remedy never awarded as of right.") (quotation marks omitted); *Gazzola*, 88 F.4th at 193–94 (same). First and foremost, the County Plaintiffs' TRO Motion fails to demonstrate a likelihood of success on the merits of the sole equal protection claim pled in the Complaint. Based on the record before the Court, the claim is nonjusticiable under the doctrine of Eleventh Amendment sovereign immunity, the application of Rule 17(b) and New York's capacity-to-sue rule, and the requirements of Article III standing. Second, the County Plaintiffs' submissions fail to show that they will suffer irreparable harm without the requested temporary restraining order.

I. Likelihood of Success on the Merits

The Plaintiffs' single claim for declaratory and injunctive relief under the Equal Protection Clause suffers from defects that render it nonjusticiable. The Eleventh Amendment affords New York and the OAG sovereign immunity from Plaintiffs' claim for injunctive and declaratory relief and bars any claim for retrospective declaratory relief against James. Additionally, the County Plaintiffs lack the capacity to sue all Defendants under Rule 17(b), Fed. R. Civ. P., and New York law. Furthermore, the record does not establish that any of the Plaintiffs—whether Nassau County, Blakeman, or the Individual Plaintiffs—have demonstrated an actual and imminent injury that is concrete and particularized as required for Article III standing to bring the equal protection claim pled in the Complaint.

A. Eleventh Amendment Sovereign Immunity

Defendants argue that the Eleventh Amendment bars Plaintiffs' claim for injunctive and declaratory relief against New York and the OAG, as well as any claim for "retroactive relief" against James for conduct taken in her official capacity as the NY Attorney General. (Defs.' Br. at 8–9.) The County Plaintiffs fail to address the Eleventh Amendment in their opening brief and to respond to any of Defendants' arguments in their reply brief in support of the TRO Motion. (*See generally* Defs.' Br. at 8–9; Cnty. Pls.' Reply.) Defendants are correct. The Eleventh Amendment bars almost all aspects of Plaintiffs' equal protection claim, with the sole exception of an equal protection claim for injunctive and prospective declaratory relief against James in her official capacity as the NY Attorney General.[9]

***8** The Eleventh Amendment provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. Amend. XI. Though not set forth in the text, the Eleventh Amendment also bars

"suits in federal court against a state brought by that state's own citizens." *Mary Jo C. v. New York State & Loc. Ret. Sys.*, 707 F.3d 144, 151 (2d Cir. 2013). Eleventh Amendment sovereign immunity also applies to suits by a municipality—such as Nassau County—against a state. *See Monroe Cnty. v. State of Fla.*, 678 F.2d 1124, 1131 (2d Cir. 1982) (holding that a New York county bringing suit against Florida is a "Citizen of another State" within the meaning of the Eleventh Amendment), *cert. denied*, 459 U.S. 1104 (1983); *see also Oneida Cnty., N.Y. v. Oneida Indian Nation of New York State*, 470 U.S. 226 (holding that the Eleventh Amendment bars a county's cross-claim against New York for indemnification), *reh'g denied*, 471 U.S. 1062 (1985). Eleventh Amendment sovereign immunity applies not just to lawsuits filed in federal court against states themselves, but also to "certain actions against state agents and instrumentalities." *Leitner v. Westchester Cmty. Coll.*, 779 F.3d 130, 134 (2d Cir. 2015) (citing *Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425, 429 (1997)); *see also Mary Jo C.*, 707 F.3d at 151–52 (same). An entity "asserting Eleventh Amendment immunity ... bear[s] the burden of demonstrating entitlement." *Leitner*, 779 F.3d at 134. "[T]he question is whether the state instrumentality is independent or whether it is an 'arm of the state.' " *Id.*; *see, e.g.*, *Gollomp v. Spitzer*, 568 F.3d 355, 366 (2d Cir. 2009) (holding that the New York State Unified Court System is an "arm of the State" entitled to Eleventh Amendment sovereign immunity). The Second Circuit has applied two different tests to answer this question. *Leitner*, 779 F.3d at 134–35, 137.[10] Both tests are ultimately guided by what the Supreme Court has recognized are the Eleventh Amendment's "twin reasons for being": the need to "preserv[e] the state's treasury and protect[ ] the integrity of the state." *Id.* at 134 (citing *Hess v. PATH*, 513 U.S. 30, 47–48 (1994)).

Entities shielded from suit by the Eleventh Amendment "may not be sued in federal court unless they have waived their Eleventh Amendment immunity, or unless Congress has abrogate[d] the states' Eleventh Amendment immunity when acting pursuant to its authority under Section 5 of the Fourteenth Amendment." *Gollomp*, 568 F.3d at 366 (quotation marks omitted). The Eleventh Amendment thus "generally bars suits in federal court" against "non-consenting states." *Leitner*, 779 F.3d at 134. This bar applies to federal court suits against a state and its agents and instrumentalities "regardless of the nature of the relief sought." *74 Pinehurst LLC v. New York*, 59 F.4th 557, 570 (2d Cir. 2023), *cert. denied*, No. 22-1130, 2024 WL 674658 (U.S. Feb. 20, 2024); *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 120 (1984) ("[I]f a § 1983 action alleging a constitutional claim is brought directly against a State, the Eleventh Amendment bars a federal court from granting *any relief* on that claim.") (emphasis supplied). Accordingly, states and their agents and instrumentalities are immune from suits seeking monetary damages and injunctive relief, *McGinty v. New York*, 251 F.3d 84, 91 (2d Cir. 2001) (citations omitted), as well as declaratory relief, *Ashmore v. Prus*, 510 F. App'x 47, 48 (2d Cir. 2013) (citing *Pennhurst*, 465 U.S. at 100–01); *Manners v. New York*, 175 F.3d 1008, 1999 WL 96136 at *1 (2d Cir. 1999) (summary order) (citing *Atlantic Healthcare Benefits Trust v. Googins*, 2 F.3d 1, 4 (2d Cir. 1993)).

***9** Notwithstanding the Eleventh Amendment's bar to federal court suits against states and their agents and instrumentalities, a plaintiff may sue a state official acting in their official capacity "for prospective, injunctive relief from violations of federal law" under the doctrine established by the Supreme Court in *Ex parte Young*, 209 U.S. 123 (1908). *State Emps. Bargaining Agent Coal. v. Rowland*, 494 F.3d 71, 94 (2d Cir. 2007). The *Ex parte Young* exception applies to a claim against a state official when the "complaint (a) alleges an ongoing violation of federal law and (b) seeks relief properly characterized as prospective." *In re Deposit Ins. Agency*, 482 F.3d 612, 618 (2d Cir. 2007) (citing *Verizon Maryland Inc. v. Pub. Serv. Comm'n of Maryland*, 535 U.S. 635, 645 (2002)) (quotation marks omitted). The *Ex parte Young* exception does not apply if a plaintiff seeks declaratory relief that "would have the same effect as an award of damages against the state." *Williams v. Marinelli*, 987 F.3d 188, 197 (2d Cir. 2021) (citing *Green v. Mansour*, 474 U.S. 64, 73 (1985)); *see also Bythewood v. New York*, No. 22-2542-CV, 2023 WL 6152796, at *1 (2d Cir. Sept. 21, 2023) ("Retrospective declaratory relief cannot otherwise serve as an end run around the Eleventh Amendment's bar on retrospective awards of monetary relief.") (citing *Ward v. Thomas*, 207 F.3d 114, 120 (2d Cir. 2000)) (quotation marks omitted).

1) Plaintiffs' Claim against New York and the OAG

The Eleventh Amendment precludes Plaintiffs' claim against New York and the OAG because New York has not waived its Eleventh Amendment immunity to claims brought under the Fourteenth Amendment's Equal Protection Clause and Congress has not abrogated that immunity. *Gollomp*, 568 F.3d at 366; *Barone v. Laws.' Fund for Client Prot.*, 2023 WL 1975783, at *2 (2d Cir. 2023).

First, the Eleventh Amendment applies to both New York and the OAG. As one of the "United States," New York is squarely

covered by the plain text of the Eleventh Amendment. U.S. Const. Amend. XI. The OAG also falls within the Amendment's reach because it "is unquestionably an arm of the State of New York for purposes of Eleventh Amendment immunity." *Giordani v. U.S. Dep't of Just.*, No. 22-CV-642 (AMD) (LB), 2022 WL 17488494, at *6 (E.D.N.Y. Dec. 7, 2022) (citation omitted), *appeal dismissed* (Nov. 6, 2023); *see also Butler v. New York State Dep't of L.*, 211 F.3d 739, 746 (2d Cir. 2000) (affirming dismissal of employment discrimination claim against the OAG (referred to as the "New York State Department of Law") as barred by Eleventh Amendment sovereign immunity); *Mitchell v. New York*, No. 23-705, 2024 WL 319106, at *2 (2d Cir. Jan. 29, 2024) (holding that "no relief, either legal or equitable, is available against ... the New York Attorney General" because it is entitled to Eleventh Amendment immunity); *Smith v. United States*, 554 F. App'x 30, 31 (2d Cir. 2013) (affirming district court's dismissal of a suit against New York and the NY Attorney General as barred by the Eleventh Amendment); *Petreykov v. Vacco*, 159 F.3d 1347 (2d Cir. 1998) (same); *Rivera v. United States Citizenship & Immigr. Servs.*, No. 19-CV-3101, 2020 WL 4705220, at *9 (S.D.N.Y. Aug. 12, 2020) (collecting district court decisions holding that the Eleventh Amendment bars claims against the OAG).[11]

***10** Second, Congress has not abrogated the States' Eleventh Amendment immunity as to Plaintiffs' Fourteenth Amendment claim. The Complaint appears to assert a claim under the Declaratory Judgment Act and the Fourteenth Amendment's Equal Protection Clause without identifying a valid cause of action under which Plaintiffs bring this claim. (*See generally* Compl.)[12] Even if the Court were to liberally construe the Complaint to assert a Fourteenth Amendment claim pursuant to 42 U.S.C. § 1983, it is well established that "Congress did not abrogate the state's Eleventh Amendment immunity by enacting 42 U.S.C. § 1983." *Barone*, 2023 WL 1975783, at *2 (citing *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 66 (1989)).

Third, there is no indication that New York has waived its immunity by "voluntarily invok[ing] federal court jurisdiction, or else ... mak[ing] a clear declaration that it intends to submit itself to federal court jurisdiction." *Kelly v. New York State Unified Ct. Sys.*, No. 21-1633, 2022 WL 1210665, at *2 (2d Cir. Apr. 25, 2022) (quoting *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 675–76 (1999)) (brackets omitted); *see also, e.g.*, *Trotman v. Palisades Interstate Park Comm'n*, 557 F.2d 35, 37–38 (2d Cir. 1977) (finding that clause in interstate charter permitting New York to "sue and be sued," was not a clear declaration that New York intended to waive sovereign immunity).

Fourth, the Eleventh Amendment applies to the injunctive and declaratory relief Plaintiffs seek through their equal protection claim against New York and the OAG, as well as the specific relief they seek on the TRO/PI Motion. Plaintiffs' requests for a temporary restraining order, preliminary injunction, and permanent injunction all include requests for injunctive relief that is squarely barred by the Eleventh Amendment. *See McGinty*, 251 F.3d at 91 (holding that the Eleventh Amendment bars claims for "injunctive relief" against nonconsenting states).[13] Plaintiffs' request for a declaration that Defendants' application of the New York Human Rights Law to the Executive Order violates the Fourteenth Amendment and a declaration that the Executive Order is lawful under federal and state law concern declaratory relief that is also barred by the Eleventh Amendment. *See Ashmore*, 510 F. App'x at 48; *Manners*, 1999 WL 96136 at *1.

***11** Accordingly, Plaintiffs' equal protection claim for declaratory and injunctive relief against Defendants New York and the OAG are barred by Eleventh Amendment sovereign immunity.

2) Claims against Defendant James, in her Capacity as NY Attorney General

Defendants argue that any claims for "retroactive relief" against Defendant James acting in her official capacity are also barred by Eleventh Amendment sovereign immunity. (Defs.' Br. at 9.) This raises the question of whether any part of Plaintiffs' claim against James withstands Defendants' invocation of immunity.

The Complaint by its caption sues James "as attorney General of the State of New York" and its allegations solely address conduct by James' staff at the OAG, both of which suggest that Plaintiffs sue James only in her official capacity, rather than in her individual capacity. (*See* Compl. at 1.) The Complaint's request for a declaration that Defendants' application of the New York Human Rights Law to the Executive Order violates the Equal Protection Clause could be construed to include a request for a declaration that the OAG's March 1, 2024 letter violated the Equal Protection Clause. (*See* Compl. ¶ 41 (alleging that "[i]n fact, the cease-and-desist order violates the constitutional rights of biologically [sic] girls and women who are a federally recognized protected class")). The Eleventh Amendment bars this demand for retrospective declaratory relief

against James in her official capacity. *Williams*, 987 F.3d at 197; *Green*, 474 U.S. at 73; *Bythewood*, 2023 WL 6152796, at *1.

At least a portion of the requested declaratory relief pled against James, however, is forward looking. That portion seeks to establish that the Executive Order is lawful going forward and that the New York Human Rights Law's provisions prohibiting discrimination on the bases of sex and gender identity and expression are invalid. These aspects of Plaintiffs' declaratory relief claim against James, as well as the request for an injunction barring James from taking any action to prevent implementation of the Executive Order, fall within the *Ex parte Young* exception to Eleventh Amendment sovereign immunity. *See Seneca Nation*, 58 F.4th at 672 n.39; *Rowland*, 494 F.3d at 95–98. As discussed below, however, those aspects of Plaintiffs' declaratory relief claim against James are nonjusticiable for other reasons.

B. The County Plaintiffs' Capacity to Sue

Defendants argue that both Nassau County and Blakeman, who sues in his official capacity as the Nassau County Executive, lack the capacity to sue Defendants for the equal protection claim pled in the Complaint.

Rule 17(b) of the Federal Rules of Civil Procedure governs the capacity of an entity to bring a claim in federal court. *Centro de la Comunidad Hispana de Locust Valley v. Town of Oyster Bay*, 954 F. Supp. 2d 127, 136 (E.D.N.Y. 2013), *aff'd* 868 F.3d 104 (2d Cir. 2017). "Capacity to sue is a threshold matter allied with, but conceptually distinct from, the question of standing." *Sonterra Cap. Master Fund, Ltd. v. Barclays Bank PLC*, 403 F. Supp. 3d 257, 267 (S.D.N.Y. 2019). As relevant here, the "[c]apacity to sue or be sued is determined ... by the law of the state where the court is located." Fed. R. Civ. P. 17(b)(3); *Orraca v. City of New York*, 897 F. Supp. 148, 152 (S.D.N.Y. 1995) (noting that under Rule 17(b), "the capacity of a governmental entity to sue or be sued is a question of state law"); *see, e.g.*, *In re World Trade Ctr. Lower Manhattan Disaster Site Litig.*, 846 F.3d 58, 63–64 (2d Cir. 2017) (applying New York law to determine whether a public benefit corporation had the capacity to challenge a New York claim-revival statute under the New York Constitution). "[A] party must maintain its capacity to sue throughout litigation, and lack of capacity is grounds for dismissal." *Sonterra*, 403 F. Supp. 3d at 267 (quotation marks and citation omitted). If not raised by motion, a defense of lack of capacity to sue "can be waived." *City of New York v. State of New York*, 86 N.Y.2d 286, 292 (1995).

***12** New York follows the "traditional" capacity-to-sue rule, according to which "municipalities and other local governmental corporate entities and their officers lack capacity to mount constitutional challenges to acts of the State and State legislation." *City of New York*, 86 N.Y.2d at 289; *In re World Trade Ctr. Lower Manhattan Disaster Site Litig.*, 846 F.3d at 63. This rule "flows" from the recognition that "municipal corporate bodies—counties, towns and school districts—are merely subdivisions of the State, created by the State for the convenient carrying out of the State's governmental powers and responsibilities as its agents." *City of New York*, 86 N.Y.2d at 289. The Second Circuit has recognized that "[t]his rule is also a necessary outgrowth of separation of powers doctrine: it expresses the extreme reluctance of courts to intrude in the political relationships between the Legislature, the State and its governmental subdivisions." *In re World Trade Ctr. Lower Manhattan Disaster Site Litig.*, 846 F.3d at 63 (citing *City of New York*, 86 N.Y.2d at 296). Thus, New York counties "cannot have the right to contest the actions of their principal or creator affecting them in their governmental capacity or as representatives of their inhabitants." *City of New York*, 86 N.Y.2d at 290. "Municipal officials ... suffer the same lack of capacity to sue the State with the municipal corporate bodies they represent." *Id.* at 291.[14]

The New York Court of Appeals recognizes only four limited exceptions to the general rule that municipal corporate entities and their officers lack capacity to mount constitutional challenges to State action and legislation:

> (1) [where there is] an express statutory authorization to bring such a suit; (2) where the State legislation adversely affects a municipality's proprietary interest in a specific fund of moneys; (3) where the State statute impinges upon "Home Rule" powers of a municipality constitutionally guaranteed under article IX of the State Constitution; and (4) where the municipal challengers assert that if they are obliged to comply with the State statute they will by that very compliance be forced to violate a constitutional proscription.

City of New York, 86 N.Y.2d at 291–92 (quotation marks and citations omitted); *see also In re World Trade Ctr. Lower Manhattan Disaster Site Litig.*, 846 F.3d at 63–64. The New York Court of Appeals has emphasized that these four

exceptions are "narrow." *In re World Trade Ctr. Lower Manhattan Disaster Site Litig.*, 30 N.Y.3d 377, 387 (2017). Thus, the capacity-to-sue rule has been applied to bar:

> public entities from challenging a wide variety of state actions, such as, e.g., the allocation of state funds amongst various localities, the modification of a village operated hospital's operating certificate, the closure of a local jail by the State, special exemptions from local real estate tax assessments, laws mandating that counties make certain expenditures, state land use regulations and state laws requiring electronic voting systems to be installed at polling places in lieu of lever-operated machines.

Id. (citations to New York Court of Appeals decisions omitted).

Defendants have timely raised the County Plaintiffs' lack of capacity to sue in their opposition to the TRO/PI Motion and in a timely filed Motion to Dismiss the Complaint. (*See* Defs.' Br. at 9; Defs.' Mem. Supp. Mot. Dismiss at 9, ECF No. 20-1.) Under well-established New York law, both Nassau County and Blakeman lack the capacity to sue Defendants for the sole claim pled in the Complaint. Plaintiffs explicitly seek a ruling from this Court that Defendants violate the rights of women and girl athletes to equal protection by applying state anti-discrimination laws to the Executive Order. (Compl. ¶¶ 35–41; *id.* at 12.) Blakeman attests that he and Nassau County bring this suit to vindicate the rights of women and girls in Nassau County. (Blakeman Aff. ¶¶ 3–4.) As a subdivision and creation of Defendant New York, Nassau County lacks the authority to bring such a claim "contest[ing] the actions of [its] principal or creator affecting [it] in [its] governmental capacity or as representatives of [its] inhabitants." *City of New York*, 86 N.Y.2d at 290. Because Blakeman sues in his role as Nassau County's top official, he too lacks the authority to bring such a claim. *See id.* at 291 ("Municipal officials ... suffer the same lack of capacity to sue the State with the municipal corporate bodies they represent.").

***13** The County Plaintiffs fail to show that any of the four limited exceptions to New York's capacity-to-sue rule apply to their claim. First, they do not identify any express statutory language or legislative history showing that the New York Legislature intended to confer upon a county or a county executive the capacity to sue Defendants under the Fourteenth Amendment for any type of relief, much less the specific relief sought in the Complaint. *See e.g.*, *City of New York*, 86 N.Y.2d at 289 (holding that the New York capacity-to-sue doctrine barred an equal protection claim by New York City, its Mayor, and other city entities against New York State and "various State officials" for public school funding issues where there was no "any express statutory language or legislative history" showing "capacity to bring suit challenging State legislation").[15]

This case does not trigger the second exception to New York's capacity-to-sue rule because the Plaintiffs do not show that the challenged provisions of the New York Human Rights Law adversely affect Nassau County's "proprietary interest in a specific fund of moneys." *City of New York*, 86 N.Y.2d at 287. There is no argument, much less a showing, that Plaintiffs' claims concern any Nassau County proprietary interest in any monetary fund.

The County Plaintiffs argue that the third exception to New York's capacity-to-sue rule—the "home rule" exception—applies to their Fourteenth Amendment equal protection claim because the New York Constitution's home rule provision "provides protections to local governments more extensive than those in many other states," the "laws enacted and adopted by the Nassau County Legislature carry the weight of state law," and that body delegated to the County Executive the authority to develop policies and procedures for the issuance of permits to use Nassau County Park property. (Cnty. Pls.' Reply at 2–3.) This argument is unpersuasive.

The New York Court of Appeals first recognized the home rule exception in *Town of Black Brook v. State*, 41 N.Y.2d 486 (1977), finding "a limited exception" to the rule that a municipality cannot attack "state legislative action affecting its powers" where the "local government's claim is based on one of the [home rule] protections of article IX [of the New York Constitution]." *Id.* at 487–89. This "limited exception" applies only to a municipality's claim that a state statute violates Article IX of the New York Constitution. *See id.* at 489 (noting that the home rule exception applies "when a home rule challenge is brought"); *New York Blue Line Council, Inc. v. Adirondack Park Agency*, 86 A.D.3d 756, 758 (2011) (affirming the lower court's ruling "that the municipal petitioners lack capacity to sue on all claims other than that alleging a violation of their home rule powers" under "article IX of the N.Y. Constitution"), *appeal dismissed* 17 N.Y.3d 947 (2011), *lv. denied* 18 N.Y.3d 806 (2012); *Town of Verona v. Cuomo*, 136 A.D.3d 36, 41 (2015) (noting that the home rule exception "applies when a municipality's claim is based upon a violation of its home rule powers").[16]

***14** Here, the home rule exception does not apply because the Complaint does not plead a claim that the New York Human

Rights law, as applied to the Executive Order, violates the home rule provision of the New York Constitution. *See New York Blue Line Council*, 86 A.D.3d at 759 (2011) (applying the home rule exception to hold that municipal entities only had capacity to sue state agency under article IX of the N.Y. Constitution, but not to bring other claims); *Town of Black Brook*, 41 N.Y.2d at 489 (the home rule exception applies "when a home rule challenge is brought"). The sole claim set forth in the Complaint concerns an alleged violation of the Equal Protection Clause and the Declaratory Judgment Act. (Compl. ¶¶ 33–43.) Without providing any legal authority, the County Plaintiffs appear to argue that the home rule exception permits a municipality and a municipal official to sue state defendants for claims *other than* an alleged violation of the home rule protections of article IX of the New York Constitution. (*See* Reply Br. at 2–3). This Court will not expand the home rule exception beyond the contours laid out by New York courts. Based on the record before the Court, the home rule exception is inapplicable to this case and the County Plaintiffs lack capacity to sue Defendants for violation of the Fourteenth Amendment's Equal Protection Clause and the Declaratory Judgment Act.

Finally, the fourth exception to the New York capacity-to-sue rule, which the County Plaintiffs invoke on reply, does not apply. (*Id.*) The record does not establish that any action by Defendants to enforce the New York Human Rights Law against the Executive Order would compel either Nassau County or Blakeman "to violate a constitutional proscription." *City of New York*, 86 N.Y.2d at 292. "New York courts have interpreted constitutional ... proscriptions to be something expressly forbidden ...." *Merola v. Cuomo*, 427 F. Supp. 3d 286, 292 (2019). The County Plaintiffs broadly argue that rescission of the Executive Order would "allow[ ] transgender females (biological males) to play sports with biological females, thereby violating the constitutional rights of women as a protected class" and that rescission of the Executive Order would "violate the rights afforded to [women] by Title IX." (Cnty. Pls.' Reply at 2.) The County Plaintiffs' claim that rescission of the Executive Order would lead to Title IX violations is confusing and out of place because that statute applies to educational institutions, and the County Plaintiffs concede that Title IX does not apply to any sporting and athletic endeavors on Nassau County Parks property. (Cnty. Pls.' Br. at 7 n.1.) The County Plaintiffs' assertion that invalidation of the Executive Order would compel them to violate the equal protection rights of women and girls is also unpersuasive. There is no record evidence that the County Plaintiffs would be forced to violate the Equal Protection Clause's prohibition against intentional discrimination with respect to any individual or group if Nassau County were to revert to the procedures in place prior to enactment of the Executive Order for evaluating and granting permits to use Nassau County Parks facilities. *See Howard v. City of New York*, 602 F. App'x 545, 547 (2d Cir. 2015) ("[T]he Equal Protection Clause[ ] only prohibits intentional ... discrimination.") (quoting *Brown v. City of Oneonta*, 221 F.3d 329, 339 (2d Cir. 2000)). Indeed, the County Plaintiffs' argument suggests that prior to the Executive Order's enactment, the County Plaintiffs were violating the rights of women and girls by not having such a permitting process in place.

C. Standing

Plaintiffs' equal protection claim boils down to the argument that the OAG's application of the New York Human Rights Law's prohibitions against discrimination on the bases of gender identity and expression to the Executive Order will cause violations of women and girls' rights under the Equal Protection Clause of the Fourteenth Amendment. (*See* Compl. ¶¶ 33–43.) Based on this claim, Plaintiffs seek a declaration that those provisions of the New York Human Rights Law are unconstitutional as applied to the Executive Order and that the Executive Order complies with federal and state law, and an injunction barring New York, the OAG, and James in her role as NY Attorney General, from taking any enforcement action that might lead to invalidation of the Executive Order. (*Id.* at 12.) The Court lacks jurisdiction over this claim under Article III of the Constitution because none of the Plaintiffs have standing to bring it.

***15** Article III of the Constitution "limits the federal judicial power to deciding 'Cases' and 'Controversies.' " *Soule v. Connecticut Ass'n of Sch., Inc.*, 90 F.4th 34, 45 (2d Cir. 2023) (citing U.S. Const. art. III § 2). A case or controversy only exists when the plaintiff has "standing" to sue because they have "a personal stake in the outcome of the litigation." *Id.* (citing *United States v. Texas*, 599 U.S. 670 (2023)) (quotation marks omitted). In order to establish Article III standing, a plaintiff must show: "(1) that they suffered an injury in fact, (2) that the injury is fairly traceable to Defendants' challenged conduct, and (3) that the injury is likely to be redressed by a favorable judicial decision." *Id.* (citing *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016)) (quotation marks omitted). A "plaintiff[ ] must demonstrate standing for each claim that they press and for each form of relief that they seek." *Id.* (citing *TransUnion LLC v. Ramirez*, 594 U.S. 413 (2021)). When seeking the extraordinary relief of a temporary restraining order or preliminary injunction, a plaintiff's burden to demonstrate standing

"will normally be no less than that required on a motion for summary judgment." *Do No Harm v. Pfizer Inc.*, No. 23-15, 2024 WL 949506, at *7 (2d Cir. Mar. 6, 2024) (citing *Cacchillo v. Insmed, Inc.*, 638 F.3d 401, 404 (2d Cir. 2011)). Accordingly, a plaintiff seeking such extraordinary relief "cannot rest on such mere allegations as would be appropriate at the pleading stage but must set forth by affidavit or other evidence specific facts" to establish injury-in-fact, redressability, and standing. *Id.* (citing *Cacchillo*, 638 F.3d at 404); *see also Green Haven Prison Preparative Meeting of Religious Soc'y of Friends v. New York State Dep't of Corr. & Cmty. Supervision*, 16 F.4th 67, 78–79 (2d Cir. 2021) (same); *Pers. v. United States*, No. 19 CIV. 154 (LGS), 2019 WL 258095, at *1 n.2 (S.D.N.Y. Jan. 18, 2019) (applying the same rule "in the context of a temporary restraining order, since the legal standard for granting temporary restraining orders and preliminary injunctions is the same").

In order to demonstrate an "injury in fact," a plaintiff must establish "an invasion of a legally protected interest which is (a) concrete and particularized ... and (b) actual or imminent, not conjectural or hypothetical." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (quotation marks and citations omitted); *see also Soule*, 90 F.4th at 45, 50 (citing *TransUnion*, 594 U.S. at 423). To be "concrete," an injury must be "real, and not abstract." *Id.* at 45. An injury is "particularized" only when it "affect[s] the plaintiff in a personal and individual way." *Id.* at 45–46 (citing *Spokeo*, 578 U.S. at 339). Lastly, an injury is "actual or imminent" where the injury "has actually happened or is certainly impending." *Id.* at 46, 50 (citing *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013), and then citing *Lujan*, 504 U.S. at 560–61) (quotation marks omitted).

Under these standards, the County Plaintiffs' submissions fail to establish that any Plaintiff—Nassau County, Blakeman, or K.E.M., whose claim is brought by the Mullens—have the required injury-in-fact for standing to bring a claim for the requested relief against Defendants. (Compl. at 12.)

1) County Plaintiffs

The County Plaintiffs' submissions fail to show they have standing for two reasons. First, in the Second Circuit, it is well established that a county lacks standing to challenge the constitutionality of a state statute under the Fourteenth Amendment. Blakeman does not demonstrate that he meets any exception to this rule for county officials who bring a legal claim in their official capacity. Second, the County Plaintiffs fail to show that they have any constitutional interest implicated by an OAG enforcement action against them related to the Executive Order. Even if an OAG enforcement action implicated the constitutional interest of third-parties—such as women and girls in Nassau County—the County Plaintiffs lack standing to assert an equal protection claim on behalf of these third-parties.

a. Standing to Challenge the Constitutionality of the New York Human Rights Law

The County Plaintiffs lack standing to bring the equal protection claim pled in the Complaint. (*See* Compl. ¶¶ 33–43.) The Second Circuit has squarely held that "a political subdivision" of a state, such as a county, "does not have standing to sue its state under the Fourteenth Amendment." *Tweed-New Haven Airport Auth. v. Tong*, 930 F.3d 65, 73 n.7 (2d Cir. 2019). "Political subdivisions of a state may not challenge the validity of a state statute under the Fourteenth Amendment." *City of New York v. Richardson*, 473 F.2d 923, 929 (2d Cir. 1973) (citations omitted); *see also Aguayo v. Richardson*, 473 F.2d 1090, 1101 (2d Cir. 1973).[17] Accordingly, under longstanding Second Circuit precedent, Nassau County, as a political subdivision of New York, does not have standing to bring a claim for injunctive and declaratory relief against any of the Defendants to challenge the OAG's application of the New York Human Rights Law to the Executive Order under the Fourteenth Amendment's Equal Protection Clause. *See Tweed*, 930 F.3d at 73 n.7.[18]

***16** The Second Circuit has recognized a limited theory of standing—the so-called "dilemma" theory—where, unlike a municipal corporation, a municipal official acting in their official capacity may have standing to challenge a state statute under the Fourteenth Amendment in certain circumstances. *See Bd. of Educ. of Mt. Sinai Union Free Sch. Dist. v. New York State Tchrs. Ret. Sys.*, 60 F.3d 106, 112 (2d Cir. 1995) (citing *Bd. of Ed. of Cent. Sch. Dist. No. 1 v. Allen*, 392 U.S. 236, 241 n.5 (1968)). The county official must demonstrate that "compliance with state law will require them to violate their oaths to act constitutionally" and "that their positions as officials or funding for [their governmental entity] is in jeopardy if they

refuse" to comply. *New York State Tchrs. Ret. Sys.*, 60 F.3d at 110–112 (finding that county officials who did not make such allegations lacked standing to bring Fourteenth Amendment and Contracts Clause claims against a state statute under the dilemma theory); *see also Merola v. Cuomo*, 427 F. Supp. 3d 286, 290–91 (N.D.N.Y. 2019).

Blakeman has failed to make the required showing. The County Plaintiffs have not set forth any evidence that an OAG enforcement action against them or even the eventual invalidation of the Executive Order would require Blakeman to violate his oath to act in accordance with the U.S. Constitution. Further, the County Plaintiffs have not submitted evidence showing that Blakeman's failure to comply with the New York Human Rights Law would likely result in the loss of his position as County Executive or a reduction in funding for Nassau County. Without evidence as to any "realistic threat of harm" to Blakeman if the OAG were to prevail on its theory that the Executive Order violates the New York Human Rights Law's prohibitions against discrimination on the bases of sex and gender identity and expression, the County Plaintiffs fail to establish any dilemma that could support Blakeman's standing to bring the Fourteenth Amendment claim pled in the Complaint. *New York State Tchrs. Ret. Sys.*, 60 F.3d at 112.

b. Standing to Bring a Pre-Enforcement Challenge

Finally, the County Plaintiffs' submissions fail to establish their standing to bring a pre-enforcement equal protection claim challenging Defendants' application of the New York Human Rights Law to the Executive Order. The OAG has not initiated any legal action against Nassau County related to the Executive Order, although the March 1, 2024 letter conveys a demand that the County Plaintiffs rescind the Executive Order and produce the documentary record supporting its issuance or face "further legal action by the OAG." (OAG Ltr. at 3). For standing to bring a pre-enforcement challenge, a plaintiff must show a "sufficiently imminent" injury-in-fact by demonstrating (1) "an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute," and (2) that there exists "a credible threat of prosecution thereunder." *Silva v. Farrish*, 47 F.4th 78, 86 (2d Cir. 2022) (citing *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159 (2014)) (quotations omitted); *see, e.g.*, *Org. for Marriage, Inc. v. Walsh*, 714 F.3d 682, 687–691 (2d Cir. 2013) (holding that an organization had standing to bring a pre-enforcement First Amendment challenge to a state law where the plaintiff intended to engage in arguably protected speech and fear of violating the law had a chilling effect on that speech).

Defendants argue that implementation of the Executive Order does not implicate any "constitutional interest" of the County Plaintiffs themselves as required for a pre-enforcement challenge. (Defs.' Br. at 13.) Indeed, the County Plaintiffs have not pointed to any constitutional interest in maintaining the Executive Order that they themselves—rather than third parties—possess. *Cf. Cnty. of Santa Clara v. Trump*, 250 F. Supp. 3d 497, 525 (N.D. Cal. 2017) (finding that plaintiff counties demonstrated injury-in-fact to support standing for a pre-enforcement challenge to a federal executive order where plaintiffs' failure to comply would lead to the withdrawal of federal funding and "implicate a constitutional interest, the rights of states and local governments to determine their own local policies and enforcement priorities pursuant to the Tenth Amendment"). Instead, the County Plaintiffs allege that the OAG's enforcement actions will cause "women and girls in Nassau County" to face "discriminat[ion]" and violations of "their constitutional rights." (Blakeman Aff. ¶ 3.) The County Plaintiffs contend that they have standing because of an asserted "increased risk of future physical injury" to these third parties and rely on two district court decisions that address organizational standing. (Cnty. Pls.' Br. at 23–24) (citing *Rural & Migrant Ministry v. United States EPA*, 510 F. Supp. 3d 138, 155 (S.D.N.Y. 2020), *amended and superseded by Rural & Migrant Ministry v. United States EPA*, 565 F. Supp. 3d 578 (S.D.N.Y. 2021); *Brooklyn Ctr. for Indep. of the Disabled v. Bloomberg*, 290 F.R.D. 409, 416 (S.D.N.Y. 2012)). The County is not an organization, however, and the County Plaintiffs do not provide any legal authority for the proposition that a municipality is treated as an organization for purposes of Article III standing. *Cf. City of Olmsted Falls, OH v. F.A.A.*, 292 F.3d 261, 268 (D.C. Cir. 2002) (assuming, without deciding, that a city may not establish standing on behalf of its citizens under the doctrine of organizational standing).

***17** Moreover, even if Nassau County could avail itself of organizational standing doctrine, it would not be able to assert the equal protection rights of its female residents. It is well established in the Second Circuit that an organization lacks "standing to assert the rights of its members" under 42 U.S.C. § 1983. *Connecticut Citizens Def. League, Inc. v. Lamont*, 6 F.4th 439, 447 (2d Cir. 2021) (quotation marks omitted); *Nnebe v. Daus*, 644 F.3d 147, 156 (2d Cir. 2011) ("It is the law of this Circuit that an organization does not have standing to assert the rights of its members in a case brought under 42 U.S.C. § 1983, as we have 'interpret[ed] the rights [§ 1983] secures to be personal to those purportedly injured.").

In the section of their reply brief addressing irreparable harm, the County Plaintiffs also argue that Nassau County and Blakeman will suffer an injury in the form of budget uncertainty due to the potential for "[a]n influx of [personal injury] lawsuits against the County" in the absence of the Executive Order, which "can result in millions of dollars of increase in the County budget in the form of settlements or verdicts." (Cnty. Pls.' Reply at 4.) These assertions, which are not alleged in the Complaint or supported by any evidence, are speculative and fail to establish that enforcement of the Executive Order implicates any constitutional interest of the County itself. *Cf. County of Santa Clara*, 250 F. Supp. 3d at 528–29.

Accordingly, the record fails to show that the County Plaintiffs have standing to sue Defendants in a pre-enforcement claim that the New York Human Rights Law as applied to the Executive Order violates the Equal Protection Clause.

2) Individual Plaintiffs

In addition to the County Plaintiffs, the Individual Plaintiffs bring an equal protection claim against Defendants on behalf of their minor child, K.E.M. The record also fails to demonstrate an injury in fact supporting K.E.M.'s Article III standing to sue Defendants for the requested relief.

"Parents generally have standing to assert the claims of their minor children." *Nguyen v. Milliken*, No. 15-CV-0587 (MKB), 2016 WL 2962204, at *7 (E.D.N.Y. May 20, 2016) (citing *Altman v. Bedford Cent. Sch. Dist.*, 245 F.3d 49, 70 (2d Cir. 2001)) (quotation marks omitted); *see, e.g.*, *Soule*, 90 F.4th 51 (finding standing to bring Title IX claim for some requested injunctive relief where parents sued on behalf of their minor daughters). Where a parent asserts a claim in federal court on behalf of a child, the child must meet the requirements for Article III standing. *See id.* at 45–51 (analyzing whether the plaintiffs' children met the Article III requirements); *see also McCormick ex. Rel. v. Sch. Dist. of Mamaroneck*, 370 F.3d 275, 284 (2d Cir. 2004) (same).

There is no evidence in the record relating to K.E.M. The Complaint alleges only that K.E.M. is a "16-year-old biological female high school volleyball player" whose parents reside in Nassau County, and that "the Mullens are being forced into making the impossible determination whether to expose their 16-year-old daughter to the risk of injury by a transgender girl or simply to not play volleyball at all and forego whatever opportunities may present because of her participation in volleyball." (Compl. ¶¶ 7–8, 30.) Plaintiffs have not put forward any evidence addressing whether K.E.M. plays on a volleyball team, whether that team engages in athletic endeavors on Nassau County Parks property, whether K.E.M. plays against or alongside transgender girls in those activities, or how rescission of the Executive Order will directly cause K.E.M. any concrete and imminent injury. The record lacks any evidence showing that K.E.M. has suffered, or imminently will suffer, an injury that is real, and not abstract and actual and imminent based on the OAG's application of the New York Human Rights Law to the Executive Order. The record thus fails to show that K.E.M has standing to seek a declaration that the New York Human Rights Law's prohibition against discrimination on the bases of gender identity and expression violates the Equal Protection Clause, a declaration that the Executive Order is lawful, or an injunction barring the OAG's enforcement of the New York Human Rights Law against the Executive Order. *See Do No Harm v. Pfizer Inc.*, 2024 WL 949506, at *7 (requiring plaintiff seeking preliminary relief to establish injury-in-fact, causation and redressability as required for standing by "affidavit or other evidence"); *Green Haven Prison*, 16 F.4th at 78–79 (same); *cf. Soule*, 90 F.4th 45 (finding plaintiffs established an injury in a Title IX action against a sports conference policy permitting athletes to play on teams consistent with their gender identities, where each plaintiff alleged, among other things, that they had competed in covered events and finished behind a transgender girl at least once).

***18** Further, to the extent the Complaint alleges that the Individual Plaintiffs themselves will suffer an injury based on any violation of K.E.M.'s constitutional right to equal protection, they lack standing to pursue such a claim. *Nguyen*, 2016 WL 2962204, at *7 ("[A]lthough parents may sue on behalf of their minor child, they do not have standing to assert claims on their own behalf for a violation of their child's rights."); *see also T.P. ex rel. Patterson v. Elmsford Union Free Sch. Dist.*, No. 11 CV 5133 VB, 2012 WL 860367, at *3 (S.D.N.Y. Feb. 27, 2012) (finding that a mother could not recover on a derivative claim under Section 1983 for the violation of her child's constitution rights).

D. The Merits of Plaintiffs' Equal Protection Claim

The County Plaintiffs cannot show a likelihood of success on the merits of their equal protection claim where, as here, the Court finds that (1)Eleventh Amendment sovereign immunity bars all aspects of the claim except for the portion seeking injunctive and prospective declaratory relief against James in her official capacity; (2) the County Plaintiffs lack the capacity to sue Defendants under Rule 17(b) and New York law; and (3) the record fails to show that Nassau County, Blakeman, or the Individual Plaintiffs have standing to bring the sole equal protection claim pled in the Complaint. In this context, the Court need not address the merits of Plaintiffs' equal protection challenge to Defendants' application of the New York Human Rights Law to the Executive Order. *See Fed. Defs. of New York, Inc. v. Fed. Bureau of Prisons*, 954 F.3d 118, 134 (2d Cir. 2020) ("It is axiomatic that the federal courts should, where possible, avoid reaching constitutional questions.") (citation and quotation marks omitted); *see also Spector Motor Serv., Inc. v. McLaughlin*, 323 U.S. 101, 105 (1944) ("If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality ... unless such adjudication is unavoidable.").

II. Irreparable Harm

The County Plaintiffs fail to show that they will suffer irreparable harm absent the requested TRO. A demonstration of irreparable harm is "the single most important prerequisite for the issuance of" a temporary restraining order. *JTH Tax, LLC v. Agnant*, 62 F.4th 658, 672 (2d Cir. 2023) (internal citation omitted). That is because a temporary restraining order, like a preliminary injunction, seeks to maintain the status quo in order "to protect [the] plaintiff from irreparable injury" while awaiting final decision on the merits. 11A Charles Alan Wright et al., Federal Practice and Procedure § 2947 (3d ed. April 2023 Update). Therefore, Plaintiffs must show that without a temporary restraining order, "they will suffer an injury that is neither remote nor speculative, but actual and imminent, and one that cannot be remedied if a court waits until the end of trial to resolve the harm." *JTH Tax*, 62 F.4th at 672.

In cases concerning claims of constitutional injury, a bare assertion of a constitutional injury, without evidence "*convincingly show[ing]*" the existence of noncompensable damages, is insufficient to automatically trigger a finding of irreparable harm. *KM Enters. v. McDonald*, 11-cv-5098, 2012 WL 540955, at *4 (E.D.N.Y. Feb. 16, 2012) (citing *Savage v. Gorski*, 850 F.2d 64, 68 (2d Cir. 1988), *aff'd* 518 Fed. App'x 12 (2d Cir. 2013)) (emphasis supplied); *Weinstein v. Krumpter*, 120 F. Supp. 3d 289, 297 (E.D.N.Y. 2015) (same). By contrast, irreparable harm is satisfied when "the constitutional deprivation is convincingly shown and that violation carries noncompensable damages." *Donohue v. Mangano*, 886 F. Supp. 2d 126, 150 (E.D.N.Y. 2012). Indeed, when "the violation of a constitutional right is the irreparable harm ... the two prongs of the preliminary injunction threshold merge into one: in order to show irreparable injury, plaintiff must show a likelihood of success on the merits." *Turley v. Giulani*, 86 F. Supp. 2d 291, 295 (S.D.N.Y. 2000) (citation omitted); *Jansen v. New York City Dep't of Educ.*, No. 23-cv-6756, 2023 WL 6160691, at *3 (E.D.N.Y. Sept. 20, 2023), *recons. denied*, No. 23-cv-6756, 2023 WL 6541901 (E.D.N.Y. Oct. 6, 2023). Even in a case concerning an alleged constitutional injury, "it often will be more appropriate to determine irreparable injury by considering what adverse factual consequences the plaintiff apprehends if an injunction is not issued, and then considering whether the infliction of those consequences is likely to violate any of the plaintiff's rights." *Time Warner Cable of New York City, a division of Time Warner Ent. Co., L.P. v. Bloomberg L.P.*, 118 F.3d 917, 924 (2d Cir. 1997) (addressing motion for a preliminary injunction on a First Amendment claim).

***19** The County Plaintiffs make three irreparable harm arguments—none of which are persuasive or supported by the record. First, Blakeman attests that if the Executive Order is rescinded, "women and girls in Nassau County" will "not have access to a supportive and safe environment" for sporting activities and will face "discriminat[ion]" and exclusion from the "long-term benefits" of participation in these endeavors, including "recognition and accolades, [and] college scholarships." (Blakeman Aff. ¶¶ 3–4; *see also* Cnty. Pls.' Reply at 3.) The County Plaintiffs have not put forward evidence about any specific women and girls in Nassau County who would face an imminent threat of physical injury, discrimination, or exclusion from recognition, accolades, or college scholarships, or any other long-term benefit from any current or future athletic activities on Nassau County Parks property in the absence of a temporary restraining barring the OAG from securing documents supporting the Executive Order's issuance and from exercising discretion to take legal action against the Executive Order, or

even in the event the Executive Order is rescinded. As discussed above, the record provides no facts addressing whether K.E.M. plays on a volleyball team that uses Nassau County Parks property or involves the participation of transgender women or girls, much less that any transgender women or girls pose to K.E.M. an actual or imminent threat of either physical injury or exclusion from recognition or other benefits from athletic activities. Instead, the County Plaintiffs rely on several media reports of injuries to cisgender women and girls in athletic endeavors with transgender women and girls outside of Nassau County (and even outside of New York) (*see* TRO/PI Motion at 20; Reply Br. at 4), which do not meet their high burden to demonstrate that "they will suffer an injury that is neither remote nor speculative, but actual and imminent" as required for the extraordinary relief of a temporary restraining order. *JTH Tax*, 62 F.4th at 672.

The County Plaintiffs cite several cases to support the undisputed proposition that a "substantial risk of serious illness or death" presents a situation where "monetary damages are difficult to ascertain or are inadequate." (Cnty. Pls.' Br. at 25.) Those cases concerning serious medical illness and death are readily distinguishable because the plaintiffs were able to establish, through both expert and lay testimonial evidence, that a specific illness or disease from which they suffered would result in injury or illness absent the requested preliminary relief. In *Shapiro v. Cadman Towers, Inc.*, for example, the Second Circuit upheld the district court's finding that the plaintiff established irreparable harm to support a preliminary injunction requiring her apartment complex to provide her a parking space inside the apartment's garage where the district court found, based upon testimony from medical experts, that the plaintiff suffered from multiple sclerosis and that requiring her to park on the street could result in humiliation and injury from urinary dysfunction and loss of balance. 51 F.3d 328, 332–33 (2d Cir. 1995). In other words, the plaintiff established, through expert testimonial evidence, that a disease from which she presently suffered could cause symptoms that would increase her risk of injury and humiliation absent injunctive relief. Likewise, in *Innovative Health Systems, Inc. v. City of White Plains*, the Second Circuit upheld the district court's finding of irreparable harm if a drug and alcohol treatment center were to close based on testimonial evidence that the plaintiffs being treated for substance abuse at the center were at risk of relapse and consequent harms, including illness, disability, or death. 117 F.3d 37, 43–44 (2d Cir. 1997), *superseded on other grounds in Zervos v. Verizon New York, Inc.*, 252 F.3d 163, 171 n.7 (2001). Further, the Circuit upheld a finding that one plaintiff in particular would *not* suffer irreparable harm where that individual had completed treatment at the program and provided no evidence that he continued to use their services. *Id.*[19] By contrast, here, the County Plaintiffs have not presented any evidence showing that K.E.M. or any other woman or girl would be physically injured or be excluded from recognition, accolades, or other long-term benefits from athletic activities by invalidation of the Executive Order, much less a denial of the requested TRO barring Defendants from securing the record supporting issuance of the Executive Order and from taking enforcement action related to the Executive Order.

***20** The County Plaintiffs' second irreparable harm argument is that without the Executive Order, they face "the risk of substantial personal injury judgments by allowing participation on women's athletic teams based on gender identity." (Cnty. Pls.' Br. at 19). This argument has no basis in the record. The County Plaintiffs fail to identify a single past or current personal injury lawsuit filed against them due to an alleged injury suffered by a cisgender women during an athletic endeavor involving the participation of a transgender woman or girl on Nassau County Parks property. Moreover, as noted above, the record does not support the conclusion that any such personal injury lawsuits would imminently be filed against the County if the requested TRO is denied because there are no facts in the record showing that any specific cisgender woman or girl in Nassau County will face imminent injury in an athletic event involving a transgender woman or girl on Nassau County Parks property if the Executive Order is invalidated.

Third, the County Plaintiffs argue that irreparable harm is "presumed" in this case because the Complaint alleges that "the NYS AG is effectively seeking to deprive Plaintiffs their constitutional right to equal protection." (Cnty. Pls.' Br. at 25.) The County Plaintiffs misstate the law. As discussed, "the mere allegation of a constitutional infringement in and of itself does not constitute irreparable harm." *Pinckney v. Bd. of Educ. of Westbury Union Free Sch. Dist.*, 920 F. Supp. 393, 400 (E.D.N.Y. 1996). The burden remains on the County Plaintiffs to "convincingly show[ ]" irreparable constitutional injury in order to secure a temporary restraining order. *Donohue*, 886 F. Supp. 2d at 150; *KM Enters.*, 2012 WL 540955, at *4 (same); *Weinstein*, 120 F. Supp. 3d at 297 (same). Based on the current record before the Court, the County Plaintiffs fail to meet this burden because: (1) Eleventh Amendment sovereign immunity bars Plaintiffs' equal protection claim for declaratory and injunctive relief against Defendants New York and the OAG, and Plaintiffs' claim for retrospective declaratory relief against James; (2) the County Plaintiffs lack the capacity to bring their equal protection claim under Rule 17(b) and New York's capacity-to-sue rule; and (3) all of the Plaintiffs lack standing to bring the sole equal protection claim pled in the Complaint. *See supra*, Section I.

III. Balance of Hardships and Public Interest

A plaintiff seeking a temporary restraining order must additionally establish that the "public interest" and "balance of equities" of the parties weigh in favor of granting the injunction. *Yang*, 960 F.3d at 127. "When the government is a party to the suit, our inquiries into the public interest and the balance of the equities merge." *We the Patriots USA, Inc.*, 17 F.4th at 295. The Court declines to address these factors because the County Plaintiffs' submissions do not meet the critical requirements of showing a likelihood of success on the merits of their equal protection claim and irreparable harm in the absence of the requested temporary restraining order.

CONCLUSION

For the reasons set forth above, the Court denies the County Plaintiffs' TRO Motion (ECF No. 10) and reserves decision on the PI Motion pending resolution of Defendants' Motion to Dismiss (ECF No. 20).

All Citations

Slip Copy, 2024 WL 3201671

Footnotes

1 New York law refers to the OAG as the "New York Department of Law." *See* N.Y. Const. art. V, § 4 ("The head of the ... department of law[shall be] the attorney-general."); *see also* N.Y. Exec. Law § 60.

2 The Court overlooks any procedural deficiency in the County Plaintiffs' submission and construes it as a TRO/PI Motion because Plaintiffs "submitt[ed] a memorandum of law and supporting documents that allow the Court to consider the proposed motion" (ECF Nos. 10-5, 14, 17) and because "the parties are fairly and adequately apprised of the nature and basis of the application." *Fiedler v. Incandela*, 222 F. Supp. 3d 141, 155 (E.D.N.Y. 2016) (quotation marks omitted).

3 As discussed below, the Court set a March 22, 2024 deadline for the Defendants and the Individual Plaintiffs to respond to the County Plaintiffs' TRO/PI Motion. Although the Defendants provided a timely response, the Individual Plaintiffs did not submit anything. (Elec. Order, Mar. 28, 2024.)

4 The plain text of the Executive Order refers to permits to use and occupy "Nassau County Parks property" (*see* E.O. at 1), but Defendants characterize the Executive Order as applying to all property under the purview of the Nassau County Department of Parks, Recreation and Museums. (Defs.' Br. at 3.) The full name of the department overseeing Nassau County Parks property is the "Nassau County Department of Parks, Recreation, and Museums." *See* Nassau County, Departments, Parks, Recreation and Museums, About Parks, https://www.nassaucountyny.gov/1768/About-Parks (last visited Apr. 2, 2024). According to Nassau County's website, there are "more than 70 parks, preserves, museums, historic properties, and athletic facilities comprising 6,000 acres throughout the county." *Id.* The Court need not resolve whether the Executive Order applies to all property under the purview of the Nassau County Department of Parks, Recreation and Museums or only a subset consisting of "Nassau County Parks property," as that term is used in the Executive Order, in order to resolve the County Plaintiffs' TRO Motion.

5 This Opinion and Order uses the terms "biological males" and "biological females" only when quoting from the Executive Order. These terms are scientifically "imprecise" and are viewed as derogatory to transgender women and girls. *Soule v. Connecticut Ass'n of Sch., Inc.*, 90 F.4th 34 at 83 n.8 (2d Cir. 2023) (Judges Chin, Carney, Kahn, Lee, Pérez, dissenting) (referring to

intervening parties as "transgender females" and transgender girls" rather than "biological males" (the term used by appellants) to "afford them the respect and dignity they are due" because "calling attention to a transgender person's biological sex by referring to them as a 'biological male' is harmful and invalidating" and because such terms are scientifically "imprecise") (citing Wylie C. Hembree, Peggy T. Cohen-Kettenis, et al., *Endocrine Treatment of Gender-Dysphoric/Gender-Incongruent Persons: An Endocrine Society Clinical Practice Guideline*, 102(11) J. Clinical Endocrinology & Metabolism, 3869, 3875 tbl. 1 (2017)); Glossary of Terms: Transgender, GLADD Media Reference Guide: 11th Edition, GLADD, https://glaad.org/reference/trans-terms/ (last visited Apr. 22, 2024); *see also Hecox v. Little*, 79 F.4th 1009, 1023–24 (9th Cir. 2023) ("[T]he [challenged] Act's definition of 'biological sex' is likely an oversimplification of the complicated biological reality of sex and gender.").

6 This Opinion and Order uses the term "transgender" to refer to individuals whose gender identity does not correspond to their sex assigned at birth. The term "gender identity" refers to a person's sense of being male, female, neither, or some combination of both, which may or may not correspond to an individual's sex assigned at birth. *See* N.Y. Exec. Law § 292(35) ("The term 'gender identity or expression' means a person's actual or perceived gender-related identity, appearance, behavior, expression, or other gender-related characteristic regardless of the sex assigned to that person at birth, including, but not limited to, the status of being transgender.").

7 Although the March 1, 2024 letter set forth the OAG's position that the Executive Order violates both the New York Human Rights Law and the New York Civil Rights Law, Plaintiffs' requested declaratory relief concerns only the alleged unconstitutionality of the New York Human Rights Law as applied to the Executive Order. (*See* Compl. at 12.)

8 Although this requested declaration is part of the ultimate relief sought in the Complaint (Compl. at 12), it is not identified as a part of the preliminary relief requested in the Order to Show Cause or proposed TRO. (*See* ECF Nos. 10, 17.)

9 Defendants do not argue that Eleventh Amendment sovereign immunity bars any claim for injunctive relief by Plaintiffs against James for conduct taken in her official capacity. (Defs' Br. at 8–9). As discussed below, Plaintiffs' equal protection claim for injunctive relief against James for conduct taken in her official capacity is permissible under the exception to Eleventh Amendment sovereign immunity established in *Ex parte Young*, 209 U.S. 123 (1908).

10 The Second Circuit has recognized that both arm-of-the-state tests "have much in common" and that "the choice of test is rarely outcome-determinative." *Leitner*, 779 F.3d at 137. The first arm-of-the-state test requires courts to consider (1) "the extent to which the state would be responsible for satisfying any judgment that might be entered against the defendant entity," and (2) "the degree of supervision exercised by the state over the defendant entity." *Clissuras v. City Univ. of N.Y.*, 359 F.3d 79, 82 (2d Cir. 2004) (quotation marks omitted). The second arm-of-the state test requires consideration of six factors:

> (1) how the entity is referred to in the documents that created it; (2) how the governing members of the entity are appointed; (3) how the entity is funded; (4) whether the entity's function is traditionally one of local or state government; (5) whether the state has a veto power over the entity's actions; and (6) whether the entity's obligations are binding upon the state.

Mancuso v. New York State Thruway Auth., 86 F.3d 289, 293 (2d Cir. 1996). If the factors from the second test do not lean in a clear direction, a court must consider "the twin reasons for the Eleventh Amendment: (1) protecting the dignity of the state, and (2) preserving the state treasury." *Woods v. Rondout Valley Cent. Sch. Dist. Bd. of Educ.*, 466 F.3d 232, 240 (2d Cir. 2006) (citing *Mancuso*, 86 F.3d at 293). If consideration of these two reasons does not clarify the determination, the court then focuses on "whether a judgment against the governmental entity would be paid out of the state treasury." *Id.* at 241.

11 Given the weight of this authority, the Court does not address all of the factors of the *Mancuso* arm-of-the-state test, but recognizes that the first four *Mancuso* factors weigh in favor of finding the OAG to be an arm of the state. The OAG is referenced in the New York Constitution and its duties and powers are established in New York statutes (the first *Mancuso* factor). *See* N.Y. Const. art. V, §§ 1, 4; N.Y. Exec Law § 60 *et seq.* The NY Attorney General is elected in "the same general election as the governor" (the second *Mancuso* factor). N.Y. Const. art. V, § 1. The budget for the office comes from the New York Legislature (the third

Mancuso factor). *See* N.Y. Exec. Law § 60. The powers and duties of the NY Attorney General are traditionally those of state government (the fourth *Mancuso* factor). *See e.g.*, N.Y. Exec. Law § 63 ("The attorney-general shall ... [p]rosecute and defend all actions and proceedings in which the state is interested ... and have charge and control of all the legal business of the departments and bureaus of the state ... in order to protect the interest of the state ....").

12 The Complaint does not cite 42 U.S.C. § 1983, which established a cause of action for bringing constitutional claims against people acting under color of state law. (*See* Compl. ¶ 14; *id.* at 9.) The only statute Defendants' cite—the Declaratory Judgment Act, 28 U.S.C. § 2201—"does not create an independent cause of action." *Chevron Corp. v. Naranjo*, 667 F.3d 232, 244–45 (2d Cir. 2012). In their reply brief, the County Plaintiffs state that the claim "was in fact asserted under the Equal Protection Clause" (Cnty. Pls.' Reply at 1), but point to no authority for the proposition that there is an implied cause of action against state governments under the Fourteenth Amendment. *Cf. Pauk v. Bd. of Trs. of City Univ. of New York*, 654 F.2d 856, 864 (2d Cir. 1981) (collecting cases where courts have found implied causes of action for certain constitutional violations, but not in the Equal Protection Clause context); *Turpin v. Mailet*, 591 F.2d 426 (2d Cir. 1979) (abrogating prior Second Circuit decision finding an implied cause of action under the Fourteenth Amendment for suits against municipalities). Even if Plaintiffs could bring an implied cause of action under the Fourteenth Amendment, the Supreme Court has held that Congress did not express an intent to abrogate states' Eleventh Amendment immunity by ratifying the Fourteenth Amendment itself. *See Santiago v. New York State Dept. of Corr. Servs.*, 945 F.2d 25, 30–32 (2d Cir. 1991) ("[W]e are unpersuaded that the states, in ratifying the Fourteenth Amendment, waived their Eleventh Amendment immunity ....").

13 As discussed, the Complaint requests a permanent injunction barring Defendants from "taking any action" against implementation and enforcement of the Executive Order. (Compl. at 12). Plaintiffs also seek a temporary restraining order and preliminary injunction barring Defendants from "taking further legal action" and "from initiating any legal proceedings and/or actions against" the County Plaintiffs, and enjoining Defendants "from obtaining any and all documents produced or maintained by" the County Plaintiffs. (Proposed TRO at 1.)

14 As discussed later in this Opinion and Order, *see* Section I.C n.18, the Second Circuit has employed a similar rationale in finding that political subdivisions lack "standing" to sue their state creators in a challenge to a state statute under the Fourteenth Amendment. *See Tweed-New Haven Airport Auth. v. Tong*, 930 F.3d 65, 73 n.7 (2d Cir. 2019); *Aguayo v. Richardson*, 473 F.2d 1090, 1101 (2d Cir. 1973).

15 In arguing that the first exception to New York's capacity-to-sue rule does not apply to this case, Defendants contend that county and county officials generally lack capacity to assert a Fourteenth Amendment claim against a state because "they are not 'persons' within the meaning" of the Due Process Clause. (Defs.' Br. at 11) (citing *Cnty. of Chautauqua v. Shah*, 126 A.D.3d 1317, 1321 (4th Dep't 2015), *aff'd sub nom Cnty. of Chemung v. Shah*, 28 N.Y.3d 244 (2016)). The Court does not need to reach this question because the County Plaintiffs point to no express statutory language or legislative history demonstrating the New York Legislature's intent to grant them capacity to sue Defendants under the Fourteenth Amendment.

16 In *Town of Babylon, NY v. James*, No. 22-CV-1681(KAM)(AYS), 2023 WL 8734201 (E.D.N.Y. Dec. 19, 2023), *appeal docketed*, No. 24-177 (2d Cir. Jan. 22, 2024), however, the parties brought claims against the NY Attorney General challenging a state statute under the Fourteenth Amendment and article IX of the New York Constitution. The Court held that the home rule exception did not apply to the case and did not explicitly distinguish whether it was invoked with respect to both claims, or just the home rule claim. *Id.*

17 By contrast, the Second Circuit held in *Tweed* that a political subdivision "may sue its state under the Supremacy Clause" because that clause "raises unique federalism concerns." 930 F.3d at 73. *Tweed* did not abrogate the Second Circuit's previous decisions in *Richardson* and *Aguayo* as to a political subdivision's lack of standing to sue the state under the Fourteenth Amendment, finding that those cases "present[ed] considerations different from those we consider here." *Tweed*, 930 F.3d at 73 n.7. Accordingly, this Court is bound to follow the holdings of *Richardson* and *Aguayo*. *See, e.g.*, *Town of Babylon*, 2023 WL 8734201, at *9 (finding that under the *Tweed-Richardson-Aguayo* line of cases, a New York municipality is barred from bringing due process and equal

protection claims against a New York statute).

18 The Second Circuit has characterized its analysis in the *Tweed-Richardson-Aguayo* line of cases as concerning a political subdivision's "standing" to sue. *See Tweed*, 930 F.3d at 73 n.7; *Aguayo*, 473 F.2d at 1100; *but see Richardson*, 473 F.2d at 929 (describing the rule as one where the state lacks "privileges or immunities ... [to] invoke in opposition to the will of its creator" (citing *Williams v. Mayor & City Council of Baltimore*, 289 U.S. 36, 40 (1933))). This concept of standing is distinct from New York law on the capacity to sue. *Sonterra*, 403 F. Supp. 3d at 267 ("Capacity to sue is a threshold matter allied with, but conceptually distinct from, the question of standing.").

19 *See also New York v. Heckler*, 742 F.2d 729, 736 (2d Cir. 1984) (plaintiffs established irreparable harm where they suffered from mental illnesses and presented "ample evidence" that they would likely suffer "a severe medical setback" as a result of the challenged requirement), *aff'd sub nom. Bowen v. City of New York*, 476 U.S. 467 (1986); *New York v. Sullivan*, 906 F.2d 910, 918 (S.D.N.Y. 1990) (plaintiffs, who had cardiovascular disease, established that irreparable harm would result if they did not receive disability benefits needed to ensure treatment).

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74 S.Ct. 686
Supreme Court of the United States

BROWN et al.
v.
BOARD OF EDUCATION OF TOPEKA, SHAWNEE COUNTY, KAN., et al.
BRIGGS et al.
v.
ELLIOTT et al.
DAVIS et al.
v.
COUNTY SCHOOL BOARD OF PRINCE EDWARD COUNTY, VA., et al.
GEBHART et al.
v.
BELTON et al.

Nos. 1, 2, 4, 10.
|
Reargued Dec. 7, 8, 9, 1953.
|
Decided May 17, 1954.

Synopsis
Class actions originating in the four states of Kansas, South Carolina, Virginia, and Delaware, by which minor Negro plaintiffs sought to obtain admission to public schools on a nonsegregated basis. On direct appeals by plaintiffs from adverse decisions in the United States District Courts, District of Kansas, 98 F.Supp. 797, Eastern District of South Carolina, 103 F.Supp. 920, and Eastern District of Virginia, 103 F.Supp. 337, and on grant of certiorari after decision favorable to plaintiffs in the Supreme Court of Delaware, 91 A.2d 137, the United States Supreme Court, Mr. Chief Justice Warren, held that segregation of children in public schools solely on the basis of race, even though the physical facilities and other tangible factors may be equal, deprives the children of the minority group of equal educational opportunities, in contravention of the Equal Protection Clause of the Fourteenth Amendment.

Cases ordered restored to docket for further argument regarding formulation of decrees.

Attorneys and Law Firms

****686** No. 1:

Mr. ***484** Robert L. Carter, New York City, for appellants Brown and others.

****687** Mr. Paul E. Wilson, Topeka, Kan., for appellees Board of Education of Topeka and others.

Nos. 2, 4:

Messrs. Spottswood Robinson III, Thurgood Marshall, New York City, for appellants Briggs and Davis and others.

Messrs. John W. Davis, ***485** T. Justin Moore, J. Lindsay Almond, Jr., Richmond, Va., for appellees Elliott and County School Board of Prince Edward County and others.

Asst. Atty. Gen. J. Lee Rankin for United States amicus curiae by special leave of Court.

No. 10:

Mr. H. Albert Young, Wilmington, Del., for petitioners Gebhart et al.

Mr. Jack Greenberg, Thurgood Marshall, New York City, for respondents Belton et al.

Opinion

***486** Mr. Chief Justice WARREN delivered the opinion of the Court.

These cases come to us from the States of Kansas, South Carolina, Virginia, and Delaware. They are premised on different facts and different local conditions, but a common legal question justifies their consideration together in this consolidated opinion.[1]

****688 *487** In each of the cases, minors of the Negro race, through their legal representatives, seek the aid of the courts in obtaining admission to the public schools of their community on a nonsegregated basis. In each instance, ***488** they have been denied admission to schools attended by white children under laws requiring or permitting segregation according to race. This segregation was alleged to deprive the plaintiffs of the equal protection of the laws under the Fourteenth Amendment. In each of the cases other than the Delaware case, a three-judge federal district court denied relief to the plaintiffs on the so-called 'separate but equal' doctrine announced by this Court in Plessy v. Ferguson, 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256. Under that doctrine, equality of treatment is accorded when the races are provided substantially equal facilities, even though these facilities be separate. In the Delaware case, the Supreme Court of Delaware adhered to that doctrine, but ordered that the plaintiffs be admitted to the white schools because of their superiority to the Negro schools.
The plaintiffs contend that segregated public schools are not 'equal' and cannot be made 'equal,' and that hence they are deprived of the equal protection of the laws. Because of the obvious importance of the question presented, the Court took jurisdiction.[2] Argument was heard in the 1952 Term, and reargument was heard this Term on certain questions propounded by the Court.[3]

***489** Reargument was largely devoted to the circumstances surrounding the adoption of the Fourteenth Amendment in 1868. It covered exhaustively consideration of the Amendment in Congress, ratification by the states, then existing practices in racial segregation, and the views of proponents and opponents of the Amendment. This discussion and our own investigation convince us that, although these sources cast some light, it ****689** is not enough to resolve the problem with which we are faced. At best, they are inconclusive. The most avid proponents of the post-War Amendments undoubtedly intended them to remove all legal distinctions among 'all persons born or naturalized in the United States.' Their opponents, just as certainly, were antagonistic to both the letter and the spirit of the Amendments and wished them to have the most limited effect. What others in Congress and the state legislatures had in mind cannot be determined with any degree of certainty.

An additional reason for the inconclusive nature of the Amendment's history, with respect to segregated schools, is the status of public education at that time.[4] In the South, the movement toward free common schools, supported ***490** by general taxation, had not yet taken hold. Education of white children was largely in the hands of private groups. Education of Negroes was almost nonexistent, and practically all of the race were illiterate. In fact, any education of Negroes was forbidden by law in some states. Today, in contrast, many Negroes have achieved outstanding success in the arts and sciences as well as in the business and professional world. It is true that public school education at the time of the Amendment had advanced further in the North, but the effect of the Amendment on Northern States was generally ignored in the congressional debates. Even in the North, the conditions of public education did not approximate those existing today. The curriculum was usually rudimentary; ungraded schools were common in rural areas; the school term was but three months a year in many states; and compulsory school attendance was virtually unknown. As a consequence, it is not surprising that there should be so little in the history of the Fourteenth Amendment relating to its intended effect on public education.

In the first cases in this Court construing the Fourteenth Amendment, decided shortly after its adoption, the Court interpreted it as proscribing all state-imposed discriminations against the Negro race.[5] The doctrine of ***491** "separate but ****690** equal" did not make its appearance in this court until 1896 in the case of Plessy v. Ferguson, supra, involving not education but

transportation.[6] American courts have since labored with the doctrine for over half a century. In this Court, there have been six cases involving the 'separate but equal' doctrine in the field of public education.[7] In Cumming v. Board of Education of Richmond County, 175 U.S. 528, 20 S.Ct. 197, 44 L.Ed. 262, and Gong Lum v. Rice, 275 U.S. 78, 48 S.Ct. 91, 72 L.Ed. 172, the validity of the doctrine itself was not challenged.[8] In more recent cases, all on the graduate school ***492** level, inequality was found in that specific benefits enjoyed by white students were denied to Negro students of the same educational qualifications. State of Missouri ex rel. Gaines v. Canada, 305 U.S. 337, 59 S.Ct. 232, 83 L.Ed. 208; Sipuel v. Board of Regents of University of Oklahoma, 332 U.S. 631, 68 S.Ct. 299, 92 L.Ed. 247; Sweatt v. Painter, 339 U.S. 629, 70 s.Ct. 848, 94 L.Ed. 1114; McLaurin v. Oklahoma State Regents, 339 U.S. 637, 70 S.Ct. 851, 94 L.Ed. 1149. In none of these cases was it necessary to re-examine the doctrine to grant relief to the Negro plaintiff. And in Sweatt v. Painter, supra, the Court expressly reserved decision on the question whether Plessy v. Ferguson should be held inapplicable to public education.

In the instant cases, that question is directly presented. Here, unlike Sweatt v. Painter, there are findings below that the Negro and white schools involved have been equalized, or are being equalized, with respect to buildings, curricula, qualifications and salaries of teachers, and other 'tangible' factors.[9] Our decision, therefore, cannot turn on merely a comparison of these tangible factors ****691** in the Negro and white schools involved in each of the cases. We must look instead to the effect of segregation itself on public education.
In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when Plessy v. Ferguson was written. We must consider public education in the light of its full development and its present place in American life throughout ***493** the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

We come then to the question presented: Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other 'tangible' factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does.

In Sweatt v. Painter, supra (339 U.S. 629, 70 S.Ct. 850), in finding that a segregated law school for Negroes could not provide them equal educational opportunities, this Court relied in large part on 'those qualities which are incapable of objective measurement but which make for greatness in a law school.' In McLaurin v. Oklahoma State Regents, supra (339 U.S. 637, 70 S.Ct. 853), the Court, in requiring that a Negro admitted to a white graduate school be treated like all other students, again resorted to intangible considerations: '* * * his ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession.' ***494** Such considerations apply with added force to children in grade and high schools. To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone. The effect of this separation on their educational opportunities was well stated by a finding in the Kansas case by a court which nevertheless felt compelled to rule against the Negro plaintiffs:
'Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to (retard) the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racial(ly) integrated school system.'[10]

****692** Whatever may have been the extent of psychological knowledge at the time of Plessy v. Ferguson, this finding is amply supported by modern authority.[11] Any language ***495** in Plessy v. Ferguson contrary to this finding is rejected.

We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have

been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment. This disposition makes unnecessary any discussion whether such segregation also violates the Due Process Clause of the Fourteenth Amendment.[12]

Because these are class actions, because of the wide applicability of this decision, and because of the great variety of local conditions, the formulation of decrees in these cases presents problems of considerable complexity. On reargument, the consideration of appropriate relief was necessarily subordinated to the primary question—the constitutionality of segregation in public education. We have now announced that such segregation is a denial of the equal protection of the laws. In order that we may have the full assistance of the parties in formulating decrees, the cases will be restored to the docket, and the parties are requested to present further argument on Questions 4 and 5 previously propounded by the Court for the reargument this Term.[13] The Attorney General ***496** of the United States is again invited to participate. The Attorneys General of the states requiring or permitting segregation in public education will also be permitted to appear as amici curiae upon request to do so by September 15, 1954, and submission of briefs by October 1, 1954.[14]

It is so ordered.

****693** Cases ordered restored to docket for further argument on question of appropriate decrees.

All Citations

347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873, 38 A.L.R.2d 1180, 53 O.O. 326

Footnotes

1 In the Kansas case, Brown v. Board of Education, the plaintiffs are Negro children of elementary school age residing in Topeka. They brought this action in the United States District Court for the District of Kansas to enjoin enforcement of a Kansas statute which permits, but does not require, cities of more than 15,000 population to maintain separate school facilities for Negro and white students. Kan.Gen.Stat.1949, s 72—1724. Pursuant to that authority, the Topeka Board of Education elected to establish segregated elementary schools. Other public schools in the community, however, are operated on a nonsegregated basis. The three-judge District Court, convened under 28 U.S.C. ss 2281 and 2284, 28 U.S.C.A. ss 2281, 2284, found that segregation in public education has a detrimental effect upon Negro children, but denied relief on the ground that the Negro and white schools were substantially equal with respect to buildings, transportation, curricula, and educational qualifications of teachers. 98 F.Supp. 797. The case is here on direct appeal under 28 U.S.C. s 1253, 28 U.S.C.A. s 1253.

In the South Carolina case, Briggs v. Elliott, the plaintiffs are Negro children of both elementary and high school age residing in Clarendon County. They brought this action in the United States District Court for the Eastern District of South Carolina to enjoin enforcement of provisions in the state constitution and statutory code which require the segregation of Negroes and whites in public schools. S.C.Const. Art. XI, s 7; S.C.Code 1942, s 5377. The three-judge District Court, convened under 28 U.S.C. ss 2281 and 2284, 28 U.S.C.A. ss 2281, 2284, denied the requested relief. The court found that the Negro schools were inferior to the white schools and ordered the defendants to begin immediately to equalize the facilities. But the court sustained the validity of the contested provisions and denied the plaintiffs admission to the white schools during the equalization program. 98 F.Supp. 529. This Court vacated the District Court's judgment and remanded the case for the purpose of obtaining the court's views on a report filed by the defendants concerning the progress made in the equalization program. 342 U.S. 350, 72 S.Ct. 327, 96 L.Ed. 392. On remand, the District Court found that substantial equality had been achieved except for buildings and that the defendants were proceeding to rectify this inequality as well. 103 F.Supp. 920. The case is again here on direct appeal under 28 U.S.C. s 1253, 28 U.S.C.A. s 1253.

In the Virginia case, Davis v. County School Board, the plaintiffs are Negro children of high school age residing in Prince Edward County. They brought this action in the United States District Court for the Eastern District of Virginia to enjoin enforcement of provisions in the state constitution and statutory code which require the segregation of Negroes and whites in public schools. Va.Const. s 140; Va.Code 1950, s 22—221. The three-judge District Court, convened under 28 U.S.C. ss 2281 and 2284, 28 U.S.C.A. ss 2281, 2284, denied the requested relief. The court found the Negro school inferior in physical plant, curricula, and transportation, and ordered the defendants forthwith to provide substantially equal curricula and transportation and to 'proceed with all reasonable diligence and dispatch to remove' the inequality in physical plant. But, as in the South Carolina case, the court sustained the validity of the contested provisions and denied the plaintiffs admission to the white schools during the equalization program. 103 F.Supp. 337. The case is here on direct appeal under 28 U.S.C. s 1253, 28 U.S.C.A. s 1253.

In the Delaware case, Gebhart v. Belton, the plaintiffs are Negro children of both elementary and high school age residing in New Castle County. They brought this action in the Delaware Court of Chancery to enjoin enforcement of provisions in the state constitution and statutory code which require the segregation of Negroes and whites in public schools. Del.Const. Art. X, s 2; Del.Rev.Code, 1935, s 2631, 14 Del.C. s 141. The Chancellor gave judgment for the plaintiffs and ordered their immediate admission to schools previously attended only by white children, on the ground that the Negro schools were inferior with respect to teacher training, pupil-teacher ratio, extracurricular activities, physical plant, and time and distance involved in travel. Del.Ch., 87 A.2d 862. The Chancellor also found that segregation itself results in an inferior education for Negro children (see note 10, infra), but did not rest his decision on that ground. 87 A.2d at page 865. The Chancellor's decree was affirmed by the Supreme Court of Delaware, which intimated, however, that the defendants might be able to obtain a modification of the decree after equalization of the Negro and white schools had been accomplished. 91 A.2d 137, 152. The defendants, contending only that the Delaware courts had erred in ordering the immediate admission of the Negro plaintiffs to the white schools, applied to this Court for certiorari. The writ was granted, 344 U.S. 891, 73 S.Ct. 213, 97 L.Ed. 689. The plaintiffs, who were successful below, did not submit a cross-petition.

2 344 U.S. 1, 73 S.Ct. 1, 97 L.Ed. 3, Id., 344 U.S. 141, 73 S.Ct. 124, 97 L.Ed. 152, Gebhart v. Belton, 344 U.S. 891, 73 S.Ct. 213, 97 L.Ed. 689.

3 345 U.S. 972, 73 S.Ct. 1118, 97 L.Ed. 1388. The Attorney General of the United States participated both Terms as amicus curiae.

4 For a general study of the development of public education prior to the Amendment, see Butts and Cremin, A History of Education in American Culture (1953), Pts. I, II: Cubberley, Public Education in the United States (1934 ed.), cc. II—XII. School practices current at the time of the adoption of the Fourteenth Amendment are described in Butts and Cremin, supra, at 269—275; Cubberley, supra, at 288—339, 408—431; Knight, Public Education in the South (1922), cc. VIII, IX. See also H. Ex. Doc. No. 315, 41st Cong., 2d Sess. (1871). Although the demand for free public schools followed substantially the same pattern in both the North and the South, the development in the South did not begin to gain momentum until about 1850, some twenty years after that in the North. The reasons for the somewhat slower development in the South (e.g., the rural character of the South and the different regional attitudes toward state assistance) are well explained in Cubberley, supra, at 408—423. In the country as a whole, but particularly in the South, the War virtually stopped all progress in public education. Id., at 427—428. The low status of Negro education in all sections of the country, both before and immediately after the War, is described in Beale, A History of Freedom of Teaching in American Schools (1941), 112—132, 175—195. Compulsory school attendance laws were not generally adopted until after the ratification of the Fourteenth Amendment, and it was not until 1918 that such laws were in force in all the states. Cubberley, supra, at 563—565.

5 In re Slaughter-House Cases, 1873, 16 Wall. 36, 67—72, 21 L.Ed. 394; Strauder v. West Virginia, 1880, 100 U.S. 303, 307—308, 25 L.Ed. 664.

'It ordains that no State shall deprive any person of life, liberty, or property, without due process of law, or deny to any person within its jurisdiction the equal protection of the laws. What is this but declaring that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color? The words of the amendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity, or right, most valuable to the colored race,—the right to exemption from unfriendly legislation against them distinctively as colored,—exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the condition of a subject race.'

See also State of Virginia v. Rives, 1879, 100 U.S. 313, 318, 25 L.Ed. 667; Ex parte Virginia, 1879, 100 U.S. 339, 344—345, 25 L.Ed. 676.

6 The doctrine apparently originated in Roberts v. City of Boston, 1850, 5 Cush. 198, 59 Mass. 198, 206, upholding school segregation against attack as being violative of a state constitutional guarantee of equality. Segregation in Boston public schools

was eliminated in 1855. Mass. Acts 1855, c. 256. But elsewhere in the North segregation in public education has persisted in some communities until recent years. It is apparent that such segregation has long been a nationwide problem, not merely one of sectional concern.

7 See also Berea College v. Kentucky, 1908, 211 U.S. 45, 29 S.Ct. 33, 53 L.Ed. 81.

8 In the Cumming case, Negro taxpayers sought an injunction requiring the defendant school board to discontinue the operation of a high school for white children until the board resumed operation of a high school for Negro children. Similarly, in the Gong Lum case, the plaintiff, a child of Chinese descent, contended only that state authorities had misapplied the doctrine by classifying him with Negro children and requiring him to attend a Negro school.

9 In the Kansas case, the court below found substantial equality as to all such factors. 98 F.Supp. 797, 798. In the South Carolina case, the court below found that the defendants were proceeding 'promptly and in good faith to comply with the court's decree.' 103 F.Supp. 920, 921. In the Virginia case, the court below noted that the equalization program was already 'afoot and progressing,' 103 F.Supp. 337, 341; since then, we have been advised, in the Virginia Attorney General's brief on reargument, that the program has now been completed. In the Delaware case, the court below similarly noted that the state's equalization program was well under way. 91 A.2d 137, 139.

10 A similar finding was made in the Delaware case: 'I conclude from the testimony that in our Delaware society, State-imposed segregation in education itself results in the Negro children, as a class, receiving educational opportunities which are substantially inferior to those available to white children otherwise similarly situated.' 87 A.2d 862, 865.

11 K. B. Clark, Effect of Prejudice and Discrimination on Personality Development (Midcentury White House Conference on Children and Youth, 1950); Witmer and Kotinsky, Personality in the Making (1952), c. VI; Deutscher and Chein, The Psychological Effects of Enforced Segregation: A Survey of Social Science Opinion, 26 J.Psychol. 259 (1948); Chein, What are the Psychological Effects of Segregation Under Conditions of Equal Facilities?, 3 Int. J. Opinion and Attitude Res. 229 (1949); Brameld, Educational Costs, in Discrimination and National Welfare (MacIver, ed., 1949), 44—48; Frazier, The Negro in the United States (1949), 674—681. And see generally Myrdal, An American Dilemma (1944).

12 See Bolling v. Sharpe, 347 U.S. 497, 74 S.Ct. 693, concerning the Due Process Clause of the Fifth Amendment.

13 '4. Assuming it is decided that segregation in public schools violates the Fourteenth Amendment

'(a) would a decree necessarily follow providing that, within the limits set by normal geographic school districting, Negro children should forthwith be admitted to schools of their choice, or

'(b) may this Court, in the exercise of its equity powers, permit an effective gradual adjustment to be brought about from existing segregated systems to a system not based on color distinctions?

'5. On the assumption on which questions 4(a) and (b) are based, and assuming further that this Court will exercise its equity powers to the end described in question 4(b),

'(a) should this Court formulate detailed decrees in these cases;

'(b) if so, what specific issues should the decrees reach;

'(c) should this Court appoint a special master to hear evidence with a view to recommending specific terms for such decrees;

'(d) should this Court remand to the courts of first instance with directions to frame decrees in these cases, and if so what general directions should the decrees of this Court include and what procedures should the courts of first instance follow in arriving at the specific terms of more detailed decrees?'

14 See Rule 42, Revised Rules of this Court, effective July 1, 1954, 28 U.S.C.A.

86 N.Y.2d 286
Court of Appeals of New York.

CITY OF NEW YORK et al., Appellants,
v.
STATE of New York et al., Respondents.

June 15, 1995.

Synopsis

City, its board of education, and others sued state, challenging constitutionality of method by which state distributed funds between city's public schools and other public schools. The Supreme Court, New York County, DeGrasse, J., granted defendant's entire complaint on ground of lack of legal capacity to sue and dismissed certain causes of action for failure to state causes of action. Appeal was taken. The Supreme Court, Appellate Division, Wallach, J., 205 A.D.2d 272, 619 N.Y.S.2d 699, affirmed as modified by dismissal of remaining causes of action for failure to state claim. City and others appealed. The Court of Appeals, Levine, J., held that city, its school board, and other municipal plaintiffs were agents or creatures of state which lacked legal capacity to bring constitutional challenge against state.

Affirmed.

Ciparick, J., dissented and filed opinion in which Smith, J., concurred.

Attorneys and Law Firms

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Stroock & Stroock & Lavan, New York City (Alan M. Klinger and Adam S. Grace, of counsel), Rhonda Weingarten and Frederick K. Reich for United Federation of Teachers, amicus curiae.

***289 OPINION OF THE COURT**

LEVINE, Judge.

The City of New York, Board of Education of the City, its Mayor and Chancellor of the City School District (hereinafter the municipal plaintiffs) have brought this action against the State and various State officials seeking declaratory and injunctive relief. They allege three causes of action in their amended complaint: (1) that the present State statutory scheme for funding public education denies the school children of New York City their educational rights guaranteed by the Education Article of

the State Constitution (N.Y. Const., art. XI, § 1); (2) that the State's funding of public schools ***555 **651 provides separate and unequal treatment for the public schools of New York City in violation of the Equal Protection Clauses of the Federal and State Constitutions (U.S. Const. 14th Amend.; N.Y. Const., art. I, § 11); and (3) that the disparate impact of the State's funding scheme for public education on members of racial and ethnic minority groups in New York City violates title VI of the Federal Civil Rights Act of 1964 (42 U.S.C. § 2000d *et seq.*) as amended and its implementing regulations.

We agree with the courts below that the municipal plaintiffs lack the legal capacity to bring this suit against the State. Despite their contrary claims, the traditional principle throughout the United States has been that municipalities and other local governmental corporate entities and their officers lack capacity to mount constitutional challenges to acts of the State and State legislation. This general incapacity to sue flows from judicial recognition of the juridical as well as political relationship between those entities and the State. Constitutionally as well as a matter of historical fact, municipal ***290** corporate bodies—counties, towns and school districts—are merely subdivisions of the State, created by the State for the convenient carrying out of the State's governmental powers and responsibilities as its agents. Viewed, therefore, by the courts as purely creatures or agents of the State, it followed that municipal corporate bodies cannot have the right to contest the actions of their principal or creator affecting them in their governmental capacity or as representatives of their inhabitants. Thus, the United States Supreme Court has held:

> " 'A municipal corporation is simply a political subdivision of the State, and exists by virtue of the exercise of the power of the State through its legislative department. The legislature could at any time terminate the existence of the corporation itself, and provide other and different means for the government of the district comprised within the limits of the former city. The city is the creature of the State.' " (*Trenton v. New Jersey,* 262 U.S. 182, 189–190, 43 S.Ct. 534, 537, 67 L.Ed. 937, quoting *Worcester v. Street Ry. Co.,* 196 U.S. 539, 548–549, 25 S.Ct. 327, 329, 49 L.Ed. 591.)
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> "The distinction between the municipality as an agent of the State for governmental purposes and as an organization to care for local needs in a private or proprietary capacity has been applied in various branches of the law of municipal corporations" (*id.,* at 191, 43 S.Ct., at 538 [challenge to New Jersey statute under Due Process and Contract Clauses of the U.S. Constitution]).
>
> "A municipal corporation, created by a state for the better ordering of government, has no privileges or immunities under the federal constitution which it may invoke in opposition to the will of its creator" (*Williams v. Mayor,* 289 U.S. 36, 40, 53 S.Ct. 431, 432, 77 L.Ed. 1015 [Cardozo, J.] [Equal Protection Clause challenge to Maryland statute]).

New York has long followed the Federal rationale for finding that municipalities lack the capacity to bring suit to invalidate State legislation (*see, County of Albany v. Hooker,* 204 N.Y. 1, 97 N.E. 403; *City of New York v. Village of Lawrence,* 250 N.Y. 429, 165 N.E. 836; *Robertson v. Zimmermann,* 268 N.Y. 52, 196 N.E. 740). As stated in *Black Riv. Regulating Dist. v. Adirondack League Club,* 307 N.Y. 475, 121 N.E.2d 428, *appeal dismissed* 351 U.S. 922, 76 S.Ct. 780, 100 L.Ed. 1453:

> ***291** "The courts of this State from very early times have consistently applied the Federal rule in holding that political power conferred by the Legislature confers no vested right as against the government itself. * * * The concept of the supreme power of the Legislature over its creatures has been respected and followed in many decisions." (*Id.,* at 488, 121 N.E.2d 428.)

The rationale was succinctly described in *Matter of County of Cayuga v. McHugh,* 4 N.Y.2d 609, 176 N.Y.S.2d 643, 152 N.E.2d 73:

> "Counties, as civil divisions of a State, had their origin in England and were formed to aid in the more convenient administration of government * * *. So it is today that counties are mere political subdivisions of the State, created by the State Legislature and possessing no more power save that ***556 **652** deputed to them by that body." (*Id.,* at 614, 176 N.Y.S.2d 643, 152 N.E.2d 73.)

Moreover, our Court has extended the doctrine of no capacity to sue by municipal corporate bodies to a wide variety of challenges based as well upon claimed violations of the State Constitution (*see, Black Riv. Regulating Dist. v. Adirondack League Club, supra; City of New York v. Village of Lawrence, supra; County of Albany v. Hooker, supra*).

Municipal officials and members of municipal administrative or legislative boards suffer the same lack of capacity to sue the State with the municipal corporate bodies they represent (*see, Williams v. Mayor,* 289 U.S. 36, 53 S.Ct. 431, 77 L.Ed. 1015, *supra*). As we held in *Black Riv. Regulating Dist. v. Adirondack League Club,* 307 N.Y., at 489, 121 N.E.2d 428, *supra:*

> "As we have pointed out, the district board has no special character different from that of the State. Its only purpose is to construct reservoirs and that, concededly, is a State purpose in the interest of public health, safety and welfare

(Conservation Law, § 431). *Not only as a board, but also as individuals,* the plaintiffs are without power to challenge the validity of the act or the Constitution" (emphasis supplied).

The only exceptions to the general rule barring local governmental challenges to State legislation which have been identified in the case law are: (1) an express statutory authorization to bring such a suit (*County of Albany v. Hooker,* 204 N.Y., at 9, 97 N.E. 403, *supra*); (2) where the State legislation adversely affects a municipality's proprietary interest in a specific fund ***292** of moneys (*County of Rensselaer v. Regan,* 173 A.D.2d 37, 578 N.Y.S.2d 274, *affd.* 80 N.Y.2d 988, 592 N.Y.S.2d 646, 607 N.E.2d 793; *Matter of Town of Moreau v. County of Saratoga,* 142 A.D.2d 864, 531 N.Y.S.2d 61); (3) where the State statute impinges upon "Home Rule" powers of a municipality constitutionally guaranteed under article IX of the State Constitution (*Town of Black Brook v. State of New York,* 41 N.Y.2d 486, 393 N.Y.S.2d 946, 362 N.E.2d 579); and (4) where "the municipal challengers assert that if they are obliged to comply with the State statute they will by that very compliance be forced to violate a constitutional proscription" (*Matter of Jeter v. Ellenville Cent. School Dist.,* 41 N.Y.2d 283, 287, 392 N.Y.S.2d 403, 360 N.E.2d 1086 [citing *Board of Educ. v. Allen,* 20 N.Y.2d 109, 281 N.Y.S.2d 799, 228 N.E.2d 791, *affd.* 392 U.S. 236, 88 S.Ct. 1923, 20 L.Ed.2d 1060]).

The arguments by the municipal plaintiffs favoring their capacity to sue are unpersuasive. First, they contend that our decision in *Levittown (Board of Educ., Levittown Union Free School Dist. v. Nyquist,* 57 N.Y.2d 27, 453 N.Y.S.2d 643, 439 N.E.2d 359) constitutes controlling precedent in favor of their capacity to sue. As the municipal plaintiffs have virtually conceded, however, when *Levittown* reached the Court of Appeals, the State did not appeal on the capacity to sue issue. The issue of lack of capacity to sue does not go to the jurisdiction of the court, as is the case when the plaintiffs lack standing. Rather, lack of capacity to sue is a ground for dismissal which must be raised by motion and is otherwise waived (CPLR 3211[a][3]; [e]). It follows, then, that if the defense of lack of capacity to sue can be waived by merely failing to raise it, it may also be abandoned on appeal and, in fact, was abandoned by the State when its appeal in *Levittown* reached our Court. Therefore, the *Levittown* decision is not precedent for the municipal plaintiffs' capacity to sue in this case.

Alternatively, the municipal plaintiffs argue that our decision in *Community Bd. 7 v. Schaffer,* 84 N.Y.2d 148, 615 N.Y.S.2d 644, 639 N.E.2d 1 supports their capacity to sue in this case. To be sure, *Community Bd. 7* held that a municipal body's capacity to sue may arise by necessary implication. However, *Community Bd. 7* unequivocally holds that, in the absence of express authority to bring the specific action in question the plaintiff must establish a legislative intent to confer such capacity to sue by inference. "Governmental entities created by legislative enactment present similar capacity problems. Being artificial creatures of statute, such entities have neither an inherent nor a common-law right to sue. Rather, the right to *****557 **653** sue, if it exists at all, *must be derived from the relevant enabling legislation or some other concrete statutory predicate* " (*id.,* at 155–156, 615 N.Y.S.2d 644, 639 N.E.2d 1 [emphasis ***293** supplied]). Thus, in *Community Bd. 7,* even though the plaintiff had an identifiable functional responsibility in the subject matter of the lawsuit, this Court concluded it lacked capacity to bring the suit because various inclusions or omissions in the enabling legislation negated any inference of a legislative intent to confer that power (*id.,* at 157–158, 615 N.Y.S.2d 644, 639 N.E.2d 1).

The municipal plaintiffs have not pointed to any express statutory language or legislative history which would necessarily imply that the Legislature intended to confer upon them the capacity to bring a suit challenging State legislation. The fact that the Legislature has expressly conferred the power to sue upon the City or the City School District in furtherance of their general statutory municipal or educational responsibilities is clearly insufficient from which to imply authority to bring suit against the State itself to declare that the public school funding scheme enacted by the Legislature is unconstitutional (*see, County of Albany v. Hooker,* 204 N.Y. 1, 97 N.E. 403, *supra* [discussing extensively the difference between the general power to sue by a municipal corporation, and the same municipality's lack of capacity to sue its creator, the State]). Indeed, from early times municipalities have had the statutory general power to sue and be sued in their own name (*see, People v. Ingersoll,* 58 N.Y. 1, 28–31; *see also,* County Law § 51 [current authority for counties to sue in their own name]), but that power has always been limited "[i]n political and governmental matters [because] municipalities are the representatives of the sovereignty of the State, and auxiliary to it" (*People v. Ingersoll,* 58 N.Y., at 29, *supra*). Moreover, in view of the manifest improbability that the Legislature would have intended to authorize the municipal plaintiffs to challenge the constitutionality of its own public school funding allocation formula, the evidence from "necessary implication" would have to be particularly strong to support capacity to sue here, and it certainly is not. Hence, *Community Bd. 7 v. Schaffer* does not provide a precedential basis for capacity to sue here.

Next, the municipal plaintiffs argue that the lack of capacity to sue doctrine only applies to (1) statutory restrictions on a municipality's power; and (2) State-mandated compulsion to make expenditures. This contention ignores our precedents in

which lack of capacity to sue has applied to block challenges to a far wider variety of State actions having differing adverse impacts on local governmental bodies and their constituents (*see, Matter of County of Cayuga v. McHugh, supra; Black Riv. Regulating Dist. v. Adirondack League Club, supra;* ***294** *Robertson v. Zimmermann, supra;* and *County of Albany v. Hooker, supra*). *County of Albany v. Hooker* is particularly instructive because it involved a claim quite analogous to the claims of the municipal plaintiffs in the instant case. Albany County relied upon a 1905 amendment to the State Constitution authorizing the State to incur debts of up to $50 million for improvements to State highways (204 N.Y. 1, 5, 97 N.E. 403, *supra*). To pay the principal and interest on such debts, the amendment provided for the creation of a sinking fund made up of at least half State moneys and the remainder from counties and towns where the improvements were located. The amendment guaranteed that enabling statutes would equitably apportion the highway improvements among the counties (*id.*). Not unlike the claim here of an unfair allocation of educational funding violating the State Constitution, in *County of Albany v. Hooker,* the county challenged 1911 State legislation providing for highway improvements elsewhere in the State, as violating the constitutional mandate for equitable apportionment of highway improvements. This Court determined that the County of Albany lacked the capacity to bring the suit. We recognized that the underlying purpose of the action was to vindicate the interests and rights of the inhabitants of the county to a fair apportionment of the public moneys devoted to highway improvement (*id.,* at 17, 97 N.E. 403). We held in *Hooker,* however, that counties lack the capacity to sue the State to protect such rights of or redress such wrongs or injuries to their citizens (*id.,* at 14, 97 N.E. 403). The holding in *****558 **654** *County of Albany v. Hooker* is directly on point regarding the lack of capacity of the municipal plaintiffs to sue in the instant case.

> "With no fund or property in existence, the title to which is in the county, and no funds or property in the possession of another to which the county is entitled to possession, and the entire subject being one of governmental and public policy, independent of the corporate rights of the county, the action cannot be maintained by the plaintiff, and the wrong, if any, created and existing by the acts of the legislature, must be corrected by the legislature, or by an action where the people, as distinguished from a municipal corporate body, are before the court" (*id.,* at 18–19, 97 N.E. 403).

The only remaining argument made by the municipal plaintiffs in favor of their capacity to sue is that they are challenging legislation which adversely affects the City's proprietary interests. Clearly, however, they fail to point to any specific fund in which they are entitled to a proprietary ***295** interest. Their claim is merely to a greater portion of the general State funds which the Legislature chooses to appropriate for public education. Accordingly, they lack a proprietary interest in a fund or property to which their claims relate and cannot ground capacity to sue on that basis (*see, County of Albany v. Hooker, supra*) under the criteria set in *Matter of Town of Moreau v. County of Saratoga,* 142 A.D.2d 864, 531 N.Y.S.2d 61, *supra* and *County of Rensselaer v. Regan,* 173 A.D.2d 37, 578 N.Y.S.2d 274, *supra.* Finding a proprietary interest of the City of New York sufficient to confer capacity to sue without regard to a cognizable right in a specific fund would create a municipal power to sue the State in any dispute over the appropriate amount of State aid to a governmental subdivision or the appropriate State/local mix of shared governmental expenses. The narrow proprietary interest exception would then ultimately swallow up the general rule barring suit against the State by local governments.

Although not a point advanced by the municipal plaintiffs on this appeal, the dissent seeks to bring this case within the already noted exception to the lack of capacity to sue rule, where municipal officials contend that " 'if they are obliged to comply with the State statute they will by that very compliance be forced to *violate a constitutional proscription* ' " (dissenting opn., at 298–299, at 560 of 631 N.Y.S.2d, at 656 of 655 N.E.2d [quoting *Matter of Jeter v. Ellenville Cent. School Dist.,* 41 N.Y.2d 283, 287, 392 N.Y.S.2d 403, 360 N.E.2d 1086, *supra*] [emphasis supplied]). The dissent fails to cite to any specific constitutional "proscription", that is, *prohibition,* that the State school funding formula forces the municipal officials to violate. Surely, it cannot be persuasively argued that the City officials in question should be held accountable either under the Equal Protection Clause or the State Constitution's public Education Article by reason of the alleged State underfunding of the New York City school system over which they have absolutely no control (*see, Athanson v. Grasso,* 411 F.Supp. 1153).

Thus, the municipal plaintiffs have failed to bring their claims within any recognized exception to the general rule that municipalities lack capacity to sue the State and their action must be dismissed. We decline the invitation to erode that general rule. Our adherence to that rule is not, as suggested by the dissent "a regression into formalism and rigidity" (dissenting opn. at 303, at 563 of 631 N.Y.S.2d, at 659 of 655 N.E.2d). The lack of capacity of municipalities to sue the State is a necessary outgrowth of separation ***296** of powers doctrine: it expresses the extreme reluctance of courts to intrude in the political relationships between the Legislature, the State and its governmental subdivisions.

The order of the Appellate Division should be affirmed, with costs.

CIPARICK, Judge (dissenting).

I respectfully dissent. If our complex, collaborative system of education is to work, and if local control and autonomy at the school district and Board of Education level is to have real meaning, the Legislature and other governmental officials responsible for maintaining the educational system cannot be immunized from accountability in a suit of this nature. The Legislature has delegated virtually all of the day-to-day responsibilities ***559 **655 involving the provision of education and the management of educational affairs to local authorities. When these local entities are unable to fulfill their constitutional and statutory obligations because of the State's failure to carry out its own constitutional obligations, a substantive right to sue has been and must continue to be recognized (*see, Matter of Jeter v. Ellenville Cent. School Dist.,* 41 N.Y.2d 283, 287, 392 N.Y.S.2d 403, 360 N.E.2d 1086; *Board of Educ. v. Allen,* 20 N.Y.2d 109, 118, 281 N.Y.S.2d 799, 228 N.E.2d 791; *Board of Educ., Levittown Union Free School Dist. v. Nyquist,* 83 A.D.2d 217, 234, 443 N.Y.S.2d 843, *mod.* 57 N.Y.2d 27, 453 N.Y.S.2d 643, 439 N.E.2d 359). Accordingly, we would hold that the New York City Board of Education and the Chancellor of the City School District (school plaintiffs) have the capacity to bring this action. We also would hold that New York City and its Mayor (city plaintiffs) have capacity to bring this suit for reasons we discuss below.

This is a declaratory judgment action challenging the constitutionality and legality of New York State's current statutory methodology for financing public education. Supreme Court dismissed plaintiffs' complaint in its entirety for lack of capacity to sue. The Appellate Division agreed, reasoning that "units of municipal government, as political subdivisions created by the State, lack the capacity (with very limited exceptions not applicable here) to challenge in a lawsuit the constitutionality of State legislative enactments affecting them (*Town of Black Brook v. State of New York,* 41 N.Y.2d 486, 488 [393 N.Y.S.2d 946, 362 N.E.2d 579]; *Matter of Jeter v. Ellenville Cent. School Dist.,* 41 N.Y.2d 283, 287 [392 N.Y.S.2d 403, 360 N.E.2d 1086])" (205 A.D.2d 272, 277–278, 619 N.Y.S.2d 699).

I.

Although courts often use the terms interchangeably, the concepts of capacity to sue and standing are distinct (*see,* ***297** *Community Bd. 7 v. Schaffer,* 84 N.Y.2d 148, 155, 615 N.Y.S.2d 644, 639 N.E.2d 1). Capacity to sue "concerns a litigant's power to appear and bring its grievance before the court" (*id.,* at 155, 615 N.Y.S.2d 644, 639 N.E.2d 1). Standing is "designed to ensure that the party seeking relief has a sufficiently cognizable stake in the outcome" so as to cast the controversy " ' "in a form traditionally capable of judicial resolution" ' " (*id.,* at 154–155, 615 N.Y.S.2d 644, 639 N.E.2d 1 [quoting *Society of Plastics Indus. v. County of Suffolk,* 77 N.Y.2d 761, 772, 570 N.Y.S.2d 778, 573 N.E.2d 1034]). "Capacity, or the lack thereof, sometimes depends purely upon a litigant's status" (*Community Bd. 7, supra,* at 155, 615 N.Y.S.2d 644, 639 N.E.2d 1). For instance, an infant or an individual adjudicated incompetent may be disqualified from seeking relief in court (*id.*).

The question of capacity to sue often arises when governmental entities, which are creatures of statute, attempt to sue. In that context, the right to sue, "if it exists at all, must be derived from the relevant enabling legislation or some other concrete statutory predicate" (*id.,* at 156, 615 N.Y.S.2d 644, 639 N.E.2d 1 [citing *Matter of Pooler v. Public Serv. Commn.,* 58 A.D.2d 940, 397 N.Y.S.2d 425, *affd. on mem. below* 43 N.Y.2d 750, 401 N.Y.S.2d 1009, 372 N.E.2d 797; *Matter of Flacke v. Freshwater Wetlands Appeals Bd.,* 53 N.Y.2d 537, 444 N.Y.S.2d 48, 428 N.E.2d 380]).

We first address the capacity of the school plaintiffs. Plaintiff Board of Education's authority to sue is well recognized in case law. This Court has observed that the Board of Education of the City of New York is not a mere department of government, but "an independent corporate body" which "may sue and be sued in its corporate name" (*Matter of Divisich v.*

Marshall, 281 N.Y. 170, 173, 22 N.E.2d 327) "in all matters relating to the control and management of the schools" (*Gunnison v. Board of Educ.,* 176 N.Y. 11, 17, 68 N.E. 106; *see also, Matter of Fleischmann v. Graves,* 235 N.Y. 84, 138 N.E. 745). As to whether the City Board of Education can sue the *State* in matters relating to the control and management of the schools, we conclude that the answer is yes based on our examination of relevant authority.

In *Board of Educ. v. Allen,* 20 N.Y.2d 109, 281 N.Y.S.2d 799, 228 N.E.2d 791, several local Boards of Education challenged the constitutionality of a State statute permitting ***560 **656** school authorities to loan textbooks free of charge to children enrolled in parochial schools. This Court stated: "The cases holding that a public body has no standing to challenge a State statute restricting its governmental powers are not in point (e.g., *City of Buffalo v. State Bd. of Equalization,* 26 A.D.2d 213 [272 N.Y.S.2d 168]; *County of Albany v. Hooker,* 204 N.Y. 1, 9–10 [97 N.E. 403]; *Black Riv. Regulating Dist. v. Adirondack League Club,* 307 N.Y. 475, 487 [121 N.E.2d 428]; *St. Clair v.* ***298** *Yonkers Raceway,* 13 N.Y.2d 72, 76 [242 N.Y.S.2d 43, 192 N.E.2d 15], cert. den. 375 U.S. 970 [84 S.Ct. 488, 11 L.Ed.2d 417])" (*id.* at 118, 281 N.Y.S.2d 799, 228 N.E.2d 791). The reason for our conclusion, we stated, was adequately set forth in the opinion by Special Term:

> "Granted there is apparent substantial authority prohibiting a municipality or agency of the State from challenging a State statute (*Black Riv. Regulating Dist. v. Adirondack League Club,* 307 N.Y. 475 [121 N.E.2d 428]), but the rule could be subject to some conditions and limitations, which appear particularly appropriate in the pending matter. *A school district and its Board of Education is more than a mere agent of the State.* It is an entity performing a State purpose pursuant to the mandate of the People as directed by their Constitution. (N.Y. Const., art. XI, § 1; Education Law, § 2, subd. 14; *Matter of Divisich v. Marshall,* 281 N.Y. 170 [22 N.E.2d 327].)" (*Board of Educ. v. Allen,* 51 Misc.2d 297, 299, 273 N.Y.S.2d 239 [emphasis added].)

We further noted in *Allen* that the plaintiffs were not seeking to augment their powers, but were "asking for a court determination (in the form of a declaratory judgment) concerning whether they are legally authorized to spend public money for purposes purporting to be authorized by [the] statute", and that "[t]he right of a local Board of Education to sue the State Commissioner of Education has frequently been upheld including actions involving the question of constitutionality of State statutes. (*Matter of Board of Educ. of Cent. School Dist. No. 2 v. Allen,* 14 A.D.2d 429 [221 N.Y.S.2d 587]; *Matter of Bethlehem Union Free School Dist. v. Wilson,* 303 N.Y. 107 [100 N.E.2d 159]; *Matter of Board of Educ. of Union Free School Dist. No. 3 v. Allen,* 6 A.D.2d 316 [177 N.Y.S.2d 169], affd. 6 N.Y.2d 871 [188 N.Y.S.2d 988, 160 N.E.2d 119].)" (20 N.Y.2d, at 118, 281 N.Y.S.2d 799, 228 N.E.2d 791.)

Here, as in *Allen,* school plaintiffs are not attempting to augment their powers, but instead seek a determination in the form of a declaratory judgment that the State is not in compliance with its constitutional obligations. School plaintiffs complain that the statutory scheme for funding public education fails to provide them with sufficient resources to enable them to discharge their obligations under the Education Article of the State Constitution. This case thus falls squarely within a well-defined exception to the general rule of lack of capacity to sue which arises where "municipal challengers assert that if they are obliged to comply with the State statute they will by that very compliance be forced to violate a ***299** constitutional proscription" (*see, Matter of Jeter v. Ellenville Cent. School Dist.,* 41 N.Y.2d 283, 287, 392 N.Y.S.2d 403, 360 N.E.2d 1086; *Allen, supra*).

A more recent recognition of the right of local school authorities to sue the State occurred in *Levittown,* 83 A.D.2d 217, 234, 443 N.Y.S.2d 843, *mod.* 57 N.Y.2d 27, 453 N.Y.S.2d 643, 439 N.E.2d 359, *supra.* The plaintiffs there were the City of New York and the Boards of Education of various property-poor school districts, including New York City, Buffalo, Rochester, and Syracuse. The State defendants challenged the plaintiffs' capacity to sue in the lower courts. The Appellate Division ruled in favor of the plaintiffs, stating:

> "Two of defendants' threshold contentions—both fastening upon aspects of justiciability * * *—merit summary dispatch. The various boards of education have standing to make the current challenge (*see, Board of Educ. v Allen,* 20 NY 2d 109 [281 N.Y.S.2d 799, 228 N.E.2d 791], *affd* 392 US 236 [88 S.Ct. 1923, 20 L.Ed.2d 1060]), and, in view of the 'expanding scope of standing' * * * the school children represented by their parents have similar status" ***561 **657** (*Levittown,* 83 A.D.2d 217, 233–234, 443 N.Y.S.2d 843 [citations omitted]).

Although the *Levittown* Appellate Division used the term standing, as courts often do, the Court was clearly addressing the capacity issue as evidenced by its citation to *Allen.*

On appeal, this Court reached the merits, stating that it was our responsibility "to adjudicate contentions that actions taken by

the Legislature and the executive fail to conform to the mandates of the Constitutions which constrain the activities of all three branches" (57 N.Y.2d, at 39, 453 N.Y.S.2d 643, 439 N.E.2d 359). Although the *Levittown* defendants did not argue lack of capacity before this Court, there is no question in my mind that the Appellate Division's decision, which stands for the proposition that the State can be sued in a declaratory judgment action challenging the constitutionality of the public school funding scheme, was correct and should be followed here.

In our view, the majority's extremely limited application of the general rule of lack of capacity is inappropriate here because it undermines the power and autonomy of local Boards of Education. Public education in New York is a complex, collaborative enterprise between a decentralized State authority and autonomous local districts endowed with broad powers and responsibilities for the management and control of day-to-day educational affairs:

> "Our State Constitution mandates that the 'legislature shall provide for the maintenance and support ***300** of a system of free common schools, wherein *all* the children of this state may be educated' (N.Y. Const., art. XI, § 1; emphasis supplied). *The Legislature has imposed this duty in cities upon local boards of education* (Education Law, § 2554)." (*Matter of Wiltwyck School for Boys v. Hill,* 11 N.Y.2d 182, 191, 227 N.Y.S.2d 655, 182 N.E.2d 268 [emphasis added]; *see also, Herman v. Board of Educ.,* 234 N.Y. 196, 202, 137 N.E. 24 ["The board of education is the agency to which the state delegates the power and duty of controlling the schools in the district"].)

The right to sue logically and necessarily derives from this statutory state of affairs. Indeed, how are local school districts to discharge their many duties if they are powerless to hold the State responsible where, as here, it is claimed that the State is failing to carry out its own constitutional mandate with respect to funding public education? For our system of education to work, there must be accountability.

Contrary to the majority's view, local school districts and Boards of Education are not mere "artificial creatures of statute" (majority opn., at 292, at 556 of 631 N.Y.S.2d, at 652 of 655 N.E.2d); rather, they are substantially autonomous entities entrusted with carrying out a State purpose, and they possess broad powers and duties delegated to them by the State through Education Law § 2554. The City Board of Education is charged with the general administration and control of all aspects of educational affairs. Among other powers, duties, and responsibilities, it is empowered to create, abolish, and maintain positions, divisions, boards, bureaus, etc. (Education Law § 2554[2]); appoint superintendents, examiners, directors, principals, teachers, nurses, etc. *(id.);* take care, custody, control and safekeeping of all school property and dispose of and sell all property (Education Law § 2554[4], [5]); lease property for school accommodations (Education Law § 2554[6]); purchase and furnish equipment, books, textbooks, furniture, and other supplies as may be necessary for the use of children (Education Law § 2554[7]); establish, maintain and equip libraries and playgrounds (Education Law § 2554[10]); and, authorize the general courses of study in schools and approve the content of such courses (Education Law § 2554[11]). The powers and duties delegated to plaintiff Board of Education have also been delegated to plaintiff Chancellor through Education Law § 2590–h(17).

The majority's reliance on several older United States Supreme ***301** Court decisions which merely state the general rule that municipal corporations are but agents of the State have little persuasive value in the specific context of this modern-day challenge to the constitutionality of the State's public school financing scheme (*see,* majority opn., at 290, *****562 **658** at 555 of 631 N.Y.S.2d, at 651 of 655 N.E.2d).[1] The cases cited by the majority fail to reflect the Supreme Court's more recently expressed view that local school districts are not mere arms of the State, but actually possess a significant degree of independence and autonomy which must be recognized and respected.

In *Milliken v. Bradley,* 418 U.S. 717, 94 S.Ct. 3112, 41 L.Ed.2d 1069, the Supreme Court rejected interdistrict busing as a remedy for unconstitutional segregation in the Detroit, Michigan, public school system. The District Court in *Milliken,* as does the majority here, took a narrow view of local school districts as mere political subdivisions established for administrative convenience (*see, id.,* at 741, 94 S.Ct., at 3125). The Supreme Court soundly rejected this analytical approach as "contrary to the history of public education in our country" (*id.,* at 741, 94 S.Ct., at 3125). The Supreme Court noted that in Michigan, as in this State, school districts are formally considered "instrumentalities of the State and subordinate to its State Board of Education and its legislature" (*id.,* at 726, n. 5, 94 S.Ct., at 3118, n. 5). Nonetheless, while Michigan school districts were instrumentalities of the State in theory, in practice the Michigan educational structure actually endowed them with "a large measure of local control" (*id.,* at 742, 94 S.Ct., at 3126) over day-to-day educational affairs, as evidenced by their statutory powers to acquire real and personal property, hire and contract with personnel, borrow money, determine the length of school terms, determine courses of study, make rules and regulations for operating schools, and so on (*id.,* at 742, n. 20, 94 S.Ct., at 3126, n. 20). Thus, although school districts are, in theory, creatures of the State, the State's theoretical

supremacy must sometimes give way to the realities of local control and autonomy, most especially in the area of education:

> "No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community ***302** concern and support for public schools and to [the] quality of the educational process. See *Wright v. Council of the City of Emporia,* 407 U.S. [451], at 469 [92 S.Ct. 2196, at 2206, 33 L.Ed.2d 51 (1972)]. Thus, in *San Antonio School District v. Rodriguez,* 411 U.S. 1, 50 [93 S.Ct. 1278, 1305, 36 L.Ed.2d 16] (1973), we observed that local control over the educational process affords citizens an opportunity to participate in decisionmaking, permits the structuring of school programs to fit local needs, and encourages 'experimentation, innovation, and a healthy competition for educational excellence.' " (*Id.,* at 741–742, 94 S.Ct., at 3125–3126.)

In *Washington v. Seattle School Dist. No. 1,* 458 U.S. 457, 102 S.Ct. 3187, 73 L.Ed.2d 896, the Supreme Court permitted a local school district to assert the Fourteenth Amendment to invalidate a State initiative aimed at banning the use of mandatory busing as a means of promoting integration in Washington's public schools. The Court acknowledged the State's formal authority over local school districts, but found it highly significant that "Washington has chosen to meet its educational responsibilities primarily through 'state and local officials, boards, and committees,' * * * and the responsibility to devise and tailor educational programs to suit local needs has emphatically been vested in the local school boards" (*id.,* at 477–478, 102 S.Ct., at 3199 [citations omitted]; *see also, Lawrence County v. Lead–Deadwood School Dist.,* 469 U.S. 256, 105 S.Ct. 695, 83 L.Ed.2d 635 [Supreme Court permitted a South Dakota county to assert the Supremacy Clause to preempt State law limiting discretion to use Federal funds]).

The Supreme Court of Kentucky has addressed the precise issue before us today, holding that local school districts have capacity to sue the legislature in the context of a constitutional challenge to the public school financing scheme (*see, Rose v. Council for Better Educ.,* 790 S.W.2d 186, 201, n. 16). Notably, the court rejected the same "sterile *****563 **659** logic" the majority resurrects today—that local Boards of Education are creatures of the State who cannot sue the State (*id.,* at 200). We agree with the Kentucky court's reasoning that such a rule would be illogical in light of the many broad and specific powers conferred upon school districts by the legislature and the absence of any statutory restriction on the right of local boards to sue (*id.*). The Kentucky court stated, in words that could not be more fitting here:

> "The subject matter of this lawsuit is whether the General Assembly has complied with its constitutional ***303** duty to provide an 'efficient' system of common schools in Kentucky. Who is better qualified, who is more knowledgeable, who is more duty-bound, than the local school boards to raise the question? If the General Assembly is not adequately meeting its responsibility, how can the local boards meet theirs?" (*Id.,* at 200.)

As the Kentucky Supreme Court stated, "a lawsuit to declare an education system unconstitutional falls within the authority, if not the duty, of local school boards to fulfill their statutory responsibilities, no matter who the defendants are" (*id.,* at 201).

The majority's extensive quotation of *Black Riv.,* 307 N.Y. 475, 121 N.E.2d 428, *supra* reflects a regression into formalism and rigidity (majority opn., at 291, at 556 of 631 N.Y.S.2d, at 652 of 655 N.E.2d). As the majority notes, we held in that case that the plaintiff river regulating district " 'has no special character different from that of the State.' " (*Id.,* at 291, at 556 of 631 N.Y.S.2d, at 652 of 655 N.E.2d [quoting *Black Riv., supra,* at 489, 121 N.E.2d 428].) Just the opposite is true here. Local school districts and their Boards of Education have a "special character" and place in our State; they cannot be equated with the purely governmental subdivisions at issue in the cases the majority relies upon. As we stated in *Levittown:*

> " 'For all of the nearly two centuries that New York has had public schools, it has utilized a statutory system whereby citizens at the local level, acting as part of school district units containing people with a community of interest and a tradition of acting together to govern themselves, have made the basic decisions on funding and operating their own schools. Through the years, the people of this State have remained true to the concept that the maximum support of the public schools and the most informed, intelligent and responsive decision-making as to the financing and operation of those schools is generated by giving citizens direct and meaningful control over the schools that their children attend' " (*Board of Educ., Levittown Union Free School Dist. v. Nyquist,* 57 N.Y.2d 27, 46, 453 N.Y.S.2d 643, 439 N.E.2d 359, *supra*).

In our view, the majority's refusal to infer capacity to sue on the part of the school plaintiffs rests on a foundational premise—the State's legal supremacy—that simply cannot be reconciled with reality and actual practice. Local school districts ***304** and Boards of Education possess substantial independence and control, the significance of which must be recognized and respected rather than ignored.

II.

A governmental entity's capacity to bring suit may be inferred as a necessary incident of its powers and responsibilities, provided that no clear legislative intent negates review (*see, Matter of City of New York v. City Civ. Serv. Commn.,* 60 N.Y.2d 436, 444–445, 470 N.Y.S.2d 113, 458 N.E.2d 354). We have stated that the authority to bring a particular claim may be inferred when the agency in question has "functional responsibility within the zone of interest to be protected" (*id.,* at 445, 470 N.Y.S.2d 113, 458 N.E.2d 354). In *Community Bd. 7 supra,* we concluded that the petitioner community board had such functional responsibility. The petitioner was challenging a City agency's decision denying it "access to certain documents which, arguably, might be useful *in carrying out its statutorily mandated responsibility* to study the land use proposal and to make appropriate recommendations to the Borough President and Planning Department" (84 N.Y.2d, at 157, 615 N.Y.S.2d 644, 639 N.E.2d 1 [emphasis ***564 **660 added]).[2] The inquiry did not end there, however, and we ultimately concluded that even though petitioner had functional responsibilities within the "zone of interest", other factors negated the inference of capacity, including the actual "terms and history of [petitioner's] own enabling legislation" and its "limited role in the land use planning process" (*id.,* at 157, 615 N.Y.S.2d 644, 639 N.E.2d 1).

Nonetheless, applying this inferred authority standard here, it is clear that the school plaintiffs' authority to sue defendants must be inferred as a necessary incident of their broad powers and responsibilities in all matters relating to the control and management of the schools and in light of the State's decentralized role in our educational structure. School plaintiffs satisfy the "zone of interest" test, as they possess the requisite "policy-making authority and functional responsibility" from which the capacity to sue may be inferred (*see, City of New York,* 60 N.Y.2d, at 442, 470 N.Y.S.2d 113, 458 N.E.2d 354; *Community Bd. 7, supra; cf., Matter of Bradford Cent. School Dist. v. Ambach,* 56 N.Y.2d 158, 163–164, 451 N.Y.S.2d 654, 436 N.E.2d 1256). Moreover, neither the majority nor defendants ***305** point to anything negating the inference of capacity on the part of the school plaintiffs in this case. To the contrary, the comprehensive nature of the school plaintiffs' powers and duties unequivocally supports a finding of capacity to sue here.

In conclusion, the City Board of Education is responsible for providing a constitutionally adequate education to the students in its charge. If, as alleged in this case, the current statutory public school financing scheme is so flawed that it effectively prevents the Board from carrying out its responsibilities within its "zone of interest", then the right to seek a declaratory judgment aimed at correcting those flaws must be inferred (*see Community Bd. 7, supra; City of New York, supra; Board of Educ. v. Allen, supra; Board of Educ., Levittown Union Free School Dist. v. Nyquist,* 83 A.D.2d 217, 443 N.Y.S.2d 843, *supra; Rose v. Council for Better Educ., supra*).

Accordingly, we would hold that the school plaintiffs have capacity to bring this declaratory judgment action challenging the constitutionality of the public school financing system.

III.

Finally, we address the city plaintiffs' capacity to sue. The New York City Charter expressly authorizes the City to sue and be sued, and states in pertinent part:

> "Except as otherwise provided in this chapter or other law, the corporation counsel shall have the right to institute actions in law or equity and any proceedings provided by law in any court, local, state or national, to maintain, defend and establish the rights, interests, revenues, property, privileges, franchises or demands of the city or of any part or portion thereof, or of the people thereof" (NY City Charter § 394[c]).

Thus, New York City, through its Corporation Counsel, may bring suit to protect and vindicate the rights, property, and revenues of the City and its citizens.

The city plaintiffs are responsible for the maintenance and support of public schools in the City School District and have distinct functional responsibilities within the zone of interest to be protected. The City is under a statutory obligation to

provide substantial financial support for its school children (*see,* Education Law § 2576), and if the educational financing ***306** system is constitutionally infirm, as is alleged here, the City is obviously affected, as it is saddled with, among other things, an increased financial burden. Moreover, the New York City Charter imposes significant responsibilities on the City with respect to education (*see,* NY City Charter §§ 520–523). The city plaintiffs' capacity to bring this suit in order to protect the rights, property and revenue of the City must be inferred from these responsibilities and from its financial obligations *(see, Community Bd. 7, supra; City of New York, supra).*

*****565 **661** Accordingly, we would reverse the order of the Appellate Division and reinstate plaintiffs' complaint in its entirety.

SIMONS, TITONE and BELLACOSA, JJ., concur with LEVINE, J.

CIPARICK, J., dissents in a separate opinion in which SMITH, J., concurs.

KAYE, C.J., taking no part.

Order affirmed, with costs.

All Citations

86 N.Y.2d 286, 655 N.E.2d 649, 631 N.Y.S.2d 553, 103 Ed. Law Rep. 1146

Footnotes

1 We consider the majority's heavy reliance on *County of Albany v. Hooker,* 204 N.Y. 1, 97 N.E. 403 even less persuasive. That case was decided in 1912, well before *Allen* and other cases which developed the exceptions to the general rule of lack of capacity to sue were decided, and did not even involve educational issues or school entities as plaintiffs.

2 In *Community Bd. 7* we noted that the "zone of interest" test, as used in the capacity context, "is related but not identical to the 'zone of interest' analysis that is traditionally applied in the allied area of standing" (84 N.Y.2d, at 156, 615 N.Y.S.2d 644, 639 N.E.2d 1).

109 S.Ct. 706
Supreme Court of the United States

CITY OF RICHMOND, Appellant
v.
J.A. CROSON COMPANY.

No. 87–998
|
Argued Oct. 5, 1988.
|
Decided Jan. 23, 1989.

Synopsis
Bidder brought suit challenging city's plan requiring prime contractors awarded city construction contracts to subcontract at least 30% of the dollar amount of each contract to one or more "Minority Business Enterprises." The United States District Court for the Eastern District of Virginia, Robert R. Merhige, Jr., J., ruled in favor of city. Bidder appealed. The Court of Appeals, Fourth Circuit, 779 F.2d 181, affirmed. Certiorari was granted. The Supreme Court, 106 S.Ct. 3327, remanded case for further consideration. On remand, the Court of Appeals, 822 F.2d 1355, struck down the set-aside program, and probable jurisdiction was noted. The Supreme Court, Justice O'Connor, held that: (1) city failed to demonstrate compelling governmental interest justifying the plan, and (2) plan was not narrowly tailored to remedy effects of prior discrimination.

Affirmed.

Justices Stevens and Kennedy filed opinions concurring in part and concurring in the judgment.

Justice Scalia filed an opinion concurring in the judgment.

Justice Marshall filed a dissenting opinion in which Justice Brennan and Blackmun joined.

Justice Blackmun filed dissenting opinion in which Justice Brennan joined.

****708** *Syllabus*[*]

***469** Appellant city adopted a Minority Business Utilization Plan (Plan) requiring prime contractors awarded city construction contracts to subcontract at least 30% of the dollar amount of each contract to one or more "Minority Business Enterprises" (MBE's), which the Plan defined to include a business from anywhere in the country at least 51% of which is owned and controlled by black, Spanish-speaking, Oriental, Indian, Eskimo, or Aleut citizens. Although the Plan declared that it was "remedial" in nature, it was adopted after a public hearing at which no direct evidence was presented that the city had discriminated on the basis of race in letting contracts or that its prime contractors had discriminated against minority subcontractors. The evidence that was introduced included: a statistical study indicating that, although the city's population was 50% black, only 0.67% of its prime construction contracts had been awarded to minority businesses in recent years; figures establishing that a variety of local contractors' associations had virtually no MBE members; the city's counsel's conclusion that the Plan was constitutional under *Fullilove v. Klutznick,* 448 U.S. 448, 100 S.Ct. 2758, 65 L.Ed.2d 902, and the statements of Plan proponents indicating that there had been widespread racial discrimination in the local, state, and national construction industries. Pursuant to the Plan, the city adopted rules requiring individualized consideration of each bid or request for a waiver of the 30% set-aside, and providing that a waiver could be granted only upon proof that sufficient qualified MBE's were unavailable or unwilling to participate. After appellee construction company, the sole bidder on a city

contract, was denied a waiver and lost its contract, it brought suit under 42 U.S.C. § 1983, alleging that the Plan was unconstitutional under the Fourteenth Amendment's Equal Protection Clause. The Federal District Court upheld the Plan in all respects, and the Court of Appeals affirmed, applying a test derived from the principal opinion in *Fullilove, supra,* which accorded great deference to Congress' findings of past societal discrimination in holding that a 10% minority set-aside for certain federal construction grants did not violate the equal protection component of the Fifth Amendment. However, on appellee's petition for certiorari in this case, this Court vacated and remanded for further consideration in light of its intervening decision in ****709** *Wygant v. Jackson Board of Education,* 476 U.S. 267, 106 S.Ct. 1842, 90 L.Ed.2d 260, in ***470** which the plurality applied a strict scrutiny standard in holding that a race-based layoff program agreed to by a school board and the local teachers' union violated the Fourteenth Amendment's Equal Protection Clause. On remand, the Court of Appeals held that the city's Plan violated both prongs of strict scrutiny, in that (1) the Plan was not justified by a compelling governmental interest, since the record revealed no prior discrimination by the city itself in awarding contracts, and (2) the 30% set-aside was not narrowly tailored to accomplish a remedial purpose.

Held: The judgment is affirmed.

822 F.2d 1355 (CA4 1987), affirmed.

Justice O'CONNOR delivered the opinion of the Court with respect to Parts I, III–B, and IV, concluding that:

1. The city has failed to demonstrate a compelling governmental interest justifying the Plan, since the factual predicate supporting the Plan does not establish the type of identified past discrimination in the city's construction industry that would authorize race-based relief under the Fourteenth Amendment's Equal Protection Clause. Pp. 724–728.

(a) A generalized assertion that there has been past discrimination in the entire construction industry cannot justify the use of an unyielding racial quota, since it provides no guidance for the city's legislative body to determine the precise scope of the injury it seeks to remedy and would allow race-based decisionmaking essentially limitless in scope and duration. The city's argument that it is attempting to remedy various forms of past societal discrimination that are alleged to be responsible for the small number of minority entrepreneurs in the local contracting industry fails, since the city also lists a host of nonracial factors which would seem to face a member of any racial group seeking to establish a new business enterprise, such as deficiencies in working capital, inability to meet bonding requirements, unfamiliarity with bidding procedures, and disability caused by an inadequate track record. Pp. 724–725.

(b) None of the "facts" cited by the city or relied on by the District Court, singly or together, provide a basis for a prima facie case of a constitutional or statutory violation by *anyone* in the city's construction industry. The fact that the Plan declares itself to be "remedial" is insufficient, since the mere recitation of a "benign" or legitimate purpose for a racial classification is entitled to little or no weight. Similarly, the views of Plan proponents as to past and present discrimination in the industry are highly conclusory and of little probative value. Reliance on the disparity between the number of prime contracts awarded to minority businesses and the city's minority population is also misplaced, since the proper statistical evaluation would compare the percentage of MBE's ***471** in the relevant market that are qualified to undertake city subcontracting work with the percentage of total city construction dollars that are presently awarded to minority subcontractors, neither of which is known to the city. The fact that MBE membership in local contractors' associations was extremely low is also not probative absent some link to the number of MBE's eligible for membership, since there are numerous explanations for the dearth of minority participation, including past societal discrimination in education and economic opportunities as well as both black and white career and entrepreneurial choices. Congress' finding in connection with the set-aside approved in *Fullilove* that there had been nationwide discrimination in the construction industry also has extremely limited probative value, since, by including a waiver procedure in the national program, Congress explicitly recognized that the scope of the problem would vary from market area to market area. In any event, Congress was acting pursuant to its unique enforcement powers under § 5 of the Fourteenth Amendment. Pp. 725–727.

****710** (c) The "evidence" relied upon by Justice MARSHALL's dissent—the city's history of school desegregation and numerous congressional reports—does little to define the scope of any injury to minority contractors in the city or the necessary remedy, and could justify a preference of any size or duration. Moreover, Justice MARSHALL's suggestion that discrimination findings may be "shared" from jurisdiction to jurisdiction is unprecedented and contrary to this Court's decisions. Pp. 727–728.

(d) Since there is *absolutely no evidence* of past discrimination against Spanish-speaking, Oriental, Indian, Eskimo, or Aleut persons in any aspect of the city's construction industry, the Plan's random inclusion of those groups strongly impugns the city's claim of remedial motivation. P. 728.

2. The Plan is not narrowly tailored to remedy the effects of prior discrimination, since it entitles a black, Hispanic, or Oriental entrepreneur from anywhere in the country to an absolute preference over other citizens based solely on their race. Although many of the barriers to minority participation in the construction industry relied upon by the city to justify the Plan appear to be race neutral, there is no evidence that the city considered using alternative, race-neutral means to increase minority participation in city contracting. Moreover, the Plan's rigid 30% quota rests upon the completely unrealistic assumption that minorities will choose to enter construction in lockstep proportion to their representation in the local population. Unlike the program upheld in *Fullilove,* the Plan's waiver system focuses upon the availability of MBE's, and does not inquire whether the particular MBE seeking a racial preference has suffered from the effects of past discrimination by the city or prime contractors. Given the fact that the city must already consider bids and ***472** waivers on a case-by-case basis, the city's only interest in maintaining a quota system rather than investigating the need for remedial action in particular cases would seem to be simply administrative convenience, which, standing alone, cannot justify the use of a suspect classification under equal protection strict scrutiny. Pp. 729–730.

Justice O'CONNOR, joined by THE CHIEF JUSTICE and Justice WHITE, concluded in Part II that if the city could identify past discrimination in the local construction industry with the particularity required by the Equal Protection Clause, it would have the power to adopt race-based legislation designed to eradicate the effects of that discrimination. The principal opinion in *Fullilove* cannot be read to relieve the city of the necessity of making the specific findings of discrimination required by the Clause, since the congressional finding of past discrimination relied on in that case was made pursuant to Congress' unique power under § 5 of the Amendment to enforce, and therefore to identify and redress violations of, the Amendment's provisions. Conversely, § 1 of the Amendment, which includes the Equal Protection Clause, is an explicit constraint upon the power of States and political subdivisions, which must undertake any remedial efforts in accordance with the dictates of that section. However, the Court of Appeals erred to the extent that it followed by rote the *Wygant* plurality's ruling that the Equal Protection Clause requires a showing of prior discrimination by the governmental unit involved, since that ruling was made in the context of a race-based policy that affected the particular public employer's own work force, whereas this case involves a state entity which has specific state-law authority to address discriminatory practices within local commerce under its jurisdiction. Pp. 718–721.

Justice O'CONNOR, joined by THE CHIEF JUSTICE, Justice WHITE, and Justice KENNEDY, concluded in Parts III–A and V that:

1. Since the Plan denies certain citizens the opportunity to compete for a fixed ****711** percentage of public contracts based solely on their race, *Wygant'* s strict scrutiny standard of review must be applied, which requires a firm evidentiary basis for concluding that the underrepresentation of minorities is a product of past discrimination. Application of that standard, which is not dependent on the race of those burdened or benefited by the racial classification, assures that the city is pursuing a remedial goal important enough to warrant use of a highly suspect tool and that the means chosen "fit" this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype. The relaxed standard of review proposed by Justice MARSHALL's dissent does not provide a means for determining that a racial classification is in fact "designed to further remedial goals," since it accepts the remedial nature of the classification ***473** before examination of the factual basis for the classification's enactment and the nexus between its scope and that factual basis. Even if the level of equal protection scrutiny could be said to vary according to the ability of different groups to defend their interests in the representative process, heightened scrutiny would still be appropriate in the circumstances of this case, since blacks constitute approximately 50% of the city's population and hold five of nine seats on the City Council, thereby raising the concern that the political majority may have acted to disadvantage a minority based on unwarranted assumptions or incomplete facts. Pp. 721–724.

2. Even in the absence of evidence of discrimination in the local construction industry, the city has at its disposal an array of race-neutral devices to increase the accessibility of city contracting opportunities to small entrepreneurs of all races who have suffered the effects of past societal discrimination, including simplification of bidding procedures, relaxation of bonding requirements, training, financial aid, elimination or modification of formal barriers caused by bureaucratic inertia, and the prohibition of discrimination in the provision of credit or bonding by local suppliers and banks. Pp. 730–731.

Justice STEVENS, although agreeing that the Plan cannot be justified as a remedy for past discrimination, concluded that the Fourteenth Amendment does not limit permissible racial classifications to those that remedy past wrongs, but requires that race-based governmental decisions be evaluated primarily by studying their probable impact on the future. Pp. 731–734.

(a) Disregarding the past history of racial injustice, there is not even an arguable basis for suggesting that the race of a subcontractor or contractor on city projects should have any relevance to his or her access to the market. Although race is not always irrelevant to sound governmental decisionmaking, the city makes no claim that the public interest in the efficient performance of its construction contracts will be served by granting a preference to minority-business enterprises. Pp. 731–732.

(b) Legislative bodies such as the city council, which are primarily policymaking entities that promulgate rules to govern future conduct, raise valid constitutional concerns when they use the political process to punish or characterize past conduct of private citizens. Courts, on the other hand, are well equipped to identify past wrongdoers and to fashion remedies that will create the conditions that presumably would have existed had no wrong been committed, and should have the same broad discretion in racial discrimination cases that chancellors enjoy in other areas of the law to fashion remedies against persons who have been proved guilty of violations of law. P. 732.

***474** c) Rather than engaging in debate over the proper standard of review to apply in affirmative-action litigation, it is more constructive to try to identify the characteristics of the advantaged and disadvantaged classes that may justify their disparate treatment. Here, instead of carefully identifying those characteristics, the city ****712** has merely engaged in the type of stereotypical analysis that is the hallmark of Equal Protection Clause violations. The class of persons benefited by the Plan is not limited to victims of past discrimination by white contractors in the city, but encompasses persons who have never been in business in the city, minority contractors who may have themselves been guilty of discrimination against other minority group members, and firms that have prospered notwithstanding discriminatory treatment. Similarly, although the Plan unquestionably disadvantages some white contractors who are guilty of past discrimination against blacks, it also punishes some who discriminated only before it was forbidden by law and some who have never discriminated against anyone. Pp. 733–734.

Justice KENNEDY concluded that the Fourteenth Amendment ought not to be interpreted to reduce a State's power to eradicate racial discrimination and its effects in both the public and private sectors, or its absolute duty to do so where those wrongs were caused intentionally by the State itself, except where there is a conflict with federal law or where, as here, a state remedy itself violates equal protection. Although a rule striking down all racial preferences which are not necessary remedies to victims of unlawful discrimination would serve important structural goals by eliminating the necessity for courts to pass on each such preference that is enacted, that rule would be a significant break with this Court's precedents that require a case-by-case test, and need not be adopted. Rather, it may be assumed that the principle of race neutrality found in the Equal Protection Clause will be vindicated by the less absolute strict scrutiny standard, the application of which demonstrates that the city's Plan is not a remedy but is itself an unconstitutional preference. Pp. 734–735.

Justice SCALIA, agreeing that strict scrutiny must be applied to all governmental racial classifications, concluded that:

1. The Fourteenth Amendment prohibits state and local governments from discriminating on the basis of race in order to undo the effects of past discrimination, except in one circumstance: where that is necessary to eliminate their own maintenance of a system of unlawful racial classification. Moreover, the State's remedial power in that instance extends no further than the scope of the constitutional violation, and does not encompass the continuing effects of a discriminatory system once the system itself has been eliminated. Pp. 735–738.

***475** 2. The State remains free to undo the effects of past discrimination in permissible ways that do not involve classification by race—for example, by according a contracting preference to small or new businesses or to actual victims of discrimination who can be identified. In the latter instance, the classification would not be based on race but on the fact that the victims were wronged. Pp. 739–740.

O'CONNOR, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, III–B, and IV, in which REHNQUIST, C.J., and WHITE, STEVENS, and KENNEDY, JJ., joined, an opinion with respect to Part II, in which REHNQUIST, C.J., and WHITE, J., joined, and an opinion with respect to Parts III–A and V, in which REHNQUIST, C.J., and WHITE and KENNEDY, JJ., joined. STEVENS, J., *post,* p. 731, and KENNEDY, J., *post,* p. 734,

filed opinions concurring in part and concurring in the judgment. SCALIA, J., filed an opinion concurring in the judgment, *post,* p. 735. MARSHALL, J., filed a dissenting opinion, in which BRENNAN and BLACKMUN, JJ., joined, *post,* p. 740. BLACKMUN, J., filed a dissenting opinion, in which BRENNAN, J., joined, *post,* p. 757.

Attorneys and Law Firms

John Payton argued the cause for appellant. With him on the briefs were Mark S. Hersh, Drew St. J. Carneal, Michael L. Sarahan, Michael K. Jackson, and John H. Pickering.

****713** Walter H. Ryland argued the cause and filed a brief for appellee.*

* Briefs of amici curiae urging reversal were filed for the State of Maryland by J. Joseph Curran, Jr., Attorney General, and Charles O. Monk II, Deputy Attorney General; for the State of Michigan by Frank J. Kelley, Attorney General, Louis J. Caruso, Solicitor General, and Brent E. Simmons, Assistant Attorney General; for the State of New York et al. by Robert Abrams, Attorney General of New York, O. Peter Sherwood, Solicitor General, and Suzanne M. Lynn, Marjorie Fujiki, and Marla Tepper, Assistant Attorneys General, John K. Van de Kamp, Attorney General of California, Joseph I. Lieberman, Attorney General of Connecticut, Frederick D. Cooke, Corporation Counsel of the District of Columbia, Neil F. Hartigan, Attorney General of Illinois, James M. Shannon, Attorney General of Massachusetts, Hubert H. Humphrey III, Attorney General of Minnesota, W. Cary Edwards, Attorney General of New Jersey, Anthony J. Celebrezze, Jr., Attorney General of Ohio, Dave Frohnmayer, Attorney General of Oregon, James E. O'Neil, Attorney General of Rhode Island, T. Travis Medlock, Attorney General of South Carolina, Kenneth O. Eikenberry, Attorney General of Washington, Charles G. Brown, Attorney General of West Virginia, Donald Hanaway, Attorney General of Wisconsin, and Joseph B. Meyer, Attorney General of Wyoming; for the Alpha Kappa Alpha Sorority et al. by Eva Jefferson Paterson, Robert L. Harris, Judith Kurtz, William C. McNeill III, and Nathaniel Colley; for the American Civil Liberties Union et al. by Edward M. Chen, Steven R. Shapiro, John A. Powell, and John Hart Ely; for the city of San Francisco, California, et al. by Louise H. Renne and Burk E. Delventhal; for the Lawyer's Committee for Civil Rights under Law et al. by Stephen J. Pollak, James R. Bird, Paula A. Sweeney, Grover Hankins, Judith L. Lichtman, Conrad K. Harper, Stuart J. Land, Norman Redlich, William L. Robinson, Judith A. Winston, and Antonia Hernandez; for the Maryland Legislative Black Caucus by Koteles Alexander and Bernadette Gartrell; for the Minority Business Enterprize Legal Defense and Education Fund, Inc., et al. by Anthony W. Robinson, H. Russell Frisby, Jr., and Andrew L. Sandler; for the NAACP Legal Defense and Educational Fund, Inc., by Julius L. Chambers, Charles Stephen Ralston, Ronald L. Ellis, Eric Schnapper, Napoleon B. Williams, Jr., and Clyde E. Murphy; and for the National League of Cities et al. by Benna Ruth Solomon and David A. Strauss.

Briefs of amici curiae urging affirmance were filed for the United States by Solicitor General Fried, Assistant Attorney General Reynolds, Deputy Solicitor General Ayer, Deputy Assistant Attorney General Clegg, Glen G. Nager, and David K. Flynn; for the Anti-Defamation League of B'nai B'rith by Robert A.Helman, Michele Odorizzi, Daniel M. Harris, Justin J. Finger, Jeffrey P. Sinensky, and Jill L. Kahn; for Associated Specialty Contractors, Inc., by John A. McGuinn and Gary L. Lieber; for the Equal Employment Advisory Council by Robert E. Williams and Douglas S. McDowell; for the Mountain States Legal Foundation by Constance E. Brooks; for the Pacific Legal Foundation by Ronald A. Zumbrun and John H. Findley; for the Southeastern Legal Foundation, Inc., by G. Stephen Parker; and for the Washington Legal Foundation et al. by Daniel J. Popeo and Paul D. Kamenar.

Opinion

***476** Justice O'CONNOR announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, III–B, and IV, an opinion with respect to Part II, in which THE CHIEF JUSTICE and Justice WHITE join, and an opinion with respect to Parts III–A and V, in which THE CHIEF JUSTICE, Justice WHITE, and Justice KENNEDY join.

In this case, we confront once again the tension between the Fourteenth Amendment's guarantee of equal treatment to all citizens, and the use of race-based measures to ameliorate ***477** the effects of past discrimination on the opportunities enjoyed by members of minority groups in our society. In *Fullilove v. Klutznick,* 448 U.S. 448, 100 S.Ct. 2758, 65 L.Ed.2d 902 (1980), we held that a congressional program requiring that 10% of certain federal construction grants be awarded to minority contractors did not violate the equal protection principles embodied in the Due Process Clause of the Fifth

Amendment. Relying largely on our decision in *Fullilove,* some lower federal courts have applied a similar standard of review in assessing the constitutionality of state and local minority set-aside provisions under the Equal Protection Clause of the Fourteenth Amendment. See, *e.g. South Florida Chapter, Associated General Contractors of America, Inc. v. Metropolitan Dade County,* 723 F.2d 846 (CA11), cert. denied, 469 U.S. 871, 105 S.Ct. 220, 83 L.Ed.2d 150 (1984); *Ohio Contractors Assn. v. Keip,* 713 F.2d 167 (CA6 1983). Since our decision two Terms ago in *Wygant v. Jackson Board of Education,* 476 U.S. 267, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986), the lower federal courts have attempted to apply its standards in evaluating the constitutionality of state and local programs which allocate a portion of public contracting opportunities exclusively to minority-owned businesses. See, *e.g., Michigan Road Builders Assn., Inc. v. Milliken,* 834 F.2d 583 (CA6 1987), appeal docketed, No. 87–1860; *Associated General Contractors of Cal. v. City and Cty. of San Francisco,* 813 F.2d 922 (CA9 1987). We noted probable jurisdiction in this case to consider the applicability of our decision in *Wygant* to a minority set-aside program adopted by the city of Richmond, Virginia.

I

On April 11, 1983, the Richmond City Council adopted the Minority Business Utilization Plan (the Plan). The Plan required prime contractors to whom the city awarded construction contracts to subcontract at least 30% of the dollar amount of the contract to one or more Minority Business Enterprises (MBE's). Ordinance No. 83–69–59, codified in Richmond, Va., City Code, § 12–156(a) (1985). The 30% set-aside ***478** did not apply to city contracts awarded to minority-owned prime contractors. *Ibid.*

The Plan defined an MBE as "[a] business at least fifty-one (51) percent of which is owned and controlled ... by minority group members." § 12–23, p. 941. "Minority group members" were defined as "[c]itizens of the United States who are Blacks, Spanish-speaking, Orientals, Indians, Eskimos, or Aleuts." *Ibid.* There was no geographic limit to the Plan; an otherwise qualified MBE from anywhere in the United States could avail itself of the 30% set-aside. The Plan declared that it was "remedial" in nature, and enacted "for the purpose of promoting wider participation by minority business enterprises in the construction of public projects." § 12–158(a). The Plan expired on June 30, 1988, and was in effect for approximately five years. *Ibid.*[1]

****714** The Plan authorized the Director of the Department of General Services to promulgate rules which "shall allow waivers in those individual situations where a contractor can prove to the satisfaction of the director that the requirements herein cannot be achieved." § 12–157. To this end, the Director promulgated Contract Clauses, Minority Business Utilization Plan (Contract Clauses). Paragraph D of these rules provided:

> "No partial or complete waiver of the foregoing [30% set-aside] requirement shall be granted by the city other than in exceptional circumstances. To justify a waiver, it must be shown that every feasible attempt has been made to comply, and it must be demonstrated that sufficient, relevant, qualified Minority Business Enterprises ... are unavailable or unwilling to participate in the ***479** contract to enable meeting the 30% MBE goal." ¶ D, Record, Exh. 24, p. 1; see *J.A. Croson Co. v. Richmond,* 779 F.2d 181, 197 (CA4 1985) *(Croson I).*

The Director also promulgated "purchasing procedures" to be followed in the letting of city contracts in accordance with the Plan. *Id.,* at 194. Bidders on city construction contracts were provided with a "Minority Business Utilization Plan Commitment Form." Record, Exh. 24, p. 3. Within 10 days of the opening of the bids, the lowest otherwise responsive bidder was required to submit a commitment form naming the MBE's to be used on the contract and the percentage of the total contract price awarded to the minority firm or firms. The prime contractor's commitment form or request for a waiver of the 30% set-aside was then referred to the city Human Relations Commission (HRC). The HRC verified that the MBE's named in the commitment form were in fact minority owned, and then either approved the commitment form or made a recommendation regarding the prime contractor's request for a partial or complete waiver of the 30% set-aside. *Croson I,* 779 F.2d, at 196. The Director of General Services made the final determination on compliance with the set-aside provisions or the propriety of granting a waiver. *Ibid.* His discretion in this regard appears to have been plenary. There was no direct administrative appeal from the Director's denial of a waiver. Once a contract had been awarded to another firm a bidder denied an award for failure to comply with the MBE requirements had a general right of protest under Richmond procurement policies. Richmond, Va., City Code, § 12–126(a) (1985).

The Plan was adopted by the Richmond City Council after a public hearing. App. 9–50. Seven members of the public spoke to the merits of the ordinance: five were in opposition, two in favor. Proponents of the set-aside provision relied on a study which indicated that, while the general population of Richmond was 50% black, only 0.67% of the city's prime construction ***480** contracts had been awarded to minority businesses in the 5–year period from 1978 to 1983. It was also established that a variety of contractors' associations, whose representatives appeared in opposition to the ordinance, had virtually no minority businesses within their membership. See Brief for Appellant 22 (chart listing minority membership of six local construction industry associations). The city's legal counsel indicated his view that the ordinance was constitutional under this Court's decision in *Fullilove v. Klutznick,* 448 U.S. 448, 100 S.Ct. 2758, 65 L.Ed.2d 902 (1980). App. 24. Councilperson Marsh, a proponent of the ordinance, made the following statement:

> "There is some information, however, that I want to make sure that we put in the record. I have been practicing law in this community since 1961, and I am familiar with the practices in the construction industry in this area, in the State, and around the nation. And I can say without equivocation, that the general conduct of the construction industry in ****715** this area, and the State, and around the nation, is one in which race discrimination and exclusion on the basis of race is widespread." *Id.,* at 41.

There was no direct evidence of race discrimination on the part of the city in letting contracts or any evidence that the city's prime contractors had discriminated against minority-owned subcontractors. See *Id.,* at 42 (statement of Councilperson Kemp) ("[The public witnesses] indicated that the minority contractors were just not available. There wasn't a one that gave any indication that a minority contractor would not have an opportunity, if he were available").

Opponents of the ordinance questioned both its wisdom and its legality. They argued that a disparity between minorities in the population of Richmond and the number of prime contracts awarded to MBE's had little probative value in establishing discrimination in the construction industry. *Id.,* at 30 (statement of Councilperson Wake). Representatives of various contractors' associations questioned whether there ***481** were enough MBE's in the Richmond area to satisfy the 30% set-aside requirement. *Id.,* at 32 (statement of Mr. Beck); *id.,* at 33 (statement of Mr. Singer); *id.,* at 35–36 (statement of Mr. Murphy). Mr. Murphy noted that only 4.7% of all construction firms in the United States were minority owned and that 41% of these were located in California, New York, Illinois, Florida, and Hawaii. He predicted that the ordinance would thus lead to a windfall for the few minority firms in Richmond. *Ibid.* Councilperson Gillespie indicated his concern that many local labor jobs, held by both blacks and whites, would be lost because the ordinance put no geographic limit on the MBE's eligible for the 30% set-aside. *Id.,* at 44. Some of the representatives of the local contractor's organizations indicated that they did not discriminate on the basis of race and were in fact actively seeking out minority members. *Id.,* at 38 (statement of Mr. Shuman) ("The company I work for belonged to all these [contractors'] organizations. Nobody that I know of, black, Puerto Rican or any minority, has ever been turned down. They're actually sought after to join, to become part of us"); see also *id.,* at 20 (statement of Mr. Watts). Councilperson Gillespie expressed his concern about the legality of the Plan, and asked that a vote be delayed pending consultation with outside counsel. His suggestion was rejected, and the ordinance was enacted by a vote of six to two, with Councilperson Gillespie abstaining. *Id.,* at 49.

On September 6, 1983, the city of Richmond issued an invitation to bid on a project for the provision and installation of certain plumbing fixtures at the city jail. On September 30, 1983, Eugene Bonn, the regional manager of J.A. Croson Company (Croson), a mechanical plumbing and heating contractor, received the bid forms. The project involved the installation of stainless steel urinals and water closets in the city jail. Products of either of two manufacturers were specified, Acorn Engineering Company (Acorn) or Bradley Manufacturing Company (Bradley). Bonn determined that ***482** to meet the 30% set-aside requirement, a minority contractor would have to supply the fixtures. The provision of the fixtures amounted to 75% of the total contract price.

On September 30, Bonn contacted five or six MBE's that were potential suppliers of the fixtures, after contacting three local and state agencies that maintained lists of MBE's. No MBE expressed interest in the project or tendered a quote. On October 12, 1983, the day the bids were due, Bonn again telephoned a group of MBE's. This time, Melvin Brown, president of Continental Metal Hose (Continental), a local MBE, indicated that he wished to participate in the project. Brown subsequently contacted two sources of the specified fixtures in order to obtain a price quotation. One supplier, Ferguson Plumbing Supply, which is not an MBE, had already made a quotation directly to Croson, and refused to quote the same fixtures to Continental. ****716** Brown also contacted an agent of Bradley, one of the two manufacturers of the specified fixtures. The agent was not familiar with Brown or Continental, and indicated that a credit check was required which would

take at least 30 days to complete.

On October 13, 1983, the sealed bids were opened. Croson turned out to be the only bidder, with a bid of $126,530. Brown and Bonn met personally at the bid opening, and Brown informed Bonn that his difficulty in obtaining credit approval had hindered his submission of a bid.

By October 19, 1983, Croson had still not received a bid from Continental. On that date it submitted a request for a waiver of the 30% set-aside. Croson's waiver request indicated that Continental was "unqualified" and that the other MBE's contacted had been unresponsive or unable to quote. Upon learning of Croson's waiver request, Brown contacted an agent of Acorn, the other fixture manufacturer specified by the city. Based upon his discussions with Acorn, Brown subsequently submitted a bid on the fixtures to Croson. Continental's bid was $6,183.29 higher than the price Croson had included for the fixtures in its bid to the city. This ***483** constituted a 7% increase over the market price for the fixtures. With added bonding and insurance, using Continental would have raised the cost of the project by $7,663.16. On the same day that Brown contacted Acorn, he also called city procurement officials and told them that Continental, an MBE, could supply the fixtures specified in the city jail contract. On November 2, 1983, the city denied Croson's waiver request, indicating that Croson had 10 days to submit an MBE Utilization Commitment Form, and warned that failure to do so could result in its bid being considered unresponsive.

Croson wrote the city on November 8, 1983. In the letter, Bonn indicated that Continental was not an authorized supplier for either Acorn or Bradley fixtures. He also noted that Acorn's quotation to Brown was subject to credit approval and in any case was substantially higher than any other quotation Croson had received. Finally, Bonn noted that Continental's bid had been submitted some 21 days after the prime bids were due. In a second letter, Croson laid out the additional costs that using Continental to supply the fixtures would entail, and asked that it be allowed to raise the overall contract price accordingly. The city denied both Croson's request for a waiver and its suggestion that the contract price be raised. The city informed Croson that it had decided to rebid the project. On December 9, 1983, counsel for Croson wrote the city asking for a review of the waiver denial. The city's attorney responded that the city had elected to rebid the project, and that there is no appeal of such a decision. Shortly thereafter Croson brought this action under 42 U.S.C. § 1983 in the Federal District Court for the Eastern District of Virginia, arguing that the Richmond ordinance was unconstitutional on its face and as applied in this case.

The District Court upheld the Plan in all respects. See Supplemental App. to Juris.Statement 112–232 (Supp.App.). In its original opinion, a divided panel of the Fourth Circuit ***484** Court of Appeals affirmed. *Croson I,* 779 F.2d 181 (1985). Both courts applied a test derived from "the common concerns articulated by the various Supreme Court opinions" in *Fullilove v. Klutznick,* 448 U.S. 448, 100 S.Ct. 2758, 65 L.Ed.2d 902 (1980), and *University of California Regents v. Bakke,* 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978). See *Croson I, supra,* at 188. Relying on the great deference which this Court accorded Congress' findings of past discrimination in *Fullilove,* the panel majority indicated its view that the same standard should be applied to the Richmond City Council, stating:

> "Unlike the review we make of a lower court decision, our task is not to determine if there was sufficient evidence to sustain the council majority's position in any traditional sense of weighing the evidence. Rather, it is to determine whether ****717** 'the legislative history ... demonstrates that [the council] reasonably concluded that ... private and governmental discrimination had contributed to the negligible percentage of public contracts awarded minority contractors.' " 779 F.2d, at 190 (quoting *Fullilove, supra,* 448 U.S., at 503, 100 S.Ct., at 2787 (Powell, J., concurring)).

The majority found that national findings of discrimination in the construction industry, when considered in conjunction with the statistical study concerning the awarding of prime contracts in Richmond, rendered the city council's conclusion that low minority participation in city contracts was due to past discrimination "reasonable." *Croson I,* 779 F.2d, at 190, and n. 12. The panel opinion then turned to the second part of its "synthesized *Fullilove"* test, examining whether the racial quota was "narrowly tailored to the legislative goals of the Plan." *Id.,* at 190. First, the court upheld the 30% set-aside figure, by comparing it not to the number of MBE's in Richmond, but rather to the percentage of minority persons in the city's population. *Id.,* at 191. The panel held that to remedy the effects of past discrimination, "a set-aside program for a period of five years obviously must require more than a 0.67% set-aside to encourage minorities to enter ***485** the contracting industry and to allow existing minority contractors to grow." *Ibid.* Thus, in the court's view the 30% figure was "reasonable in light of the undisputed fact that minorities constitute 50% of the population of Richmond." *Ibid.*

Croson sought certiorari from this Court. We granted the writ, vacated the opinion of the Court of Appeals, and remanded the case for further consideration in light of our intervening decision in *Wygant v. Jackson Board of Education,* 476 U.S. 267,

106 S.Ct. 1842, 90 L.Ed.2d 260 (1986). See 478 U.S. 1016, 106 S.Ct. 3327, 92 L.Ed.2d 733 (1986).

On remand, a divided panel of the Court of Appeals struck down the Richmond set-aside program as violating both prongs of strict scrutiny under the Equal Protection Clause of the Fourteenth Amendment. *J.A. Croson Co. v. Richmond,* 822 F.2d 1355 (CA4 1987) *(Croson II).* The majority found that the "core" of this Court's holding in *Wygant* was that, "[t]o show that a plan is justified by a compelling governmental interest, a municipality that wishes to employ a racial preference cannot rest on broad-brush assumptions of historical discrimination." 822 F.2d, at 1357. As the court read this requirement, "[f]indings of *societal* discrimination will not suffice; the findings must concern 'prior discrimination *by the government unit involved.*' " *Id.,* at 1358 (quoting *Wygant, supra,* 476 U.S., at 274, 106 S.Ct., at 1847) (emphasis in original).

In this case, the debate at the city council meeting "revealed no record of prior discrimination by the city in awarding public contracts...." *Croson II, supra,* at 1358. Moreover, the statistics comparing the minority population of Richmond to the percentage of *prime* contracts awarded to minority firms had little or no probative value in establishing prior discrimination in the relevant market, and actually suggested "more of a political than a remedial basis for the racial preference." 822 F.2d, at 1359. The court concluded that, "[i]f this plan is supported by a compelling governmental interest, so is every other plan that has been enacted in the past or that will be enacted in the future." *Id.,* at 1360.

***486** The Court of Appeals went on to hold that even if the city had demonstrated a compelling interest in the use of a race-based quota, the 30% set-aside was not narrowly tailored to accomplish a remedial purpose. The court found that the 30% figure was "chosen arbitrarily" and was not tied to the number of minority subcontractors in Richmond or to any other relevant number. *Ibid.* The dissenting judge argued that the majority had "misconstrue[d] and misapplie[d]" our decision in *Wygant.* 822 F.2d, at 1362. We noted probable jurisdiction of the city's appeal, ****718** 484 U.S. 1058, 108 S.Ct. 1010, 98 L.Ed.2d 976 (1988), and we now affirm the judgment.

II

The parties and their supporting *amici* fight an initial battle over the scope of the city's power to adopt legislation designed to address the effects of past discrimination. Relying on our decision in *Wygant,* appellee argues that the city must limit any race-based remedial efforts to eradicating the effects of its own prior discrimination. This is essentially the position taken by the Court of Appeals below. Appellant argues that our decision in *Fullilove* is controlling, and that as a result the city of Richmond enjoys sweeping legislative power to define and attack the effects of prior discrimination in its local construction industry. We find that neither of these two rather stark alternatives can withstand analysis.

In *Fullilove,* we upheld the minority set-aside contained in § 103(f)(2) of the Public Works Employment Act of 1977, Pub.L. 95–28, 91 Stat. 116, 42 U.S.C. § 6701 *et seq.* (Act) against a challenge based on the equal protection component of the Due Process Clause. The Act authorized a $4 billion appropriation for federal grants to state and local governments for use in public works projects. The primary purpose of the Act was to give the national economy a quick boost in a recessionary period; funds had to be committed to state or local grantees by September 30, 1977. The Act also contained the following requirement: " 'Except to the extent the Secretary ***487** determines otherwise, no grant shall be made under this Act ... unless the applicant gives satisfactory assurance to the Secretary that at least 10 per centum of the amount of each grant shall be expended for minority business enterprises.' " *Fullilove,* 448 U.S., at 454, 100 S.Ct., at 2762 (quoting 91 Stat. 116, 42 U.S.C. § 6705(f)(2)). MBE's were defined as businesses effectively controlled by "citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts." *Ibid.*

The principal opinion in *Fullilove,* written by Chief Justice Burger, did not employ "strict scrutiny" or any other traditional standard of equal protection review. The Chief Justice noted at the outset that although racial classifications call for close examination, the Court was at the same time "bound to approach [its] task with appropriate deference to the Congress, a co-equal branch charged by the Constitution with the power to 'provide for the ... general Welfare of the United States' and 'to enforce by appropriate legislation,' the equal protection guarantees of the Fourteenth Amendment." 448 U.S., at 472, 100 S.Ct., at 2771. The principal opinion asked two questions: first, were the objectives of the legislation within the power of Congress? Second, was the limited use of racial and ethnic criteria a permissible means for Congress to carry out its objectives within the constraints of the Due Process Clause? *Id.,* at 473, 100 S.Ct., at 2772.

On the issue of congressional power, the Chief Justice found that Congress' commerce power was sufficiently broad to allow it to reach the practices of prime contractors on federally funded local construction projects. *Id.,* at 475–476, 100 S.Ct., at 2773–2774. Congress could mandate state and local government compliance with the set-aside program under its § 5 power to enforce the Fourteenth Amendment. *Id.,* at 476 100 S.Ct., at 2773 (citing *Katzenbach v. Morgan,* 384 U.S. 641, 651, 86 S.Ct. 1717, 1723, 16 L.Ed.2d 828 (1966)).

The Chief Justice next turned to the constraints on Congress' power to employ race-conscious remedial relief. His opinion stressed two factors in upholding the MBE set-aside. ***488** First was the unique remedial powers of Congress under § 5 of the Fourteenth Amendment:

> "Here we deal ... not with the limited remedial powers of a federal court, for example, but with the broad remedial powers of Congress. It is fundamental that *in no organ of government, state* ****719** *or federal, does there repose a more comprehensive remedial power than in the Congress,* expressly charged by the Constitution with competence and authority to enforce equal protection guarantees." 448 U.S., at 483, 100 S.Ct., at 2777 (principal opinion) (emphasis added).

Because of these unique powers, the Chief Justice concluded that "Congress not only may induce voluntary action to assure compliance with existing federal statutory or constitutional antidiscrimination provisions, but also, where Congress has authority to *declare certain conduct unlawful,* it may, as here, authorize and induce state action to avoid such conduct." *Id.,* at 483–484, 100 S.Ct., at 2777 (emphasis added).

In reviewing the legislative history behind the Act, the principal opinion focused on the evidence before Congress that a nationwide history of past discrimination had reduced minority participation in federal construction grants. *Id.,* at 458–467, 100 S.Ct., at 2764–2769. The Chief Justice also noted that Congress drew on its experience under § 8(a) of the Small Business Act of 1953, which had extended aid to minority businesses. *Id.,* at 463–467, 100 S.Ct., at 2767–2769. The Chief Justice concluded that "Congress had abundant historical basis from which it could conclude that traditional procurement practices, when applied to minority businesses, could perpetuate the effects of prior discrimination." *Id.,* at 478, 100 S.Ct., at 2775.

The second factor emphasized by the principal opinion in *Fullilove* was the flexible nature of the 10% set-aside. Two "congressional assumptions" underlay the MBE program: first, that the effects of past discrimination had impaired the competitive position of minority businesses, and second, that "adjustment for the effects of past discrimination" would assure ***489** that at least 10% of the funds from the federal grant program would flow to minority businesses. The Chief Justice noted that both of these "assumptions" could be "rebutted" by a grantee seeking a waiver of the 10% requirement. *Id.,* at 487–488, 100 S.Ct., at 2779–2780. Thus a waiver could be sought where minority businesses were not available to fill the 10% requirement or, more importantly, where an MBE attempted "to exploit the remedial aspects of the program by charging an unreasonable price, *i.e.,* a price not attributable to the present effects of prior discrimination." *Id.,* at 488, 100 S.Ct., at 2780. The Chief Justice indicated that without this fine tuning to remedial purpose, the statute would not have "pass[ed] muster." *Id.,* at 487, 100 S.Ct., at 2779.

In his concurring opinion, Justice Powell relied on the legislative history adduced by the principal opinion in finding that "Congress reasonably concluded that private and governmental discrimination had contributed to the negligible percentage of public contracts awarded minority contractors." *Id.,* at 503, 100 S.Ct., at 2787. Justice Powell also found that the means chosen by Congress, particularly in light of the flexible waiver provisions, were "reasonably necessary" to address the problem identified. *Id.,* at 514–515, 100 S.Ct., at 2793–2794. Justice Powell made it clear that other governmental entities might have to show more than Congress before undertaking race-conscious measures: "The degree of specificity required in the findings of discrimination and the breadth of discretion in the choice of remedies may vary with the nature and authority of the governmental body." *Id.,* at 515–516, n. 14, 100 S.Ct., at 2794, n. 14.

Appellant and its supporting *amici* rely heavily on *Fullilove* for the proposition that a city council, like Congress, need not make specific findings of discrimination to engage in race-conscious relief. Thus, appellant argues "[i]t would be a perversion of federalism to hold that the federal government has a compelling interest in remedying the effects of racial discrimination in its own public works program, but a city government does not." Brief for Appellant 32 (footnote omitted).

***490 **720** What appellant ignores is that Congress, unlike any State or political subdivision, has a specific constitutional

mandate to enforce the dictates of the Fourteenth Amendment. The power to "enforce" may at times also include the power to define situations which *Congress* determines threaten principles of equality and to adopt prophylactic rules to deal with those situations. See *Katzenbach v. Morgan,* 384 U.S., at 651, 86 S.Ct., at 1723 ("Correctly viewed, § 5 is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment"). See also *South Carolina v. Katzenbach,* 383 U.S. 301, 326, 86 S.Ct. 803, 817, 15 L.Ed.2d 769 (1966) (similar interpretation of congressional power under § 2 of the Fifteenth Amendment). The Civil War Amendments themselves worked a dramatic change in the balance between congressional and state power over matters of race. Speaking of the Thirteenth and Fourteenth Amendments in *Ex parte Virginia,* 100 U.S. 339, 345, 25 L.Ed. 676 (1880), the Court stated: "They were intended to be, what they really are, limitations of the powers of the States and enlargements of the power of Congress."

That Congress may identify and redress the effects of society-wide discrimination does not mean that, *a fortiori,* the States and their political subdivisions are free to decide that such remedies are appropriate. Section 1 of the Fourteenth Amendment is an explicit *constraint* on state power, and the States must undertake any remedial efforts in accordance with that provision. To hold otherwise would be to cede control over the content of the Equal Protection Clause to the 50 state legislatures and their myriad political subdivisions. The mere recitation of a benign or compensatory purpose for the use of a racial classification would essentially entitle the States to exercise the full power of Congress under § 5 of the Fourteenth Amendment and insulate any racial classification from judicial scrutiny under § 1. We believe that such a result would be contrary to the intentions of ***491** the Framers of the Fourteenth Amendment, who desired to place clear limits on the States' use of race as a criterion for legislative action, and to have the federal courts enforce those limitations. See *Associated General Contractors of Cal. v. City and Cty. of San Francisco,* 813 F.2d, at 929 (Kozinski, J.) ("The city is not just like the federal government with regard to the findings it must make to justify race-conscious remedial action"); see also Days, Fullilove, 96 Yale L.J. 453, 474 (1987) (hereinafter Days) ("*Fullilove* clearly focused on the constitutionality of a *congressionally* mandated set-aside program") (emphasis in original); Bohrer, *Bakke, Weber,* and *Fullilove:* Benign Discrimination and Congressional Power to Enforce the Fourteenth Amendment, 56 Ind. L.J. 473, 512–513 (1981) ("Congress may authorize, pursuant to section 5, state action that would be foreclosed to the states acting alone").

We do not, as Justice MARSHALL's dissent suggests, see *post,* at 755–757, find in § 5 of the Fourteenth Amendment some form of federal pre-emption in matters of race. We simply note what should be apparent to all—§ 1 of the Fourteenth Amendment stemmed from a distrust of state legislative enactments based on race; § 5 is, as the dissent notes, " 'a *positive* grant of legislative power' " to Congress. *Post,* at 755, quoting *Katzenbach v. Morgan, supra,* 384 U.S., at 651, 86 S.Ct., at 1723 (emphasis in dissent). Thus, our treatment of an exercise of congressional power in *Fullilove* cannot be dispositive here. In the *Slaughter–House Cases,* 16 Wall. 36, 21 L.Ed. 394 (1873), cited by the dissent, *post,* at 756, the Court noted that the Civil War Amendments granted "additional powers to the Federal government," and laid "additional restraints upon those of the States." 16 Wall., at 68.

It would seem equally clear, however, that a state or local subdivision (if delegated the authority from the State) has the authority to eradicate the effects of private ****721** discrimination ***492** within its own legislative jurisdiction.[2] This authority must, of course, be exercised within the constraints of § 1 of the Fourteenth Amendment. Our decision in *Wygant* is not to the contrary. *Wygant* addressed the constitutionality of the use of racial quotas by local school authorities pursuant to an agreement reached with the local teachers' union. It was in the context of addressing the school board's power to adopt a race-based layoff program affecting its own work force that the *Wygant* plurality indicated that the Equal Protection Clause required "some showing of prior discrimination by the governmental unit involved." *Wygant,* 476 U.S., at 274, 106 S.Ct., at 1847. As a matter of state law, the city of Richmond has legislative authority over its procurement policies, and can use its spending powers to remedy private discrimination, if it identifies that discrimination with the particularity required by the Fourteenth Amendment. To this extent, on the question of the city's competence, the Court of Appeals erred in following *Wygant* by rote in a case involving a state entity which has state-law authority to address discriminatory practices within local commerce under its jurisdiction.

Thus, if the city could show that it had essentially become a "passive participant" in a system of racial exclusion practiced by elements of the local construction industry, we think it clear that the city could take affirmative steps to dismantle such a system. It is beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice. Cf. *Norwood v. Harrison,* 413 U.S. 455, 465, 93 S.Ct. 2804, 2810, 37 L.Ed.2d 723 (1973) ("Racial discrimination in state-operated schools is barred by the Constitution and [i]t is also axiomatic that a state may not induce, ***493** encourage or promote private persons

to accomplish what it is constitutionally forbidden to accomplish") (citation and internal quotations omitted).

III

A

The Equal Protection Clause of the Fourteenth Amendment provides that "[n]o State shall ... deny to *any person* within its jurisdiction the equal protection of the laws." (Emphasis added.) As this Court has noted in the past, the "rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights." *Shelley v. Kraemer,* 334 U.S. 1, 22, 68 S.Ct. 836, 846, 92 L.Ed. 1161 (1948). The Richmond Plan denies certain citizens the opportunity to compete for a fixed percentage of public contracts based solely upon their race. To whatever racial group these citizens belong, their "personal rights" to be treated with equal dignity and respect are implicated by a rigid rule erecting race as the sole criterion in an aspect of public decisionmaking.

Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are "benign" or "remedial" and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics. Indeed, the purpose of strict scrutiny is to "smoke out" illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool. The test also ensures that the means chosen "fit" this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.

****722** Classifications based on race carry a danger of stigmatic harm. Unless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility. See ***494** *University of California Regents v. Bakke,* 438 U.S., at 298, 98 S.Ct., at 2752 (opinion of Powell, J.) ("[P]referential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relation to individual worth"). We thus reaffirm the view expressed by the plurality in *Wygant* that the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification. *Wygant,* 476 U.S., at 279–280, 106 S.Ct., at 1849–1850; *id.,* at 285–286, 106 S.Ct., at 1852–1853 (O'CONNOR, J., concurring in part and concurring in judgment). See also *San Antonio Independent School Dist. v. Rodriguez,* 411 U.S. 1, 105, 93 S.Ct. 1278, 1333, 36 L.Ed.2d 16 (1973) (MARSHALL, J., dissenting) ("The highly suspect nature of classifications based on race, nationality, or alienage is well established") (footnotes omitted).

Our continued adherence to the standard of review employed in *Wygant* does not, as Justice MARSHALL's dissent suggests, see *post,* at 752, indicate that we view "racial discrimination as largely a phenomenon of the past" or that "government bodies need no longer preoccupy themselves with rectifying racial injustice." As we indicate, see *infra,* at 730–731, States and their local subdivisions have many legislative weapons at their disposal both to punish and prevent present discrimination and to remove arbitrary barriers to minority advancement. Rather, our interpretation of § 1 stems from our agreement with the view expressed by Justice Powell in *Bakke* that "[t]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color." *Bakke, supra,* 438 U.S., at 289–290, 98 S.Ct., at 2748.

Under the standard proposed by Justice MARSHALL's dissent, "race-conscious classifications designed to further remedial goals," *post,* at 743, are forthwith subject to a relaxed standard of review. How the dissent arrives at the legal conclusion that a racial classification is "designed to further remedial goals," without first engaging in an examination of ***495** the factual basis for its enactment and the nexus between its scope and that factual basis, we are not told. However, once the "remedial" conclusion is reached, the dissent's standard is singularly deferential, and bears little resemblance to the close examination of legislative purpose we have engaged in when reviewing classifications based either on race or gender. See *Weinberger v. Wiesenfeld,* 420 U.S. 636, 648, 95 S.Ct. 1225, 1233, 43 L.Ed.2d 514 (1975) ("[T]he mere recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme"). The dissent's watered-down version of equal protection review effectively assures that race will always

be relevant in American life, and that the "ultimate goal" of "eliminat[ing] entirely from governmental decisionmaking such irrelevant factors as a human being's race," *Wygant, supra,* 476 U.S., at 320, 106 S.Ct., at 1871 (STEVENS, J., dissenting) (footnote omitted), will never be achieved.

Even were we to accept a reading of the guarantee of equal protection under which the level of scrutiny varies according to the ability of different groups to defend their interests in the representative process, heightened scrutiny would still be appropriate in the circumstances of this case. One of the central arguments for applying a less exacting standard to "benign" racial classifications is that such measures essentially involve a choice made by dominant racial groups to disadvantage themselves. If one aspect of the judiciary's role under the Equal Protection Clause is to protect ****723** "discrete and insular minorities" from majoritarian prejudice or indifference, see *United States v. Carolene Products Co.,* 304 U.S. 144, 153, n. 4, 58 S.Ct. 778, 784, n. 4, 82 L.Ed. 1234 (1938), some maintain that these concerns are not implicated when the "white majority" places burdens upon itself. See J. Ely, Democracy and Distrust 170 (1980).

In this case, blacks constitute approximately 50% of the population of the city of Richmond. Five of the nine seats on the city council are held by blacks. The concern that a political majority will more easily act to the disadvantage of a minority ***496** based on unwarranted assumptions or incomplete facts would seem to militate for, not against, the application of heightened judicial scrutiny in this case. See Ely, The Constitutionality of Reverse Racial Discrimination, 41 U.Chi.L.Rev. 723, 739, n. 58 (1974) ("Of course it works both ways: a law that favors Blacks over Whites would be suspect if it were enacted by a predominantly Black legislature").

In *Bakke, supra,* the Court confronted a racial quota employed by the University of California at Davis Medical School. Under the plan, 16 out of 100 seats in each entering class at the school were reserved exclusively for certain minority groups. *Id.,* 438 U.S., at 288–289, 98 S.Ct., at 2747–2748. Among the justifications offered in support of the plan were the desire to "reduc[e] the historic deficit of traditionally disfavored minorities in medical school and the medical profession" and the need to "counte[r] the effects of societal discrimination." *Id.,* at 306, 98 S.Ct., at 2756 (citations omitted). Five Members of the Court determined that none of these interests could justify a plan that completely eliminated nonminorities from consideration for a specified percentage of opportunities. *Id.,* at 271–272, 98 S.Ct., at 2738 (Powell, J.) (addressing constitutionality of Davis plan); *id.,* at 408, 98 S.Ct., at 2808 (STEVENS, J., joined by Burger, C.J. and Stewart and REHNQUIST, JJ. concurring in judgment in part and dissenting in part) (addressing only legality of Davis admissions plan under Title VI of the Civil Rights Act of 1964).

Justice Powell's opinion applied heightened scrutiny under the Equal Protection Clause to the racial classification at issue. His opinion decisively rejected the first justification for the racially segregated admissions plan. The desire to have more black medical students or doctors, standing alone, was not merely insufficiently compelling to justify a racial classification, it was "discrimination for its own sake," forbidden by the Constitution. *Id.,* at 307, 98 S.Ct., at 2757. Nor could the second concern, the history of discrimination in society at large, justify a racial quota in medical school admissions. Justice Powell contrasted the "focused" goal of remedying "wrongs ***497** worked by specific instances of racial discrimination" with "the remedying of the effects of 'societal discrimination,' an amorphous concept of injury that may be ageless in its reach into the past." *Ibid.* He indicated that for the governmental interest in remedying past discrimination to be triggered "judicial, legislative, or administrative findings of constitutional or statutory violations" must be made. *Ibid.* Only then does the government have a compelling interest in favoring one race over another. *Id.,* at 308–309, 98 S.Ct., at 2757–2758.

In *Wygant,* 476 U.S. 267, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986), four Members of the Court applied heightened scrutiny to a race-based system of employee layoffs. Justice Powell, writing for the plurality, again drew the distinction between "societal discrimination" which is an inadequate basis for race-conscious classifications, and the type of identified discrimination that can support and define the scope of race-based relief. The challenged classification in that case tied the layoff of minority teachers to the percentage of minority students enrolled in the school district. The lower courts had upheld the scheme, based on the theory that minority students were in need of "role models" to alleviate the effects of prior discrimination in society. ****724** This Court reversed, with a plurality of four Justices reiterating the view expressed by Justice Powell in *Bakke* that "[s]ocietal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy." *Wygant, supra,* at 276, 106 S.Ct., at 1848.

The role model theory employed by the lower courts failed for two reasons. First, the statistical disparity between students and teachers had no probative value in demonstrating the kind of prior discrimination in hiring or promotion that would justify race-based relief. 476 U.S., at 276, 106 S.Ct., at 1848; see also *id.,* at 294, 106 S.Ct., at 1857 (O'CONNOR, J.,

concurring in part and concurring in judgment) ("The disparity between the percentage of minorities on the teaching staff and the percentage of minorities in the student body is not probative of employment discrimination"). Second, because the role model theory had no ***498** relation to some basis for believing a constitutional or statutory violation had occurred, it could be used to "justify" race-based decisionmaking essentially limitless in scope and duration. *Id.,* at 276, 106 S.Ct., at 1848 (plurality opinion) ("In the absence of particularized findings, a court could uphold remedies that are ageless in their reach into the past, and timeless in their ability to affect the future").

B

We think it clear that the factual predicate offered in support of the Richmond Plan suffers from the same two defects identified as fatal in *Wygant.* The District Court found the city council's "findings sufficient to ensure that, in adopting the Plan, it was remedying the present effects of past discrimination in the *construction industry.*" Supp.App. 163 (emphasis added). Like the "role model" theory employed in *Wygant,* a generalized assertion that there has been past discrimination in an entire industry provides no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy. It "has no logical stopping point." *Wygant, supra,* at 275, 106 S.Ct., at 1847 (plurality opinion). "Relief" for such an ill-defined wrong could extend until the percentage of public contracts awarded to MBE's in Richmond mirrored the percentage of minorities in the population as a whole.

Appellant argues that it is attempting to remedy various forms of past discrimination that are alleged to be responsible for the small number of minority businesses in the local contracting industry. Among these the city cites the exclusion of blacks from skilled construction trade unions and training programs. This past discrimination has prevented them "from following the traditional path from laborer to entrepreneur." Brief for Appellant 23–24. The city also lists a host of nonracial factors which would seem to face a member of any racial group attempting to establish a new business enterprise, such as deficiencies in working capital, inability to meet bonding requirements, unfamiliarity with bidding procedures, ***499** and disability caused by an inadequate track record. *Id.,* at 25–26, and n. 41.

While there is no doubt that the sorry history of both private and public discrimination in this country has contributed to a lack of opportunities for black entrepreneurs, this observation, standing alone, cannot justify a rigid racial quota in the awarding of public contracts in Richmond, Virginia. Like the claim that discrimination in primary and secondary schooling justifies a rigid racial preference in medical school admissions, an amorphous claim that there has been past discrimination in a particular industry cannot justify the use of an unyielding racial quota.

It is sheer speculation how many minority firms there would be in Richmond absent past societal discrimination, just as it was sheer speculation how many minority medical students would have been admitted to the medical school at Davis absent past discrimination in educational opportunities. Defining these sorts of injuries as "identified discrimination" would give local ****725** governments license to create a patchwork of racial preferences based on statistical generalizations about any particular field of endeavor.

These defects are readily apparent in this case. The 30% quota cannot in any realistic sense be tied to any injury suffered by anyone. The District Court relied upon five predicate "facts" in reaching its conclusion that there was an adequate basis for the 30% quota: (1) the ordinance declares itself to be remedial; (2) several proponents of the measure stated their views that there had been past discrimination in the construction industry; (3) minority businesses received 0.67% of prime contracts from the city while minorities constituted 50% of the city's population; (4) there were very few minority contractors in local and state contractors' associations; and (5) in 1977, Congress made a determination that the effects of past discrimination had stifled minority participation in the construction industry nationally. Supp.App. 163–167.

***500** None of these "findings," singly or together, provide the city of Richmond with a "strong basis in evidence for its conclusion that remedial action was necessary." *Wygant,* 476 U.S., at 277, 106 S.Ct., at 1849 (plurality opinion). There is nothing approaching a prima facie case of a constitutional or statutory violation by *anyone* in the Richmond construction industry. *Id.,* at 274–275, 106 S.Ct., at 1846–1847; see also *id.,* at 293, 106 S.Ct., at 1856 (O'CONNOR, J., concurring).

The District Court accorded great weight to the fact that the city council designated the Plan as "remedial." But the mere

recitation of a "benign" or legitimate purpose for a racial classification is entitled to little or no weight. See *Weinberger v. Wiesenfeld,* 420 U.S., at 648, n. 16, 95 S.Ct., at 1233, n. 16 ("This Court need not in equal protection cases accept at face value assertions of legislative purposes, when an examination of the legislative scheme and its history demonstrates that the asserted purpose could not have been a goal of the legislation"). Racial classifications are suspect, and that means that simple legislative assurances of good intention cannot suffice.

The District Court also relied on the highly conclusionary statement of a proponent of the Plan that there was racial discrimination in the construction industry "in this area, and the State, and around the nation." App. 41 (statement of Councilperson Marsh). It also noted that the city manager had related his view that racial discrimination still plagued the construction industry in his home city of Pittsburgh. *Id.,* at 42 (statement of Mr. Deese). These statements are of little probative value in establishing identified discrimination in the Richmond construction industry. The factfinding process of legislative bodies is generally entitled to a presumption of regularity and deferential review by the judiciary. See *Williamson v. Lee Optical of Oklahoma, Inc.,* 348 U.S. 483, 488–489, 75 S.Ct. 461, 464–465, 99 L.Ed. 563 (1955). But when a legislative body chooses to employ a suspect classification, it cannot rest upon a generalized assertion as to the classification's relevance to its goals. See *McLaughlin v. Florida,* 379 U.S. 184, 190–192, 85 S.Ct. 283, 287–289, 13 L.Ed.2d 222 (1964). A ***501** governmental actor cannot render race a legitimate proxy for a particular condition merely by declaring that the condition exists. See *id.,* at 193, 85 S.Ct., at 289; *Wygant, supra,* 476 U.S., at 277, 106 S.Ct., at 1848. The history of racial classifications in this country suggests that blind judicial deference to legislative or executive pronouncements of necessity has no place in equal protection analysis. See *Korematsu v. United States,* 323 U.S. 214, 235–240, 65 S.Ct. 193, 202–205, 89 L.Ed. 194 (1944) (Murphy, J., dissenting).

Reliance on the disparity between the number of prime contracts awarded to minority firms and the minority population of the city of Richmond is similarly misplaced. There is no doubt that "[w]here gross statistical disparities can be shown, ****726** they alone in a proper case may constitute prima facie proof of a pattern or practice of discrimination" under Title VII. *Hazelwood School Dist. v. United States,* 433 U.S. 299, 307–308, 97 S.Ct. 2736, 2741, 53 L.Ed.2d 768 (1977). But it is equally clear that "[w]hen special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value." *Id.,* at 308, n. 13, 97 S.Ct., at 2742, n. 13. See also *Mayor of Philadelphia v. Educational Equality League,* 415 U.S. 605, 620, 94 S.Ct. 1323, 1333, 39 L.Ed.2d 630 (1974) ("[T]his is not a case in which it can be assumed that all citizens are fungible for purposes of determining whether members of a particular class have been unlawfully excluded").

In the employment context, we have recognized that for certain entry level positions or positions requiring minimal training, statistical comparisons of the racial composition of an employer's work force to the racial composition of the relevant population may be probative of a pattern of discrimination. See *Teamsters v. United States,* 431 U.S. 324, 337–338, 97 S.Ct. 1843, 1855–1856, 52 L.Ed.2d 396 (1977) (statistical comparison between minority truck-drivers and relevant population probative of discriminatory exclusion). But where special qualifications are necessary, the relevant statistical pool for purposes of demonstrating ***502** discriminatory exclusion must be the number of minorities qualified to undertake the particular task. See *Hazelwood, supra,* 433 U.S., at 308, 97 S.Ct., at 2741; *Johnson v. Transportation Agency, Santa Clara County,* 480 U.S. 616, 651–652, 107 S.Ct. 1442, 1462, 94 L.Ed.2d 615 (1987) (O'CONNOR, J., concurring in judgment).

In this case, the city does not even know how many MBE's in the relevant market are qualified to undertake prime or subcontracting work in public construction projects. Cf. *Ohio Contractors Assn. v. Keip,* 713 F.2d, at 171 (relying on percentage of minority *businesses* in the State compared to percentage of state purchasing contracts awarded to minority firms in upholding set-aside). Nor does the city know what percentage of total city construction dollars minority firms now receive as subcontractors on prime contracts let by the city.

To a large extent, the set-aside of subcontracting dollars seems to rest on the unsupported assumption that white prime contractors simply will not hire minority firms. See *Associated General Contractors of Cal. v. City and Cty. of San Francisco,* 813 F.2d, at 933 ("There is no finding—and we decline to assume—that male caucasian contractors will award contracts only to other male caucasians").[3] Indeed, there is evidence in this record that overall minority participation in city contracts in Richmond is 7 to 8%, and that minority contractor participation in Community Block Development Grant *construction* projects is 17 to 22%. App. 16 (statement of Mr. Deese, City Manager). Without any information ***503** on minority participation in subcontracting, it is quite simply impossible to evaluate overall minority representation in the city's construction expenditures.

The city and the District Court also relied on evidence that MBE membership in local contractors' associations was extremely low. Again, standing alone this evidence is not probative of any discrimination in the local construction industry. There are numerous ****727** explanations for this dearth of minority participation, including past societal discrimination in education and economic opportunities as well as both black and white career and entrepreneurial choices. Blacks may be disproportionately attracted to industries other than construction. See The State of Small Business: A Report of the President 201 (1986) ("Relative to the distribution of all businesses, black-owned businesses are more than proportionally represented in the transportation industry, but considerably less than proportionally represented in the wholesale trade, manufacturing, and finance industries"). The mere fact that black membership in these trade organizations is low, standing alone, cannot establish a prima facie case of discrimination. Cf. *Bazemore v. Friday,* 478 U.S. 385, 407–408, 106 S.Ct. 3000, 3013, 92 L.Ed.2d 315 (1986) (mere existence of single race clubs in absence of evidence of exclusion by race cannot create a duty to integrate).

For low minority membership in these associations to be relevant, the city would have to link it to the number of local MBE's eligible for membership. If the statistical disparity between eligible MBE's and MBE membership were great enough, an inference of discriminatory exclusion could arise. In such a case, the city would have a compelling interest in preventing its tax dollars from assisting these organizations in maintaining a racially segregated construction market. See *Norwood,* 413 U.S., at 465, 93 S.Ct., at 2804; *Ohio Contractors, supra,* at 171 (upholding minority set-aside based in part on earlier District Court finding that "the state had become 'a joint participant' with private industry and certain craft unions in ***504** a pattern of racially discriminatory conduct which excluded black laborers from work on public construction contracts").

Finally, the city and the District Court relied on Congress' finding in connection with the set-aside approved in *Fullilove* that there had been nationwide discrimination in the construction industry. The probative value of these findings for demonstrating the existence of discrimination in Richmond is extremely limited. By its inclusion of a waiver procedure in the national program addressed in *Fullilove,* Congress explicitly recognized that the scope of the problem would vary from market area to market area. See *Fullilove,* 448 U.S., at 487, 100 S.Ct., at 2779 (noting that the presumption that minority firms are disadvantaged by past discrimination may be rebutted by grantees in individual situations).

Moreover, as noted above, Congress was exercising its powers under § 5 of the Fourteenth Amendment in making a finding that past discrimination would cause federal funds to be distributed in a manner which reinforced prior patterns of discrimination. While the States and their subdivisions may take remedial action when they possess evidence that their own spending practices are exacerbating a pattern of prior discrimination, they must identify that discrimination, public or private, with some specificity before they may use race-conscious relief. Congress has made national findings that there has been societal discrimination in a host of fields. If all a state or local government need do is find a congressional report on the subject to enact a set-aside program, the constraints of the Equal Protection Clause will, in effect, have been rendered a nullity. See Days 480–481 ("[I]t is essential that state and local agencies also establish the presence of discrimination in their own bailiwicks, based either upon their own fact-finding processes or upon determinations made by other competent institutions").

Justice MARSHALL apparently views the requirement that Richmond identify the discrimination it seeks to remedy in its own jurisdiction as a mere administrative headache, an ***505** "onerous documentary obligatio[n]." *Post,* at 750. We cannot agree. In this regard, we are in accord with Justice STEVENS' observation in *Fullilove,* that "[b]ecause racial characteristics so seldom provide a relevant basis for disparate ****728** treatment, and because classifications based on race are potentially so harmful to the entire body politic, it is especially important that the reasons for any such classification be clearly identified and unquestionably legitimate." *Fullilove, supra,* at 533–535, 100 S.Ct., at 2803–2804 (dissenting opinion) (footnotes omitted). The "evidence" relied upon by the dissent, the history of school desegregation in Richmond and numerous congressional reports, does little to define the scope of any injury to minority contractors in Richmond or the necessary remedy. The factors relied upon by the dissent could justify a preference of any size or duration.

Moreover, Justice MARSHALL's suggestion that findings of discrimination may be "shared" from jurisdiction to jurisdiction in the same manner as information concerning zoning and property values is unprecedented. See *post,* at 750, quoting *Renton v. Playtime Theatres, Inc.,* 475 U.S. 41, 51–52, 106 S.Ct. 925, 931, 89 L.Ed.2d 29 (1986). We have never approved the extrapolation of discrimination in one jurisdiction from the experience of another. See *Milliken v. Bradley,* 418 U.S. 717, 746, 94 S.Ct. 3112, 3128, 41 L.Ed.2d 1069 (1974) ("Disparate treatment of white and Negro students occurred within the Detroit school system, and not elsewhere, and on this record the remedy must be limited to that system").

In sum, none of the evidence presented by the city points to any identified discrimination in the Richmond construction industry. We, therefore, hold that the city has failed to demonstrate a compelling interest in apportioning public contracting opportunities on the basis of race. To accept Richmond's claim that past societal discrimination alone can serve as the basis for rigid racial preferences would be to open the door to competing claims for "remedial relief" for every disadvantaged group. The dream of a Nation of equal citizens in a society where race is irrelevant to personal opportunity ***506** and achievement would be lost in a mosaic of shifting preferences based on inherently unmeasurable claims of past wrongs. "Courts would be asked to evaluate the extent of the prejudice and consequent harm suffered by various minority groups. Those whose societal injury is thought to exceed some arbitrary level of tolerability then would be entitled to preferential classifications...." *Bakke,* 438 U.S., at 296–297, 98 S.Ct., at 2751 (Powell, J.). We think such a result would be contrary to both the letter and spirit of a constitutional provision whose central command is equality.

The foregoing analysis applies only to the inclusion of blacks within the Richmond set-aside program. There is *absolutely no evidence* of past discrimination against Spanish-speaking, Oriental, Indian, Eskimo, or Aleut persons in any aspect of the Richmond construction industry. The District Court took judicial notice of the fact that the vast majority of "minority" persons in Richmond were black. Supp.App. 207. It may well be that Richmond has never had an Aleut or Eskimo citizen. The random inclusion of racial groups that, as a practical matter, may never have suffered from discrimination in the construction industry in Richmond suggests that perhaps the city's purpose was not in fact to remedy past discrimination.

If a 30% set-aside was "narrowly tailored" to compensate black contractors for past discrimination, one may legitimately ask why they are forced to share this "remedial relief" with an Aleut citizen who moves to Richmond tomorrow? The gross overinclusiveness of Richmond's racial preference strongly impugns the city's claim of remedial motivation. See *Wygant,* 476 U.S., at 284, n. 13, 106 S.Ct., at 1852, n. 13 (haphazard inclusion of racial groups "further illustrates the undifferentiated nature of the plan"); see also Days 482 ("Such programs leave one with the sense that the racial and ethnic groups favored by the set-aside were added without attention to whether their inclusion was justified by evidence of past discrimination").

***507 **729** IV

As noted by the court below, it is almost impossible to assess whether the Richmond Plan is narrowly tailored to remedy prior discrimination since it is not linked to identified discrimination in any way. We limit ourselves to two observations in this regard.

First, there does not appear to have been any consideration of the use of race-neutral means to increase minority business participation in city contracting. See *United States v. Paradise,* 480 U.S. 149, 171, 107 S.Ct. 1053, 1066, 94 L.Ed.2d 203 (1987) ("In determining whether race-conscious remedies are appropriate, we look to several factors, including the efficacy of alternative remedies"). Many of the barriers to minority participation in the construction industry relied upon by the city to justify a racial classification appear to be race neutral. If MBE's disproportionately lack capital or cannot meet bonding requirements, a race-neutral program of city financing for small firms would, *a fortiori,* lead to greater minority participation. The principal opinion in *Fullilove* found that Congress had carefully examined and rejected race-neutral alternatives before enacting the MBE set-aside. See *Fullilove,* 448 U.S., at 463–467, 100 S.Ct., at 2767–2769; see also *id.,* at 511, 100 S.Ct., at 2792 (Powell, J., concurring) ("[B]y the time Congress enacted [the MBE set-aside] in 1977, it knew that other remedies had failed to ameliorate the effects of racial discrimination in the construction industry"). There is no evidence in this record that the Richmond City Council has considered any alternatives to a race-based quota.

Second, the 30% quota cannot be said to be narrowly tailored to any goal, except perhaps outright racial balancing. It rests upon the "completely unrealistic" assumption that minorities will choose a particular trade in lockstep proportion to their representation in the local population. See *Sheet Metal Workers v. EEOC,* 478 U.S. 421, 494, 106 S.Ct. 3019, 3059, 92 L.Ed.2d 344 (1986) (O'CONNOR, J., concurring in part and dissenting in part) ("[I]t is completely unrealistic to assume that individuals of ***508** one race will gravitate with mathematical exactitude to each employer or union absent unlawful discrimination").

Since the city must already consider bids and waivers on a case-by-case basis, it is difficult to see the need for a rigid numerical quota. As noted above, the congressional scheme upheld in *Fullilove* allowed for a waiver of the set-aside

provision where an MBE's higher price was not attributable to the effects of past discrimination. Based upon proper findings, such programs are less problematic from an equal protection standpoint because they treat all candidates individually, rather than making the color of an applicant's skin the sole relevant consideration. Unlike the program upheld in *Fullilove,* the Richmond Plan's waiver system focuses solely on the availability of MBE's; there is no inquiry into whether or not the particular MBE seeking a racial preference has suffered from the effects of past discrimination by the city or prime contractors.

Given the existence of an individualized procedure, the city's only interest in maintaining a quota system rather than investigating the need for remedial action in particular cases would seem to be simple administrative convenience. But the interest in avoiding the bureaucratic effort necessary to tailor remedial relief to those who truly have suffered the effects of prior discrimination cannot justify a rigid line drawn on the basis of a suspect classification. See *Frontiero v. Richardson,* 411 U.S. 677, 690, 93 S.Ct. 1764, 1772, 36 L.Ed.2d 583 (1973) (plurality opinion) ("[W]hen we enter the realm of 'strict judicial scrutiny,' there can be no doubt that 'administrative convenience' is not a shibboleth, the mere recitation of which dictates constitutionality"). Under Richmond's scheme, a successful black, Hispanic, or Oriental entrepreneur from anywhere in the country enjoys an absolute preference over other citizens based solely on their race. We think it obvious that such a ****730** program is not narrowly tailored to remedy the effects of prior discrimination.

***509** V

Nothing we say today precludes a state or local entity from taking action to rectify the effects of identified discrimination within its jurisdiction. If the city of Richmond had evidence before it that nonminority contractors were systematically excluding minority businesses from subcontracting opportunities it could take action to end the discriminatory exclusion. Where there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality's prime contractors, an inference of discriminatory exclusion could arise. See *Bazemore v. Friday,* 478 U.S., at 398, 106 S.Ct., at 3008; *Teamsters v. United States,* 431 U.S., at 337–339, 97 S.Ct., at 1856. Under such circumstances, the city could act to dismantle the closed business system by taking appropriate measures against those who discriminate on the basis of race or other illegitimate criteria. See, *e.g., New York State Club Assn. v. New York City,* 487 U.S. 1, 10–11, 13–14, 108 S.Ct. 2225, 2232–2233, 2234–2235, 101 L.Ed.2d 1 (1988). In the extreme case, some form of narrowly tailored racial preference might be necessary to break down patterns of deliberate exclusion.

Nor is local government powerless to deal with individual instances of racially motivated refusals to employ minority contractors. Where such discrimination occurs, a city would be justified in penalizing the discriminator and providing appropriate relief to the victim of such discrimination. See generally *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802–803, 93 S.Ct. 1817, 1824–1825, 36 L.Ed.2d 668 (1973). Moreover, evidence of a pattern of individual discriminatory acts can, if supported by appropriate statistical proof, lend support to a local government's determination that broader remedial relief is justified. See *Teamsters, supra,* 431 U.S., at 338, 97 S.Ct., at 1856.

Even in the absence of evidence of discrimination, the city has at its disposal a whole array of race-neutral devices to increase the accessibility of city contracting opportunities to small entrepreneurs of all races. Simplification of bidding ***510** procedures, relaxation of bonding requirements, and training and financial aid for disadvantaged entrepreneurs of all races would open the public contracting market to all those who have suffered the effects of past societal discrimination or neglect. Many of the formal barriers to new entrants may be the product of bureaucratic inertia more than actual necessity, and may have a disproportionate effect on the opportunities open to new minority firms. Their elimination or modification would have little detrimental effect on the city's interests and would serve to increase the opportunities available to minority business without classifying individuals on the basis of race. The city may also act to prohibit discrimination in the provision of credit or bonding by local suppliers and banks. Business as usual should not mean business pursuant to the unthinking exclusion of certain members of our society from its rewards.

In the case at hand, the city has not ascertained how many minority enterprises are present in the local construction market nor the level of their participation in city construction projects. The city points to no evidence that qualified minority contractors have been passed over for city contracts or subcontracts, either as a group or in any individual case. Under such

circumstances, it is simply impossible to say that the city has demonstrated "a strong basis in evidence for its conclusion that remedial action was necessary." *Wygant,* 476 U.S., at 277, 106 S.Ct., at 1849.

Proper findings in this regard are necessary to define both the scope of the injury and the extent of the remedy necessary to cure its effects. Such findings also serve ****731** to assure all citizens that the deviation from the norm of equal treatment of all racial and ethnic groups is a temporary matter, a measure taken in the service of the goal of equality itself. Absent such findings, there is a danger that a racial classification is merely the product of unthinking stereotypes or a form of racial politics. "[I]f there is no duty to attempt either to measure the recovery by the wrong or to distribute that recovery ***511** within the injured class in an evenhanded way, our history will adequately support a legislative preference for almost any ethnic, religious, or racial group with the political strength to negotiate 'a piece of the action' for its members." *Fullilove,* 448 U.S., at 539, 100 S.Ct., at 2806 (STEVENS, J., dissenting). Because the city of Richmond has failed to identify the need for remedial action in the awarding of its public construction contracts, its treatment of its citizens on a racial basis violates the dictates of the Equal Protection Clause. Accordingly, the judgment of the Court of Appeals for the Fourth Circuit is

Affirmed.

Justice STEVENS, concurring in part and concurring in the judgment.

A central purpose of the Fourteenth Amendment is to further the national goal of equal opportunity for all our citizens. In order to achieve that goal we must learn from our past mistakes, but I believe the Constitution requires us to evaluate our policy decisions—including those that govern the relationships among different racial and ethnic groups—primarily by studying their probable impact on the future. I therefore do not agree with the premise that seems to underlie today's decision, as well as the decision in *Wygant v. Jackson Board of Education,* 476 U.S. 267, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986), that a governmental decision that rests on a racial classification is never permissible except as a remedy for a past wrong. See *ante,* at 721–722.[1] I do, however, agree with the Court's explanation ***512** of why the Richmond ordinance cannot be justified as a remedy for past discrimination, and therefore join Parts I, III–B, and IV of its opinion. I write separately to emphasize three aspects of the case that are of special importance to me.

First, the city makes no claim that the public interest in the efficient performance of its construction contracts will be served by granting a preference to minority-business enterprises. This case is therefore completely unlike *Wygant,* in which I thought it quite obvious that the school board had reasonably concluded that an integrated faculty could provide educational benefits to the entire student body that could not be provided by an all-white, or nearly all-white, faculty. As I pointed out in my dissent in that case, even if we completely disregard our history of racial ****732** injustice, race is not always irrelevant to sound governmental decisionmaking.[2] In the ***513** case of public contracting, however, if we disregard the past, there is not even an arguable basis for suggesting that the race of a subcontractor or general contractor should have any relevance to his or her access to the market.

Second, this litigation involves an attempt by a legislative body, rather than a court, to fashion a remedy for a past wrong. Legislatures are primarily policymaking bodies that promulgate rules to govern future conduct. The constitutional prohibitions against the enactment of *ex post facto* laws and bills of attainder reflect a valid concern about the use of the political process to punish or characterize past conduct of private citizens.[3] It is the judicial system, rather than the legislative process, that is best equipped to identify ***514** past wrongdoers and to fashion remedies that will create the conditions that presumably would have existed had no wrong been committed. Thus, in cases involving the review of judicial remedies imposed against persons who have been proved guilty of violations of law, I would allow the courts in racial discrimination cases the same broad discretion that chancellors enjoy in other areas of the law. See *Swann v. Charlotte–Mecklenburg Board of Education,* 402 U.S. 1, 15–16, 91 S.Ct. 1267, 1275–1276, 28 L.Ed.2d 554 (1971).[4]

****733** Third, instead of engaging in a debate over the proper standard of review to apply in affirmative-action litigation,[5] I believe it is more constructive to try to identify the characteristics of the advantaged and disadvantaged classes that may justify their disparate treatment. See *Cleburne v. Cleburne Living Center, Inc.,* 473 U.S. 432, 452–453, 105 S.Ct. 3249, 3261, 87 L.Ed.2d 313 (1985) (STEVENS, J., concurring).[6] In this case that approach convinces ***515** me that, instead of carefully identifying the characteristics of the two classes of contractors that are respectively favored and disfavored by its ordinance,

the Richmond City Council has merely engaged in the type of stereotypical analysis that is a hallmark of violations of the Equal Protection Clause. Whether we look at the class of persons benefited by the ordinance or at the disadvantaged class, the same conclusion emerges.

The justification for the ordinance is the fact that in the past white contractors—and presumably other white citizens in Richmond—have discriminated against black contractors. The class of persons benefited by the ordinance is not, however, limited to victims of such discrimination—it encompasses persons who have never been in business in Richmond as well as minority contractors who may have been guilty of discriminating against members of other minority groups. Indeed, for all the record shows, all of the minority-business enterprises that have benefited from the ordinance may be firms that have prospered notwithstanding the discriminatory conduct that may have harmed other minority firms years ago. Ironically, minority firms that have survived in the competitive struggle, rather than those that have perished, are most likely to benefit from an ordinance of this kind.

The ordinance is equally vulnerable because of its failure to identify the characteristics of the disadvantaged class of ***516** white contractors that justify the disparate treatment. That class unquestionably includes some white contractors who are guilty of past discrimination against blacks, but it is only habit, rather than evidence or analysis, that makes it seem acceptable to assume that every white contractor covered by the ordinance shares in that guilt. Indeed, even among those who have discriminated in the past, it must be assumed that at least some of them have complied with the city ordinance that has made such discrimination unlawful since 1975.[7] Thus, the composition of the disadvantaged class of white contractors presumably includes some who have been guilty of unlawful discrimination, some who practiced discrimination before it was forbidden by law,[8] and ****734** some who have never discriminated against anyone on the basis of race. Imposing a common burden on such a disparate class merely because each member of the class is of the same race stems from reliance on a stereotype rather than fact or reason.[9]

There is a special irony in the stereotypical thinking that prompts legislation of this kind. Although it stigmatizes the disadvantaged class with the unproven charge of past racial discrimination, it actually imposes a greater stigma on its ***517** supposed beneficiaries. For, as I explained in my opinion in *Fullilove v. Klutznick,* 448 U.S. 448, 100 S.Ct. 2758, 65 L.Ed.2d 902 (1980):

> "[E]ven though it is not the actual predicate for this legislation, a statute of this kind inevitably is perceived by many as resting on an assumption that those who are granted this special preference are less qualified in some respect that is identified purely by their race." *Id.,* at 545, 100 S.Ct., at 2809.
>
> "The risk that habitual attitudes toward classes of persons, rather than analysis of the relevant characteristics of the class, will serve as a basis for a legislative classification is present when benefits are distributed as well as when burdens are imposed. In the past, traditional attitudes too often provided the only explanation for discrimination against women, aliens, illegitimates, and black citizens. Today there is a danger that awareness of past injustice will lead to automatic acceptance of new classifications that are not in fact justified by attributes characteristic of the class as a whole.
>
> "When [government] creates a special preference, or a special disability, for a class of persons, it should identify the characteristic that justifies the special treatment. When the classification is defined in racial terms, I believe that such particular identification is imperative.
>
> "In this case, only two conceivable bases for differentiating the preferred classes from society as a whole have occurred to me: (1) that they were the victims of unfair treatment in the past and (2) that they are less able to compete in the future. Although the first of these factors would justify an appropriate remedy for past wrongs, for reasons that I have already stated, this statute is not such a remedial measure. The second factor is simply not true. Nothing in the record of this case, the legislative history of the Act, or experience that we may notice judicially provides any support for such a proposition." *Id.,* at 552–554, 100 S.Ct., at 2813–2814 (footnote omitted).

***518** Accordingly, I concur in Parts I, III–B, and IV of the Court's opinion, and in the judgment.

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

I join all but Part II of Justice O'CONNOR's opinion and give this further explanation.

Part II examines our case law upholding congressional power to grant preferences based on overt and explicit classification by race. See *Fullilove v. Klutznick,* 448 U.S. 448, 100 S.Ct. 2758, 65 L.Ed.2d 902 (1980). With the acknowledgment that the summary in Part II is both precise and fair, I must decline to join it. The process by which a law that is an equal protection ****735** violation when enacted by a State becomes transformed to an equal protection guarantee when enacted by Congress poses a difficult proposition for me; but as it is not before us, any reconsideration of that issue must await some further case. For purposes of the ordinance challenged here, it suffices to say that the State has the power to eradicate racial discrimination and its effects in both the public and private sectors, and the absolute duty to do so where those wrongs were caused intentionally by the State itself. The Fourteenth Amendment ought not to be interpreted to reduce a State's authority in this regard, unless, of course, there is a conflict with federal law or a state remedy is itself a violation of equal protection. The latter is the case presented here.

The moral imperative of racial neutrality is the driving force of the Equal Protection Clause. Justice SCALIA's opinion underscores that proposition, quite properly in my view. The rule suggested in his opinion, which would strike down all preferences which are not necessary remedies to victims of unlawful discrimination, would serve important structural goals, as it would eliminate the necessity for courts to pass upon each racial preference that is enacted. Structural protections may be necessities if moral imperatives are to be obeyed. His opinion would make it crystal clear to the ***519** political branches, at least those of the States, that legislation must be based on criteria other than race.

Nevertheless, given that a rule of automatic invalidity for racial preferences in almost every case would be a significant break with our precedents that require a case-by-case test, I am not convinced we need adopt it at this point. On the assumption that it will vindicate the principle of race neutrality found in the Equal Protection Clause, I accept the less absolute rule contained in Justice O'CONNOR's opinion, a rule based on the proposition that any racial preference must face the most rigorous scrutiny by the courts. My reasons for doing so are as follows. First, I am confident that, in application, the strict scrutiny standard will operate in a manner generally consistent with the imperative of race neutrality, because it forbids the use even of narrowly drawn racial classifications except as a last resort. Second, the rule against race-conscious remedies is already less than an absolute one, for that relief may be the only adequate remedy after a judicial determination that a State or its instrumentality has violated the Equal Protection Clause. I note, in this connection, that evidence which would support a judicial finding of intentional discrimination may suffice also to justify remedial legislative action, for it diminishes the constitutional responsibilities of the political branches to say they must wait to act until ordered to do so by a court. Third, the strict scrutiny rule is consistent with our precedents, as Justice O'CONNOR's opinion demonstrates.

The ordinance before us falls far short of the standard we adopt. The nature and scope of the injury that existed; its historical or antecedent causes; the extent to which the city contributed to it, either by intentional acts or by passive complicity in acts of discrimination by the private sector; the necessity for the response adopted, its duration in relation to the wrong, and the precision with which it otherwise bore on whatever injury in fact was addressed, were all matters unmeasured, unexplored, and unexplained by the city council. We ***520** are left with an ordinance and a legislative record open to the fair charge that it is not a remedy but is itself a preference which will cause the same corrosive animosities that the Constitution forbids in the whole sphere of government and that our national policy condemns in the rest of society as well. This ordinance is invalid under the Fourteenth Amendment.

Justice SCALIA, concurring in the judgment.

I agree with much of the Court's opinion, and, in particular, with Justice O'CONNOR's conclusion that strict scrutiny must be applied to all governmental classification ****736** by race, whether or not its asserted purpose is "remedial" or "benign." *Ante,* at 721–722. I do not agree, however, with Justice O'CONNOR's dictum suggesting that, despite the Fourteenth Amendment, state and local governments may in some circumstances discriminate on the basis of race in order (in a broad sense) "to ameliorate the effects of past discrimination." *Ante,* at 713. The benign purpose of compensating for social disadvantages, whether they have been acquired by reason of prior discrimination or otherwise, can no more be pursued by

the illegitimate means of racial discrimination than can other assertedly benign purposes we have repeatedly rejected. See, *e.g., Wygant v. Jackson Board of Education,* 476 U.S. 267, 274–276, 106 S.Ct. 1842, 1847–1848, 90 L.Ed.2d 260 (1986) (plurality opinion) (discrimination in teacher assignments to provide "role models" for minority students); *Palmore v. Sidoti,* 466 U.S. 429, 433, 104 S.Ct. 1879, 1882, 80 L.Ed.2d 421 (1984) (awarding custody of child to father, after divorced mother entered an interracial remarriage, in order to spare child social "pressures and stresses"); *Lee v. Washington,* 390 U.S. 333, 88 S.Ct. 994, 19 L.Ed.2d 1212 (1968) (*per curiam*) (permanent racial segregation of all prison inmates, presumably to reduce possibility of racial conflict). The difficulty of overcoming the effects of past discrimination is as nothing compared with the difficulty of eradicating from our society the source of those effects, which is the tendency—fatal to a Nation such as ours—to classify and judge men and women on the basis of their country of origin or the color of their skin. A solution ***521** to the first problem that aggravates the second is no solution at all. I share the view expressed by Alexander Bickel that "[t]he lesson of the great decisions of the Supreme Court and the lesson of contemporary history have been the same for at least a generation: discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society." A. Bickel, The Morality of Consent 133 (1975). At least where state or local action is at issue, only a social emergency rising to the level of imminent danger to life and limb—for example, a prison race riot, requiring temporary segregation of inmates, cf. *Lee v. Washington, supra*—can justify an exception to the principle embodied in the Fourteenth Amendment that "[o]ur Constitution is color-blind, and neither knows nor tolerates classes among citizens," *Plessy v. Ferguson,* 163 U.S. 537, 559, 16 S.Ct. 1138, 1146, 41 L.Ed. 256 (1896) (Harlan, J., dissenting); accord, *Ex parte Virginia,* 100 U.S. 339, 345, 25 L.Ed. 676 (1880); 2 J. Story, Commentaries on the Constitution § 1961, p. 677 (T. Cooley ed. 1873); T. Cooley, Constitutional Limitations 439 (2d ed. 1871).

We have in some contexts approved the use of racial classifications by the Federal Government to remedy the effects of past discrimination. I do not believe that we must or should extend those holdings to the States. In *Fullilove v. Klutznick,* 448 U.S. 448, 100 S.Ct. 2758, 65 L.Ed.2d 902 (1980), we upheld legislative action by Congress similar in its asserted purpose to that at issue here. And we have permitted federal courts to prescribe quite severe, race-conscious remedies when confronted with egregious and persistent unlawful discrimination, see, *e.g., United States v. Paradise,* 480 U.S. 149, 107 S.Ct. 1053, 94 L.Ed.2d 203 (1987); *Sheet Metal Workers v. EEOC,* 478 U.S. 421, 106 S.Ct. 3019, 92 L.Ed.2d 344 (1986). As Justice O'CONNOR acknowledges, however, *ante,* at 717–720 it is one thing to permit racially based conduct by the Federal Government—whose legislative powers concerning matters of race were explicitly enhanced by the Fourteenth Amendment, see U.S. Const., Amdt. 14, § 5—and quite another to permit it by the precise entities against whose conduct in ***522** matters of race that Amendment was specifically directed, see Amdt. 14, § 1. As we said in *Ex parte Virginia, supra,* 100 U.S., at 345, the Civil War Amendments were designed to "take away all possibility of oppression by law because of race or color" and "to be ... limitations on the power of the States and enlargements of ****737** the power of Congress." Thus, without revisiting what we held in *Fullilove* (or trying to derive a rationale from the three separate opinions supporting the judgment, none of which commanded more than three votes, compare 448 U.S., at 453–495, 100 S.Ct., at 2762–2783 (opinion of Burger, C.J., joined by WHITE and Powell, JJ.), with *id.,* at 495–517, 100 S.Ct., at 2783–2794 (opinion of Powell, J.), and *id.,* at 517–522, 100 S.Ct., at 2794–2797 (opinion of MARSHALL, J., joined by BRENNAN and BLACKMUN, JJ.)), I do not believe our decision in that case controls the one before us here.

A sound distinction between federal and state (or local) action based on race rests not only upon the substance of the Civil War Amendments, but upon social reality and governmental theory. It is a simple fact that what Justice Stewart described in *Fullilove* as "the dispassionate objectivity [and] the flexibility that are needed to mold a race-conscious remedy around the single objective of eliminating the effects of past or present discrimination"—political qualities already to be doubted in a national legislature, *Fullilove, supra,* at 527, 100 S.Ct., at 2800 (Stewart, J., with whom REHNQUIST, J., joined, dissenting)—are substantially less likely to exist at the state or local level. The struggle for racial justice has historically been a struggle by the national society against oppression in the individual States. See, *e.g., Ex parte Virginia, supra* (denying writ of habeas corpus to a state judge in custody under federal indictment for excluding jurors on the basis of race); H. Hyman & W. Wiecek, Equal Justice Under Law, 1835–1875, pp. 312–334 (1982); Logan, Judicial Federalism in the Court of History, 66 Ore.L.Rev. 454, 494–515 (1988). And the struggle retains that character in modern times. See, *e.g., Brown v. Board of Education,* 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083 (1955) (*Brown II*); *United States v. Montgomery Board of Education,* 395 U.S. 225, 89 S.Ct. 1670, 23 L.Ed.2d 263 (1969); ***523** *Swann v. Charlotte–Mecklenburg Board of Education,* 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971); *Griffin v. Prince Edward County School Board,* 377 U.S. 218, 84 S.Ct. 1226, 12 L.Ed.2d 256 (1964); *Cooper v. Aaron,* 358 U.S. 1, 78 S.Ct. 1401, 3 L.Ed.2d 5 (1958). Not all of that struggle has involved discrimination against blacks, see, *e.g., Yick Wo v. Hopkins,* 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886) (Chinese); *Hernandez v. Texas,* 347 U.S. 475, 74 S.Ct. 667, 98 L.Ed. 866 (1954) (Hispanics), and not all of it has been in the Old South, see, *e.g., Columbus Board of Education v. Penick,* 443 U.S. 449, 99 S.Ct. 2941, 61 L.Ed.2d 666 (1979); *Keyes v. School Dist.*

No. 1, Denver, Colorado, 413 U.S. 189, 93 S.Ct. 2686, 37 L.Ed.2d 548 (1973). What the record shows, in other words, is that racial discrimination against any group finds a more ready expression at the state and local than at the federal level. To the children of the Founding Fathers, this should come as no surprise. An acute awareness of the heightened danger of oppression from political factions in small, rather than large, political units dates to the very beginning of our national history. See G. Wood, The Creation of the American Republic, 1776–1787, pp. 499–506 (1969). As James Madison observed in support of the proposed Constitution's enhancement of national powers:

> "The smaller the society, the fewer probably will be the distinct parties and interests composing it; the fewer the distinct parties and interests, the more frequently will a majority be found of the same party; and the smaller the number of individuals composing a majority, and the smaller the compass within which they are placed, the more easily will they concert and execute their plan of oppression. Extend the sphere and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength and to act in unison with each other." The Federalist No. 10, pp. 82–84 (C. Rossiter ed. 1961).

***524** The prophesy of these words came to fruition in Richmond in the enactment of a set-aside clearly and directly beneficial to the dominant political group, which happens ****738** also to be the dominant racial group. The same thing has no doubt happened before in other cities (though the racial basis of the preference has rarely been made textually explicit)—and blacks have often been on the receiving end of the injustice. Where injustice is the game, however, turnabout is not fair play.

In my view there is only one circumstance in which the States may act *by race* to "undo the effects of past discrimination": where that is necessary to eliminate their own maintenance of a system of unlawful racial classification. If, for example, a state agency has a discriminatory pay scale compensating black employees in all positions at 20% less than their nonblack counterparts, it may assuredly promulgate an order raising the salaries of "all black employees" to eliminate the differential. Cf. *Bazemore v. Friday,* 478 U.S. 385, 395–396, 106 S.Ct. 3000, 3006, 92 L.Ed.2d 315 (1986). This distinction explains our school desegregation cases, in which we have made plain that States and localities sometimes have an obligation to adopt race-conscious remedies. While there is no doubt that those cases have taken into account the continuing "effects" of previously mandated racial school assignment, we have held those effects to justify a race-conscious remedy only because we have concluded, in that context, that they perpetuate a "dual school system." We have stressed each school district's constitutional "duty to *dismantle* its dual system," and have found that "[e]ach instance of a failure or refusal to fulfill this affirmative duty *continues the violation* of the Fourteenth Amendment." *Columbus Board of Education v. Penick, supra,* 443 U.S., at 458–459, 99 S.Ct. at 2946–2947 (emphasis added). Concluding in this context that race-neutral efforts at "dismantling the state-imposed dual system" were so ineffective that they might "indicate a lack of good faith," *Green v. New Kent County School Board,* 391 U.S. 430, 439, 88 S.Ct. 1689, 1695, 20 L.Ed.2d 716 (1968); see also ***525** *Raney v. Board of Education of Gould School Dist.,* 391 U.S. 443, 88 S.Ct. 1697, 20 L.Ed.2d 727 (1968), we have permitted, as part of the local authorities' "affirmative duty to disestablish the dual school system[s]," such voluntary (that is, noncourt-ordered) measures as attendance zones drawn to achieve greater racial balance, and out-of-zone assignment by race for the same purpose. *McDaniel v. Barresi,* 402 U.S. 39, 40–41, 91 S.Ct. 1287, 1288, 28 L.Ed.2d 582 (1971). While thus permitting the use of race to *de* classify racially classified students, teachers, and educational resources, however, we have also made it clear that the remedial power extends no further than the scope of the continuing constitutional violation. See, *e.g., Columbus Board of Education v. Penick, supra,* 443 U.S., at 465, 99 S.Ct., at 2950; *Dayton Board of Education v. Brinkman,* 433 U.S. 406, 420, 97 S.Ct. 2766, 2775, 53 L.Ed.2d 851 (1977); *Milliken v. Bradley,* 418 U.S. 717, 744, 94 S.Ct. 3112, 3127, 41 L.Ed.2d 1069 (1974); *Keyes v. School Dist. No. 1, Denver, Colorado, supra,* 413 U.S., at 213, 93 S.Ct., at 2699. And it is implicit in our cases that after the dual school system has been completely disestablished, the States may no longer assign students by race. Cf. *Pasadena City Board of Education v. Spangler,* 427 U.S. 424, 96 S.Ct. 2697, 49 L.Ed.2d 599 (1976) (federal court may not require racial assignment in such circumstances).

Our analysis in *Bazemore v. Friday, supra,* reflected our unwillingness to conclude, outside the context of school assignment, that the continuing effects of prior discrimination can be equated with state maintenance of a discriminatory system. There we found both that the government's adoption of "wholly neutral admissions" policies for 4–H and Homemaker Clubs sufficed to remedy its prior constitutional violation of maintaining segregated admissions, and that there was no further obligation to use racial reassignments to eliminate continuing effects—that is, any remaining all-black and all-white clubs. 478 U.S., at 407–408, 106 S.Ct., at 3012–3013. "[H]owever sound *Green* [*v. New Kent County School Board, supra*] may have been in the context of the public schools," we said, "it has no application to this wholly ****739** different milieu." *Id.,* at 408, 106 S.Ct., at 3013. The same is so here.

***526** A State can, of course, act "to undo the effects of past discrimination" in many permissible ways that do not involve classification by race. In the particular field of state contracting, for example, it may adopt a preference for small businesses, or even for new businesses—which would make it easier for those previously excluded by discrimination to enter the field. Such programs may well have racially disproportionate impact, but they are not based on race. And, of course, a State may "undo the effects of past discrimination" in the sense of giving the identified victim of state discrimination that which it wrongfully denied him—for example, giving to a previously rejected black applicant the job that, by reason of discrimination, had been awarded to a white applicant, even if this means terminating the latter's employment. In such a context, the white job-holder is not being selected for disadvantageous treatment because of his race, but because he was wrongfully awarded a job to which another is entitled. That is worlds apart from the system here, in which those to be disadvantaged are identified solely by race.

I agree with the Court's dictum that a fundamental distinction must be drawn between the effects of "societal" discrimination and the effects of "identified" discrimination, and that the situation would be different if Richmond's plan were "tailored" to identify those particular bidders who "suffered from the effects of past discrimination by the city or prime contractors." *Ante,* at 729. In my view, however, the reason that would make a difference is not, as the Court states, that it would justify race-conscious action—see, *e.g., ante,* at 727–728, 729—but rather that it would enable race-neutral remediation. Nothing prevents Richmond from according a contracting preference to identified victims of discrimination. While most of the beneficiaries might be black, neither the beneficiaries nor those disadvantaged by the preference would be identified *on the basis of their race.* In other words, far from justifying racial classification, identification ***527** of actual victims of discrimination makes it less supportable than ever, because more obviously unneeded.

In his final book, Professor Bickel wrote:

> "[A] racial quota derogates the human dignity and individuality of all to whom it is applied; it is invidious in principle as well as in practice. Moreover, it can easily be turned against those it purports to help. The history of the racial quota is a history of subjugation, not beneficence. Its evil lies not in its name, but in its effects: a quota is a divider of society, a creator of castes, and it is all the worse for its racial base, especially in a society desperately striving for an equality that will make race irrelevant." Bickel, The Morality of Consent, at 133.

Those statements are true and increasingly prophetic. Apart from their societal effects, however, which are "in the aggregate disastrous," *id.,* at 134, it is important not to lose sight of the fact that even "benign" racial quotas have individual victims, whose very real injustice we ignore whenever we deny them enforcement of their right not to be disadvantaged on the basis of race. *Johnson v. Transportation Agency, Santa Clara County,* 480 U.S. 616, 677, 107 S.Ct. 1442, 1475, 94 L.Ed.2d 615 (1987) (SCALIA, J., dissenting). As Justice Douglas observed: "A. DeFunis who is white is entitled to no advantage by virtue of that fact; nor is he subject to any disability, no matter what his race or color. Whatever his race, he had a constitutional right to have his application considered on its individual merits in a racially neutral manner." *DeFunis v. Odegaard,* 416 U.S. 312, 337, 94 S.Ct. 1704, 1716, 40 L.Ed.2d 164 (1974) (dissenting opinion). When we depart from this American principle we play with fire, and much more than an occasional DeFunis, Johnson, or Croson burns.

It is plainly true that in our society blacks have suffered discrimination immeasurably greater than any directed at other racial groups. But those who believe that racial preferences can help to "even the ****740** score" display, and reinforce, a manner of thinking by race that was the source of the injustice and that will, if it endures within our society, be the ***528** source of more injustice still. The relevant proposition is not that it was blacks, or Jews, or Irish who were discriminated against, but that it was individual men and women, "created equal," who were discriminated against. And the relevant resolve is that that should never happen again. Racial preferences appear to "even the score" (in some small degree) only if one embraces the proposition that our society is appropriately viewed as divided into races, making it right that an injustice rendered in the past to a black man should be compensated for by discriminating against a white. Nothing is worth that embrace. Since blacks have been disproportionately disadvantaged by racial discrimination, any race-neutral remedial program aimed at the disadvantaged *as such* will have a disproportionately beneficial impact on blacks. Only such a program, and not one that operates on the basis of race, is in accord with the letter and the spirit of our Constitution.

Since I believe that the appellee here had a constitutional right to have its bid succeed or fail under a decisionmaking process uninfected with racial bias, I concur in the judgment of the Court.

Justice MARSHALL, with whom Justice BRENNAN and Justice BLACKMUN join, dissenting.

It is a welcome symbol of racial progress when the former capital of the Confederacy acts forthrightly to confront the effects of racial discrimination in its midst. In my view, nothing in the Constitution can be construed to prevent Richmond, Virginia, from allocating a portion of its contracting dollars for businesses owned or controlled by members of minority groups. Indeed, Richmond's set-aside program is indistinguishable in all meaningful respects from—and in fact was patterned upon—the federal set-aside plan which this Court upheld in *Fullilove v. Klutznick,* 448 U.S. 448, 100 S.Ct. 2758, 65 L.Ed.2d 902 (1980).

A majority of this Court holds today, however, that the Equal Protection Clause of the Fourteenth Amendment blocks Richmond's initiative. The essence of the majority's ***529** position[1] is that Richmond has failed to catalog adequate findings to prove that past discrimination has impeded minorities from joining or participating fully in Richmond's construction contracting industry. I find deep irony in second-guessing Richmond's judgment on this point. As much as any municipality in the United States, Richmond knows what racial discrimination is; a century of decisions by this and other federal courts has richly documented the city's disgraceful history of public and private racial discrimination. In any event, the Richmond City Council *has* supported its determination that minorities have been wrongly excluded from local construction contracting. Its proof includes statistics showing that minority-owned businesses have received virtually no city contracting dollars and rarely if ever belonged to area trade associations; testimony by municipal officials that discrimination has been widespread in the local construction industry; and the same exhaustive and widely publicized federal studies relied on in *Fullilove,* studies which showed that pervasive discrimination in the Nation's tight-knit construction industry had operated to exclude minorities from public contracting. These are precisely the types of statistical and testimonial evidence which, until today, this Court had credited in cases approving of race-conscious measures designed to remedy past discrimination.

More fundamentally, today's decision marks a deliberate and giant step backward in this Court's affirmative-action jurisprudence. Cynical of one municipality's attempt to redress the effects of past racial discrimination in a particular industry, the majority launches a grapeshot attack on race-conscious remedies in general. The ****741** majority's unnecessary pronouncements will inevitably discourage or prevent governmental entities, particularly States and localities, from acting to rectify the scourge of past discrimination. This is ***530** the harsh reality of the majority's decision, but it is not the Constitution's command.

I

As an initial matter, the majority takes an exceedingly myopic view of the factual predicate on which the Richmond City Council relied when it passed the Minority Business Utilization Plan. The majority analyzes Richmond's initiative as if it were based solely upon the facts about local construction and contracting practices adduced during the city council session at which the measure was enacted. *Ante,* at 714–715. In so doing, the majority downplays the fact that the city council had before it a rich trove of evidence that discrimination in the Nation's construction industry had seriously impaired the competitive position of businesses owned or controlled by members of minority groups. It is only against this backdrop of documented national discrimination, however, that the local evidence adduced by Richmond can be properly understood. The majority's refusal to recognize that Richmond has proved itself no exception to the dismaying pattern of national exclusion which Congress so painstakingly identified infects its entire analysis of this case.

Six years before Richmond acted, Congress passed, and the President signed, the Public Works Employment Act of 1977, Pub.L. 95–28, 91 Stat. 116, 42 U.S.C. § 6701 *et seq.* (Act), a measure which appropriated $4 billion in federal grants to state and local governments for use in public works projects. Section 103(f)(2) of the Act was a minority business set-aside provision. It required state or local grantees to use 10% of their federal grants to procure services or supplies from businesses owned or controlled by members of statutorily identified minority groups, absent an administrative waiver. In 1980, in *Fullilove, supra,* this Court upheld the validity of this federal set-aside. Chief Justice Burger's principal opinion noted the importance of overcoming those "criteria, methods, or practices thought by Congress to have the effect of defeating, or

substantially impairing, access ***531** by the minority business community to public funds made available by congressional appropriations." *Fullilove,* 448 U.S., at 480, 100 S.Ct., at 2775. Finding the set-aside provision properly tailored to this goal, the Chief Justice concluded that the program was valid under either strict or intermediate scrutiny. *Id.,* at 492, 100 S.Ct., at 2781.

The congressional program upheld in *Fullilove* was based upon an array of congressional and agency studies which documented the powerful influence of racially exclusionary practices in the business world. A 1975 Report by the House Committee on Small Business concluded:

> "The effects of past inequities stemming from racial prejudice have not remained in the past. The Congress has recognized the reality that past discriminatory practices have, to some degree, adversely affected our present economic system.
>
> "While minority persons comprise about 16 percent of the Nation's population, of the 13 million businesses in the United States, only 382,000, or approximately 3.0 percent, are owned by minority individuals. The most recent data from the Department of Commerce also indicates that the gross receipts of all businesses in this country totals about $2,540.8 billion, and of this amount only $16.6 billion, or about 0.65 percent was realized by minority business concerns.
>
> "These statistics are not the result of random chance. *The presumption must be made that past discriminatory systems have resulted in present economic inequities.*" H.R.Rep. No. 94–468, pp. 1–2 (1975) (quoted in *Fullilove, supra,* at 465, 100 S.Ct., at 2768) (opinion of Burger, C.J.) (emphasis deleted and added).

A 1977 Report by the same Committee concluded:

> "[O]ver the years, there has developed a business system which has traditionally excluded measurable minority participation. ****742** In the past more than the present, ***532** this system of conducting business transactions overtly precluded minority input. Currently, we more often encounter a business system which is racially neutral on its face, but because of past overt social and economic discrimination is presently operating, in effect, to perpetuate these past inequities. Minorities, until recently, have not participated to any measurable extent, in our total business system generally, or in the construction industry in particular." H.R.Rep. No. 94–1791, p. 182 (1977), summarizing H.R.Rep. No. 94–468, p. 17 (1976) (quoted in *Fullilove, supra,* at 466, n. 48, 100 S.Ct., at 2768, n. 48).

Congress further found that minorities seeking initial public contracting assignments often faced immense entry barriers which did not confront experienced nonminority contractors. A report submitted to Congress in 1975 by the United States Commission on Civil Rights, for example, described the way in which fledgling minority-owned businesses were hampered by "deficiencies in working capital, inability to meet bonding requirements, disabilities caused by an inadequate 'track record,' lack of awareness of bidding opportunities, unfamiliarity with bidding procedures, preselection before the formal advertising process, and the exercise of discretion by government procurement officers to disfavor minority businesses." *Fullilove, supra,* at 467, 100 S.Ct., at 2769 (summarizing United States Comm'n on Civil Rights, Minorities and Women as Government Contractors (May 1975)).

Thus, as of 1977, there was "abundant evidence" in the public domain "that minority businesses ha[d] been denied effective participation in public contracting opportunities by procurement practices that perpetuated the effects of prior discrimination." *Fullilove, supra,* at 477–478, 100 S.Ct., at 2774.[2] Significantly, ***533** this evidence demonstrated that discrimination had prevented existing or nascent minority-owned businesses from obtaining not only federal contracting assignments, but state and local ones as well. See *Fullilove, supra,* at 478, 100 S.Ct., at 2774.[3]

****743** The members of the Richmond City Council were well aware of these exhaustive congressional findings, a point the ***534** majority, tellingly, elides. The transcript of the session at which the council enacted the local set-aside initiative contains numerous references to the 6–year–old congressional set-aside program, to the evidence of nationwide discrimination barriers described above, and to the *Fullilove* decision itself. See, *e.g.,* App. 14–16, 24 (remarks of City Attorney William H. Hefty); *id.,* at 14–15 (remarks of Councilmember William J. Leidinger); *id.,* at 18 (remarks of minority community task force president Freddie Ray); *id.,* at 25, 41 (remarks of Councilmember Henry L. Marsh III); *id.,* at 42 (remarks of City Manager Manuel Deese).

The city council's members also heard testimony that, although minority groups made up half of the city's population, only 0.67% of the $24.6 million which Richmond had dispensed in construction contracts during the five years ending in March 1983 had gone to minority-owned prime contractors. *Id.,* at 43 (remarks of Councilmember Henry W. Richardson). They

heard testimony that the major Richmond area construction trade associations had virtually no minorities among their hundreds of members.[4] Finally, they heard testimony from city officials as to the exclusionary history of the local construction industry.[5] As the District Court noted, not a ***535** single person who testified before the city council denied that discrimination in Richmond's construction industry had been widespread. Civ.Action No. 84–0021 (ED Va., Dec. 3, 1984) (reprinted in Supp.App. to Juris.Statement 164–165).[6] So long as one views Richmond's local evidence of discrimination against the backdrop of systematic nationwide racial discrimination which Congress had so painstakingly identified in this very industry, this case is readily resolved.

II

"Agreement upon a means for applying the Equal Protection Clause to an affirmative-action program has eluded this Court every time the issue has come before us." *Wygant v. Jackson Bd. of Education,* 476 U.S. 267, 301, 106 S.Ct. 1842, 1861, 90 L.Ed.2d 260 (1986) (MARSHALL, J., dissenting). My view has long been that race-conscious classifications designed to further remedial goals "must serve important governmental objectives and must be substantially related to achievement of those ****744** objectives" in order to withstand constitutional scrutiny. *University of California Regents v. Bakke,* 438 U.S. 265, 359, 98 S.Ct. 2733, 2783, 57 L.Ed.2d 750 (1978) (joint opinion of BRENNAN, WHITE, MARSHALL, and BLACKMUN, JJ.) (citations omitted); see also *Wygant, supra,* 476 U.S., at 301–302, 106 S.Ct., at 1861 (MARSHALL, J., dissenting); *Fullilove,* 448 U.S., at 517–519, 100 S.Ct., at 2794–2795 ***536** MARSHALL, J., concurring in judgment). Analyzed in terms of this two-pronged standard, Richmond's set-aside, like the federal program on which it was modeled, is "plainly constitutional." *Fullilove, supra,* at 519, 100 S.Ct., at 2795–2796 (MARSHALL, J., concurring in judgment).

A

1

Turning first to the governmental interest inquiry, Richmond has two powerful interests in setting aside a portion of public contracting funds for minority-owned enterprises. The first is the city's interest in eradicating the effects of past racial discrimination. It is far too late in the day to doubt that remedying such discrimination is a compelling, let alone an important, interest. In *Fullilove,* six Members of this Court deemed this interest sufficient to support a race-conscious set-aside program governing federal contract procurement. The decision, in holding that the federal set-aside provision satisfied the equal protection principles under any level of scrutiny, recognized that the measure sought to remove "barriers to competitive access which had their roots in racial and ethnic discrimination, and which continue today, even absent any intentional discrimination or unlawful conduct." 448 U.S., at 478, 100 S.Ct., at 2774; see also *id.,* at 502–506, 100 S.Ct., at 2787–2789 (Powell, J., concurring); *id.,* at 520, 100 S.Ct., at 2796 (MARSHALL, J., concurring in judgment). Indeed, we have repeatedly reaffirmed the government's interest in breaking down barriers erected by past racial discrimination in cases involving access to public education, *McDaniel v. Barresi,* 402 U.S. 39, 41, 91 S.Ct. 1287, 1288, 28 L.Ed.2d 582 (1971); *University of California Regents v. Bakke,* 438 U.S., at 320, 98 S.Ct., at 2763 (opinion of Powell, J.); *id.,* at 362–364, 98 S.Ct., at 2784–2785 (joint opinion of BRENNAN, WHITE, MARSHALL, and BLACKMUN, JJ.), employment, *United States v. Paradise,* 480 U.S. 149, 167, 107 S.Ct. 1053, 1064, 94 L.Ed.2d 203 (1987) (plurality opinion); *id.,* at 186–189, 107

S.Ct., at 1074–1076 (Powell, J., concurring), and valuable government contracts, *Fullilove,* 448 U.S., at 481–484, 100 S.Ct., at 2776–2777 (opinion of Burger, C.J.); ***537** *id.,* at 496–497, 100 S.Ct., at 2783–2784 (Powell, J., concurring); *id.,* at 521, 100 S.Ct., at 2797 (MARSHALL, J., concurring in judgment).

Richmond has a second compelling interest in setting aside, where possible, a portion of its contracting dollars. That interest is the prospective one of preventing the city's own spending decisions from reinforcing and perpetuating the exclusionary effects of past discrimination. See *Fullilove,* 448 U.S., at 475, 100 S.Ct., at 2773 (noting Congress' conclusion that "the subcontracting practices of prime contractors could perpetuate the prevailing impaired access by minority businesses to public contracting opportunities"); *id.,* at 503, 100 S.Ct., at 2787 (Powell, J., concurring).

The majority pays only lipservice to this additional governmental interest. See *ante,* at 720–721, 726–727. But our decisions have often emphasized the danger of the government tacitly adopting, encouraging, or furthering racial discrimination even by its own routine operations. In *Shelley v. Kraemer,* 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161 (1948), this Court recognized this interest as a constitutional command, holding unanimously that the Equal Protection Clause forbids courts to enforce racially restrictive covenants even where such covenants satisfied all requirements of state law and where the State harbored no discriminatory intent. Similarly, in *Norwood v. Harrison,* 413 U.S. 455, 93 S.Ct. 2804, 37 L.Ed.2d 723 (1973), we invalidated a program in which a State purchased textbooks ****745** and loaned them to students in public and private schools, including private schools with racially discriminatory policies. We stated that the Constitution requires a State "to steer clear, not only of operating the old dual system of racially segregated schools, but also of giving significant aid to institutions that practice racial or other invidious discrimination." *Id.,* at 467, 93 S.Ct., at 2811–2812; see also *Gilmore v. City of Montgomery,* 417 U.S. 556, 94 S.Ct. 2416, 41 L.Ed.2d 304 (1974) (upholding federal-court order forbidding city to allow private segregated schools which allegedly discriminated on the basis of race to use public parks).

***538** The majority is wrong to trivialize the continuing impact of government acceptance or use of private institutions or structures once wrought by discrimination. When government channels all its contracting funds to a white-dominated community of established contractors whose racial homogeneity is the product of private discrimination, it does more than place its *imprimatur* on the practices which forged and which continue to define that community. It also provides a measurable boost to those economic entities that have thrived within it, while denying important economic benefits to those entities which, but for prior discrimination, might well be better qualified to receive valuable government contracts. In my view, the interest in ensuring that the government does not reflect and reinforce prior private discrimination in dispensing public contracts is every bit as strong as the interest in eliminating private discrimination—an interest which this Court has repeatedly deemed compelling. See, *e.g., New York State Club Assn. v. New York City,* 487 U.S. 1, 14, n. 5, 108 S.Ct. 2225, 2235, n. 5, 101 L.Ed.2d 1 (1988); *Board of Directors of Rotary Int'l v. Rotary Club of Duarte,* 481 U.S. 537, 549, 107 S.Ct. 1940, 1948, 95 L.Ed.2d 474 (1987); *Roberts v. United States Jaycees,* 468 U.S. 609, 623, 104 S.Ct. 3244, 3252, 82 L.Ed.2d 462 (1984); *Bob Jones University v. United States,* 461 U.S. 574, 604, 103 S.Ct. 2017, 2035, 76 L.Ed.2d 157 (1983); *Runyon v. McCrary,* 427 U.S. 160, 179, 96 S.Ct. 2586, 2598, 49 L.Ed.2d 415 (1976). The more government bestows its rewards on those persons or businesses that were positioned to thrive during a period of private racial discrimination, the tighter the deadhand grip of prior discrimination becomes on the present and future. Cities like Richmond may not be constitutionally required to adopt set-aside plans. But see *North Carolina Bd. of Education v. Swann,* 402 U.S. 43, 46, 91 S.Ct. 1284, 1286, 28 L.Ed.2d 586 (1971) (Constitution may require consideration of race in remedying state-sponsored school segregation); *McDaniel, supra,* 402 U.S., at 41, 91 S.Ct., at 1288 (same, and stating that "[a]ny other approach would freeze the status quo that is the very target of all desegregation processes"). But there can be no doubt that when Richmond acted affirmatively to stem the perpetuation of patterns of discrimination through ***539** its own decisionmaking, it served an interest of the highest order.

2

The remaining question with respect to the "governmental interest" prong of equal protection analysis is whether Richmond has proffered satisfactory proof of past racial discrimination to support its twin interests in remediation and in governmental

nonperpetuation. Although the Members of this Court have differed on the appropriate standard of review for race-conscious remedial measures, see *United States v. Paradise,* 480 U.S., at 166, and 166–167, n. 17, 107 S.Ct., at 1064, and 1064, n. 17 (plurality opinion); *Sheet Metal Workers v. EEOC,* 478 U.S. 421, 480, 106 S.Ct. 3019, 3052, 92 L.Ed.2d 344 (1986) (plurality opinion), we have always regarded this factual inquiry as a practical one. Thus, the Court has eschewed rigid tests which require the provision of particular species of evidence, statistical or otherwise. At the same time we have required that government adduce evidence that, taken as a whole, is sufficient to support its claimed interest and to dispel the natural concern that it acted out of mere "paternalistic stereotyping, not on a careful consideration of modern social conditions." ****746** *Fullilove v. Klutznick, supra,* 448 U.S., at 519, 100 S.Ct., at 2795 (MARSHALL, J., concurring in judgment).

The separate opinions issued in *Wygant v. Jackson Bd. of Education,* a case involving a school board's race-conscious layoff provision, reflect this shared understanding. Justice Powell's opinion for a plurality of four Justices stated that "the trial court must make a factual determination that the employer had a strong basis in evidence for its conclusion that remedial action was necessary." 476 U.S., at 277, 106 S.Ct., at 1849. Justice O'CONNOR's separate concurrence required "a firm basis for concluding that remedial action was appropriate." *Id.,* at 293, 106 S.Ct., at 1857. The dissenting opinion I authored, joined by Justices BRENNAN and BLACKMUN, required a government body to present a "legitimate factual predicate" and a reviewing court to "genuinely consider the circumstances of the provision at issue." *Id.,* at 297, 303, 106 S.Ct., at 1859, 1862. Finally, Justice ***540** STEVENS' separate dissent sought and found "a rational and unquestionably legitimate basis" for the school board's action. *Id.,* at 315–316, 106 S.Ct., at 1868–1869. Our unwillingness to go beyond these generalized standards to require specific types of proof in all circumstances reflects, in my view, an understanding that discrimination takes a myriad of "ingenious and pervasive forms." *University of California Regents v. Bakke,* 438 U.S., at 387, 98 S.Ct., at 2797 (separate opinion of MARSHALL, J.).

The varied body of evidence on which Richmond relied provides a "strong," "firm," and "unquestionably legitimate" basis upon which the city council could determine that the effects of past racial discrimination warranted a remedial and prophylactic governmental response. As I have noted, *supra,* at 741–743 Richmond acted against a backdrop of congressional and Executive Branch studies which demonstrated with such force the nationwide pervasiveness of prior discrimination that Congress presumed that " 'present economic inequities' " in construction contracting resulted from " 'past discriminatory systems.' " *Supra,* at 741 (quoting H.R.Rep. No. 94–468, pp. 1–2 (1975)). The city's local evidence confirmed that Richmond's construction industry did not deviate from this pernicious national pattern. The fact that just 0.67% of public construction expenditures over the previous five years had gone to minority-owned prime contractors, despite the city's racially mixed population, strongly suggests that construction contracting in the area was rife with "present economic inequities." To the extent this enormous disparity did not itself demonstrate that discrimination had occurred, the descriptive testimony of Richmond's elected and appointed leaders drew the necessary link between the pitifully small presence of minorities in construction contracting and past exclusionary practices. That *no one* who testified challenged this depiction of widespread racial discrimination in area construction contracting lent significant weight to these accounts. The fact that area trade associations had virtually no minority members dramatized the extent of present ***541** inequities and suggested the lasting power of past discriminatory systems. In sum, to suggest that the facts on which Richmond has relied do not provide a sound basis for its finding of past racial discrimination simply blinks credibility.

Richmond's reliance on localized, industry-specific findings is a far cry from the reliance on generalized "societal discrimination" which the majority decries as a basis for remedial action. *Ante,* at 723, 724–725, 727–728. But characterizing the plight of Richmond's minority contractors as mere "societal discrimination" is not the only respect in which the majority's critique shows an unwillingness to come to grips with why construction-contracting in Richmond is essentially a whites-only enterprise. The majority also takes the disingenuous approach of disaggregating Richmond's local evidence, attacking it piecemeal, and thereby concluding that no *single* piece of evidence adduced by the city, "standing alone," see, *e.g., ante,* at 726, suffices to prove past discrimination. But items of evidence do not, of course, ****747** "stan[d] alone" or exist in alien juxtaposition; they necessarily work together, reinforcing or contradicting each other.

In any event, the majority's criticisms of individual items of Richmond's evidence rest on flimsy foundations. The majority states, for example, that reliance on the disparity between the share of city contracts awarded to minority firms (0.67%) and the minority population of Richmond (approximately 50%) is "misplaced." *Ante,* at 725. It is true that, when the factual predicate needed to be proved is one of *present* discrimination, we have generally credited statistical contrasts between the racial composition of a work force and the general population as proving discrimination only where this contrast revealed "gross statistical disparities." *Hazelwood School Dist. v. United States,* 433 U.S. 299, 307–308, 97 S.Ct. 2736, 2741–2742, 53 L.Ed.2d 768 (1977) (Title VII case); see also *Teamsters v. United States,* 431 U.S. 324, 339, 97 S.Ct. 1843, 1856, 52 L.Ed.2d

396 (1977) (same). But this principle does not impugn Richmond's statistical contrast, for two reasons. First, considering how miniscule the share of Richmond publicconstruction ***542** contracting dollars received by minority-owned businesses is, it is hardly unreasonable to conclude that this case involves a "gross statistical disparit[y]." *Hazelwood School Dist., supra,* 433 U.S., at 307, 97 S.Ct., at 2741. There are roughly equal numbers of minorities and nonminorities in Richmond—yet minority-owned businesses receive *one-seventy-fifth* of the public contracting funds that other businesses receive. See *Teamsters, supra,* 431 U.S., at 342, n. 23, 97 S.Ct., at 1858, n. 23 ("[F]ine tuning of the statistics could not have obscured the glaring absence of minority [bus] drivers.... [T]he company's inability to rebut the inference of discrimination came not from a misuse of statistics but from 'the inexorable zero' ") (citation omitted) (quoted in *Johnson v. Transportation Agency, Santa Clara County,* 480 U.S. 616, 656–657, 107 S.Ct. 1442, 1465, 94 L.Ed.2d 615 (1987) (O'CONNOR, J., concurring in judgment)).

Second, and more fundamentally, where the issue is not present discrimination but rather whether *past* discrimination has resulted in the *continuing exclusion* of minorities from a historically tight-knit industry, a contrast between population and work force is entirely appropriate to help gauge the degree of the exclusion. In *Johnson v. Transportation Agency, Santa Clara County, supra,* Justice O'CONNOR specifically observed that, when it is alleged that discrimination has prevented blacks from "obtaining th[e] experience" needed to qualify for a position, the "relevant comparison" is not to the percentage of blacks in the pool of qualified candidates, but to "the total percentage of blacks in the labor force." *Id.,* at 651, 107 S.Ct., at 1462; see also *Steelworkers v. Weber,* 443 U.S. 193, 198–199, and n. 1, 99 S.Ct. 2721, 2724–2725, and n. 1, 61 L.Ed.2d 480 (1979); *Teamsters, supra,* 431 U.S., at 339, n. 20, 97 S.Ct., at 1856, n. 20. This contrast is especially illuminating in cases like this, where a main avenue of introduction into the work force—here, membership in the trade associations whose members presumably train apprentices and help them procure subcontracting assignments—is itself grossly dominated by nonminorities. The majority's assertion that the city "does not even know how many MBE's in the relevant market are qualified," *ante,* at 726, is thus entirely beside the ***543** point. If Richmond indeed has a monochromatic contracting community—a conclusion reached by the District Court, see Civ. Action No. 84–0021 (ED Va.1984) (reprinted in Supp.App. to Juris. Statement 164)—this most likely reflects the lingering power of past exclusionary practices. Certainly this is the explanation Congress has found persuasive at the national level. See *Fullilove,* 448 U.S., at 465, 100 S.Ct., at 2768. The city's requirement that prime public contractors set aside 30% of their subcontracting assignments for minority-owned enterprises, subject to the ordinance's provision for waivers where minority-owned enterprises are unavailable or unwilling to participate, is designed precisely ****748** to ease minority contractors into the industry.

The majority's perfunctory dismissal of the testimony of Richmond's appointed and elected leaders is also deeply disturbing. These officials—including councilmembers, a former mayor, and the present city manager—asserted that race discrimination in area contracting had been widespread, and that the set-aside ordinance was a sincere and necessary attempt to eradicate the effects of this discrimination. The majority, however, states that where racial classifications are concerned, "simple legislative assurances of good intention cannot suffice." *Ante,* at 725. It similarly discounts as minimally probative the city council's designation of its set-aside plan as remedial. "[B]lind judicial deference to legislative or executive pronouncements," the majority explains, "has no place in equal protection analysis." *Ibid.*

No one, of course, advocates "blind judicial deference" to the findings of the city council or the testimony of city leaders. The majority's suggestion that wholesale deference is what Richmond seeks is a classic straw-man argument. But the majority's trivialization of the testimony of Richmond's leaders is dismaying in a far more serious respect. By disregarding the testimony of local leaders and the judgment of local government, the majority does violence to the very principles of comity within our federal system which this ***544** Court has long championed. Local officials, by virtue of their proximity to, and their expertise with, local affairs, are exceptionally well qualified to make determinations of public good "within their respective spheres of authority." *Hawaii Housing Authority v. Midkiff,* 467 U.S. 229, 244, 104 S.Ct. 2321, 2331, 81 L.Ed.2d 186 (1984); see also *FERC v. Mississippi,* 456 U.S. 742, 777–778, 102 S.Ct. 2126, 2147, 72 L.Ed.2d 532 (1982) (O'CONNOR, J., concurring in judgment in part and dissenting in part). The majority, however, leaves any traces of comity behind in its headlong rush to strike down Richmond's race-conscious measure.

Had the majority paused for a moment on the facts of the Richmond experience, it would have discovered that the city's leadership is deeply familiar with what racial discrimination is. The members of the Richmond City Council have spent long years witnessing multifarious acts of discrimination, including, but not limited to, the deliberate diminution of black residents' voting rights, resistance to school desegregation, and publicly sanctioned housing discrimination. Numerous decisions of federal courts chronicle this disgraceful recent history. In *Richmond v. United States,* 422 U.S. 358, 95 S.Ct. 2296, 45 L.Ed.2d 245 (1975), for example, this Court denounced Richmond's decision to annex part of an adjacent county at

a time when the city's black population was nearing 50% because it was "infected by the impermissible purpose of denying the right to vote based on race through perpetuating white majority power to exclude Negroes from office." *Id.,* at 373, 95 S.Ct., at 2305; see also *id.,* at 382, 95 S.Ct., at 2309 (BRENNAN, J., dissenting) (describing Richmond's "flagrantly discriminatory purpose ... to avert a transfer of political control to what was fast becoming a black-population majority") (citation omitted).[7]

In *Bradley v. School Board of Richmond,* 462 F.2d 1058, 1060, n. 1 (CA4 1972), aff'd by an equally divided Court, ***545** 412 U.S. 92, 93 S.Ct. 1952, 36 L.Ed.2d 771 (1973), the Court of Appeals for the Fourth Circuit, sitting en banc, reviewed in the context of a school desegregation case Richmond's long history of inadequate compliance with *Brown v. Board of Education,* 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954), and the cases implementing its holding. The dissenting judge elaborated:

> "The sordid history of Virginia's, and Richmond's attempts to circumvent, defeat, and nullify the holding of *Brown I* has been recorded in the opinions of this and other courts, and need not be repeated in detail here. It suffices to say ****749** that there was massive resistance and every state resource, including the services of the legal officers of the state, the services of private counsel (costing the State hundreds of thousands of dollars), the State police, and the power and prestige of the Governor, was employed to defeat *Brown I.* In Richmond, as has been mentioned, not even freedom of choice became actually effective until 1966, *twelve years after the decision of Brown I.*" 462 F.2d, at 1075 (Winter, J.) (emphasis in original) (footnotes and citations omitted).

The Court of Appeals majority in *Bradley* used equally pungent words in describing public and private housing discrimination in Richmond. Though rejecting the black plaintiffs' request that it consolidate Richmond's school district with those of two neighboring counties, the majority nonetheless agreed with the plaintiffs' assertion that "within the City of Richmond there has been state (also federal) action tending to perpetuate apartheid of the races in ghetto patterns throughout the city." *Id.,* at 1065 (citing numerous public and private acts of discrimination).[8]

***546** When the legislatures and leaders of cities with histories of pervasive discrimination testify that past discrimination has infected one of their industries, armchair cynicism like that exercised by the majority has no place. It may well be that "the autonomy of a State is an essential component of federalism," *Garcia v. San Antonio Metropolitan Transit Authority,* 469 U.S. 528, 588, 105 S.Ct. 1005, 1037, 83 L.Ed.2d 1016 (1985) (O'CONNOR, J., dissenting), and that "each State is sovereign within its own domain, governing its citizens and providing for their general welfare," *FERC v. Mississippi, supra,* 456 U.S., at 777, 102 S.Ct., at 2147 (O'CONNOR, J., dissenting), but apparently this is not the case when federal judges, with nothing but their impressions to go on, choose to disbelieve the explanations of these local governments and officials. Disbelief is particularly inappropriate here in light of the fact that appellee Croson, which had the burden of proving unconstitutionality at trial, *Wygant,* 476 U.S., at 277–278, 106 S.Ct., at 1848–1849 (plurality opinion), has *at no point* come forward with *any* direct evidence that the city council's motives were anything other than sincere.[9]

Finally, I vehemently disagree with the majority's dismissal of the congressional and Executive Branch findings ***547** noted in *Fullilove* as having "extremely limited" probative value in this case. *Ante,* at 727. The majority concedes that Congress established nothing less than a "presumption" that minority contracting firms have been disadvantaged by prior discrimination. *Ibid.* The majority, inexplicably, would forbid Richmond to "share" in this information, and permit only Congress to take note of these ample findings. *Ante,* at 728. In thus requiring that Richmond's local evidence be severed from the context in which it was prepared, the majority would require ****750** cities seeking to eradicate the effects of past discrimination within their borders to reinvent the evidentiary wheel and engage in unnecessarily duplicative, costly, and time-consuming factfinding.

No principle of federalism or of federal power, however, forbids a state or local government to draw upon a nationally relevant historical record prepared by the Federal Government. See *Renton v. Playtime Theatres, Inc.,* 475 U.S. 41, 51–52, 106 S.Ct. 925, 931, 89 L.Ed.2d 29 (1986) (city is "entitled to rely on the experiences of Seattle and other cities" in enacting an adult theater ordinance, as the First Amendment "does not require a city ... to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the cities relies upon is reasonably believed to be relevant to the problem that the city addresses"); see also *Steelworkers v. Weber,* 443 U.S., at 198, n. 1, 99 S.Ct., at 2724, n. 1 ("Judicial findings of exclusion from crafts on racial grounds are so numerous as to make such exclusion a proper subject for judicial notice"); cf. *Wygant, supra,* 476 U.S., at 296, 106 S.Ct., at 1858 (MARSHALL, J., dissenting) ("No race-conscious provision that purports to serve a remedial purpose can be fairly assessed in a vacuum").[10] Of course, Richmond could have built an even more ***548** compendious record of past discrimination, one including additional stark statistics and additional individual accounts of past discrimination. But nothing in the Fourteenth Amendment imposes such

onerous documentary obligations upon States and localities once the reality of past discrimination is apparent. See *infra,* at 753–757.

B

In my judgment, Richmond's set-aside plan also comports with the second prong of the equal protection inquiry, for it is substantially related to the interests it seeks to serve in remedying past discrimination and in ensuring that municipal contract procurement does not perpetuate that discrimination. The most striking aspect of the city's ordinance is the similarity it bears to the "appropriately limited" federal set-aside provision upheld in *Fullilove.* 448 U.S., at 489, 100 S.Ct., at 2780. Like the federal provision, Richmond's is limited to five years in duration, *ibid.,* and was not renewed when it came up for reconsideration in 1988. Like the federal provision, Richmond's contains a waiver provision freeing from its subcontracting requirements those nonminority firms that demonstrate that they cannot comply with its provisions. *Id.,* at 483–484, 100 S.Ct., at 2777. Like the federal provision, Richmond's has a minimal impact on innocent third parties. While the measure affects 30% of *public* contracting dollars, that translates to only ***549** 3% of overall Richmond area contracting. Brief for Appellant 44, n. 73 (recounting federal census figures on construction in Richmond); see *Fullilove, supra,* at 484, 100 S.Ct., at 2778 (burden shouldered by nonminority firms is "relatively light" compared to "overall construction contracting opportunities").

Finally, like the federal provision, Richmond's does not interfere with any vested ****751** right of a contractor to a particular contract; instead it operates entirely prospectively. 448 U.S., at 484, 100 S.Ct., at 2777–2778. Richmond's initiative affects only future economic arrangements and imposes only a diffuse burden on nonminority competitors—here, businesses owned or controlled by nonminorities which seek subcontracting work on public construction projects. The plurality in *Wygant* emphasized the importance of not disrupting the settled and legitimate expectations of innocent parties. "While hiring goals impose a diffuse burden, often foreclosing only one of several opportunities, layoffs impose the entire burden of achieving racial equality on particular individuals, often resulting in serious disruption of their lives. That burden is too intrusive." *Wygant,* 476 U.S., at 283, 106 S.Ct., at 1852; see *Steelworkers v. Weber, supra,* 443 U.S., at 208, 99 S.Ct., at 2730.

These factors, far from "justify[ing] a preference of any size or duration," *ante,* at 728, are precisely the factors to which this Court looked in *Fullilove.* The majority takes issue, however, with two aspects of Richmond's tailoring: the city's refusal to explore the use of race-neutral measures to increase minority business participation in contracting, *ante,* at 729, and the selection of a 30% set-aside figure. *Ante,* at 729. The majority's first criticism is flawed in two respects. First, the majority overlooks the fact that since 1975, Richmond has barred both discrimination by the city in awarding public contracts and discrimination by public contractors. See Richmond, Va., City Code § 17.1 *et seq.* (1985). The virtual absence of minority businesses from the city's contracting rolls, indicated by the fact that such businesses have received less than 1% of public contracting dollars, ***550** strongly suggests that this ban has not succeeded in redressing the impact of past discrimination or in preventing city contract procurement from reinforcing racial homogeneity. Second, the majority's suggestion that Richmond should have first undertaken such race-neutral measures as a program of city financing for small firms, *ante,* at 729, ignores the fact that such measures, while theoretically appealing, have been discredited by Congress as ineffectual in eradicating the effects of past discrimination in this very industry. For this reason, this Court in *Fullilove* refused to fault Congress for not undertaking race-neutral measures as precursors to its race-conscious set-aside. See *Fullilove,* 448 U.S., at 463–467, 100 S.Ct., at 2767–2769 (noting inadequacy of previous measures designed to give experience to minority businesses); see also *id.,* at 511, 100 S.Ct., at 2792 (Powell, J., concurring) ("By the time Congress enacted [the federal set-aside] in 1977, it knew that other remedies had failed to ameliorate the effects of racial discrimination in the construction industry"). The Equal Protection Clause does not require Richmond to retrace Congress' steps when Congress has found that those steps lead nowhere. Given the well-exposed limitations of race-neutral measures, it was thus appropriate for a municipality like Richmond to conclude that, in the words of Justice BLACKMUN, "[i]n order to get beyond racism, we must first take account of race. There is no other way." *University of California Regents v. Bakke,* 438 U.S., at 407, 98 S.Ct., at 2807–2808 (separate opinion).[11]

***551** As for Richmond's 30% target, the majority states that this figure "cannot be said to be narrowly tailored to any goal, except perhaps outright racial balancing." *Ante,* at 729. The majority ignores two important facts. First, the set-aside measure affects only 3% of overall city contracting; thus, any imprecision in tailoring ****752** has far less impact than the majority suggests. But more important, the majority ignores the fact that Richmond's 30% figure was patterned directly on the *Fullilove* precedent. Congress' 10% figure fell "roughly halfway between the present percentage of minority contractors and the percentage of minority group members in the Nation." *Fullilove, supra,* 448 U.S., at 513–514, 100 S.Ct., at 2792–2793 (Powell, J., concurring). The Richmond City Council's 30% figure similarly falls roughly halfway between the present percentage of Richmond-based minority contractors (almost zero) and the percentage of minorities in Richmond (50%). In faulting Richmond for not presenting a different explanation for its choice of a set-aside figure, the majority honors *Fullilove* only in the breach.

III

I would ordinarily end my analysis at this point and conclude that Richmond's ordinance satisfies both the governmental interest and substantial relationship prongs of our Equal Protection Clause analysis. However, I am compelled to add more, for the majority has gone beyond the facts of this case to announce a set of principles which unnecessarily restricts the power of governmental entities to take race-conscious measures to redress the effects of prior discrimination.

A

Today, for the first time, a majority of this Court has adopted strict scrutiny as its standard of Equal Protection Clause review of race-conscious remedial measures. *Ante,* at 716–717; *ante,* at 735 (SCALIA, J., concurring in judgment). This is an unwelcome development. A profound difference separates governmental actions that themselves are racist, ***552** and governmental actions that seek to remedy the effects of prior racism or to prevent neutral governmental activity from perpetuating the effects of such racism. See, *e.g., Wygant v. Jackson Bd. of Education,* 476 U.S., at 301–302, 106 S.Ct., at 1861 (MARSHALL, J., dissenting); *Fullilove, supra,* 448 U.S., at 517–519, 100 S.Ct., at 2794–2795 (MARSHALL, J., concurring in judgment); *University of California Regents v. Bakke,* 438 U.S., at 355–362, 98 S.Ct., at 2781–2784 (joint opinion of BRENNAN, WHITE, MARSHALL, and BLACKMUN, JJ.).

Racial classifications "drawn on the presumption that one race is inferior to another or because they put the weight of government behind racial hatred and separatism" warrant the strictest judicial scrutiny because of the very irrelevance of these rationales. *Id.,* at 357–358, 98 S.Ct., at 2782. By contrast, racial classifications drawn for the purpose of remedying the effects of discrimination that itself was race based have a highly pertinent basis: the tragic and indelible fact that discrimination against blacks and other racial minorities in this Nation has pervaded our Nation's history and continues to scar our society. As I stated in *Fullilove:* "Because the consideration of race is relevant to remedying the continuing effects of past racial discrimination, and because governmental programs employing racial classifications for remedial purposes can be crafted to avoid stigmatization, ... such programs should not be subjected to conventional 'strict scrutiny'—scrutiny that is strict in theory, but fatal in fact." *Fullilove, supra,* 448 U.S., at 518–519, 100 S.Ct., at 2795 (citation omitted).

In concluding that remedial classifications warrant no different standard of review under the Constitution than the most brutal and repugnant forms of state-sponsored racism, a majority of this Court signals that it regards racial discrimination as largely a phenomenon of the past, and that government bodies need no longer preoccupy themselves with rectifying racial injustice. I, however, do not believe this Nation is anywhere close to eradicating racial discrimination or its vestiges. In constitutionalizing its wishful thinking, ***553** the majority today does a grave disservice not only to those victims of past and

present racial discrimination in this Nation whom government has sought to assist, but also to this Court's long tradition of approaching issues of race with the utmost sensitivity.

****753** B

I am also troubled by the majority's assertion that, even if it did not believe generally in strict scrutiny of race-based remedial measures, "the circumstances of this case" require this Court to look upon the Richmond City Council's measure with the strictest scrutiny. *Ante,* at 722. The sole such circumstance which the majority cites, however, is the fact that blacks in Richmond are a "dominant racial grou[p]" in the city. *Ibid.* In support of this characterization of dominance, the majority observes that "blacks constitute approximately 50% of the population of the city of Richmond" and that "[f]ive of the nine seats on the City Council are held by blacks." *Ante,* at 723.

While I agree that the numerical and political supremacy of a given racial group is a factor bearing upon the level of scrutiny to be applied, this Court has never held that numerical inferiority, standing alone, makes a racial group "suspect" and thus entitled to strict scrutiny review. Rather, we have identified *other* "traditional indicia of suspectness": whether a group has been "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *San Antonio Independent School Dist. v. Rodriguez,* 411 U.S. 1, 28, 93 S.Ct. 1278, 1294, 36 L.Ed.2d 16 (1973).

It cannot seriously be suggested that nonminorities in Richmond have any "history of purposeful unequal treatment." *Ibid.* Nor is there any indication that they have any of the disabilities that have characteristically afflicted those groups this Court has deemed suspect. Indeed, the numerical and political dominance of nonminorities within ***554** the State of Virginia and the Nation as a whole provides an enormous political check against the "simple racial politics" at the municipal level which the majority fears. *Ante,* at 721. If the majority really believes that groups like Richmond's nonminorities, which constitute approximately half the population but which are outnumbered even marginally in political fora, are deserving of suspect class status for these reasons alone, this Court's decisions denying suspect status to women, see *Craig v. Boren,* 429 U.S. 190, 197, 97 S.Ct. 451, 456, 50 L.Ed.2d 397 (1976), and to persons with below-average incomes, see *San Antonio Independent School Dist., supra,* 411 U.S., at 28, 93 S.Ct., at 1294, stand on extremely shaky ground. See *Castaneda v. Partida,* 430 U.S. 482, 504, 97 S.Ct. 1272, 1285, 51 L.Ed.2d 498 (1977) (MARSHALL, J., concurring).

In my view, the "circumstances of this case," *ante,* at 722, underscore the importance of *not* subjecting to a strict scrutiny straitjacket the increasing number of cities which have recently come under minority leadership and are eager to rectify, or at least prevent the perpetuation of, past racial discrimination. In many cases, these cities will be the ones with the most in the way of prior discrimination to rectify. Richmond's leaders had just witnessed decades of publicly sanctioned racial discrimination in virtually all walks of life—discrimination amply documented in the decisions of the federal judiciary. See *supra,* at 748–749. This history of "purposefully unequal treatment" forced upon minorities, not imposed by them, should raise an inference that minorities in Richmond had much to remedy—and that the 1983 set-aside was undertaken with sincere remedial goals in mind, not "simple racial politics." *Ante,* at 721.

Richmond's own recent political history underscores the facile nature of the majority's assumption that elected officials' voting decisions are based on the color of their skins. In recent years, white and black councilmembers in Richmond have increasingly joined hands on controversial matters. When the Richmond City Council elected a black man mayor in 1982, for example, his victory was won with the ***555** support of the city council's four white members. Richmond Times–Dispatch, July 2, 1982, p. 1, col. 1. The vote on the set-aside plan a year later also was not purely ****754** along racial lines. Of the four white councilmembers, one voted for the measure and another abstained. App. 49. The majority's view that remedial measures undertaken by municipalities with black leadership must face a stiffer test of Equal Protection Clause scrutiny than remedial measures undertaken by municipalities with white leadership implies a lack of political maturity on the part of this Nation's elected minority officials that is totally unwarranted. Such insulting judgments have no place in constitutional jurisprudence.

C

Today's decision, finally, is particularly noteworthy for the daunting standard it imposes upon States and localities contemplating the use of race-conscious measures to eradicate the present effects of prior discrimination and prevent its perpetuation. The majority restricts the use of such measures to situations in which a State or locality can put forth "a prima facie case of a constitutional or statutory violation." *Ante,* at 725. In so doing, the majority calls into question the validity of the business set-asides which dozens of municipalities across this Nation have adopted on the authority of *Fullilove.*

Nothing in the Constitution or in the prior decisions of this Court supports limiting state authority to confront the effects of past discrimination to those situations in which a prima facie case of a constitutional or statutory violation can be made out. By its very terms, the majority's standard effectively cedes control of a large component of the content of that constitutional provision to Congress and to state legislatures. If an antecedent Virginia or Richmond law had defined as unlawful the award to nonminorities of an overwhelming share of a city's contracting dollars, for example, Richmond's subsequent set-aside initiative would then satisfy ***556** the majority's standard. But without such a law, the initiative might not withstand constitutional scrutiny. The meaning of "equal protection of the laws" thus turns on the happenstance of whether a state or local body has previously defined illegal discrimination. Indeed, given that racially discriminatory cities may be the ones least likely to have tough antidiscrimination laws on their books, the majority's constitutional incorporation of state and local statutes has the perverse effect of inhibiting those States or localities with the worst records of official racism from taking remedial action.

Similar flaws would inhere in the majority's standard even if it incorporated only federal antidiscrimination statutes. If Congress tomorrow dramatically expanded Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. § 2000e *et seq.*—or alternatively, if it repealed that legislation altogether—the meaning of equal protection would change precipitately along with it. Whatever the Framers of the Fourteenth Amendment had in mind in 1868, it certainly was not that the content of their Amendment would turn on the amendments to or the evolving interpretations of a federal statute passed nearly a century later.[12]

***557 **755** To the degree that this parsimonious standard is grounded on a view that either § 1 or § 5 of the Fourteenth Amendment substantially disempowered States and localities from remedying past racial discrimination, *ante,* at 720, 727, the majority is seriously mistaken. With respect, first, to § 5, our precedents have never suggested that this provision—or, for that matter, its companion federal-empowerment provisions in the Thirteenth and Fifteenth Amendments—was meant to pre-empt or limit state police power to undertake race-conscious remedial measures. To the contrary, in *Katzenbach v. Morgan,* 384 U.S. 641, 86 S.Ct. 1717, 16 L.Ed.2d 828 (1966), we held that § 5 "is a *positive* grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment." *Id.,* at 651, 86 S.Ct., at 1723 (emphasis added); see *id.,* at 653–656, 86 S.Ct., at 1725–1726; *South Carolina v. Katzenbach,* 383 U.S. 301, 326–327, 86 S.Ct. 803, 817–818, 15 L.Ed.2d 769 (1966) (interpreting similar provision of the Fifteenth Amendment to empower Congress to "implemen[t] the rights created" by its passage); see also ***558** *City of Rome v. United States,* 446 U.S. 156, 173, 100 S.Ct. 1548, 1559, 64 L.Ed.2d 119 (1980) (same). Indeed, we have held that Congress has this authority even where no constitutional violation has been found. See *Katzenbach v. Morgan, supra* (upholding Voting Rights Act provision nullifying state English literacy requirement we had previously upheld against Equal Protection Clause challenge). Certainly *Fullilove* did not view § 5 either as limiting the traditionally broad police powers of the States to fight discrimination, or as mandating a zero-sum game in which state power wanes as federal power waxes. On the contrary, the *Fullilove* plurality invoked § 5 only because it provided specific and certain authorization for the Federal Government's attempt to impose a race-conscious condition on the dispensation of federal funds by state and local grantees. See *Fullilove,* 448 U.S., at 476, 100 S.Ct., at 2774 (basing decision on § 5 because "[i]n certain contexts, there are limitations on the reach of the Commerce Power").

As for § 1, it is too late in the day to assert seriously that the Equal Protection Clause prohibits States—or for that matter, the

Federal Government, to whom the equal protection guarantee has largely been applied, see *Bolling v. Sharpe,* 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884 (1954)—from enacting race-conscious remedies. Our cases in the areas of school desegregation, voting rights, and affirmative action have demonstrated time and again that race is constitutionally germane, precisely because race remains dismayingly relevant in American life.

In adopting its prima facie standard for States and localities, the majority closes its eyes to this constitutional history and social reality. So, too, does Justice SCALIA. He would further limit consideration of race to those cases in which States find it "necessary to eliminate their own maintenance of a system of unlawful racial classification"—a "distinction" which, he states, "explains our school desegregation cases." *Ante,* at 738 (SCALIA, J., concurring in ****756** judgment). But this Court's remedy-stage school desegregation decisions cannot so conveniently be cordoned off. These decisions (like those involving voting rights and affirmative action) ***559** stand for the same broad principles of equal protection which Richmond seeks to vindicate in this case: all persons have equal worth, and it is permissible, given a sufficient factual predicate and appropriate tailoring, for government to take account of race to eradicate the present effects of race-based subjugation denying that basic equality. Justice SCALIA's artful distinction allows him to avoid having to repudiate "our school desegregation cases," *ibid.,* but, like the arbitrary limitation on race-conscious relief adopted by the majority, his approach "would freeze the status quo that is the very target" of the remedial actions of States and localities. *McDaniel v. Barresi,* 402 U.S., at 41, 91 S.Ct., at 1288; see also *North Carolina Bd. of Education v. Swann,* 402 U.S., at 46, 91 S.Ct., at 1286 (striking down State's flat prohibition on assignment of pupils on basis of race as impeding an "effective remedy"); *United Jewish Organizations v. Carey,* 430 U.S. 144, 159–162, 97 S.Ct. 996, 1006–1008, 51 L.Ed.2d 229 (1977) (upholding New York's use of racial criteria in drawing district lines so as to comply with § 5 of the Voting Rights Act).

The fact is that Congress' concern in passing the Reconstruction Amendments, and particularly their congressional authorization provisions, was that States would *not* adequately respond to racial violence or discrimination against newly freed slaves. To interpret any aspect of these Amendments as proscribing state remedial responses to these very problems turns the Amendments on their heads. As four Justices, of whom I was one, stated in *University of California Regents v. Bakke:*

> "[There is] no reason to conclude that the States cannot voluntarily accomplish under § 1 of the Fourteenth Amendment what Congress under § 5 of the Fourteenth Amendment validly may authorize or compel either the States or private persons to do. A contrary position would conflict with the traditional understanding recognizing the competence of the States to initiate measures consistent with federal policy in the absence of congressional pre-emption of the subject matter. *Nothing* ***560** *whatever in the legislative history of either the Fourteenth Amendment or the Civil Rights Acts even remotely suggests that the States are foreclosed from furthering the fundamental purpose of equal opportunity to which the Amendment and those Acts are addressed.* Indeed, voluntary initiatives by the States to achieve the national goal of equal opportunity have been recognized to be essential to its attainment. 'To use the Fourteenth Amendment as a sword against such State power would stultify that Amendment.' *Railway Mail Assn. v. Corsi,* 326 U.S. 88, 98, 65 S.Ct. 1483, 1489, 89 L.Ed. 2072 (Frankfurter, J., concurring)." 438 U.S., at 368, 98 S.Ct., at 2788 (footnote omitted; emphasis added).

In short, there is simply no credible evidence that the Framers of the Fourteenth Amendment sought "to transfer the security and protection of all the civil rights ... from the States to the Federal government." The *Slaughter–House Cases,* 16 Wall. 36, 77–78, 21 L.Ed. 394 (1873).[13] The three Reconstruction Amendments undeniably "worked a dramatic change in the balance between congressional and state power," *ante,* at 720: they forbade state-sanctioned slavery, forbade the state-sanctioned denial of the right to vote, and (until the content of the Equal Protection Clause was substantially applied to the Federal Government through the Due Process Clause of the Fifth Amendment) uniquely forbade States to deny equal protection. ****757** The Amendments also specifically empowered the Federal Government to combat discrimination at a time when the breadth of federal power under the Constitution was less apparent than it is today. But nothing in the Amendments themselves, or in our long history of interpreting or applying those momentous charters, suggests that ***561** States, exercising their police power, are in any way constitutionally inhibited from working alongside the Federal Government in the fight against discrimination and its effects.

IV

The majority today sounds a full-scale retreat from the Court's longstanding solicitude to race-conscious remedial efforts "directed toward deliverance of the century-old promise of equality of economic opportunity." *Fullilove,* 448 U.S., at 463, 100 S.Ct., at 2767. The new and restrictive tests it applies scuttle one city's effort to surmount its discriminatory past, and imperil those of dozens more localities. I, however, profoundly disagree with the cramped vision of the Equal Protection Clause which the majority offers today and with its application of that vision to Richmond, Virginia's, laudable set-aside plan. The battle against pernicious racial discrimination or its effects is nowhere near won. I must dissent.

Justice BLACKMUN, with whom Justice BRENNAN joins, dissenting.

I join Justice MARSHALL's perceptive and incisive opinion revealing great sensitivity toward those who have suffered the pains of economic discrimination in the construction trades for so long.

I never thought that I would live to see the day when the city of Richmond, Virginia, the cradle of the Old Confederacy, sought on its own, within a narrow confine, to lessen the stark impact of persistent discrimination. But Richmond, to its great credit, acted. Yet this Court, the supposed bastion of equality, strikes down Richmond's efforts as though discrimination had never existed or was not demonstrated in this particular litigation. Justice MARSHALL convincingly discloses the fallacy and the shallowness of that approach. History is irrefutable, even though one might sympathize with those who—though possibly innocent in themselves—benefit from the wrongs of past decades.

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

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Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

1 The expiration of the ordinance has not rendered the controversy between the city and appellee moot. There remains a live controversy between the parties over whether Richmond's refusal to award appellee a contract pursuant to the ordinance was unlawful and thus entitles appellee to damages. See *Memphis Light, Gas & Water Div. v. Craft,* 436 U.S. 1, 8–9, 98 S.Ct. 1554, 1559–1560, 56 L.Ed.2d 30 (1978).

2 In its original panel opinion, the Court of Appeals held that under Virginia law the city had the legal authority to enact the set-aside program. *Croson I,* 779 F.2d 181, 184–186 (CA4 1985). That determination was not disturbed by the court's subsequent holding that the Plan violated the Equal Protection Clause.

3 Since 1975 the city of Richmond has had an ordinance on the books prohibiting both discrimination in the award of public contracts and employment discrimination by public contractors. See Reply Brief for Appellant 18, n. 42 (citing Richmond, Va.,

City Code, § 17.2 *et seq.* (1985)). The city points to no evidence that its prime contractors have been violating the ordinance in either their employment or subcontracting practices. The complete silence of the record concerning enforcement of the city's own antidiscrimination ordinance flies in the face of the dissent's vision of a "tight-knit industry" which has prevented blacks from obtaining the experience necessary to participate in construction contracting. See *post,* at 747–748.

[1] In my view the Court's approach to this case gives unwarranted deference to race-based legislative action that purports to serve a purely remedial goal, and overlooks the potential value of race-based determinations that may serve other valid purposes. With regard to the former point—as I explained at some length in *Fullilove v. Klutznick,* 448 U.S. 448, 532–554, 100 S.Ct. 2758, 2802–2814, 65 L.Ed.2d 902 (1980) (dissenting opinion)—I am not prepared to assume that even a more narrowly tailored set-aside program supported by stronger findings would be constitutionally justified. Unless the legislature can identify both the particular victims and the particular perpetrators of past discrimination, which is precisely what a court does when it makes findings of fact and conclusions of law, a *remedial* justification for race-based legislation will almost certainly sweep too broadly. With regard to the latter point: I think it unfortunate that the Court in neither *Wygant* nor this case seems prepared to acknowledge that some race-based policy decisions may serve a legitimate public purpose. I agree, of course, that race is so seldom relevant to legislative decisions on how best to foster the public good that legitimate justifications for race-based legislation will usually not be available. But unlike the Court, I would not totally discount the legitimacy of race-based decisions that may produce tangible and fully justified future benefits. See n. 2, *infra;* see also Justice Powell's discussion in *University of California Regents v. Bakke,* 438 U.S. 265, 311–319, 98 S.Ct. 2733, 2759–2763, 57 L.Ed.2d 750 (1978).

[2] "Rather than analyzing a case of this kind by asking whether minority teachers have some sort of special entitlement to jobs as a remedy for sins that were committed in the past, I believe that we should first ask whether the Board's action advances the public interest in educating children for the future.

"[I]n our present society, race is not always irrelevant to sound governmental decisionmaking. To take the most obvious example, in law enforcement, if an undercover agent is needed to infiltrate a group suspected of ongoing criminal behavior—and if the members of the group are all of the same race—it would seem perfectly rational to employ an agent of that race rather than a member of a different racial class. Similarly, in a city with a recent history of racial unrest, the superintendent of police might reasonably conclude that an integrated police force could develop a better relationship with the community and thereby do a more effective job of maintaining law and order than a force composed only of white officers.

"In the context of public education, it is quite obvious that a school board may reasonably conclude that an integrated faculty will be able to provide benefits to the student body that could not be provided by an all-white, or nearly all-white, faculty. For one of the most important lessons that the American public schools teach is that the diverse ethnic, cultural, and national backgrounds that have been brought together in our famous 'melting pot' do not identify essential differences among the human beings that inhabit our land. It is one thing for a white child to be taught by a white teacher that color, like beauty, is only 'skin deep'; it is far more convincing to experience that truth on a day-to-day basis during the routine, ongoing learning process." *Wygant v. Jackson Board of Education,* 476 U.S., at 313–315, 106 S.Ct., at 1867–1869 (footnotes omitted).

[3] See U.S. Const., Art. I, § 9, cl. 3, § 10, cl. 1. Of course, legislatures frequently appropriate funds to compensate victims of past governmental misconduct for which there is no judicial remedy. See, *e.g.,* Pub.L. 100–383, 102 Stat. 903 (provision of restitution to interned Japanese–Americans during World War II). Thus, it would have been consistent with normal practice for the city of Richmond to provide direct monetary compensation to any minority-business enterprise that the city might have injured in the past. Such a voluntary decision by a public body is, however, quite different from a decision to require one private party to compensate another for an unproven injury.

[4] As I pointed out in my separate opinion concurring in the judgment in *United States v. Paradise,* 480 U.S. 149, 193–194, 107 S.Ct. 1053, 1078–1079, 94 L.Ed.2d 203 (1987):

"A party who has been found guilty of repeated and persistent violations of the law bears the burden of demonstrating that the chancellor's efforts to fashion effective relief exceed the bounds of 'reasonableness.' The burden of proof in a case like this is

precisely the opposite of that in cases such as *Wygant v. Jackson Board of Education,* 476 U.S. 267, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986), and *Fullilove v. Klutznick,* 448 U.S. 448, 100 S.Ct. 2758, 65 L.Ed.2d 902 (1980), which did not involve any proven violations of law. In such cases the governmental decisionmaker who would make race-conscious decisions must overcome a strong presumption against them. No such burden rests on a federal district judge who has found that the governmental unit before him is guilty of racially discriminatory conduct that violates the Constitution."

5 "There is only one Equal Protection Clause. It requires every State to govern impartially. It does not direct the courts to apply one standard of review in some cases and a different standard in other cases." *Craig v. Boren,* 429 U.S. 190, 211–212, 97 S.Ct. 451, 464, 50 L.Ed.2d 397 (1976) (STEVENS, J., concurring).

6 "I have always asked myself whether I could find a 'rational basis' for the classification at issue. The term 'rational,' of course, includes a requirement that an impartial lawmaker could logically believe that the classification would serve a legitimate public purpose that transcends the harm to the members of the disadvantaged class. Thus, the word 'rational'—for me at least—includes elements of legitimacy and neutrality that must always characterize the performance of the sovereign's duty to govern impartially.

. . .

"In every equal protection case, we have to ask certain basic questions. What class is harmed by the legislation, and has it been subjected to a 'tradition of disfavor' by our laws? What is the public purpose that is being served by the law? What is the characteristic of the disadvantaged class that justifies the disparate treatment? In most cases the answer to these questions will tell us whether the statute has a 'rational basis.' " *Cleburne v. Cleburne Living Center, Inc.,* 473 U.S., at 452–453, 105 S.Ct., at 3261 (STEVENS, J., concurring).

7 See *ante,* at 726, n. 3.

8 There is surely some question about the power of a legislature to impose a statutory burden on private citizens for engaging in discriminatory practices at a time when such practices were not unlawful. Cf. *Teamsters v. United States,* 431 U.S. 324, 356–357, 360, 97 S.Ct. 1843, 1865, 1867, 52 L.Ed.2d 396 (1977).

9 There is, of course, another possibility that should not be overlooked. The ordinance might be nothing more than a form of patronage. But racial patronage, like a racial gerrymander, is no more defensible than political patronage or a political gerrymander. Cf. *Karcher v. Daggett,* 462 U.S. 725, 744–765, 103 S.Ct. 2653, 2665–2668, 77 L.Ed.2d 133 (1983) (STEVENS, J., concurring); *Rogers v. Lodge,* 458 U.S. 613, 631–653, 102 S.Ct. 3272, 3283–3294, 73 L.Ed.2d 1012 (1982) (STEVENS, J., dissenting); *Mobile v. Bolden,* 446 U.S. 55, 83–94, 100 S.Ct. 1490, 1508–1513, 64 L.Ed.2d 47 (1980) (STEVENS, J., concurring in judgment); *Cousins v. City Council of Chicago,* 466 F.2d 830, 848–853 (CA7) (STEVENS, J., dissenting), cert. denied, 409 U.S. 893, 93 S.Ct. 85, 34 L.Ed.2d 151 (1972). A southern State with a long history of discrimination against Republicans in the awarding of public contracts could not rely on such past discrimination as a basis for granting a legislative preference to Republican contractors in the future.

1 In the interest of convenience, I refer to the opinion in this case authored by Justice O'CONNOR as "the majority," recognizing that certain portions of that opinion have been joined by only a plurality of the Court.

2 Other Reports indicating the dearth of minority-owned businesses include H.R.Rep. No. 92–1615, p. 3 (1972) (Report of the Subcommittee on Minority Small Business Enterprise, finding that the "long history of racial bias" has created "major problems" for minority businessmen); H.R.Doc. No. 92–194, p. 1 (1972) (text of message from President Nixon to Congress, describing federal efforts "to press open new doors of opportunity for millions of Americans to whom those doors had previously been barred, or only half-open"); H.R.Doc. No. 92–169, p. 1 (1971) (text of message from President Nixon to Congress, describing paucity of

minority business ownership and federal efforts to give "every man an equal chance at the starting line").

3 Numerous congressional studies undertaken after 1977 and issued before the Richmond City Council convened in April 1983 found that the exclusion of minorities had continued virtually unabated—and that, because of this legacy of discrimination, minority businesses across the Nation had still failed, as of 1983, to gain a real toehold in the business world. See, *e.g.,* H.R.Rep. No. 95–949, pp. 2, 8 (1978) (Report of House Committee on Small Business, finding that minority businesses "are severely undercapitalized" and that many minorities are disadvantaged "because they are identified as members of certain racial categories"); S.Rep. No. 95–1070, pp. 14–15 (1978), U.S.Code Cong. & Admin.News 1978, pp. 3835, 3848, 3849; (Report of Senate Select Committee on Small Business, finding that the federal effort "has fallen far short of its goal to develop strong and growing disadvantaged small businesses," and "recogniz [ing] the pattern of social and economic discrimination that continues to deprive racial and ethnic minorities, and others, of the opportunity to participate fully in the free enterprise system"); S.Rep. No. 96–31, pp. IX, 107 (1979) (Report of Senate Select Committee on Small Business, finding that many minorities have "suffered the effects of discriminatory practices or similar invidious circumstances over which they have no control"); S.Rep. No. 96–974, p. 3 (1980), U.S.Code Cong. & Admin.News 1980, pp. 4953, 4954 (Report of Senate Select Committee on Small Business, finding that government aid must be "significantly increased" if minority-owned businesses are to "have the maximum practical opportunity to develop into viable small businesses"); H.R.Rep. No. 97–956, p. 35 (1982) (Report of House Committee on Small Business, finding that federal programs to aid minority businesses have had "limited success" to date, but concluding that success could be "greatly expanded" with "appropriate corrective actions"); H.R.Rep. No. 98–3, p. 1 (1983) (Report of House Committee on Small Business, finding that "the small business share of Federal contracts continues to be inadequate").

4 According to testimony by trade association representatives, the Associated General Contractors of Virginia had no blacks among its 130 Richmond-area members, App. 27–28 (remarks of Stephen Watts); the American Subcontractors Association had no blacks among its 80 Richmond members, *id.,* at 36 (remarks of Patrick Murphy); the Professional Contractors Estimators Association had 1 black member among its 60 Richmond members, *id.,* at 39 (remarks of Al Shuman); the Central Virginia Electrical Contractors Association had 1 black member among its 45 members, *id.,* at 40 (remarks of Al Shuman); and the National Electrical Contractors Association had 2 black members among its 81 Virginia members. *Id.,* at 34 (remarks of Mark Singer).

5 Among those testifying to the discriminatory practices of Richmond's construction industry was Councilmember Henry Marsh, who had served as mayor of Richmond from 1977 to 1982. Marsh stated:

"I have been practicing law in this community since 1961, and I am familiar with the practices in the construction industry in this area, in the State, and around the nation. And I can say without equivocation, that the general conduct in the construction industry in this area, and the State and around the nation, is one in which race discrimination and exclusion on the basis of race is widespread.

"I think the situation involved in the City of Richmond is the same.... I think the question of whether or not remedial action is required is not open to question." *Id.,* at 41.

Manuel Deese, who in his capacity as City Manager had oversight responsibility for city procurement matters, stated that he fully agreed with Marsh's analysis. *Id.,* at 42.

6 The representatives of several trade associations did, however, deny that their particular organizations engaged in discrimination. See, *e.g., id.,* at 38 (remarks of Al Shuman, on behalf of the Central Virginia Electrical Contractors Association).

7 For a disturbing description of the lengths to which some Richmond white officials went during recent decades to hold in check growing black political power, see J. Moeser & R. Dennis, The Politics of Annexation—Oligarchic Power in a Southern City 50–188 (1982).

[8] Again the dissenting judge—who would have consolidated the school districts—elaborated:

"[M]any other instances of state and private action contribut[ed] to the concentration of black citizens within Richmond and white citizens without. These were principally in the area of residential development. Racially restrictive convenants were freely employed. Racially discriminatory practices in the prospective purchase of county property by black purchasers were followed. Urban renewal, subsidized public housing and government-sponsored home mortgage insurance had been undertaken on a racially discriminatory basis. [The neighboring counties] provided schools, roads, zoning and development approval for the rapid growth of the white population in each county at the expense of the city, without making any attempt to assure that the development that they made possible was integrated. Superimposed on the pattern of government-aided residential segregation ... had been a discriminatory policy of school construction, i.e., the selection of school construction sites in the center of racially identifiable neighborhoods manifestly to serve the educational needs of students of a single race.

"The majority does not question the accuracy of these facts." 462 F.2d, at 1075–1076 (Winter, J.) (emphasis in original) (footnote omitted).

[9] Cf. *Fullilove v. Klutznick,* 448 U.S. 448, 541, 100 S.Ct. 2758, 2807, 65 L.Ed.2d 902 (1980) (STEVENS, J., dissenting) (noting statements of sponsors of federal set-aside that measure was designed to give their constituents "a piece of the action").

[10] Although the majority sharply criticizes Richmond for using data which it did not itself develop, it is noteworthy that the federal set-aside program upheld in *Fullilove* was adopted as a floor amendment "without any congressional hearings or investigation whatsoever." L. Tribe, American Constitutional Law 345 (2d ed. 1988). The principal opinion in *Fullilove* justified the set-aside by relying heavily on the aforementioned studies by agencies like the Small Business Administration and on legislative reports prepared in connection with prior, failed legislation. See *Fullilove v. Klutznick,* 448 U.S., at 478, 100 S.Ct., at 2774 (opinion of Burger, C.J.) ("Although the Act recites no preambulary 'findings' on the subject, we are satisfied that Congress had abundant historical basis from which it could conclude that traditional procurement practices, when applied to minority businesses, could perpetuate the effects of prior discrimination"); see also *id.,* at 549–550, and n. 25, 100 S.Ct., at 2811–2812, and n. 25 (STEVENS, J., dissenting) (noting "perfunctory" consideration accorded the set-aside provision); Days, Fullilove, 96 Yale L.J. 453, 465 (1987) ("One can only marvel at the fact that the minority set-aside provision was enacted into law without hearings or committee reports, and with only token opposition") (citation and footnote omitted).

[11] The majority also faults Richmond's ordinance for including within its definition of "minority group members" not only black citizens, but also citizens who are "Spanish-speaking, Oriental, Indian, Eskimo, or Aleut persons." *Ante,* at 728. This is, of course, precisely the same definition Congress adopted in its set-aside legislation. *Fullilove, supra,* 448 U.S., at 454, 100 S.Ct., at 2762. Even accepting the majority's view that Richmond's ordinance is overbroad because it includes groups, such as Eskimos or Aleuts, about whom no evidence of local discrimination has been proffered, it does not necessarily follow that the balance of Richmond's ordinance should be invalidated.

[12] Although the majority purports to "adher[e] to the standard of review employed in *Wygant,*" *ante,* at 722, the "prima facie case" standard it adopts marks an implicit rejection of the more generally framed "strong basis in evidence" test endorsed by the *Wygant v. Jackson Bd. of Education,* 476 U.S. 267, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986) plurality, and the similar "firm basis" test endorsed by Justice O'CONNOR in her separate concurrence in that case. See *id.,* at 289, 106 S.Ct., at 1855; *id.,* at 286, 106 S.Ct., at 1853. Under those tests, proving a prima facie violation of Title VII would appear to have been but one means of adducing sufficient proof to satisfy Equal Protection Clause analysis. See *Johnson v. Transportation Agency, Santa Clara County,* 480 U.S. 616, 632, 107 S.Ct. 1442, 1452, 94 L.Ed.2d 615 (1987) (plurality opinion) (criticizing suggestion that race-conscious relief be conditioned on showing of a prima facie Title VII violation).

The rhetoric of today's majority opinion departs from *Wygant* in another significant respect. In *Wygant,* a majority of this Court rejected as unduly inhibiting and constitutionally unsupported a requirement that a municipality demonstrate that its remedial plan is designed only to benefit specific victims of discrimination. See 476 U.S., at 277–278, 106 S.Ct., at 1849; *id.,* at 286, 106 S.Ct., at 1853 (O'CONNOR, J., concurring in part and concurring in judgment); *id.,* at 305, 106 S.Ct., at 1863 (MARSHALL, J., dissenting). Justice O'CONNOR noted the Court's general agreement that a "remedial purpose need not be accompanied by contemporaneous findings of actual discrimination to be accepted as legitimate as long as the public actor has a firm basis for believing that remedial action is required.... [A] plan need not be limited to the remedying of specific instances of identified

discrimination for it to be deemed sufficiently 'narrowly tailored,' or 'substantially related,' to the correction of prior discrimination by the state actor." *Id.,* at 286–287, 106 S.Ct., at 1853–1854. The majority's opinion today, however, hints that a "specific victims" proof requirement might be appropriate in equal protection cases. See, *e.g., ante,* at 727 (States and localities "must identify that discrimination ... with some specificity"). Given that just three Terms ago this Court rejected the "specific victims" idea as untenable, I believe these references—and the majority's cryptic "identified discrimination" requirement—cannot be read to require States and localities to make such highly particularized showings. Rather, I take the majority's standard of "identified discrimination" merely to require some quantum of proof of discrimination within a given jurisdiction that exceeds the proof which Richmond has put forth here.

13 Tellingly, the sole support the majority offers for its view that the Framers of the Fourteenth Amendment intended such a result are two law review articles analyzing this Court's recent affirmative-action decisions, and a Court of Appeals decision which relies upon statements by James Madison. *Ante,* at 720. Madison, of course, had been dead for 32 years when the Fourteenth Amendment was enacted.

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906 F.2d 524
United States Court of Appeals,
Eleventh Circuit.

CONCERNED CITIZENS OF HARDEE COUNTY, etc., et al., Plaintiffs–Appellants,
v.
HARDEE COUNTY BOARD OF COMMISSIONERS, etc., et al., Defendants–Appellees.
CONCERNED CITIZENS OF HARDEE COUNTY, etc., et al., Plaintiffs–Appellants,
v.
HARDEE COUNTY SCHOOL BOARD, et al., Defendants–Appellees.

No. 89–3436.
|
July 19, 1990.
|
As Amended Aug. 6, 1990.

Synopsis

Class brought action against board of county commissioners and county school board under Voting Rights Act, seeking declaratory and injunctive relief against at-large county-wide elections for members of boards. The United States District Court for the Middle District of Florida, Nos. 86–209–CIV-T–17 and 86–1161–CIV-T–17, Clarence C. Newcomer, J., sitting by designation, denied relief, and class appealed. The Court of Appeals, Hatchett, Circuit Judge, held that: (1) class failed to prove political cohesiveness, as required for vote dilution claim under Voting Rights Act, and (2) class' new theory of recovery, that "majority" requirement of vote dilution claim could be satisfied by "functional majority," rather than numerical majority, was not properly before appellate court.

Affirmed.

Attorneys and Law Firms

***525** David M. Lipman, Miami, Fla., James A. Tucker, Florida Rural Legal Services, Inc., Fort Myers, Fla., for plaintiffs-appellants.

Robert M. Fournier, Sarasota, Fla., Katharine I. Butler, University of South Carolina Law Center, Columbia, S.C., Gary Alan Vorbeck, Arcadia, Fla., for defendants-appellees.

Appeal from the United States District Court for the Middle District of Florida.

Before HATCHETT and ANDERSON, Circuit Judges, and DYER, Senior Circuit Judge.

Opinion

HATCHETT, Circuit Judge:

In this voting rights class action, we are asked to determine whether the district court erred when it denied relief under section 2 et seq. of the Voting Rights Act of 1965. Finding (1) that the class of black and hispanic voters failed to satisfy the second element of a section 2 vote dilution claim, political cohesiveness, and (2) that the class's new theory of recovery is not properly before this court, we affirm the district court.

FACTS

In 1980, Hardee County, in southwestern Florida, had a total population of 19,379. Of that number, 75.1 percent were white, 8.2 percent were black, and 16.7 percent were hispanic. Black citizens living in Hardee County are primarily concentrated in two residential areas, and hispanic residents are dispersed in pockets throughout the county. In February, 1988, Hardee County had 7,124 registered voters with blacks comprising 8 percent and hispanics comprising 5.1 percent.

The Hardee County Board of County Commissioners ("Commission") governs the county, and the Hardee County School Board ("School Board") operates the county's school system. Each body is composed of five members who serve staggered four-year terms. Candidates run for the seat on the Commission or School Board that bears the number of the district in which they live. In both primary and general elections, the entire county electorate votes for one candidate from each residential district. To be elected, candidates must receive a plurality of the vote in a county-wide general election.

The only two blacks to ever run for county-wide office were defeated. No hispanic has ever run for county-wide office.

PROCEDURAL HISTORY

In 1986, the Hardee County Branch of the National Association for the Advancement of Colored People ("NAACP"), Concerned Citizens of Hardee County, and individual black and hispanic class representatives (the "class") filed separate actions against the Commission and the School Board (collectively "Hardee County"). Among other things, the class alleges that the at-large election systems used for electing the Commission and School Board unlawfully dilute the combined voting strength of blacks and hispanics in violation of section 2 of the Voting Rights Act of 1965, as amended. 42 U.S.C. § 1973. The class also alleges that the School Board's at-large election system offends the fourteenth and fifteenth amendments to the Constitution. In both actions, the class seeks declaratory and injunctive relief against at-large county-wide elections for members of the Commission and the School Board.

On June 17, 1986, the district court certified the case against the Commission as a class action consisting of all black and hispanic residents of Hardee County. Fed.R.Civ.P. 23(b)(2). On November 12, 1986, the case against the School Board was also certified as a class action, and on December 2, 1986, the district court consolidated ***526** these lawsuits. In March, 1989, following a non-jury trial, the district court denied the class relief concluding that blacks and hispanics in Hardee County are not politically cohesive.

CONTENTIONS

The class does not challenge the district court's finding that blacks and hispanics are not politically cohesive, but nevertheless contends that it is entitled to relief. According to the class, it is entitled to relief because section 2 only requires a "functional majority," as opposed to a numerical majority. Therefore, the "not politically cohesive" finding is not fatal to its lawsuit. Consequently, the class contends, black voters alone in Hardee County are entitled to relief because they (1) constitute a "functional majority" in the proposed single-member district, (2) are politically cohesive and (3) are racially polarized.

In response, Hardee County contends that the district court properly denied the class relief on the cohesiveness issue and that the question of whether a "functional majority" satisfies section 2's "majority" requirement is not properly before this court.

ISSUE PRESENTED

The sole issue is whether the class is entitled to relief under section 2 of the Voting Rights Act.

DISCUSSION

A. Standard of Review

In reviewing the district court's order, we must independently construe the scope of section 2 of the Voting Rights Act and the governing legal standards. *See Thornburg v. Gingles,* 478 U.S. 30, 79, 106 S.Ct. 2752, 2781, 92 L.Ed.2d 25 (1986). Our review of the district court's findings of fact is controlled by the clearly-erroneous standard. *Gingles,* 478 U.S. at 78–79, 106 S.Ct. at 2780–81; Fed.R.Civ.P. 52(a). The clearly erroneous standard, however, does not prevent this court "from correcting findings of fact based on misconceptions of the law." *Carrollton Branch of the NAACP v. Stallings,* 829 F.2d 1547, 1554 (11th Cir.1987), *cert. denied,* 485 U.S. 936, 108 S.Ct. 1111, 99 L.Ed.2d 272 (1988); *see also Gingles,* 478 U.S. at 79, 106 S.Ct. at 2781.

B. Vote Dilution and Section 2 of the Voting Rights Act

In this case, to prevail under section 2 of the Voting Rights Act, the class must prove three factors. First, the class must "demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district." *Gingles,* 478 U.S. at 50, 106 S.Ct. at 2766. Second, it "must be able to show that it is politically cohesive." *Gingles,* 478 U.S. at 51, 106 S.Ct. at 2766. Two minority groups (in this case blacks and hispanics) may be a single section 2 minority if they can establish that they behave in a politically cohesive manner. *See Campos v. City of Baytown, Texas,* 840 F.2d 1240, 1244 (5th Cir.1988), *cert. denied,* 492 U.S. 905, 109 S.Ct. 3213, 106 L.Ed.2d 564 (1989); *League of United Latin American Citizens v. Midland Independent School Dist.,* 812 F.2d 1494, 1500–02 (5th Cir.), *vacated and aff'd on other grounds,* 829 F.2d 546 (5th Cir.1987). Third, the class is required to prove that the "white majority votes sufficiently as a bloc to enable it—in the absence of special circumstances, such as the minority candidate running unopposed ...—usually to defeat the minority's preferred candidate." *Gingles,* 478 U.S. at 51, 106 S.Ct. at 2766–67.

Although a district court may consider the "totality of the circumstances" (e.g. "the lingering effects of past discrimination [and] the use of appeals to racial bias in election campaigns") when analyzing a section 2 claim of vote dilution, those factors are "supportive of, but *not essential* to, a minority voter's claim." *Gingles,* 478 U.S. at 48 n. 15, 106 S.Ct. at 2765 n. 15 (emphasis in original). Proof of the three *Gingles* elements is *necessary* for the type of section 2 vote dilution claim brought here.

C. Analysis

In this case, the district court denied the class relief because it failed to ***527** demonstrate that black and hispanic voters in Hardee County are politically cohesive. Our review of the record shows that the class offered little evidence that blacks and hispanics in Hardee County worked together and formed political coalitions. Instead, the class presented anecdotal testimony regarding individual instances where hispanic voters supported and worked for black candidates. More importantly, the class failed to demonstrate that blacks and hispanics in Hardee County have ever voted together. Finally, the class does not contest on appeal the district court's determination that blacks and hispanics in Hardee County are not politically cohesive.

Specifically, the class now contends, for the first time on appeal, that the black subclass alone is sufficiently numerous, politically cohesive and racially polarized to satisfy the three-part *Gingles* test. According to the class, the first element of a section 2 claim (the "majority" requirement) only requires a "functional majority," not a numerical majority. While neither the United States Supreme Court nor the Eleventh Circuit has passed on this legal theory, the class bases this conclusion upon its reading of both *Gingles* and Congress's intent when amending section 2 of the Voting Rights Act in 1982.

Applying this theory to the present case, the class argues that blacks in Hardee County constitute a "functional majority" in the proposed single-member district. This is so, the class asserts, because blacks (who allegedly constitute 36 percent of the electorate in the proposed district) could, given the average white cross-over vote, elect a candidate of their choice. As for the remaining elements of a section 2 claim, the class maintains that the record demonstrates (1) that blacks in Hardee County are politically cohesive and (2) that black and white voting is racially polarized. Although the class acknowledges that this theory of recovery was neither presented to the district court nor addressed in its opinion, the class maintains that this court may grant relief in order to avoid a plain miscarriage of justice. *See Singleton v. Wulff,* 428 U.S. 106, 121, 96 S.Ct. 2868, 2877, 49 L.Ed.2d 826 (1976); *Roofing & Sheet Metal Services, Inc. v. La Quinta Motor Inns, Inc.,* 689 F.2d 982, 989–90 (11th Cir.1982).

We decline to consider the class's new theory of recovery for a number of reasons. First, the "[f]ailure to raise an issue, objection or theory of relief in the first instance to the trial court generally is fatal." *Denis v. Liberty Mutual Insurance Co.,* 791 F.2d 846, 848–49 (11th Cir.1986). The class had ample opportunity to raise this theory before the district court and chose not to do so. Fairness to opponents and conservation of judicial resources require that a litigant present all of its theories at the first available opportunity. Second, the class's theory of recovery is based upon a fact (whether blacks can constitute a "functional" majority in the proposed single-member district) not found by the district court. Finally, the class has not alleged a "miscarriage of justice" sufficient to justify ignoring the usual rule preventing a party from raising an issue for the first time on appeal.[*]

CONCLUSION

We hold that the district court properly concluded that the class failed to prove political cohesiveness as required for a section 2 claim. Further, we conclude that the class's new theory of recovery is not properly before this court. Accordingly, we affirm the district court.

AFFIRMED.

All Citations

906 F.2d 524

Footnotes

[*] The real problem in this case is that the black population is too small and scattered too widely across the county. Additionally, the "functional majority" theory, even in a case where the record is fully developed, may bring with it undesirable consequences.

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137 S.Ct. 1455
Supreme Court of the United States

Roy COOPER, Governor of North Carolina, et al., appellants
v.
David HARRIS, et al.

No. 15–1262
|
Argued Dec. 5, 2016.
|
Decided May 22, 2017.

Synopsis

Background: Registered voters brought action challenging the redistricting of two North Carolina congressional districts as racial gerrymanders in violation of the Equal Protection Clause of the Fourteenth Amendment. After a bench trial, a three-judge panel of the United States District Court for the Middle District of North Carolina, Roger L. Gregory, Circuit Judge, 159 F.Supp.3d 600, ruled in favor of voters. Probable jurisdiction was noted.

Holdings: The Supreme Court, Justice Kagan, held that:

deference to District Court's findings, under clearly erroneous standard of review, was warranted;

finding that race was predominant factor in drawing one district as majority-minority district was not clearly erroneous;

State lacked strong basis in evidence for believing that it needed a majority-minority district in order to avoid liability under § 2 of Voting Rights Act (VRA) for vote dilution; and

finding that racial gerrymandering rather than political gerrymandering was predominant factor in drawing the other district as majority-minority district was not clearly erroneous.

Affirmed.

Justice Thomas filed a concurring opinion.

Justice Alito filed an opinion concurring in the judgment in part and dissenting in part, in which Chief Justice Roberts and Justice Kennedy joined.

Justice Gorsuch took no part in the consideration or decision of the case.

****1459** *Syllabus*[*]

***285** The Equal Protection Clause of the Fourteenth Amendment prevents a State, in the absence of "sufficient justification," from "separating its citizens into different voting districts on the basis of race." *Bethune–Hill v. Virginia State Bd. of Elections,* 580 U.S. ——, ——, 137 S.Ct. 788, 797, 197 L.Ed.2d 85. When a voter sues state officials for drawing such

race-based lines, this Court's decisions call for a two-step analysis. First, the plaintiff must prove that "race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district." *Miller v. Johnson,* 515 U.S. 900, 916, 115 S.Ct. 2475, 132 L.Ed.2d 762. Second, if racial considerations did predominate, the State must prove that its race-based sorting of voters serves a "compelling interest" and is "narrowly tailored" to that end, *Bethune–Hill,* 580 U.S., at ——, 137 S.Ct., at 800. This Court has long assumed that one compelling interest is compliance with the Voting Rights Act of 1965 (VRA or Act). When a State invokes the VRA to justify race-based districting, it must show (to meet the "narrow tailoring" requirement) that it had "good reasons" for concluding that the statute required its action. *Alabama Legislative Black Caucus v. Alabama,* 575 U.S. ——, ——, 135 S.Ct. 1257, 1274, 191 L.Ed.2d 314. A district court's factual findings made in the course of this two-step inquiry are reviewed only for clear error. See Fed. Rule Civ. Proc. 52(a)(6); *Easley v. Cromartie,* 532 U.S. 234, 242, 121 S.Ct. 1452, 149 L.Ed.2d 430 (*Cromartie II*).

This case concerns North Carolina's redrawing of two congressional districts, District 1 and District 12, after the 2010 census. Prior to that redistricting, neither district had a majority black voting-age population (BVAP), but both consistently elected the candidates preferred by most African–American voters. The new map significantly altered both District 1 and District 12. The State needed to add almost 100,000 people to District 1 to comply with the one-person-one-vote principle, and it chose to take most of those people from heavily black areas of Durham—increasing the district's BVAP from 48.6% to 52.7%. The State also reconfigured District 12, increasing its BVAP from 43.8% to 50.7%. Registered voters in those districts (here called "the plaintiffs") filed suit against North Carolina officials (collectively, "the State" or "North Carolina"), complaining of impermissible racial gerrymanders. ***286** A three-judge District Court held both districts unconstitutional. It found that racial considerations predominated in the drawing of District 1's lines and rejected the State's claim that this action was justified by the VRA. As for District 12, the court again found that race predominated, and it explained that the State made no attempt to justify its attention to race in designing that district.

Held:

1. North Carolina's victory in a similar state-court lawsuit does not dictate the disposition of this case or alter the applicable standard of review. Before this case was filed, a state trial court rejected a claim by several civil rights groups that ****1460** Districts 1 and 12 were unlawful racial gerrymanders. The North Carolina Supreme Court affirmed that decision under the state-court equivalent of clear error review. The State claims that the plaintiffs are members of the same organizations that brought the earlier case, and thus precluded from raising the same questions anew. But the State never satisfied the District Court that the alleged affiliation really existed. And because the District Court's factual finding was reasonable, it defeats North Carolina's attempt to argue for claim or issue preclusion here.

The State's backup argument about the proper standard of review also falls short. The rule that a trial court's factual findings are reviewed only for clear error contains no exception for findings that diverge from those made in another court. See Fed. Rule Civ. Proc. 52(a)(6). Although the state court's decision is certainly relevant, the premise of clear error review is that there are often "two permissible views of the evidence." *Anderson v. Bessemer City,* 470 U.S. 564, 574, 105 S.Ct. 1504, 84 L.Ed.2d 518. Even assuming that the state court's findings capture one such view, the only question here is whether the District Court's assessment represents another. Pp. 1467 – 1468.

2. The District Court did not err in concluding that race furnished the predominant rationale for District 1's redesign and that the State's interest in complying with the VRA could not justify that consideration of race. Pp. 1468 – 1472.

(a) The record shows that the State purposefully established a racial target for the district and that the target "had a direct and significant impact" on the district's configuration, *Alabama,* 575 U.S., at ——, 135 S.Ct. at 1271 subordinating other districting criteria. Faced with this body of evidence, the District Court did not clearly err in finding that race predominated in drawing District 1; indeed, it could hardly have concluded anything but. Pp. 1468 – 1469.

(b) North Carolina's use of race as the predominant factor in designing District 1 does not withstand strict scrutiny. The State argues ***287** that it had good reasons to believe that it had to draw a majority-minority district to avoid liability for vote dilution under § 2 of the VRA. *Thornburg v. Gingles,* 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25, identifies three threshold conditions for proving such a vote-dilution claim: (1) A "minority group" must be "sufficiently large and geographically compact to constitute a majority" in some reasonably configured legislative district, *id.,* at 50, 106 S.Ct. 2752; (2) the minority group must be "politically cohesive," *id.,* at 51, 106 S.Ct. 2752; and (3) a district's white majority must "vote[ ] sufficiently as a bloc" to usually "defeat the minority's preferred candidate," *ibid.* If a State has good reason to think that all

three of these conditions are met, then so too it has good reason to believe that § 2 requires drawing a majority-minority district. But if not, then not.

Here, electoral history provided no evidence that a § 2 plaintiff could demonstrate the third *Gingles* prerequisite. For nearly 20 years before the new plan's adoption, African–Americans made up less than a majority of District 1's voters, but their preferred candidates scored consistent victories. District 1 thus functioned as a "crossover" district, in which members of the majority help a "large enough" minority to elect its candidate of choice. *Bartlett v. Strickland,* 556 U.S. 1, 13, 129 S.Ct. 1231, 173 L.Ed.2d 173 (plurality opinion). So experience gave the State no reason to think that the VRA required it to ramp up District 1's BVAP.

The State counters that because it needed to substantially increase District ****1461** 1's population, the question facing the state mapmakers was not whether the *then-existing* District 1 violated § 2, but whether the *future* District 1 would do so if drawn without regard to race. But that reasoning, taken alone, cannot justify the State's race-based redesign of the district. Most important, the State points to no meaningful legislative inquiry into the key issue it identifies: whether a new, enlarged District 1, created without a focus on race, could lead to § 2 liability. To have a strong basis to conclude that § 2 demands race-based measures to augment a district's BVAP, the State must evaluate whether a plaintiff could establish the *Gingles* preconditions in a new district created without those measures. Nothing in the legislative record here fits that description. And that is no accident: The redistricters believed that this Court's decision in *Strickland* mandated a 50%-plus BVAP in District 1. They apparently reasoned that if, as *Strickland* held, § 2 does not *require* crossover districts (for groups insufficiently large under *Gingles*), then § 2 also cannot be *satisfied by* crossover districts (for groups meeting *Gingles* ' size condition). But, as this Court's § 2 jurisprudence makes clear, unless *each* of the three *Gingles* prerequisites is established, "there neither has been a wrong nor can be a remedy." *Growe v. Emison,* 507 U.S. 25, 41, 113 S.Ct. 1075, 122 L.Ed.2d 388. North Carolina's belief that it was compelled to redraw District 1 (a successful crossover district) as a ***288** majority-minority district thus rested on a pure error of law. Accordingly, the Court upholds the District Court's conclusion that the State's use of race as the predominant factor in designing District 1 does not withstand strict scrutiny. Pp. 1469 – 1472.

3. The District Court also did not clearly err by finding that race predominated in the redrawing of District 12. Pp. 1472 – 1481.

(a) The district's legality turns solely on which of two possible reasons predominantly explains its reconfiguration. The plaintiffs contended at trial that North Carolina intentionally increased District 12's BVAP in the name of ensuring preclearance under § 5 of the VRA. According to the State, by contrast, the mapmakers moved voters in and out of the district as part of a "strictly" political gerrymander, without regard to race. After hearing evidence supporting both parties' accounts, the District Court accepted the plaintiffs'.

Getting to the bottom of a dispute like this one poses special challenges for a trial court, which must make " 'a sensitive inquiry' " into all " 'circumstantial and direct evidence of intent' " to assess whether the plaintiffs have proved that race, not politics, drove a district's lines. *Hunt v. Cromartie,* 526 U.S. 541, 546, 119 S.Ct. 1545, 143 L.Ed.2d 731 (*Cromartie I*). This Court's job is different—and generally easier. It affirms a trial court's factual finding as to racial predominance so long as the finding is "plausible"; it reverses only when "left with the definite and firm conviction that a mistake has been committed." *Anderson,* 470 U.S., at 573–574, 105 S.Ct. 1504. In assessing a finding's plausibility, moreover, the Court gives singular deference to a trial court's judgments about the credibility of witnesses. See Fed. Rule Civ. Proc. 52(a)(6). Applying those principles here, the evidence at trial—including live witness testimony subject to credibility determinations—adequately supports the District Court's conclusion that race, not politics, accounted for District 12's reconfiguration. And contrary to the State's view, the court had no call to dismiss this challenge just because the plaintiffs did not proffer an alternative design for District 12. Pp. 1472 – 1474.

(b) By slimming the district and adding a couple of knobs to its snakelike body, ****1462** North Carolina added 35,000 African–Americans and subtracted 50,000 whites, turning District 12 into a majority-minority district. State Senator Robert Rucho and State Representative David Lewis—the chairs of the two committees responsible for preparing the revamped plan—publicly stated that racial considerations lay behind District 12's augmented BVAP. Specifically, Rucho and Lewis explained that because part of Guilford County, a jurisdiction covered by § 5 of the VRA, lay in the district, they had increased the district's BVAP to ensure preclearance of the plan. Dr. Thomas Hofeller, their hired mapmaker, confirmed that intent. The State's preclearance submission ***289** to the Justice Department indicated a similar determination to concentrate black voters in District 12. And, in testimony that the District Court found credible, Congressman Mel Watt testified that

Rucho disclosed a majority-minority target to him in 2011. Hofeller testified that he had drawn District 12's lines based on political data, and that he checked the racial data only *after* he drew a politics-based line between adjacent areas in Guilford County. But the District Court disbelieved Hofeller's asserted indifference to the new district's racial composition, pointing to his contrary deposition testimony and a significant contradiction in his trial testimony. Finally, an expert report lent circumstantial support to the plaintiffs' case, showing that, regardless of party, a black voter in the region was three to four times more likely than a white voter to cast a ballot within District 12's borders.

The District Court's assessment that all this evidence proved racial predominance clears the bar of clear error review. Maybe this Court would have evaluated the testimony differently had it presided over the trial; or then again, maybe it would not have. Either way, the Court is far from having a "definite and firm conviction" that the District Court made a mistake in concluding from the record before it that racial considerations predominated in District 12's design. Pp. 1474 – 1478.

(c) Finally, North Carolina argues that when race and politics are competing explanations of a district's lines, plaintiffs must introduce an alternative map that achieves a State's asserted political goals while improving racial balance. Such a map can serve as key evidence in a race-versus-politics dispute, but it is hardly the *only* means to disprove a State's contention that politics drove a district's lines. In this case, the plaintiffs' introduction of mostly direct and some circumstantial evidence gave the District Court a sufficient basis, sans any map, to resolve the race-or-politics question. Although a plaintiff will sometimes need an alternative map, as a practical matter, to make his case, such a map is merely an evidentiary tool to show that an equal protection violation has occurred; neither its presence nor its absence can itself resolve a racial gerrymandering claim.

North Carolina claims that a passage of this Court's opinion in *Cromartie II* makes an alternative map essential in cases like this one, but the reasoning of *Cromartie II* belies that reading. The Court's opinion nowhere attempts to explicate or justify the categorical rule that the State claims to find there, and the entire thrust of the opinion runs counter to an inflexible counter-map requirement. Rightly understood, the passage on which the State relies had a different and narrower point: Given the weak evidence of a racial gerrymander offered in *Cromartie II,* only maps that would *actually* show what the plaintiffs' had not could carry the day. This case, in contrast, turned not on the possibility ***290** of creating more optimally constructed districts, but on direct evidence ****1463** of the General Assembly's intent in creating the actual District 12—including many hours of trial testimony subject to credibility determinations. That evidence, the District Court plausibly found, itself satisfied the plaintiffs' burden of debunking North Carolina's politics defense. Pp. 1478 – 1481.

159 F.Supp.3d 600, affirmed.

KAGAN, J., delivered the opinion of the Court, in which THOMAS, GINSBURG, BREYER, and SOTOMAYOR, JJ., joined. THOMAS, J., filed a concurring opinion. ALITO, J., filed an opinion concurring in the judgment in part and dissenting in part, in which ROBERTS, C.J., and KENNEDY, J., joined. GORSUCH, J., took no part in the consideration or decision of the case.

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Justice KAGAN delivered the opinion of the Court.

***291** The Constitution entrusts States with the job of designing congressional districts. But it also imposes an important constraint: A State may not use race as the predominant factor in drawing district lines unless it has a compelling reason. In this case, a three-judge District Court ruled that North Carolina officials violated that bar when they created two districts whose voting-age populations were majority black. Applying a deferential standard of review to the factual findings underlying that decision, we affirm.

I

A

The Equal Protection Clause of the Fourteenth Amendment limits racial gerrymanders in legislative districting plans. It prevents a State, in the absence of "sufficient justification," from "separating its citizens into different voting districts on the basis of race." *Bethune–Hill v. Virginia State Bd. of Elections,* 580 U.S. ——, ——, 137 S.Ct. 788, 797, 197 L.Ed.2d 85 (2017) (internal quotation marks and alteration omitted). When a voter sues state officials for drawing such race-based lines, our decisions call for a two-step analysis.

First, the plaintiff must prove that "race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district." *Miller v. Johnson,* 515 U.S. 900, 916, 115 S.Ct. 2475, 132 L.Ed.2d 762 (1995). That entails demonstrating ****1464** that the legislature "subordinated" other factors—compactness, respect for political subdivisions, partisan advantage, what have you—to "racial considerations." *Ibid.* The plaintiff may make the required showing through "direct evidence" of legislative intent, "circumstantial evidence of a district's shape and demographics," or a mix of both. *Ibid.*[1]

***292** Second, if racial considerations predominated over others, the design of the district must withstand strict scrutiny. See *Bethune–Hill,* 580 U.S., at ——, 137 S.Ct., at 800. The burden thus shifts to the State to prove that its race-based sorting of voters serves a "compelling interest" and is "narrowly tailored" to that end. *Ibid*. This Court has long assumed that one compelling interest is complying with operative provisions of the Voting Rights Act of 1965 (VRA or Act), 79 Stat. 437, as amended, 52 U.S.C. § 10301 *et seq*. See, *e.g., Shaw v. Hunt,* 517 U.S. 899, 915, 116 S.Ct. 1894, 135 L.Ed.2d 207 (1996) (*Shaw II*).

Two provisions of the VRA—§ 2 and § 5—are involved in this case. §§ 10301, 10304. Section 2 prohibits any "standard, practice, or procedure" that "results in a denial or abridgement of the right ... to vote on account of race." § 10301(a). We have construed that ban to extend to "vote dilution"—brought about, most relevantly here, by the "dispersal of [a group's members] into districts in which they constitute an ineffective minority of voters." *Thornburg v. Gingles,* 478 U.S. 30, 46, n. 11, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986). Section 5, at the time of the districting in dispute, worked through a different mechanism. Before this Court invalidated its coverage formula, see *Shelby County v. Holder,* 570 U.S. ——, 133 S.Ct. 2612, 186 L.Ed.2d 651 (2013), that section required certain jurisdictions (including various North Carolina counties) to pre-clear voting changes with the Department of Justice, so as to forestall "retrogression" in the ability of racial minorities to elect their preferred candidates, *Beer v. United States,* 425 U.S. 130, 141, 96 S.Ct. 1357, 47 L.Ed.2d 629 (1976).

When a State invokes the VRA to justify race-based districting, it must show (to meet the "narrow tailoring" requirement) that it had "a strong basis in evidence" for concluding that the statute required its action. ***293** *Alabama Legislative Black Caucus v. Alabama,* 575 U.S. ——, ——, 135 S.Ct. 1257, 1274, 191 L.Ed.2d 314 (2015). Or said otherwise, the State must establish that it had "good reasons" to think that it would transgress the Act if it did *not* draw race-based district lines. *Ibid*. That "strong basis" (or "good reasons") standard gives States "breathing room" to adopt reasonable compliance measures that may prove, in perfect hindsight, not to have been needed. *Bethune–Hill,* 580 U.S., at ——, 137 S.Ct., at 802.

A district court's assessment of a districting plan, in accordance with the two-step inquiry just described, warrants significant deference on appeal to this Court.[2] We of course retain full power to ****1465** correct a court's errors of law, at either stage of the analysis. But the court's findings of fact—most notably, as to whether racial considerations predominated in drawing district lines—are subject to review only for clear error. See Fed. Rule Civ. Proc. 52(a)(6); *Easley v. Cromartie,* 532 U.S. 234, 242, 121 S.Ct. 1452, 149 L.Ed.2d 430 (2001) (*Cromartie II*); *id.,* at 259, 121 S.Ct. 1452 (THOMAS, J., dissenting). Under that standard, we may not reverse just because we "would have decided the [matter] differently." *Anderson v. Bessemer City,* 470 U.S. 564, 573, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985). A finding that is "plausible" in light of the full record—even if another is equally or more so—must govern. *Id.,* at 574, 105 S.Ct. 1504.

B

This case concerns North Carolina's most recent redrawing of two congressional districts, both of which have long included substantial populations of black voters. In its current incarnation, District 1 is anchored in the northeastern part of the State, with appendages stretching both south and west (the latter into Durham). District 12 begins in the south-central part of the State (where it takes in a large part of Charlotte) and then travels northeast, zig-zagging much ***294** of the way to the State's northern border. (Maps showing the districts are included in an appendix to this opinion.) Both have quite the history before this Court.

We first encountered the two districts, in their 1992 versions, in *Shaw v. Reno,* 509 U.S. 630, 113 S.Ct. 2816, 125 L.Ed.2d 511 (1993). There, we held that voters stated an equal protection claim by alleging that Districts 1 and 12 were unwarranted racial gerrymanders. See *id.,* at 642, 649, 113 S.Ct. 2816. After a remand to the District Court, the case arrived back at our door. See *Shaw II,* 517 U.S. 899, 116 S.Ct. 1894, 135 L.Ed.2d 207. That time, we dismissed the challenge to District 1 for lack of standing, but struck down District 12. The design of that "serpentine" district, we held, was nothing if not race-centric, and could not be justified as a reasonable attempt to comply with the VRA. *Id.,* at 906, 116 S.Ct. 1894; see *id.,* at 911–918, 116 S.Ct. 1894.

The next year, the State responded with a new districting plan, including a new District 12—and residents of that district brought another lawsuit alleging an impermissible racial gerrymander. A District Court sustained the claim twice, but both times this Court reversed. See *Hunt v. Cromartie,* 526 U.S. 541, 119 S.Ct. 1545, 143 L.Ed.2d 731 (1999) (*Cromartie I*); *Cromartie II,* 532 U.S. 234, 121 S.Ct. 1452, 149 L.Ed.2d 430. Racial considerations, we held, did not predominate in designing the revised District 12. Rather, that district was the result of a *political* gerrymander—an effort to engineer, mostly "without regard to race," a safe Democratic seat. *Id.,* at 245, 121 S.Ct. 1452.

The State redrew its congressional districts again in 2001, to account for population changes revealed in the prior year's census. Under the 2001 map, which went unchallenged in court, neither District 1 nor District 12 had a black voting-age population (called a "BVAP") that was a majority of the whole: The former had a BVAP of around 48%, the latter a BVAP of around 43%. See App. 312, 503. Nonetheless, in five successive general elections conducted in those reconfigured districts, all the candidates preferred by most African–American voters won their contests—and by some handy margins. In District 1, black voters' candidates of ***295** choice garnered ****1466** as much as 70% of the total vote, and never less than 59%. See 5 Record 636, 638, 641, 645, 647 (Pls. Exh. 112). And in District 12, those candidates won with 72% of the vote at the high end and 64% at the low. See *id.,* at 637, 640, 643, 646, 650.

Another census, in 2010, necessitated yet another congressional map—(finally) the one at issue in this case. State Senator Robert Rucho and State Representative David Lewis, both Republicans, chaired the two committees jointly responsible for preparing the revamped plan. They hired Dr. Thomas Hofeller, a veteran political mapmaker, to assist them in redrawing district lines. Several hearings, drafts, and revisions later, both chambers of the State's General Assembly adopted the scheme the three men proposed.

The new map (among other things) significantly altered both District 1 and District 12. The 2010 census had revealed District 1 to be substantially underpopulated: To comply with the Constitution's one-person-one-vote principle, the State needed to place almost 100,000 new people within the district's boundaries. See App. 2690; *Evenwel v. Abbott,* 578 U.S. ——, ——, 136 S.Ct. 1120, 1124, 194 L.Ed.2d 291 (2016) (explaining that "[s]tates must draw congressional districts with populations

as close to perfect equality as possible"). Rucho, Lewis, and Hofeller chose to take most of those people from heavily black areas of Durham, requiring a finger-like extension of the district's western line. See Appendix, *infra*. With that addition, District 1's BVAP rose from 48.6% to 52.7%. See App. 312–313. District 12, for its part, had no need for significant total-population changes: It was overpopulated by fewer than 3,000 people out of over 730,000. See *id*., at 1150. Still, Rucho, Lewis, and Hofeller decided to reconfigure the district, further narrowing its already snakelike body while adding areas at either end—most relevantly here, in Guilford County. See Appendix, *infra* ; App. 1164. Those changes appreciably shifted the racial composition of District 12: As the district gained some 35,000 African–Americans of voting ***296** age and lost some 50,000 whites of that age, its BVAP increased from 43.8% to 50.7%. See 2 Record 349 (Fourth Affidavit of Dan Frey, Exh. 5); *id.,* at 416 (Exh. 11).

Registered voters in the two districts (David Harris and Christine Bowser, here called "the plaintiffs") brought this suit against North Carolina officials (collectively, "the State" or "North Carolina"), complaining of impermissible racial gerrymanders. After a bench trial, a three-judge District Court held both districts unconstitutional. All the judges agreed that racial considerations predominated in the design of District 1. See *Harris v. McCrory,* 159 F.Supp.3d 600, 611 (M.D.N.C.2016). And in then applying strict scrutiny, all rejected the State's argument that it had a "strong basis" for thinking that the VRA compelled such a race-based drawing of District 1's lines. *Id.,* at 623. As for District 12, a majority of the panel held that "race predominated" over all other factors, including partisanship. *Id.,* at 622. And the court explained that the State had failed to put forward any reason, compelling or otherwise, for its attention to race in designing that district. See *ibid.* Judge Osteen dissented from the conclusion that race, rather than politics, drove District 12's lines—yet still characterized the majority's view as "[e]minently reasonable." *Id.,* at 640.

The State filed a notice of appeal, and we noted probable jurisdiction. *McCrory v. Harris,* 579 U.S. ——, 136 S.Ct. 2512, 195 L.Ed.2d 838 (2016).

****1467** II

We address at the outset North Carolina's contention that a victory it won in a very similar state-court lawsuit should dictate (or at least influence) our disposition of this case. As the State explains, the North Carolina NAACP and several other civil rights groups challenged Districts 1 and 12 in state court immediately after their enactment, charging that they were unlawful racial gerrymanders. See Brief for Appellants 19–20. By the time the plaintiffs before us filed this action, the state trial court, in *Dickson v. Rucho,* had rejected ***297** those claims—finding that in District 1 the VRA justified the General Assembly's use of race and that in District 12 race was not a factor at all. See App. 1969. The North Carolina Supreme Court then affirmed that decision by a 4–3 vote, applying the state-court equivalent of clear error review. See *Dickson v. Rucho,* 368 N.C. 481, 500, 781 S.E.2d 404, 419 (2015), modified on denial of reh'g, 368 N.C. 673, 789 S.E.2d 436 (2016), cert. pending, No. 16–24. In this Court, North Carolina makes two related arguments based on the *Dickson* litigation: first, that the state trial court's judgment should have barred this case altogether, under familiar principles of claim and issue preclusion; and second, that the state court's conclusions should cause us to conduct a "searching review" of the decision below, rather than deferring (as usual) to its factual findings. Reply Brief 6.

The State's preclusion theory rests on an assertion about how the plaintiffs in the two cases are affiliated. As the State acknowledges, one person's lawsuit generally does not bar another's, no matter how similar they are in substance. See *Taylor v. Sturgell,* 553 U.S. 880, 892–893, 128 S.Ct. 2161, 171 L.Ed.2d 155 (2008) (noting the "deep-rooted historic tradition that everyone should have his own day in court"). But when plaintiffs in two cases have a special relationship, a judgment against one can indeed bind both. See *id.,* at 893–895, 128 S.Ct. 2161 (describing six categories of qualifying relationships). The State contends that Harris and Bowser, the plaintiffs here, are members of organizations that were plaintiffs in *Dickson*. And according to North Carolina, that connection prevents the pair from raising anew the questions that the state court previously resolved against those groups. See Brief for Appellants 20–21.

But North Carolina never satisfied the District Court that the alleged affiliation really existed. When the State argued that its preclusion theory entitled it to summary judgment, Harris and Bowser responded that they were not members of any of the organizations that had brought the ***298** *Dickson* suit. See 3 Record 1577–1582 (Defs. Motion for Summary Judgment); 4 Record 101–106 (Pls. Opposition to Motion for Summary Judgment). The parties' dueling contentions turned on intricate

issues about those groups' membership policies (*e.g.,* could Harris's payment of dues to the national NAACP, or Bowser's financial contribution to the Mecklenburg County NAACP, have made either a member of the state branch?). Because of those unresolved "factual disputes," the District Court denied North Carolina's motion for summary judgment. 4 Record 238 (July 29, 2014 Order). And nothing in the subsequent trial supported the State's assertion about Harris's and Bowser's organizational ties: Indeed, the State chose not to present any further evidence relating to the membership issue. Based on the resulting record, the District Court summarily rejected the State's claim that Harris and Bowser were something other than independent plaintiffs. See 159 F.Supp.3d, at 609.

****1468** That conclusion defeats North Carolina's attempt to argue for claim or issue preclusion here. We have no basis for assessing the factual assertions underlying the State's argument any differently than the District Court did. Nothing in the State's evidence clearly rebuts Harris's and Bowser's testimony that they never joined any of the *Dickson* groups. We need not decide whether the alleged memberships would have supported preclusion if they had been proved. It is enough that the District Court reasonably thought they had not.

The State's back-up argument about our standard of review also falls short. The rule that we review a trial court's factual findings for clear error contains no exception for findings that diverge from those made in another court. See Fed. Rule Civ. Proc. 52(a)(6) ("Findings of fact ... must not be set aside unless clearly erroneous"); see also *Hernandez v. New York,* 500 U.S. 352, 369, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991) (plurality opinion) (applying the same standard to a state court's findings). Whatever findings are under review receive the benefit of ***299** deference, without regard to whether a court in a separate suit has seen the matter differently. So here, we must ask not which court considering Districts 1 and 12 had the better view of the facts, but simply whether the court below's view is clearly wrong. That does not mean the state court's decision is wholly irrelevant: It is common sense that, all else equal, a finding is more likely to be plainly wrong if some judges disagree with it. Cf. *Glossip v. Gross,* 576 U.S. ——, ——, 135 S.Ct. 2726, 2740, 192 L.Ed.2d 761 (2015) (noting that we are even less likely to disturb a factual determination when "multiple trial courts have reached the same finding"). But the very premise of clear error review is that there are often "two permissible"—because two "plausible"—"views of the evidence." *Anderson,* 470 U.S., at 574, 105 S.Ct. 1504; see *supra,* at 1465. Even assuming the state court's findings capture one such view, the District Court's assessment may yet represent another. And the permissibility of the District Court's account is the only question before us.

III

With that out of the way, we turn to the merits of this case, beginning (appropriately enough) with District 1. As noted above, the court below found that race furnished the predominant rationale for that district's redesign. See *supra,* at 1466 – 1467. And it held that the State's interest in complying with the VRA could not justify that consideration of race. See *supra,* at 1466 – 1467. We uphold both conclusions.

A

Uncontested evidence in the record shows that the State's mapmakers, in considering District 1, purposefully established a racial target: African–Americans should make up no less than a majority of the voting-age population. See 159 F.Supp.3d, at 611–614. Senator Rucho and Representative Lewis were not coy in expressing that goal. They repeatedly told their colleagues that District 1 had to be majority-minority, so as to comply with the VRA. During a Senate ***300** debate, for example, Rucho explained that District 1 "must include a sufficient number of African–Americans" to make it "a majority black district." App. 689–690. Similarly, Lewis informed the House and Senate redistricting committees that the district must have "a majority black voting age population." *Id.,* at 606. And that objective was communicated in no uncertain terms to the legislators' consultant. Dr. Hofeller testified multiple times at trial that ****1469** Rucho and Lewis instructed him "to draw [District 1] with a [BVAP] in excess of 50 percent." 159 F.Supp.3d, at 613; see, *e.g., ibid.* ("Once again, my instructions [were] that the district had to be drawn at above 50 percent").

Hofeller followed those directions to the letter, such that the 50%-plus racial target "had a direct and significant impact" on District 1's configuration. *Alabama,* 575 U.S., at ——, 135 S.Ct., at 1271. In particular, Hofeller moved the district's borders to encompass the heavily black parts of Durham (and only those parts), thus taking in tens of thousands of additional African–American voters. That change and similar ones, made (in his words) to ensure that the district's racial composition would "add[ ] up correctly," deviated from the districting practices he otherwise would have followed. App. 2802. Hofeller candidly admitted that point: For example, he testified, he sometimes could not respect county or precinct lines as he wished because "the more important thing" was to create a majority-minority district. *Id*., at 2807; see *id*., at 2809. The result is a district with stark racial borders: Within the same counties, the portions that fall inside District 1 have black populations two to three times larger than the portions placed in neighboring districts. See Brief for United States as *Amicus Curiae* 19; cf. *Alabama,* 575 U.S., at —— – ——, 135 S.Ct., at 1271–1272 (relying on similar evidence to find racial predominance).

Faced with this body of evidence—showing an announced racial target that subordinated other districting criteria and produced boundaries amplifying divisions between blacks ***301** and whites—the District Court did not clearly err in finding that race predominated in drawing District 1. Indeed, as all three judges recognized, the court could hardly have concluded anything but. See 159 F.Supp.3d, at 611 (calling District 1 a "textbook example" of race-based districting).[3]

B

The more substantial question is whether District 1 can survive the strict scrutiny applied to racial gerrymanders. As noted earlier, we have long assumed that complying with the VRA is a compelling interest. See *supra,* at 1463 – 1464. And we have held that race-based districting is narrowly tailored to that objective if a State had "good reasons" for thinking that the Act demanded such steps. See *supra,* at 1464. North Carolina argues that District 1 passes muster under that standard: The General Assembly (so says the State) had "good reasons to believe it needed to draw [District 1] as a majority-minority district to avoid Section 2 liability" for vote dilution. Brief for Appellants 52. We now turn to that defense.

****1470** This Court identified, in *Thornburg v. Gingles,* three threshold conditions for proving vote dilution under § 2 of the VRA. See 478 U.S., at 50–51, 106 S.Ct. 2752. First, a "minority group" must be "sufficiently large and geographically compact to constitute a majority" in some reasonably configured legislative district. *Id.,* at 50, 106 S.Ct. 2752. Second, the minority ***302** group must be "politically cohesive." *Id.,* at 51, 106 S.Ct. 2752. And third, a district's white majority must "vote [ ] sufficiently as a bloc" to usually "defeat the minority's preferred candidate." *Ibid*. Those three showings, we have explained, are needed to establish that "the minority [group] has the potential to elect a representative of its own choice" in a possible district, but that racially polarized voting prevents it from doing so in the district as actually drawn because it is "submerg[ed] in a larger white voting population." *Growe v. Emison,* 507 U.S. 25, 40, 113 S.Ct. 1075, 122 L.Ed.2d 388 (1993). If a State has good reason to think that all the "*Gingles* preconditions" are met, then so too it has good reason to believe that § 2 requires drawing a majority-minority district. See *Bush v. Vera,* 517 U.S. 952, 978, 116 S.Ct. 1941, 135 L.Ed.2d 248 (1996) (plurality opinion). But if not, then not.

Here, electoral history provided no evidence that a § 2 plaintiff could demonstrate the third *Gingles* prerequisite—effective white bloc-voting.[4] For most of the twenty years prior to the new plan's adoption, African–Americans had made up less than a majority of District 1's voters; the district's BVAP usually hovered between 46% and 48%. See 159 F.Supp.3d, at 606; App. 312. Yet throughout those two decades, as the District Court noted, District 1 was "an extraordinarily safe district for African–American preferred candidates." 159 F.Supp.3d, at 626. In the *closest* election during that period, African–Americans' candidate of choice ***303** received 59% of the total vote; in other years, the share of the vote garnered by those candidates rose to as much as 70%. See *supra,* at 1465 – 1466. Those victories (indeed, landslides) occurred because the district's white population did *not* "vote [ ] sufficiently as a bloc" to thwart black voters' preference, *Gingles,* 478 U.S., at 51, 106 S.Ct. 2752; rather, a meaningful number of white voters joined a politically cohesive black community to elect that group's favored candidate. In the lingo of voting law, District 1 functioned, election year in and election year out, as a "crossover" district, in which members of the majority help a "large enough" minority to elect its candidate of choice. *Bartlett v. Strickland,* 556 U.S. 1, 13, 129 S.Ct. 1231, 173 L.Ed.2d 173 (2009) (plurality opinion). When voters act in that way, "[i]t is difficult to see how the majority-bloc-voting requirement could be met"—and hence how § 2 liability could be established. *Id.,* at 16, 129 S.Ct. 1231. So experience gave the State no reason to think that the VRA required it to ramp up District 1's BVAP.

The State counters that, in this context, past performance is no guarantee of future results. See Brief for Appellants 57–58; Reply Brief 19–20. Recall here that the State had to redraw its whole congressional map following the 2010 census. See *supra,* at 1465 – 1466. And in particular, ****1471** the State had to add nearly 100,000 new people to District 1 to meet the one-person-one-vote standard. See *supra,* at 1466. That meant about 13% of the voters in the new district would never have voted there before. See App. 2690; Reply Brief 20. So, North Carolina contends, the question facing the state mapmakers was not whether the *then-existing* District 1 violated § 2. Rather, the question was whether the *future* District 1 would do so if drawn without regard to race. And that issue, the State claims, could not be resolved by "focusing myopically on past elections." *Id.,* at 19.

But that reasoning, taken alone, cannot justify North Carolina's race-based redesign of District 1. True enough, a legislature undertaking a redistricting must assess whether ***304** the new districts it contemplates (not the old ones it sheds) conform to the VRA's requirements. And true too, an inescapable influx of additional voters into a district may suggest the possibility that its former track record of compliance can continue only if the legislature intentionally adjusts its racial composition. Still, North Carolina too far downplays the significance of a longtime pattern of white crossover voting in the area that would form the core of the redrawn District 1. See *Gingles,* 478 U.S., at 57, 106 S.Ct. 2752 (noting that longtime voting patterns are highly probative of racial polarization). And even more important, North Carolina can point to no meaningful legislative inquiry into what it now rightly identifies as the key issue: whether a new, enlarged District 1, created without a focus on race but however else the State would choose, could lead to § 2 liability. The prospect of a significant population increase in a district only raises—it does not answer—the question whether § 2 requires deliberate measures to augment the district's BVAP. (Indeed, such population growth could cut in either direction, depending on who comes into the district.) To have a strong basis in evidence to conclude that § 2 demands such race-based steps, the State must carefully evaluate whether a plaintiff could establish the *Gingles* preconditions—including effective white bloc-voting—in a new district created without those measures. We see nothing in the legislative record that fits that description.[5]

***305** And that absence is no accident: Rucho and Lewis proceeded under a wholly different theory—arising not from *Gingles* but from *Bartlett v. Strickland*—of what § 2 demanded in drawing District 1. *Strickland* involved a geographic area in which African–Americans could not form a majority of a reasonably compact district. See 556 U.S., at 8, 129 S.Ct. 1231 (plurality opinion). The African–American ****1472** community, however, was sizable enough to enable the formation of a crossover district, in which a substantial bloc of black voters, if receiving help from some white ones, could elect the candidates of their choice. See *supra,* at 1470 – 1471. A plurality of this Court, invoking the first *Gingles* precondition, held that § 2 did not require creating that district: When a minority group is not sufficiently large to make up a majority in a reasonably shaped district, § 2 simply does not apply. See 556 U.S., at 18–20, 129 S.Ct. 1231. Over and over in the legislative record, Rucho and Lewis cited *Strickland* as mandating a 50%-plus BVAP in District 1. See App. 355–356, 363–364, 472–474, 609–610, 619, 1044. They apparently reasoned that if, as *Strickland* held, § 2 does not *require* crossover districts (for groups insufficiently large under *Gingles*), then § 2 also cannot be *satisfied by* crossover districts (for groups in fact meeting *Gingles* ' size condition). In effect, they concluded, whenever a legislature *can* draw a majority-minority district, it *must* do so—even if a crossover district would also allow the minority group to elect its favored candidates. See 1 Tr. 21–22 (counsel's explanation that "the [S]tate interpreted" *Strickland* to say that, in order to protect African–Americans' electoral ***306** strength and thus avoid § 2 liability, the BVAP in District 1 "need [ed] to be above 50 percent").

That idea, though, is at war with our § 2 jurisprudence—*Strickland* included. Under the State's view, the third *Gingles* condition is no condition at all, because even in the absence of effective white bloc-voting, a § 2 claim could succeed in a district (like the old District 1) with an under–50% BVAP. But this Court has made clear that unless *each* of the three *Gingles* prerequisites is established, "there neither has been a wrong nor can be a remedy." *Growe,* 507 U.S., at 41, 113 S.Ct. 1075. And *Strickland,* far from supporting North Carolina's view, underscored the necessity of demonstrating effective white bloc-voting to prevail in a § 2 vote-dilution suit. The plurality explained that "[i]n areas with substantial crossover voting," § 2 plaintiffs would not "be able to establish the third *Gingles* precondition" and so "majority-minority districts would not be required." 556 U.S., at 24, 129 S.Ct. 1231; see also *ibid.* (noting that States can "defend against alleged § 2 violations by pointing to crossover voting patterns and to effective crossover districts"). Thus, North Carolina's belief that it was compelled to redraw District 1 (a successful crossover district) as a majority-minority district rested not on a "strong basis in evidence," but instead on a pure error of law. *Alabama,* 575 U.S., at ——, 135 S.Ct., at 1274.

In sum: Although States enjoy leeway to take race-based actions reasonably judged necessary under a proper interpretation of the VRA, that latitude cannot rescue District 1. We by no means "insist that a state legislature, when redistricting, determine

precisely what percent minority population [§ 2 of the VRA] demands." *Ibid*. But neither will we approve a racial gerrymander whose necessity is supported by no evidence and whose *raison d'être* is a legal mistake. Accordingly, we uphold the District Court's conclusion that North Carolina's use of race as the predominant factor in designing District 1 does not withstand strict scrutiny.

***307** IV

We now look west to District 12, making its fifth(!) appearance before this Court. This time, the district's legality turns, and turns solely, on which of two possible reasons predominantly explains its most recent reconfiguration. The plaintiffs contended at trial that the General ****1473** Assembly chose voters for District 12, as for District 1, because of their race; more particularly, they urged that the Assembly intentionally increased District 12's BVAP in the name of ensuring preclearance under the VRA's § 5. But North Carolina declined to mount any defense (similar to the one we have just considered for District 1) that § 5's requirements in fact justified race-based changes to District 12—perhaps because § 5 could not reasonably be understood to have done so, see n. 10, *infra*. Instead, the State altogether denied that racial considerations accounted for (or, indeed, played the slightest role in) District 12's redesign. According to the State's version of events, Senator Rucho, Representative Lewis, and Dr. Hofeller moved voters in and out of the district as part of a "strictly" political gerrymander, without regard to race. 6 Record 1011. The mapmakers drew their lines, in other words, to "pack" District 12 with Democrats, not African–Americans. After hearing evidence supporting both parties' accounts, the District Court accepted the plaintiffs'.[6]

***308** Getting to the bottom of a dispute like this one poses special challenges for a trial court. In the more usual case alleging a racial gerrymander—where no one has raised a partisanship defense—the court can make real headway by exploring the challenged district's conformity to traditional districting principles, such as compactness and respect for county lines. In *Shaw II,* for example, this Court emphasized the "highly irregular" shape of then-District 12 in concluding that race predominated in its design. 517 U.S., at 905, 116 S.Ct. 1894 (internal quotation marks omitted). But such evidence loses much of its value when the State asserts partisanship as a defense, because a bizarre shape—as of the new District 12—can arise from a "political motivation" as well as a racial one. *Cromartie I,* 526 U.S., at 547, n. 3, 119 S.Ct. 1545. And crucially, political and racial reasons are capable of yielding similar oddities in a district's boundaries. That is because, of course, "racial identification is highly correlated with political affiliation." *Cromartie II,* 532 U.S., at 243, 121 S.Ct. 1452. As a result of those redistricting realities, a trial court has a formidable task: It must make "a sensitive inquiry" into all "circumstantial and direct evidence of intent" to assess whether the plaintiffs have managed to disentangle race from politics and prove that the former drove a district's lines. *Cromartie I,* 526 U.S., at 546, 119 S.Ct. 1545 (internal quotation marks omitted).[7]

****1474 *309** Our job is different—and generally easier. As described earlier, we review a district court's finding as to racial predominance only for clear error, except when the court made a legal mistake. See *supra,* at 1464 – 1465. Under that standard of review, we affirm the court's finding so long as it is "plausible"; we reverse only when "left with the definite and firm conviction that a mistake has been committed." *Anderson,* 470 U.S., at 573–574, 105 S.Ct. 1504; see *supra,* at 1465. And in deciding which side of that line to come down on, we give singular deference to a trial court's judgments about the credibility of witnesses. See Fed. Rule Civ. Proc. 52(a)(6). That is proper, we have explained, because the various cues that "bear so heavily on the listener's understanding of and belief in what is said" are lost on an appellate court later sifting through a paper record. *Anderson,* 470 U.S., at 575, 105 S.Ct. 1504.[8]

In light of those principles, we uphold the District Court's finding of racial predominance respecting District 12. The evidence offered at trial, including live witness testimony subject to credibility determinations, adequately supports ***310** the conclusion that race, not politics, accounted for the district's reconfiguration. And no error of law infected that judgment: Contrary to North Carolina's view, the District Court had no call to dismiss this challenge just because the plaintiffs did not proffer an alternative design for District 12 as circumstantial evidence of the legislature's intent.

A

Begin with some facts and figures, showing how the redistricting of District 12 affected its racial composition. As explained above, District 12 (unlike District 1) was approximately the right size as it was: North Carolina did not—indeed, could not—much change its total population. See *supra,* at 1466. But by further slimming the district and adding a couple of knobs to its snakelike body (including in Guilford County), the General Assembly incorporated tens of thousands of new voters and pushed out tens of thousands of old ones. And those changes followed racial lines: To be specific, the new District 12 had 35,000 more African–Americans of voting age and 50,000 fewer whites of that age. (The difference was made up of voters from other racial categories.) See ****1475** *ibid*. Those voter exchanges produced a sizable jump in the district's BVAP, from 43.8% to 50.7%. See *ibid.* The Assembly thus turned District 12 (as it did District 1, see *supra,* at 1468 – 1469) into a majority-minority district.

As the plaintiffs pointed out at trial, Rucho and Lewis had publicly stated that racial considerations lay behind District 12's augmented BVAP. In a release issued along with their draft districting plan, the two legislators ascribed that change to the need to achieve preclearance of the plan under § 5 of the VRA. See App. 358. At that time, § 5 covered Guilford County and thus prohibited any "retrogression in the [electoral] position of racial minorities" there. *Beer,* 425 U.S., at 141, 96 S.Ct. 1357; see 31 Fed.Reg. 5081 (1966). And part of Guilford County lay within District 12, which meant that the Department of Justice would closely scrutinize that district's ***311** new lines. In light of those facts, Rucho and Lewis wrote: "Because of the presence of Guilford County in the Twelfth District, we have drawn our proposed Twelfth District at a [BVAP] level that is above the percentage of [BVAP] found in the current Twelfth District." App. 358. According to the two legislators, that race-based "measure w[ould] ensure preclearance of the plan." *Ibid.* Thus, the District Court found, Rucho's and Lewis's own account "evince[d] intentionality" as to District 12's racial composition: *Because of* the VRA, they increased the number of African–Americans. 159 F.Supp.3d, at 617.

Hofeller confirmed that intent in both deposition testimony and an expert report. Before the redistricting, Hofeller testified, some black residents of Guilford County fell within District 12 while others fell within neighboring District 13. The legislators, he continued, "decided to reunite the black community in Guilford County into the Twelfth." App. 558; see *id.,* at 530–531. Why? Hofeller responded, in language the District Court emphasized: "[I]n order to be cautious and draw a plan that would pass muster under the Voting Rights Act." *Id.,* at 558; see 159 F.Supp.3d, at 619. Likewise, Hofeller's expert report highlighted the role of the VRA in altering District 12's lines. "[M]indful that Guilford County was covered" by § 5, Hofeller explained, the legislature "determined that it was prudent to reunify [the county's] African–American community" into District 12. App. 1103. That change caused the district's compactness to decrease (in expert-speak, it "lowered the Reock Score"), but that was a sacrifice well worth making: It would "avoid the possibility of a[VRA] charge" that would "inhibit [ ] preclearance." *Ibid.*

The State's preclearance submission to the Justice Department indicated a similar determination to concentrate black voters in District 12. "One of the concerns of the Redistricting Chairs," North Carolina there noted, had to do with the Justice Department's years-old objection to "a failure by ***312** the State to create a second majority minority district" (that is, in addition to District 1). *Id*., at 478. The submission then went on to explain that after considering alternatives, the redistricters had designed a version of District 12 that would raise its BVAP to 50.7%. Thus, concluded the State, the new District 12 "increases[ ] the African–American community's ability to elect their candidate of choice." *Id*., at 479. In the District Court's view, that passage once again indicated that making District 12 majority-minority was no "mere coincidence," but a deliberate attempt to avoid perceived obstacles to preclearance. 159 F.Supp.3d, at 617.[9]

****1476** And still there was more: Perhaps the most dramatic testimony in the trial came when Congressman Mel Watt (who had represented District 12 for some 20 years) recounted a conversation he had with Rucho in 2011 about the district's future make-up. According to Watt, Rucho said that "his leadership had told him that he had to ramp the minority percentage in [District 12] up to over 50 percent to comply with the Voting Rights Law." App. 2369; see *id*., at 2393. And further, that it would then be Rucho's "job to go and convince the African–American community" that such a racial target "made sense" under the Act. *Ibid.*; see *id*., at 2369.[10] The District Court credited Watt's testimony about ***313** the conversation, citing his courtroom demeanor and "consistent recollection" under "probing cross-examination." 159 F.Supp.3d, at 617–618.[11] In the court's view, Watt's account was of a piece with all the other evidence—including the redistricters' on-the-nose attainment of a 50% BVAP—indicating that the General Assembly, in the name of VRA compliance, deliberately redrew District 12 as a majority-minority district. See *id.,* at 618.[12]

The State's contrary story—that politics alone drove decisionmaking—came into the trial mostly through Hofeller's testimony. Hofeller explained that Rucho and Lewis instructed him, first and foremost, to make the map as a whole "more

favorable to Republican candidates." App. 2682. One agreed-on stratagem in that effort was to pack the historically Democratic District 12 with even more Democratic voters, thus leaving surrounding districts more reliably Republican. See *id*., at 2682–2683, 2696–2697. To that end, Hofeller recounted, he drew District 12's new boundaries based on political data—specifically, the voting behavior of precincts in the 2008 Presidential election between Barack Obama and John McCain. See *id*., at 2701–2702. Indeed, he claimed, he displayed only this data, and no racial data, ***314** on his computer screen while mapping the district. See *id*., at 2721. In part of his testimony, Hofeller further stated that the Obama–McCain election data explained ****1477** (among other things) his incorporation of the black, but not the white, parts of Guilford County then located in District 13. See *id*., at 2824. Only *after* he drew a politics-based line between those adjacent areas, Hofeller testified, did he "check[ ]" the racial data and "f[ind] out" that the resulting configuration of District 12 "did not have a[§ 5] issue." *Id*., at 2822.

The District Court, however, disbelieved Hofeller's asserted indifference to the new district's racial composition. The court recalled Hofeller's contrary deposition testimony—his statement (repeated in only slightly different words in his expert report) that Rucho and Lewis "decided" to shift African–American voters into District 12 "in order to" ensure preclearance under § 5. See 159 F.Supp.3d, at 619–620; App. 558. And the court explained that even at trial, Hofeller had given testimony that undermined his "blame it on politics" claim. Right after asserting that Rucho and Lewis had told him "[not] to use race" in designing District 12, Hofeller added a qualification: "except perhaps with regard to Guilford County." *Id*., at 2791; see *id*., at 2790. As the District Court understood, that is the kind of "exception" that goes pretty far toward swallowing the rule. District 12 saw a net increase of more than 25,000 black voters in Guilford County, relative to a net gain of fewer than 35,000 across the district: So the newly added parts of that county played a major role in pushing the district's BVAP over 50%. See *id*., at 384, 500–502.[13] The District ***315** Court came away from Hofeller's self-contradictory testimony unpersuaded that this decisive influx of black voters was an accident. Whether the racial make-up of the county was displayed on his computer screen or just fixed in his head, the court thought, Hofeller's denial of race-based districting "r[ang] hollow." 159 F.Supp.3d, at 620, n. 8.

Finally, an expert report by Dr. Stephen Ansolabehere lent circumstantial support to the plaintiffs' race-not-politics case. Ansolabehere looked at the six counties overlapping with District 12—essentially the region from which the mapmakers could have drawn the district's population. The question he asked was: Who from those counties actually ended up in District 12? The answer he found was: Only 16% of the region's white registered voters, but 64% of the black ones. See App. 321–322. Ansolabehere next controlled for party registration, but discovered that doing so made essentially no difference: For example, only 18% of the region's white Democrats wound up in District 12, whereas 65% of the black Democrats did. See *id.,* at 332. The upshot was that, regardless of party, a black voter was three to four times more likely than a white voter to cast his ballot within District 12's borders. See *ibid.* Those stark disparities led Ansolabehere to conclude that "race, and not party," was "the dominant factor" in District 12's design. *Id*., at 337.[14] His report, ****1478** as the District Court held, thus tended to ***316** confirm the plaintiffs' direct evidence of racial predominance. See 159 F.Supp.3d, at 620–621.

The District Court's assessment that all this evidence proved racial predominance clears the bar of clear error review. The court emphasized that the districting plan's own architects had repeatedly described the influx of African–Americans into District 12 as a § 5 compliance measure, not a side-effect of political gerrymandering. And those contemporaneous descriptions comported with the court's credibility determinations about the trial testimony—that Watt told the truth when he recounted Rucho's resolve to hit a majority-BVAP target; and conversely that Hofeller skirted the truth (especially as to Guilford County) when he claimed to have followed only race-blind criteria in drawing district lines. We cannot disrespect such credibility judgments. See *Anderson,* 470 U.S., at 575, 105 S.Ct. 1504 (A choice to believe "one of two or more witnesses, each of whom has told a coherent and facially plausible story that is not contradicted by extrinsic evidence," can "virtually never be clear error"). And more generally, we will not take it upon ourselves to weigh the trial evidence as if we were the first to hear it. See *id.,* at 573, 105 S.Ct. 1504 (A "reviewing court oversteps" under Rule 52(a) "if it undertakes to duplicate the role of the lower court"). No doubt other interpretations of that evidence were permissible. Maybe we would have evaluated the testimony differently ***317** had we presided over the trial; or then again, maybe we would not have. Either way—and it is only *this* which matters—we are far from having a "definite and firm conviction" that the District Court made a mistake in concluding from the record before it that racial considerations predominated in District 12's design.

B

The State mounts a final, legal rather than factual, attack on the District Court's finding of racial predominance. When race and politics are competing explanations of a district's lines, argues North Carolina, the party challenging the district must introduce a particular kind of circumstantial evidence: "an alternative [map] that achieves the legislature's political objectives while improving racial balance." Brief for Appellants 31 (emphasis deleted). That is true, the State says, irrespective of what other evidence is in the case—so even if the plaintiff offers powerful direct proof that the legislature adopted the map it did for racial reasons. See Tr. of Oral Arg. 8. Because the plaintiffs here (as all agree) did not present such a counter-map, ****1479** North Carolina concludes that they cannot prevail. The dissent echoes that argument. See *post,* at 1488 – 1491.

We have no doubt that an alternative districting plan, of the kind North Carolina describes, can serve as key evidence in a race-versus-politics dispute. One, often highly persuasive way to disprove a State's contention that politics drove a district's lines is to show that the legislature had the capacity to accomplish all its partisan goals without moving so many members of a minority group into the district. If you were *really* sorting by political behavior instead of skin color (so the argument goes) you would have done—or, at least, could just as well have done—*this*. Such would-have, could-have, and (to round out the set) should-have arguments are a familiar means of undermining a claim that an action was based on a permissible, rather than a prohibited, ground. ***318** See, *e.g., Miller–El v. Dretke,* 545 U.S. 231, 249, 125 S.Ct. 2317, 162 L.Ed.2d 196 (2005) ("If that were the [real] explanation for striking [juror] Warren[,] the prosecutors should have struck [juror] Jenkins" too).

But they are hardly the *only* means. Suppose that the plaintiff in a dispute like this one introduced scores of leaked emails from state officials instructing their mapmaker to pack as many black voters as possible into a district, or telling him to make sure its BVAP hit 75%. Based on such evidence, a court could find that racial rather than political factors predominated in a district's design, with or without an alternative map. And so too in cases lacking that kind of smoking gun, as long as the evidence offered satisfies the plaintiff's burden of proof. In *Bush v. Vera,* for example, this Court upheld a finding of racial predominance based on "substantial direct evidence of the legislature's racial motivations"—including credible testimony from political figures and statements made in a § 5 preclearance submission—plus circumstantial evidence that redistricters had access to racial, but not political, data at the "block-by-block level" needed to explain their "intricate" designs. See 517 U.S., at 960–963, 116 S.Ct. 1941 (plurality opinion). Not a single Member of the Court thought that the absence of a counter-map made any difference. Similarly, it does not matter in this case, where the plaintiffs' introduction of mostly direct and some circumstantial evidence—documents issued in the redistricting process, testimony of government officials, expert analysis of demographic patterns—gave the District Court a sufficient basis, sans any map, to resolve the race-or-politics question.

A plaintiff's task, in other words, is simply to persuade the trial court—without any special evidentiary prerequisite—that race (not politics) was the "predominant consideration in deciding to place a significant number of voters within or without a particular district." *Alabama,* 575 U.S., at ——, 135 S.Ct., at 1265 (internal quotation marks omitted); cf. *Bethune–Hill,* 580 U.S., at ——, ——, 137 S.Ct., at 798, 799 (rejecting a similar effort to elevate one form of "persuasive circumstantial evidence" in a dispute respecting ***319** racial predominance to a "mandatory precondition" or "threshold requirement" of proof). That burden of proof, we have often held, is "demanding." *E.g., Cromartie II,* 532 U.S., at 241, 121 S.Ct. 1452. And because that is so, a plaintiff will sometimes need an alternative map, as a practical matter, to make his case. But in no area of our equal protection law have we forced plaintiffs to submit one particular form of proof to prevail. See *Arlington Heights v. Metropolitan Housing Development Corp.,* 429 U.S. 252, 266–268, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977) (offering a varied and non-exhaustive list of "subjects ****1480** of proper inquiry in determining whether racially discriminatory intent existed"). Nor would it make sense to do so here. The Equal Protection Clause prohibits the unjustified drawing of district lines based on race. An alternative map is merely an evidentiary tool to show that such a substantive violation has occurred; neither its presence nor its absence can itself resolve a racial gerrymandering claim.[15]

***320** North Carolina insists, however, that we have already said to the contrary—more particularly, that our decision in *Cromartie II* imposed a non-negotiable "alternative-map requirement." Brief for Appellants 31. As the State observes, *Cromartie II* reversed as clearly erroneous a trial court's finding that race, rather than politics, predominated in the assignment of voters to an earlier incarnation of District 12. See 532 U.S., at 241, 121 S.Ct. 1452; *supra,* at 1465 – 1466. And as the State emphasizes, a part of our opinion faulted the *Cromartie* plaintiffs for failing to offer a convincing account of how the legislature could have accomplished its political goals other than through the map it chose. See 532 U.S., at 257–258, 121 S.Ct. 1452. We there stated:

> "In a case such as this one where majority-minority districts ... are at issue and where racial identification correlates highly with political affiliation, ***333** the party attacking the legislatively drawn boundaries must show at the least that the

> legislature could have achieved its legitimate political objectives in alternative ways that are comparably consistent with traditional districting principles. That party must also show that those districting alternatives would have brought about significantly greater racial balance." *Id.,* at 258, 121 S.Ct. 1452.

According to North Carolina, that passage alone settles this case, because it makes an alternative map "essential" to a finding that District 12 (a majority-minority district in which race and partisanship are correlated) was a racial gerrymander. Reply Brief 11. Once again, the dissent says the same. See *post,* at 1489.

***321** But the reasoning of *Cromartie II* belies that reading. The Court's opinion nowhere ****1481** attempts to explicate or justify the categorical rule that the State claims to find there. (Certainly the dissent's current defense of that rule, see *post,* at 1489 – 1491, was nowhere in evidence.) And given the strangeness of that rule—which would treat a mere form of evidence as the very substance of a constitutional claim, see *supra,* at 1478 – 1480—we cannot think that the Court adopted it without any explanation. Still more, the entire thrust of the *Cromartie II* opinion runs counter to an inflexible counter-map requirement. If the Court had adopted that rule, it would have had no need to weigh each piece of evidence in the case and determine whether, taken together, they were "adequate" to show "the predominance of race in the legislature's line-drawing process." 532 U.S., at 243–244, 121 S.Ct. 1452. But that is exactly what *Cromartie II* did, over a span of 20 pages and in exhaustive detail. Item by item, the Court discussed and dismantled the supposed proof, both direct and circumstantial, of race-based redistricting. All that careful analysis would have been superfluous—that dogged effort wasted—if the Court viewed the absence or inadequacy of a single form of evidence as necessarily dooming a gerrymandering claim.

Rightly understood, the passage from *Cromartie II* had a different and narrower point, arising from and reflecting the evidence offered in that case. The direct evidence of a racial gerrymander, we thought, was extremely weak: We said of one piece that it "says little or nothing about whether race played a predominant role" in drawing district lines; we said of another that it "is less persuasive than the kinds of direct evidence we have found significant in other redistricting cases." *Id.,* at 253–254, 121 S.Ct. 1452 (emphasis deleted). Nor did the report of the plaintiffs' expert impress us overmuch: In our view, it "offer[ed] little insight into the legislature's true motive." *Id.,* at 248, 121 S.Ct. 1452. That left a set of arguments of the would-have-could-have variety. For example, the plaintiffs ***322** offered several maps purporting to "show how the legislature might have swapped" some mostly black and mostly white precincts to obtain greater racial balance "without harming [the legislature's] political objective." *Id.,* at 255, 121 S.Ct. 1452 (internal quotation marks omitted). But the Court determined that none of those proposed exchanges would have worked as advertised—essentially, that the plaintiffs' "you could have redistricted differently" arguments failed on their own terms. See *id.,* at 254–257, 121 S.Ct. 1452. Hence emerged the demand quoted above, for maps that would *actually* show what the plaintiffs' had not. In a case like *Cromartie II*—that is, one in which the plaintiffs had meager direct evidence of a racial gerrymander and needed to rely on evidence of forgone alternatives—only maps of that kind could carry the day. *Id.,* at 258, 121 S.Ct. 1452.

But this case is most unlike *Cromartie II,* even though it involves the same electoral district some twenty years on. This case turned not on the possibility of creating more optimally constructed districts, but on direct evidence of the General Assembly's intent in creating the actual District 12, including many hours of trial testimony subject to credibility determinations. That evidence, the District Court plausibly found, itself satisfied the plaintiffs' burden of debunking North Carolina's "it was really politics" defense; there was no need for an alternative map to do the same job. And we pay our precedents no respect when we extend them far beyond the circumstances for which they were designed.

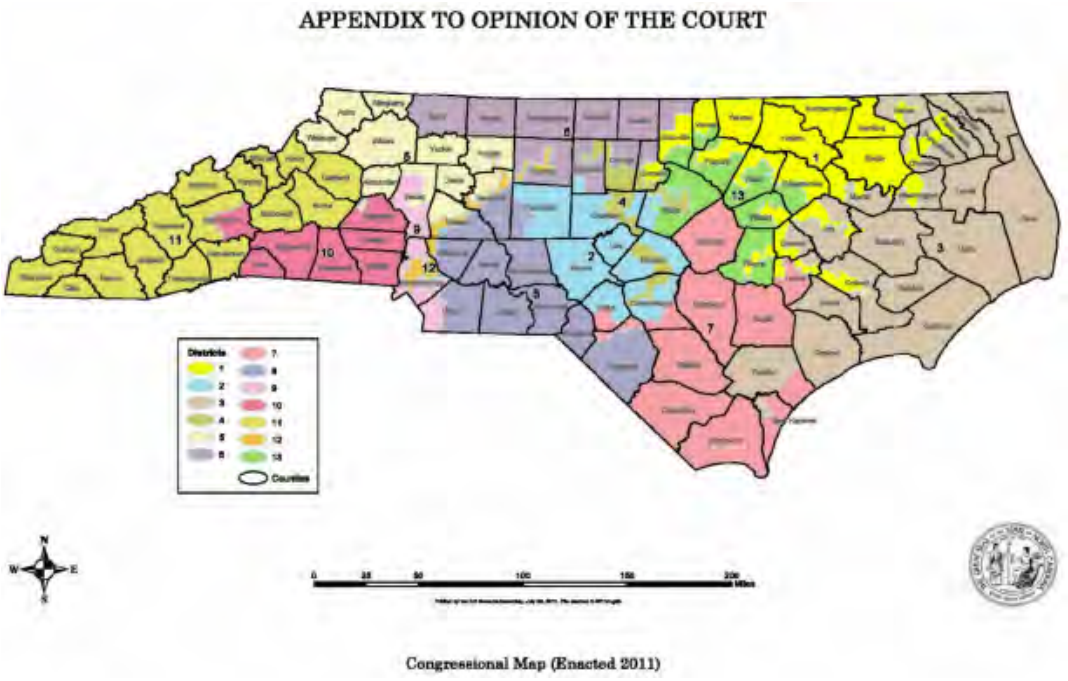
V

Applying a clear error standard, we uphold the District Court's conclusions that ****1482** racial considerations predominated in designing both District 1 and District 12. For District 12, that is all we must do, because North Carolina has made no attempt to justify race-based districting there. For District 1, we further uphold the District Court's decision that § 2 of the VRA gave North Carolina no good reason to reshuffle ***323** voters because of their race. We accordingly affirm the judgment of the District Court.

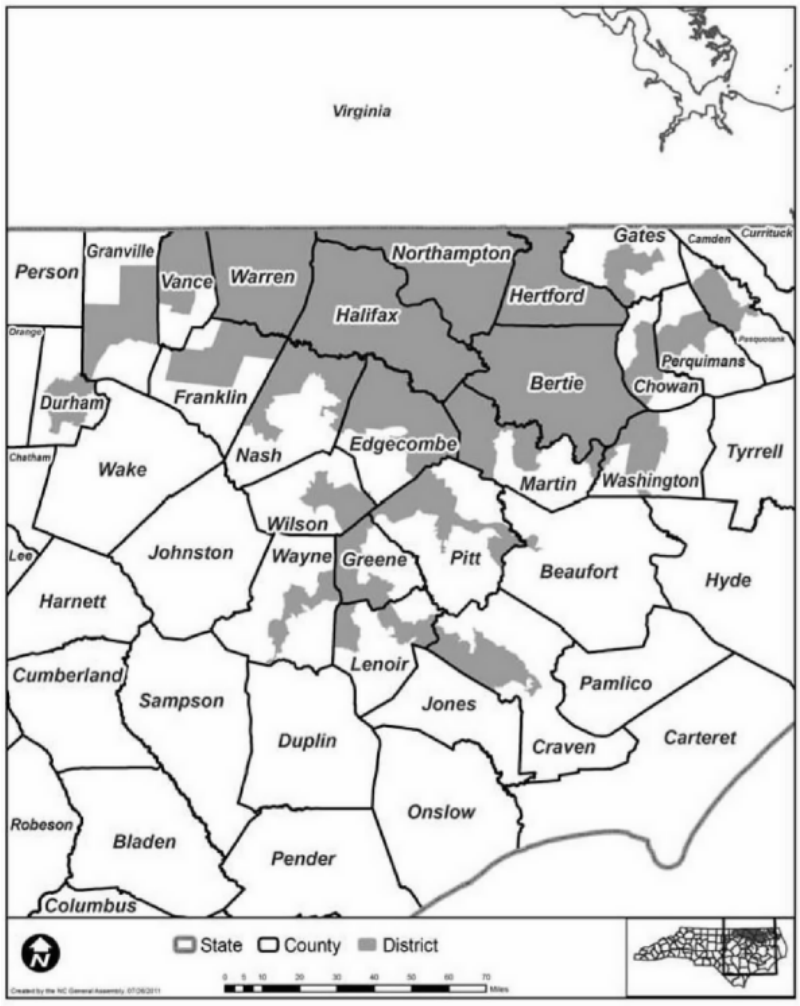
It is so ordered.

Justice GORSUCH took no part in the consideration or decision of this case.

APPENDIX



***325**



Congressional District 1 (Enacted 2011)

***326**

Congressional District 12 (Enacted 2011)

**1485 Justice THOMAS, concurring.

*327 I join the opinion of the Court because it correctly applies our precedents under the Constitution and the Voting Rights Act of 1965 (VRA), 52 U.S.C. § 10301 *et seq*. I write briefly to explain the additional grounds on which I would affirm the three-judge District Court and to note my agreement, in particular, with the Court's clear-error analysis.

As to District 1, I think North Carolina's concession that it created the district as a majority-black district is by itself sufficient to trigger strict scrutiny. See Brief for Appellants 44; see also, *e.g., Bethune–Hill v. Virginia State Bd. of Elections,* 580 U.S. ——, —— – ——, 137 S.Ct. 788, 803–804, 197 L.Ed.2d 85 (2017) (THOMAS, J., concurring in judgment in part and dissenting in part). I also think that North Carolina cannot satisfy strict scrutiny based on its efforts to comply with § 2 of the VRA. See *ante,* at 1469. In my view, § 2 does not apply to redistricting and therefore cannot justify a racial gerrymander. See **1486 *Holder v. Hall,* 512 U.S. 874, 922–923, 114 S.Ct. 2581, 129 L.Ed.2d 687 (1994) (THOMAS, J., concurring in judgment).

As to District 12, I agree with the Court that the District Court did not clearly err when it determined that race was North Carolina's predominant motive in drawing the district. See *ante,* at 1474. This is the same conclusion I reached when we last reviewed District 12. *Easley v. Cromartie,* 532 U.S. 234, 267, 121 S.Ct. 1452, 149 L.Ed.2d 430 (2001) (*Cromartie II*)

(dissenting opinion). The Court reached the contrary conclusion in *Cromartie II* only by misapplying our deferential standard for reviewing factual findings. See *id.,* at 259–262, 121 S.Ct. 1452. Today's decision does not repeat *Cromartie II* 's error, and indeed it confines that case to its particular facts. It thus represents a welcome course correction to this Court's application of the clear-error standard.

Justice ALITO, with whom THE CHIEF JUSTICE and Justice KENNEDY join, concurring in the judgment in part and dissenting in part.

A precedent of this Court should not be treated like a disposable household item—say, a paper plate or napkin—to be ***328** used once and then tossed in the trash. But that is what the Court does today in its decision regarding North Carolina's 12th Congressional District: The Court junks a rule adopted in a prior, remarkably similar challenge to this very same congressional district.

In *Easley v. Cromartie,* 532 U.S. 234, 121 S.Ct. 1452, 149 L.Ed.2d 430 (2001) (*Cromartie II*), the Court considered the constitutionality of the version of District 12 that was adopted in 1997. *Id.,* at 238, 121 S.Ct. 1452. That district had the same basic shape as the district now before us, and the challengers argued that the legislature's predominant reason for adopting this configuration was race. *Ibid.* The State responded that its motive was not race but politics. *Id.,* at 241, 121 S.Ct. 1452. Its objective, the State insisted, was to create a district in which the Democratic candidate would win. See *ibid.*; Brief for State Appellants in *Easley v. Cromartie,* O.T. 2000, Nos. 99–1864, 99–1865, p. 25. Rejecting that explanation, a three-judge court found that the legislature's predominant motive was racial, specifically to pack African–Americans into District 12. See *Cromartie v. Hunt,* 133 F.Supp.2d 407, 420 (E.D.N.C.2000). But this Court held that this finding of fact was clearly erroneous. *Cromartie II,* 532 U.S., at 256, 121 S.Ct. 1452.

A critical factor in our analysis was the failure of those challenging the district to come forward with an alternative redistricting map that served the legislature's political objective as well as the challenged version without producing the same racial effects. Noting that race and party affiliation in North Carolina were "highly correlated," *id.,* at 243, 121 S.Ct. 1452 we laid down this rule:

> "In a case such as this one ..., the party attacking the legislatively drawn boundaries must show at the least that the legislature could have achieved its legitimate political objectives in alternative ways that are comparably consistent with traditional districting principles. ***329** That party must also show that those districting alternatives would have brought about significantly greater racial balance. Appellees failed to make any such showing here." *Id.,* at 258, 121 S.Ct. 1452.

Now, District 12 is back before us. After the 2010 census, the North Carolina Legislature, with the Republicans in the majority, drew the present version of District 12. The challengers contend that this version violates equal protection because the predominant motive of the legislature ****1487** was racial: to pack the district with African–American voters. The legislature responds that its objective was political: to pack the district with Democrats and thus to increase the chances of Republican candidates in neighboring districts.

You might think that the *Cromartie II* rule would be equally applicable in this case, which does not differ in any relevant particular, but the majority executes a stunning about-face. Now, the challengers' failure to produce an alternative map that meets the *Cromartie II* test is inconsequential. It simply "does not matter." *Ante,* at 1479.

This is not the treatment of precedent that state legislatures have the right to expect from this Court. The failure to produce an alternative map doomed the challengers in *Cromartie II,* and the same should be true now. Partisan gerrymandering is always unsavory, but that is not the issue here. The issue is whether District 12 was drawn predominantly because of race. The record shows that it was not.[1]

I

Under the Constitution, state legislatures have "the initial power to draw districts for federal elections." ***330** *Vieth v. Jubelirer,* 541 U.S. 267, 275, 124 S.Ct. 1769, 158 L.Ed.2d 546 (2004) (plurality opinion).[2] This power, of course, must be exercised in conformity with the Fourteenth Amendment's Equal Protection Clause. And because the Equal Protection Clause's "central mandate is racial neutrality in governmental decisionmaking," *Miller v. Johnson,* 515 U.S. 900, 904, 115 S.Ct. 2475, 132 L.Ed.2d 762 (1995), "effort[s] to separate voters into different districts on the basis of race" must satisfy the rigors of strict scrutiny. *Shaw v. Reno,* 509 U.S. 630, 649, 653, 113 S.Ct. 2816, 125 L.Ed.2d 511 (1993) (*Shaw I*).

We have stressed, however, that courts are obligated to "exercise extraordinary caution in adjudicating claims that a State has drawn district lines on the basis of race." *Miller,* 515 U.S., at 916, 115 S.Ct. 2475. "Federal-court review of districting legislation represents a serious intrusion on the most vital of local functions," and "the good faith of a state legislature must be presumed." *Id.,* at 915, 115 S.Ct. 2475. A legislature will "almost always be aware of racial demographics" during redistricting, but evidence of such awareness does not show that the legislature violated equal protection. *Id.,* at 916, 115 S.Ct. 2475. Instead, the Court has held, "[r]ace must not simply have been *a* motivation for the drawing of a majority-minority district, but the *predominant* factor motivating the legislature's districting decision." *Cromartie II,* 532 U.S., at 241, 121 S.Ct. 1452 (citation and internal quotation marks omitted; emphasis in original).

This evidentiary burden "is a demanding one." *Ibid.* (internal quotation marks omitted). Thus, although "[t]he legislature's motivation is ... a factual question," *Hunt v. Cromartie,* 526 U.S. 541, 549, 119 S.Ct. 1545, 143 L.Ed.2d 731 (1999) (*Cromartie I*), an appellate court conducting clear-error review must always keep in mind the heavy evidentiary obligation ****1488** borne by those challenging a districting plan. See *Cromartie II,* ***331** *supra,* at 241, 257, 121 S.Ct. 1452. Recognizing "the intrusive potential of judicial intervention into the legislative realm," *Miller, supra,* at 916, 115 S.Ct. 2475 we have warned that courts must be very cautious about imputing a racial motive to a State's redistricting plan.

II

That caution "is especially appropriate ... where the State has articulated a legitimate political explanation for its districting decision, and the voting population is one in which race and political affiliation are highly correlated." *Cromartie II,* 532 U.S., at 242, 121 S.Ct. 1452. We have repeatedly acknowledged the problem of distinguishing between racial and political motivations in the redistricting context. See *id.,* at 242, 257–258, 121 S.Ct. 1452; *Cromartie I, supra,* at 551–552, 119 S.Ct. 1545; *Bush v. Vera,* 517 U.S. 952, 967–968, 116 S.Ct. 1941, 135 L.Ed.2d 248 (1996) (plurality opinion).

The problem arises from the confluence of two factors. The first is the status under the Constitution of partisan gerrymandering. As we have acknowledged, "[p]olitics and political considerations are inseparable from districting and apportionment," *Gaffney v. Cummings,* 412 U.S. 735, 753, 93 S.Ct. 2321, 37 L.Ed.2d 298 (1973), and it is well known that state legislative majorities very often attempt to gain an electoral advantage through that process. See *Davis v. Bandemer,* 478 U.S. 109, 129, 106 S.Ct. 2797, 92 L.Ed.2d 85 (1986). Partisan gerrymandering dates back to the founding, see *Vieth, supra,* at 274–276, 124 S.Ct. 1769 (plurality opinion), and while some might find it distasteful, "[o]ur prior decisions have made clear that a jurisdiction may engage in constitutional political gerrymandering, even if it so happens that the most loyal Democrats happen to be black Democrats and even if the State were *conscious* of that fact." *Cromartie I, supra,* at 551, 119 S.Ct. 1545 (emphasis in original); *Vera, supra,* at 964, 116 S.Ct. 1941 (plurality opinion).

The second factor is that "racial identification is highly correlated with political affiliation" in many jurisdictions. *Cromartie II,* 532 U.S., at 243, 121 S.Ct. 1452 (describing correlation in North Carolina). This phenomenon makes it difficult to distinguish ***332** between political and race-based decisionmaking. If around 90% of African–American voters cast their ballots for the Democratic candidate, as they have in recent elections,[3] a plan that packs Democratic voters will look very much like a plans that packs African–American voters. "[A] legislature may, by placing reliable Democratic precincts within

a district without regard to race, end up with a district containing more heavily African–American precincts, but the reasons would be political rather than racial." *Id.,* at 245, 121 S.Ct. 1452.

A

We addressed this knotty problem in *Cromartie II,* which, as noted, came to us ****1489** after the District Court had held a trial and found as a fact that the legislature's predominant reason for drawing District 12 was race, not politics. *Id*., at 239–241, 121 S.Ct. 1452. Our review for clear error in that case did not exhibit the same diffidence as today's decision. We carefully examined each piece of direct and circumstantial evidence on which the District Court had relied and conceded that this evidence provided support for the court's finding. *Id.,* at 257, 121 S.Ct. 1452. Then, at the end of our opinion, we stated:

> "We can put the matter more generally as follows: In a case such as this one where majority-minority districts (or the approximate equivalent) are at issue and where racial identification correlates highly with political affiliation, the party attacking the legislatively drawn boundaries must show at the least that the legislature could have achieved its legitimate political objectives in alternative ways that are comparably consistent with traditional districting principles. That party must also show that those districting alternatives would have brought about significantly greater racial balance." *Id.,* at 258, 121 S.Ct. 1452.

Because the plaintiffs had "failed to make any such showing," we held that the District Court had clearly erred in finding that race predominated in drawing District 12. *Ibid.*

Cromartie II plainly meant to establish a rule for use in a broad class of cases and not a rule to be employed one time only. We stated that we were "put [ting] the matter more generally" and were describing what must be shown in cases "where majority-minority districts (or the approximate equivalent) are at issue and where racial identification correlates highly with political affiliation." *Ibid.* We identified who would carry the burden of the new rule ("the party attacking the legislatively drawn boundaries") and what that party must show (that "the legislature could have achieved its legitimate political objectives in alternative ways that are comparably consistent with traditional districting principles" while achieving "significantly greater racial balance"). *Ibid.* And we reversed the finding of racial predominance due to the plaintiffs' failure to carry the burden established by this evidentiary rule. *Ibid.*

Here, too, the plaintiffs failed to carry that burden. In this case, as in *Cromartie II,* the plaintiffs allege a racial gerrymander, and the State's defense is that political motives explain District 12's boundaries. In such a case, *Cromartie II* instructed, plaintiffs must submit an alternative redistricting map demonstrating that the legislature could have achieved its political goals without the racial effects giving rise to the racial gerrymandering allegation. But in spite of this instruction, plaintiffs in this case failed to submit such a ***334** map.[4] See Brief for Appellees 31–36. Based on what we said in *Cromartie II* about *the same type of claim* involving *the same congressional district,* reversal should be a foregone conclusion. It turns out, however, that the *Cromartie II* rule was good for one use only. Even in a case involving the very same district, it is tossed aside.

B

The alternative-map requirement deserves better. It is a logical response to ****1490** the difficult problem of distinguishing between racial and political motivations when race and political party preference closely correlate.

This is a problem with serious institutional and federalism implications. When a federal court says that race was a legislature's predominant purpose in drawing a district, it accuses the legislature of "offensive and demeaning" conduct.

Miller, 515 U.S., at 912, 115 S.Ct. 2475. Indeed, we have said that racial gerrymanders "bea[r] an uncomfortable resemblance to political apartheid." *Shaw I,* 509 U.S., at 647, 113 S.Ct. 2816. That is a grave accusation to level against a state legislature.

In addition, "[f]ederal-court review of districting legislation represents a serious intrusion on the most vital of local functions" because "[i]t is well settled that reapportionment is primarily the duty and responsibility of the State." *Miller, supra,* at 915, 115 S.Ct. 2475 (internal quotation marks omitted); see also *Cromartie II,* 532 U.S., at 242, 121 S.Ct. 1452. When a federal court finds that race predominated in the redistricting process, it inserts itself into that process. That is appropriate—indeed, constitutionally required—if the legislature truly did draw district boundaries on the basis of race. But if a court mistakes a political gerrymander for a racial gerrymander, it illegitimately invades a traditional domain of state authority, ***335** usurping the role of a State's elected representatives. This does violence to both the proper role of the Judiciary and the powers reserved to the States under the Constitution.

There is a final, often-unstated danger where race and politics correlate: that the federal courts will be transformed into weapons of political warfare. Unless courts "exercise extraordinary caution" in distinguishing race-based redistricting from politics-based redistricting, *Miller, supra,* at 916, 115 S.Ct. 2475 they will invite the losers in the redistricting process to seek to obtain in court what they could not achieve in the political arena. If the majority party draws districts to favor itself, the minority party can deny the majority its political victory by prevailing on a racial gerrymandering claim. Even if the minority party loses in court, it can exact a heavy price by using the judicial process to engage in political trench warfare for years on end.

Although I do not imply that this is what occurred here, this case *does* reflect what litigation of this sort can look like. This is the *fifth time* that North Carolina's 12th Congressional District has come before this Court since 1993, and we have almost reached a new redistricting cycle without any certainty as to the constitutionality of North Carolina's *current* redistricting map. Given these dangers, *Cromartie II* was justified in crafting an evidentiary rule to prevent false positives.[5]

C

The majority nevertheless absolves the challengers of their failure to submit an alternative map. It argues that an alternative map cannot be "the *only* means" of proving ***336** racial predominance, and it concludes from this that an alternative map "does not matter in this case." *Ante,* at 1479 (emphasis in original). But even if ****1491** there are cases in which a plaintiff could prove a racial gerrymandering claim without an alternative map, they would be exceptional ones in which the evidence of racial predominance is overwhelming. This most definitely is not one of those cases, see Part III–C, *infra,* and the plaintiffs' failure to produce an alternative map mandates reversal. Moreover, even in an exceptional case, the absence of such a map would still be strong evidence that a district's boundaries were determined by politics rather than race.[6] The absence of a map would "matter." Cf. *ante,* at 1479.

The majority questions the legitimacy of the alternative-map requirement, *ante,* at 1478 – 1480, and n. 15, but the rule is a sound one. It rests on familiar principles regarding the allocation of the burdens of production and persuasion and the assessment of evidence. First, in accordance with the general rule in civil cases, plaintiffs in a case like this bear the burden of proving that the legislature's motive was unconstitutional. Second, what must be shown is not simply that race played a part in the districting process but that it played the predominant role. Third, a party challenging a districting plan must overcome the strong presumption that the plan was drawn for constitutionally permissible reasons. *Miller, supra,* at 915, 115 S.Ct. 2475. Fourth, when those responsible for adopting a challenged plan contend that the plan was devised for partisan political ends, they are making an admission that may not sit well with voters, so the explanation should not be lightly dismissed. Cf. Fed. Rule Evid. 804(b)(3). And finally, the *Cromartie II* rule takes into account the difficulty of proving a negative.

***337** For challengers like those in the present case, producing a map that meets the *Cromartie II* test should not be hard if the

predominant reason for a challenged plan really was race and not politics. Plaintiffs mounting a challenge to a districting plan are almost always sophisticated litigants who have the assistance of experts, and that is certainly true in the present case. Today, an expert with a computer can easily churn out redistricting maps that control for any number of specified criteria, including prior voting patterns and political party registration. Therefore, if it is indeed possible to find a map that meets the *Cromartie II* test, it should not be too hard for the challengers to do so. The State, on the other hand, cannot prove that no map meeting the *Cromartie II* test can be drawn. Even if a State submits, say, 100 alternative maps that fail the test, that would not prove that no such map could pass it. The relative ease with which the opposing parties can gather evidence is a familiar consideration in allocating the burden of production. See 1 C. Mueller & L. Kirkpatrick, Federal Evidence § 63, p. 316 (2d ed. 1994); 21 C. Wright & K. Graham, Federal Practice and Procedure § 5122, pp. 556–557 (1977).

III

Even if we set aside the challengers' failure to submit an alternative map, the District Court's finding that race predominated in the drawing of District 12 is clearly erroneous. The State offered strong and coherent evidence that politics, not race, was the legislature's predominant aim, and the evidence supporting the District Court's contrary finding is weak and manifestly inadequate in light of the high ****1492** evidentiary standard that our cases require challengers to meet in order to prove racial predominance.[7]

***338** My analysis will proceed in three steps. First, I will discuss what the legislature's mapmaker did and why this approach is entirely consistent with his stated political objectives. Then, I will explain why this approach inevitably had the racial effect to which the challengers object. Finally, I will address the evidence of racial predominance on which the majority relies and show why it is inadequate to sustain the District Court's judgment.

A

In order to understand the mapmaker's approach, the first element to be kept in mind is that the basic shape of District 12 was legitimately taken as a given. When a new census requires redistricting, it is a common practice to start with the plan used in the prior map and to change the boundaries of the prior districts only as needed to comply with the one-person, one-vote mandate and to achieve other desired ends. This approach honors settled expectations and, if the prior plan survived legal challenge, minimizes the risk that the new plan will be overturned. And that is the approach taken by the veteran mapmaker in the present case, Dr. Thomas Hofeller. App. 523 ("the normal starting point is always from the existing districts").

Dr. Hofeller began with the prior version of District 12 even though that version had a strange, serpentine shape. ***339** *Cromartie I,* 526 U.S., at 544, 119 S.Ct. 1545; App. 1163. That design has a long history. It was first adopted in 1992, and subsequent redistricting plans have built on the 1992 plan. *Ibid.* In *Cromartie II,* we sustained the constitutionality of the 1997 version of District 12, which featured the same basic shape. See 532 U.S., at 258, 121 S.Ct. 1452. And retention of this same basic shape is not challenged in this case.[8]

Using the prior design as his starting point, Dr. Hofeller assumed that District 12 would remain a "strong Democratic distric[t]." App. 521. He stated that he drew "the [overall redistricting] plan to ... have an increased number of competitive districts for GOP candidates," *id*., at 520, and that he therefore moved more Democratic voters into District 12 in order to "increase Republican opportunities in the surrounding districts," *id*., at 1606.

****1493** Under the map now before us, District 12 is bordered by four districts.[9] Running counterclockwise, they are: District

5 to the northwest; District 9 to the southwest; District 8 to the southeast; and District 6 to the northeast. See Appendix, *ante*. According to Dr. Hofeller, the aim was to make these four districts—considered as a whole—more secure for Republicans. App. 1606, 2696.

To do this, Dr. Hofeller set out in search of pockets of Democratic voters that could be moved into District 12 from areas adjoining or very close to District 12's prior boundaries. Of the six counties through which District 12 passes, the three most heavily Democratic (and also the most populous) are Forsyth, Guilford, and Mecklenburg, which contain the major population centers of Winston–Salem, Greensboro, and Charlotte, respectively. See 7 Record 480–482; App. 1141. As a measure of voting preferences, Dr. Hofeller used ***340** the results of the then-most recent Presidential election, *i.e.,* the election of 2008. *Id.,* at 1149, 2697, 2721–2722. In that election, these three counties voted strongly for the Democratic candidate, then-Senator Barack Obama, while the other three counties, Cabarrus, Davidson, and Rowan, all voted for the Republican candidate, Senator John McCain. See 4 Record 1341–1342.

Two of the three Democratic counties, Forsyth and Guilford, are located at the northern end of District 12, while the other Democratic county, Mecklenburg, is on the southern end. See Appendix, *ante.* The middle of the district (often called the "corridor") passes through the three more Republican-friendly counties—Cabarrus, Davidson, and Rowan. *Ibid.* Thus, if a mapmaker sat down to increase the proportion of Democrats in District 12 and to reduce the proportion in neighboring districts, the most obvious way to do that was to pull additional Democrats into the district from the north and south (the most populous and heavily Democratic counties) while shifting Republican voters out of the corridor.

That, in essence, is what Dr. Hofeller did—as the majority acknowledges. *Ante,* at 1466 (Dr. Hofeller "narrow[ed District 12's] already snakelike body while adding areas at either end"); App. 1150 (Table 1), 1163. Dr. Hofeller testified that he sought to shift parts of Mecklenburg County out of Districts 8 and 9 (in order to reduce the percentage of Democrats in these two districts) and that this required him to increase the coverage of Mecklenburg County in District 12. *Id*., at 1142–1143, 1607, 2753.

Dr. Hofeller testified that he also had political plans for the current map's District 6, which differed substantially from the version in the prior map. Dr. Hofeller wanted to improve the Republicans' prospects in this new district by minimizing its coverage of Guilford County's Democratic population. *Id.,* at 1143, 1607, 2693, 2697, 2752. That also meant increasing the population of Guilford County Democrats in District 12. *Id*., at 1143, 1607, 2697.

***341** This influx of Democratic voters from the two most populous counties in District 12 required shedding voters elsewhere in order to comply with this Court's mandate of one-person, one-vote, see *Kirkpatrick v. Preisler,* 394 U.S. 526, 530–531, 89 S.Ct. 1225, 22 L.Ed.2d 519 (1969),[10] and the population removed had to be added to a bordering district. App. 523. Parts of ****1494** Davidson and Rowan Counties were therefore shifted to District 5, *id*., at 1143, 1150 (Table 1), but Dr. Hofeller testified that this would not have been sufficient to satisfy the one-person, one-vote standard, so he also had to move voters from heavily Democratic Forsyth County into District 5, *id*., at 1143, 2697, 2752–2753. Doing so did not undermine his political objective, he explained, because District 5 "was stronger [for Republicans] to begin with and could take those [Forsyth] Democratic precincts" without endangering Republican chances in the district. *Id*., at 2753; see also *id*., at 2697. The end result was that, under the new map now at issue, the three major counties in the north and south constitute a larger percentage of District 12's total population, while the corridor lost population. See *id*., at 1150 (Table 1), 2149 (Finding 187).

A comparison of the 2008 Presidential election vote under the old and new versions of the districts shows the effect of Dr. Hofeller's map. District 8 (which, of the four districts bordering District 12 under the 2011 map, was the most Democratic district) saw a drop of almost 11% in the Democratic vote under the new map. See 2 Record 354, 421. District 9 saw a drop in the percentage of registered Democrats, *id.,* at 350, 417, although the vote percentage for the Democratic Presidential candidate remained essentially the same (increasing by 0.39%). *Id.,* at 354, 421. District 5, which was heavily Republican under the prior map and was redrawn to absorb Democrats from Forsyth County, saw about a 7–point swing in favor of the Democratic candidate, ***342** but it remained a strong Republican district. *Ibid.* New District 6 is less susceptible to comparison because its boundaries are completely different from the district bearing that number under the old plan, but the new District 6 was solidly Republican, with a Republican Presidential vote percentage of nearly 56%. *Ibid.* As stated by the state court that considered and rejected the same constitutional challenge now before us:

> "By increasing the number of Democratic voters in the 2011 Twelfth Congressional District located in Mecklenburg and Guilford Counties, the 2011 Congressional Plan created other districts that were more competitive for Republican

candidates as compared to the 2001 versions of these districts....” App. 2150 (Finding 191).

The results of subsequent congressional elections show that Dr. Hofeller’s plan achieved its goal. In 2010, prior to the adoption of the current plan, Democrats won 7 of the 13 districts, including District 8.[11] But by 2016, Republicans controlled 10 of the 13 districts, including District 8, and all the Republican candidates for the House of Representatives won their races with at least 56% of the vote.[12] In accordance with the map’s design, the only Democratic seats remaining after 2016 were in Districts 1, 4, and 12. *Id.,* at 521.

In sum, there is strong evidence in the record to support Dr. Hofeller’s testimony that the changes made to the 2001 map were designed to maximize Republican opportunities.

***343** B

I now turn to the connection between the mapmaker’s strategy and the effect on ****1495** the percentage of African–Americans in District 12.

As we recognized in *Cromartie II,* political party preference and race are highly correlated in North Carolina generally and in the area of Congressional District 12 in particular. App. 2022 (state trial court finding that “racial identification correlates highly with political affiliation” in North Carolina). The challenger’s expert, Dr. Stephen Ansolabehere, corroborated this important point. Dr. Ansolabehere calculated the statewide correlation between race and voting in 2008[13] and found a correlation of 0.8, which is “very high.” *Id.,* at 342, 352 (Table 1). See also J. Levin, J. Fox, & D. Forde, Elementary Statistics in Social Research 370 (12th ed. 2014); R. Witte & J. Witte, Statistics 138 (10th ed. 2015).

In the area of District 12, the correlation is even higher. There, Dr. Ansolabehere found that the correlation “approach[ed] 1,” App. 342, that is, almost complete overlap. These black Democrats also constitute a supermajority of Democrats in the area covered by the district. Under the 2001 version of District 12—which was drawn by Democrats and was never challenged as a racial gerrymander—black registered voters constituted 71.44% of Democrats in the district. 2 Record 350; see also App. 2145 (Finding 173).[14] ***344** What this means is that a mapmaker seeking to pull Democrats into District 12 would unavoidably pull in a very large percentage of African–Americans.

The distribution of Democratic voters magnified this effect. Dr. Hofeller’s plan required the identification of areas of Democratic strength that were near District 12’s prior boundaries. Dr. Hofeller prepared maps showing the distribution of Democratic voters by precinct,[15] see *id*., at 1148–1149, 1176–1177, 1181, and those maps show that these voters were highly concentrated around the major urban areas of Winston–Salem (in Forsyth County), Greensboro (in Guilford County), and Charlotte (in Mecklenburg County). Dr. Ansolabehere, the challengers’ expert, prepared maps showing the distribution of black registered voters in these same counties, see *id*., at 322–328; 1 Record 128–133, and a comparison of these two sets of maps reveals that the clusters of Democratic voters generally overlap with those of registered black voters. In other words, the population of nearby Democrats who could be moved into District 12 was heavily black.

****1496** The upshot is that, so long as the legislature chose to retain the basic shape of District 12 and to increase the number of Democrats in the district, it was inevitable that the Democrats brought in would be disproportionately black.

None of this should come as a surprise. After all, when the basic shape of District 12 was created after the 1990 census, the express goal of the North Carolina Legislature was to create a majority-minority district. See *Shaw I,* 509 U.S., at 633–636, 113 S.Ct. 2816. It has its unusual shape *because* it was ***345** originally designed to capture pockets of black voters. See *Shaw v. Hunt,* 517 U.S. 899, 905–906, 116 S.Ct. 1894, 135 L.Ed.2d 207 (1996) (*Shaw II*). Although the legislature has modified the district since then, see *Cromartie I,* 526 U.S., at 544, 119 S.Ct. 1545 (describing changes from the 1991 version to the 1997 version), “it retains its basic ‘snakelike’ shape and continues to track Interstate 85.” *Ibid.*; 1 Record 35 (Appellees’ Complaint) (“Congressional District 12 has existed in roughly its current form since 1992, when it was drawn as a majority

African–American district ..."); see also App. 1163 (showing the 1997, 2001, and 2011 versions of District 12). The original design of the district was devised to ensure a high concentration of black voters, and as long as the basic design is retained (as it has been), one would expect that to continue.

While plaintiffs failed to offer any alternative map, Dr. Hofeller produced a map showing what District 12 would have looked like if his computer was programmed simply to maximize the Democratic vote percentage in the district, while still abiding by the requirement of one-person, one-vote. *Id.,* at 1148. The result was a version of District 12 that is very similar to the version approved by the North Carolina Legislature. See *id*., at 1175; *id*., at 1615–1618. Indeed, this maximum-Democratic plan had a black voting age population of 50.73%, which is actually *higher* than District 12's black voting age population of 50.66%. *Id.,* at 1154 (Table 5).

Thus, the increase in the black voting age population of District 12 is easily explained by a coherent (and generally successful) political strategy. *Cromartie II,* 532 U.S., at 245, 121 S.Ct. 1452 ("[A] legislature may, by placing reliable Democratic precincts within a district without regard to race, end up with a district containing more heavily African–American precincts, but the reasons would be political rather than racial").

Amazingly, a reader of the majority opinion (and the opinion of the District Court) would remain almost entirely ignorant of the legislature's political strategy and the relationship between that strategy and the racial composition of ***346** District 12.[16] The majority's analysis is like Hamlet without the prince.[17]

****1497** C

The majority focuses almost all its attention on a few references to race by those responsible for the drafting and adoption of the redistricting plan. But the majority reads far too much into these references. First, what the plaintiffs had to prove was not simply that race played *some* role in the districting process but that it was the legislature's *predominant* consideration. Second, as I have explained, a court must exercise "extraordinary caution" before finding that a state legislature's predominant reason for a districting plan was racial. *Miller,* 515 U.S., at 916, 115 S.Ct. 2475. This means that comments should not be taken out of context and given the most sinister possible meaning. Third, the findings of the state courts in a virtually identical challenge to District 12 are entitled to respectful consideration. A North Carolina trial court, after hearing much the same evidence as the court below, found that the legislature's predominant motive was political, not racial. That decision was affirmed by the North Carolina Supreme Court. *Dickson v. Rucho,* 367 N.C. 542, 766 S.E.2d 238 (2014), vacated and remanded, ***347** 575 U.S. ——, 135 S.Ct. 1843, 191 L.Ed.2d 719 aff'd on remand, 368 N.C. 481, 781 S.E.2d 404 (2015), cert. pending, No. 16–24. Even if the judgment in the state case does not bar the present case under the doctrine of res judicata, see *ante,* at 1466 – 1468, the state-court finding illustrates the thinness of the plaintiffs' proof.

Finally, it must be kept in mind that references to race by those responsible for drawing or adopting a redistricting plan are not necessarily evidence that the plan was adopted for improper racial reasons. Under our precedents, it is unconstitutional for the government to consider race in almost any context, and therefore any mention of race by the decisionmakers may be cause for suspicion. We have said, however, that that is not so in the redistricting context. For one thing, a State like North Carolina that was either wholly or partially within the coverage of § 5 of the Voting Rights Act of 1965 could not redistrict without heeding that provision's prohibition against racial retrogression, see 52 U.S.C. § 10304(b); *Alabama Legislative Black Caucus v. Alabama,* 575 U.S. ——, —— – ——, 135 S.Ct. 1257, 1263–1263, 191 L.Ed.2d 314 (2015), and therefore race had to be kept in mind. In addition, all legislatures must also take into account the possibility of a challenge under § 2 of the Voting Rights Act claiming that a plan illegally dilutes the voting strength of a minority community. See *League of United Latin American Citizens v. Perry,* 548 U.S. 399, 425, 126 S.Ct. 2594, 165 L.Ed.2d 609 (2006). If a State ultimately concludes that it must take race into account in order to comply with the Voting Rights Act, it must show that it had a " 'strong basis in evidence' in support of the (race-based) choice that it has made." *Alabama Legislative Black Caucus, supra,* at ——, 135 S.Ct., at 1274. But those involved in the redistricting process may legitimately make statements about Voting Rights Act compliance before deciding that the Act does not provide a need for race-based districting. And it is

understandable for such individuals to explain that a race-neutral plan happens to satisfy the criteria on which Voting Rights Act challengers might insist. In ***348** short, because of the Voting Rights Act, consideration and discussion of the racial effects of a plan may be expected.

1

The June 17, 2011, Statement

I begin with a piece of evidence that the majority does *not* mention, namely, the very first item cited by the District Court in support of its racial-predominance finding. ****1498** This evidence consisted of a June 17, 2001, statement by Senator Rucho and Representative Lewis, the state legislators who took the lead in the adoption of the current map. In that statement, Rucho and Lewis referred to "constructing [Voting Rights Act] majority black districts." App. 1025. Seizing upon the use of the plural term "districts," the court below seemed to think that it had found a smoking gun. *Harris v. McCrory,* 159 F.Supp.3d 600, 616 (M.D.N.C.2016). The State had insisted that its plan drew only one majority-minority congressional district, District 1, but since the June 17 statement "clearly refers to multiple districts that are now majority minority," *ibid.,* the court below viewed the statement as telling evidence that an additional congressional district, presumably District 12, had been intentionally designed to be a majority-minority district and was thus based on race.

There is a glaring problem with this analysis: The June 17 statement was about *state legislative districts,* not *federal congressional districts*. See App. 1024–1033. The United States, as *amicus curiae* in support of plaintiffs, concedes that the District Court made a mistake by relying on the June 17 statement. Brief for United States 27, n. 13. The majority, by contrast, tries to ignore this error. But the District Court gave the June 17 statement pride-of-place in its opinion, mentioning it first in its analysis, and the District Court seemed to think that this evidence was particularly significant, stating that the reference to multiple districts was not "the result of happenstance, a mere slip of the ***349** pen." 159 F.Supp.3d, at 616. The District Court's error shows a troubling lack of precision.

2

The § 5 Preclearance Request

Under § 5 of the Voting Rights Act, North Carolina requested preclearance from the Department of Justice shortly after the Legislature approved the new congressional plan. *Id.,* at 608. In its preclearance application, the State noted that "[o]ne of the concerns of the Redistricting Chairs was that in 1992, the Justice Department had objected to the 1991 Congressional Plan because of a failure by the State to create a second majority minority district." App. 478. The application says that the Redistricting Chairs "sought input from Congressman [Mel] Watt[, the African–American incumbent who represented

District 12,] regarding options for re-drawing his district," and that after this consultation, "the Chairs had the impression that Congressman Watt would oppose any redrawing of the Twelfth District ... as originally contemplated by the 1992 Justice Department objection." *Ibid.* The Chairs drew District 12 "[b]ased in part on this input from Congressman Watt." *Id*., at 478–479. Two sentences later in the same paragraph, the application observed that the black voting age population for District 12 went up from 43.77% to 50.66% and that therefore the district "maintains, and in fact increases, the African–American community's ability to elect their candidate of choice in District 12." *Id*., at 479.

According to the majority, this statement shows a "determination to concentrate black voters in District 12." *Ante,* at 1462. In fact, it shows no such thing. The statement explains that Senator Rucho and Representative Lewis decided *not* to construct District 12 as a majority-minority district—as the 1992 Justice Department had demanded—"[b]ased in part on" the input they received from Congressman Watt, ***350** whom they thought "would oppose" drawing the district "as originally contemplated by the 1992 Justice Department objection." App. 478–479. If anything, ****1499** this document cuts *against* a finding of racial predominance.

The statement's matter-of-fact reference to the increase in District 12's black voting age population hardly shows that the legislature altered District 12 *for the purpose* of causing this increase. An entirely natural interpretation is that the Redistricting Chairs simply reported this fact so that it would be before the Justice Department in the event that the Department had renewed Voting Rights Act concerns. Only by reading a great deal between the lines and adopting the most sinister possible interpretation can the statement be viewed as pointed evidence of a predominantly racial motive.

3

The Mel Watt Testimony

In both the District Court and the state trial court, Congressman Watt testified that, while the redistricting plan was being developed, Senator Rucho invited him to his home to discuss the new boundaries of District 12. *Id.,* at 2368–2369, 1343–1344. According to Congressman Watt, Senator Rucho said that the Republican leadership wanted him to "ramp the 12th Congressional District up to over 50 percent black" because "they believed it was required ... by the Voting Rights Act." *Id.,* at 1344, 2369, 2393. In the state proceedings, Senator Rucho denied making any such statement, *id.,* at 1703, and another state legislator present at the meeting, Representative Ruth Samuelson, gave similar testimony, *id.,* at 1698. Neither Senator Rucho nor Representative Samuelson testified in federal court (although their state court testimony was made part of the federal record). See *id.,* at 2847. But the District Court credited Congressman Watt's testimony based on its assessment of his demeanor ***351** and the consistency of his recollection, 159 F.Supp.3d, at 617–618, and I accept that credibility finding for purposes of our review.[18]

But even assuming that Congressman Watt's recollection was completely accurate, all that his testimony shows is that legislative leaders *at one point in the process* thought that they had to draw District 12 as a majority-minority district in order to comply with the Voting Rights Act; it does *not* show that they actually *did* draw District 12 with the goal of creating a majority-minority district. And as explained in the discussion of the preclearance request above, Senator Rucho and Representative Lewis stated that they ultimately turned away from the creation of a majority-minority district after consulting with Congressman Watt. "Based in part on this input from Congressman Watt," they said they decided *not* to draw the district as the 1992 Department of Justice had suggested—that is, as a majority-minority district. App. 478–479.

This account is fully consistent with Congressman Watt's testimony about his ****1500** meeting with Senator Rucho. Congressman Watt noted that Senator Rucho was uncomfortable with the notion of increasing the black voting age

population, *id.,* at 2369, 2393, and Congressman Watt testified that he told Senator Rucho that he was opposed to the idea, ***352** *id.,* at 1345, 2369, 2393. So it makes sense that Senator Rucho was dissuaded from taking that course by Congressman Watt's reaction. And Dr. Hofeller consistently testified that he was never asked to meet a particular black voting age population target, see Part III–C–5, *infra,* and that the only data displayed on his screen when he drew District 12 was political data. See *infra,* at 1500, n. 19. Thus, Congressman Watt's testimony, even if taken at face value, is entirely consistent with what the preclearance request recounts: After initially contemplating the possibility of drawing District 12 as a majority-minority district, the legislative leadership met with Congressman Watt, who convinced them not to do so.

4

Dr. Hofeller's Statements About Guilford County

Under the prior map, both Guilford County and the Greensboro African–American community were divided between the 12th and 13th Districts. This had been done, Dr. Hofeller explained, "to make both the Old 12th and 13th Districts strongly Democratic." App. 1103; see also *id.,* at 555, 2821; 1 Record 132–133 (showing racial demographics of Guilford precincts under 2001 and 2011 maps). But the Republican legislature wanted to make the area surrounding District 12 more Republican. The new map eliminated the old 13th District and created a new district bearing that number farther to the east. The territory to the north of Greensboro that had previously been in the 13th District was placed in a new district, District 6, which was constructed to be a Republican-friendly district, and the new map moved more of the Greensboro area into the new District 12. This move was entirely consistent with the legislature's stated goal of concentrating Democrats in the 12th District and making the surrounding districts hospitable to Republican candidates.

Dr. Hofeller testified that the placement of the Greensboro African–American community in the 12th District was the result of this political strategy. He stated that the portion ***353** of Guilford County absorbed by District 12 "wasn't moved into CD 12 because it had a substantial black population. It was moved into CD 12 because it had a substantial Democratic political voting record...." App. 2824. And Dr. Hofeller maintained that he was never instructed to draw District 12 as a majority-minority district or to increase the district's black voting age population. See, *e.g., id.,* at 520, 556–558, 1099, 1603–1604, 2682–2683, 2789. Instead, he testified that political considerations determined the boundaries of District 12 and that the only data displayed on his computer screen when he drew the challenged map was voting data from the 2008 Presidential election.[19] *Id.,* at 1149, 2697, 2721–2722.

Dr. Hofeller acknowledged, however, that there had been concern about the possibility of a Voting Rights Act challenge ****1501** to this treatment of the Greensboro African–American community. Guilford County was covered by § 5 of the Voting Rights Act, and as noted, § 5 prohibits retrogression. Under the old map, the Guilford County African–American community was split between the old District 13 and District 12, and in both of those districts, black voters were able to elect the candidates of their choice by allying with white Democratic voters. Under the new map, however, if the Greensboro black community had been split between District 12 and the new Republican-friendly District 6, the black voters in the latter district would be unlikely to elect the candidate of their choice. Placing the African–American community in District 12 avoided this consequence. Even Congressman Watt conceded that there were potential § 5 ***354** concerns relating to the black community in Guilford County. *Id.,* at 2387–2388.

The thrust of many of Dr. Hofeller's statements about the treatment of Guilford County was that the reuniting of the Greensboro black community in District 12 was nothing more than a welcome byproduct of his political strategy. He testified that he *first* drew the district based on political considerations and *then* checked to ensure that Guilford County's black population was not fractured. *Id.,* at 2822 ("[W]hen we checked it, we found that we did not have an issue in Guilford County

with fracturing the black ... community"); see also *id.,* at 556, 2821, 2823. This testimony is entirely innocuous.

There is no doubt, however, that Dr. Hofeller also made a few statements that may be read to imply that concern about Voting Rights Act litigation was part of the motivation for the treatment of Guilford County. He testified at trial that he "was instructed [not] to use race in any form *except perhaps with regard to Guilford County*." *Id.,* at 2791 (emphasis added). See *id.,* at 1103 (the legislature "determined that it was prudent to reunify the African–American community in Guilford County"); *id.,* at 558 ("[I]t was decided to reunite the black community in Guilford County into the Twelfth").

These statements by Dr. Hofeller convinced the District Court that the drawing of District 12 was not a "purely ... politically driven affair." 159 F.Supp.3d, at 619. But in order to prevail, the plaintiffs had to show much more—that race was the *predominant* reason for the drawing of District 12, and these few bits of testimony fall far short of that showing.

Our decision in *Cromartie II* illustrates this point. In that case, the legislature's mapmaker made a statement that is remarkably similar to Dr. Hofeller's. Gerry Cohen, the "legislative staff member responsible for drafting districting plans," reported: " 'I have moved Greensboro Black community ***355** into the 12th, and now need to take [about] 60,000 out of the 12th. I await your direction on this.' " 532 U.S., at 254, 121 S.Ct. 1452. This admission did not persuade the Court that the legislature's predominant motive was racial. The majority ignores this obvious parallel with *Cromartie II*.

Moreover, in an attempt to magnify the importance of the treatment of Guilford County, the majority plays games with statistics. It states that "District 12 saw a net increase of more than 25,000 black voters in Guilford County, relative to a net gain of fewer than 35,000 across the district: So the newly added parts of that county played a major role in pushing the district's BVAP over 50%." *Ante,* at 1477.

This is highly misleading. First, since the black voting age population of District 12 is just barely over 50%—specifically, 50.66%—almost *any* decision that increased the number of voting age blacks in District 12 could be said to have "played a ****1502** major role in pushing the district's BVAP over 50%."

Second, the majority provides the total number of voting age blacks added to District 12 from Guilford County (approximately 25,000) alongside the total number of voting age blacks added to the district (approximately 35,000), and this has the effect of making Guilford County look like it is the overwhelming contributor to the district's net increase in black voting age population. In truth, Mecklenburg County was by far the greatest contributor of voting age blacks to District 12 in both absolute terms (approximately 147,000) and in terms of new voting age blacks (approximately 37,000). See App. 384, 500–502. Indeed, if what matters to the majority is how much individual counties increased District 12's black voting age population percentage, Davidson County deserves attention as well, since the portion of the county within District 12 lost over 26,000 more voting age whites than blacks. *Ibid.* That is greater than the net number of voting age blacks added to the district by Guilford County or Mecklenburg County. *Ibid.* As with so much in ***356** the majority opinion, the issue here is more nuanced—and much more favorable to the State—than the majority would have it seem.

5

The July 1, 2011, Statement

For reasons similar to those just explained, the majority makes far too much of a statement issued by Senator Rucho and Representative Lewis on July 1, 2011, when the new districting plan was proposed. Particularly in light of Dr. Hofeller's later testimony about the legislature's partisan objectives, it is apparent that this statement does not paint an entirely reliable

picture of the legislature's aims. The statement begins with this proclamation: "From the beginning, our goal has remained the same: the development of fair and legal congressional and legislative districts," *id.,* at 353, and the statement seriously downplays the role of politics in the map-drawing process, acknowledging only that "we have not been ignorant of the partisan impacts of the districts we have created," *id.,* at 361.

The statement discusses the treatment of Guilford County in a section with the heading "Compliance with the Voting Rights Act." *Id.,* at 355–358. In that section, Rucho and Lewis state: "Because of the presence of Guilford County in the Twelfth District, we have drawn our proposed Twelfth District at a black voting age level that is above the percentage of black voting age population found in the current Twelfth District. We believe that this measure will ensure preclearance of the plan." *Id.,* at 358.

The majority and the District Court interpret this passage to say that Rucho and Lewis decided to move black voters from Guilford County into District 12 in order to ward off Voting Rights Act liability. *Ante,* at 1475 ("*Because of* the VRA, [Rucho and Lewis] increased the number of African–Americans" in District 12 (citing 159 F.Supp.3d, at 617; emphasis ***357** in original)). But that is hardly the only plausible interpretation. The statement could just as easily be understood as "an explanation by [the] legislature that *because* they chose to add Guilford County back into CD 12, the district ended up with an increased ability to elect African–American candidates, rather than the legislature explaining that they chose to add Guilford County back into CD 12 because of the [racial] results that addition created." *Id.,* at 635 (Osteen, J., concurring in part and dissenting in part) (emphasis in original). And because we are obligated to presume the good faith of the North Carolina Legislature, this latter interpretation is the appropriate one.

****1503** But even if one adopts the majority's interpretation, it adds little to the analysis. The majority's close and incriminating reading of a statement issued to win public support for the new plan may represent poetic justice: Having attempted to blur the partisan aim of the new District 12, the legislature is hoisted on its own petard. But poetic justice is not the type of justice that we are supposed to dispense. This statement is *some* evidence that race played a role in the drawing of District 12, but it is a mistake to give this political statement too much weight.

Again, we made precisely this point in *Cromartie II*. There, the "legislative redistricting leader," then-Senator Roy Cooper, testified before a legislative committee that the proposed plan " 'provides for ... *racial* and partisan *balance*.' " 532 U.S., at 253, 121 S.Ct. 1452 (emphasis added). The District Court read the statement literally and concluded that the district had been drawn with a racial objective. *Ibid.* But this Court dismissed the statement, reasoning that although "the phrase shows that the legislature considered race, along with other partisan and geographic considerations; ... it says little or nothing about whether race played a *predominant* role comparatively speaking." *Ibid.*

What was good in *Cromartie II* should also be good here.

***358** 6

Dr. Ansolabehere's Testimony

Finally, the majority cites Dr. Ansolabehere's testimony that black registered voters in the counties covered by District 12 were more likely to be drawn into District 12 than white registered voters and that black registered Democrats were more likely to be pulled in than white registered Democrats. *Ante,* at 1477 – 1478.

There is an obvious flaw in Dr. Ansolabehere's analysis. He assumed that, if race was not the driving force behind the

drawing of District 12, "white and black registered voters would have approximately the same likelihood of inclusion in a given Congressional District." App. 2597 (internal quotation marks omitted). But that would be true only if black and white voters were *evenly distributed* throughout the region, and his own maps showed that this was not so. See *id.,* at 322–328; 1 Record 128–133. Black voters were concentrated in the cities located at the north and south ends of the district and constituted a supermajority of Democrats in the area covered by District 12. See Part III–B, *supra*. As long as the basic shape of the district was retained, moving Democrats from areas outside but close to the old district boundaries naturally picked up far more black Democrats than white Democrats.

This explanation eluded Dr. Ansolabehere because he refused to consider either the implications of the political strategy that the legislature claimed to have pursued or the effects of the changes to District 12 on the surrounding districts. App. 2578–2582. The result was a distorted—and largely useless—analysis.

IV

Reviewing the evidence outlined above,[20] two themes emerge. First, District 12's borders and racial composition ***359** are readily explained by political considerations and the effects of the legislature's political strategy on the demographics of District 12. Second, the majority largely ignores ****1504** this explanation, as did the court below, and instead adopts the most damning interpretation of all available evidence.

Both of these analytical maneuvers violate our clearly established precedent. Our cases say that we must " 'exercise extraordinary caution' " " 'where the State has articulated a legitimate political explanation for its districting decision,' " *Cromartie II, supra,* at 242, 121 S.Ct. 1452 (emphasis deleted); the majority ignores that political explanation. Our cases say that "the good faith of a state legislature must be presumed," *Miller,* 515 U.S., at 915, 115 S.Ct. 2475; the majority presumes the opposite. And *Cromartie II* held that plaintiffs in a case like this are obligated to produce a map showing that the legislature could have achieved its political objectives without the racial effect seen in the challenged plan; here, the majority junks that rule and says that the plaintiffs' failure to produce such a map simply "does not matter." *Ante,* at 1479.

The judgment below regarding District 12 should be reversed, and I therefore respectfully dissent.

All Citations

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Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

1 A plaintiff succeeds at this stage even if the evidence reveals that a legislature elevated race to the predominant criterion in order to advance other goals, including political ones. See *Bush v. Vera,* 517 U.S. 952, 968–970, 116 S.Ct. 1941, 135 L.Ed.2d 248 (1996) (plurality opinion) (holding that race predominated when a legislature deliberately "spread[ ] the Black population" among several districts in an effort to "protect[ ] Democratic incumbents"); *Miller v. Johnson,* 515 U.S. 900, 914, 115 S.Ct. 2475, 132 L.Ed.2d 762 (1995) (stating that the "use of race as a proxy" for "political interest[s]" is "prohibit[ed]").

2 Challenges to the constitutionality of congressional districts are heard by three-judge district courts, with a right of direct appeal to

this Court. See 28 U.S.C. §§ 2284(a), 1253.

3 The State's argument to the contrary rests on a legal proposition that was foreclosed almost as soon as it was raised in this Court. According to the State, racial considerations cannot predominate in drawing district lines unless there is an "actual conflict" between those lines and "traditional districting principles." Brief for Appellants 45. But we rejected that view earlier this Term, holding that when (as here) race furnished "the overriding reason for choosing one map over others," a further showing of "inconsistency between the enacted plan and traditional redistricting criteria" is unnecessary to a finding of racial predominance. *Bethune–Hill v. Virginia State Bd. of Elections,* 580 U.S. ——, ——, 137 S.Ct. 788, 799, 197 L.Ed.2d 85 (2017). And in any event, the evidence recounted in the text indicates that District 1's boundaries *did* conflict with traditional districting principles—for example, by splitting numerous counties and precincts. See *supra,* at 1469. So we would uphold the District Court's finding of racial predominance even under the (incorrect) legal standard the State proposes.

4 In the District Court, the parties also presented arguments relating to the first *Gingles* prerequisite, contesting whether the African–American community in the region was sufficiently large and compact to form a majority of a reasonably shaped district. The court chose not to decide that fact-intensive question. And aside from the State's unelaborated assertion that "[t]here is no question that the first factor was satisfied," Brief for Appellants 52, the parties have not briefed or argued the issue before us. We therefore have no occasion to address it.

5 North Carolina calls our attention to two expert reports on voting patterns throughout the State, but neither casts light on the relevant issue. The first (by Dr. Thomas Brunell) showed that some elections in many of the State's counties exhibited "statistically significant" racially polarized voting. App. 1001. The second (by Dr. Ray Block) found that in various elections across the State, white voters were "noticeably" less likely than black voters to support black candidates. *Id.*, at 959. From those far-flung data points—themselves based only on past elections—the experts opined (to no one's great surprise) that in North Carolina, as in most States, there are discernible, non-random relationships between race and voting. But as the District Court found, see *Harris v. McCrory,* 159 F.Supp.3d 600, 624 (M.D.N.C.2016), that generalized conclusion fails to meaningfully (or indeed, at all) address the relevant local question: whether, in a new version of District 1 created without a focus on race, black voters would encounter "sufficient [ ]" white bloc-voting to "cancel [their] ability to elect representatives of their choice," *Gingles,* 478 U.S., at 56, 106 S.Ct. 2752. And so the reports do not answer whether the legislature needed to boost District 1's BVAP to avoid potential § 2 liability.

6 Justice ALITO charges us with "ignor[ing]" the State's political-gerrymander defense, making our analysis "like Hamlet without the prince." *Post,* at 1496 (opinion concurring in judgment in part and dissenting in part) (hereinafter dissent); see *post,* at 1496, 1504. But we simply take the State's account for what it is: one side of a thoroughly two-sided case (and, as we will discuss, the side the District Court rejected, primarily on factual grounds). By contrast, the dissent consistently treats the State's version of events (what it calls "the Legislature's political strategy and the relationship between that strategy and [District 12's] racial composition," *post,* at 1496) as if it were a simple "fact of the matter"—the premise of, rather than a contested claim in, this case. See *post,* at 1492 – 1493, 1494, 1496, 1499 – 1500, 1500 – 1501, 1503. The dissent's narrative thus tracks, top-to-bottom and point-for-point, the testimony of Dr. Hofeller, the State's star witness at trial—so much so that the dissent could just have block-quoted that portion of the transcript and saved itself a fair bit of trouble. Compare *post,* at 1492 – 1496, with App. 2671–2755. Imagine (to update the dissent's theatrical reference) *Inherit the Wind* retold solely from the perspective of William Jennings Bryan, with nary a thought given to the competing viewpoint of Clarence Darrow.

7 As earlier noted, that inquiry is satisfied when legislators have "place[d] a significant number of voters within or without" a district predominantly because of their race, regardless of their ultimate objective in taking that step. See *supra,* at 1463 – 1464, and n. 1. So, for example, if legislators use race as their predominant districting criterion with the end goal of advancing their partisan interests—perhaps thinking that a proposed district is more "sellable" as a race-based VRA compliance measure than as a political gerrymander and will accomplish much the same thing—their action still triggers strict scrutiny. See *Vera,* 517 U.S., at 968–970, 116 S.Ct. 1941 (plurality opinion). In other words, the sorting of voters on the grounds of their race remains suspect even if race is meant to function as a proxy for other (including political) characteristics. See *Miller,* 515 U.S., at 914, 115 S.Ct. 2475.

8 Undeterred by these settled principles, the dissent undertakes to refind the facts of this case at every turn. See *post,* at 1491 – 1503. Indeed, the dissent repeatedly flips the appropriate standard of review—arguing, for example, that the District Court's is not "the only plausible interpretation" of one piece of contested evidence and that the State offered an "entirely natural" view of another. *Post,* at 1498 – 1499, 1502; see also *post,* at 1496, 1499 – 1500, 1500, 1503. Underlying that approach to the District Court's factfinding is an elemental error: The dissent mistakes the rule that a legislature's good faith should be presumed "until a claimant makes a showing sufficient to support th[e] allegation" of "race-based decisionmaking," *Miller,* 515 U.S., at 915, 115 S.Ct. 2475 for a kind of super-charged, pro-State presumption on appeal, trumping clear-error review. See *post,* at 1491 – 1492, n. 7.

9 The dissent's contrary reading of the preclearance submission—as reporting the redistricters' "decis[ion] *not* to construct District 12 as a majority-minority district," *post,* at 1498—is difficult to fathom. The language the dissent cites explains only why Rucho and Lewis rejected one particular way of creating such a district; the submission then relates their alternative (and, of course, successful) approach to attaining an over–50% BVAP. See App. 478–479.

10 Watt recalled that he laughed in response because the VRA required no such target. See *id*., at 2369. And he told Rucho that "the African–American community will laugh at you" too. *Ibid.* Watt explained to Rucho: "I'm getting 65 percent of the vote in a 40 percent black district. If you ramp my [BVAP] to over 50 percent, I'll probably get 80 percent of the vote, and[ ] that's not what the Voting Rights Act was designed to do." *Ibid.*

11 The court acknowledged that, in the earlier state-court trial involving District 12, Rucho denied making the comments that Watt recalled. See 159 F.Supp.3d, at 617–618. But the court explained that it could not "assess [the] credibility" of Rucho's contrary account because even though he was listed as a defense witness and present in the courtroom throughout the trial, the State chose not to put him on the witness stand. *Id.,* at 618.

12 The dissent conjures a different way of explaining Watt's testimony. Perhaps, the dissent suggests, Rucho disclosed a majority-minority target to Watt, but Watt then *changed Rucho's mind*—and perhaps it was just a coincidence (or a mistake?) that Rucho still created a 50.7%- BVAP district. See *post,* at 1499 – 1500. But nothing in the record supports that hypothesis. See *ibid.* (relying exclusively on the State's preclearance submission to back up this story); *supra,* at 1475 – 1476, and n. 9 (correcting the dissent's misreading of that submission). And the State, lacking the dissent's creativity, did not think to present it at trial.

13 The dissent charges that this comparison is misleading, but offers no good reason why that is so. See *post,* at 1501 – 1502. It is quite true, as the dissent notes, that another part of District 12 (in Mecklenburg County) experienced a net increase in black voters even larger than the one in Guilford County. See *post,* at 1501 – 1502. (The net increases in the two counties thus totaled more than 35,000; they were then partially offset by net decreases in other counties in District 12.) But that is irrelevant to the point made here: Without the numerous black voters added to District 12 in Guilford County—where the evidence most clearly indicates voters were chosen based on race—the district would have fallen well shy of majority-minority status.

14 Hofeller did not dispute Ansolabehere's figures, but questioned his inference. Those striking patterns, the mapmaker claimed, were nothing more than the result of his own reliance on voting data from the 2008 Presidential election—because that information (*i.e.,* who voted for Obama and who for McCain) tracked race better than it did party registration. See App. 1101, 1111–1114; cf. *Cromartie II,* 532 U.S. 234, 245, 121 S.Ct. 1452, 149 L.Ed.2d 430 (2001) (recognizing that "party registration and party preference do not always correspond"). As we have just recounted, however, the District Court had other reasons to disbelieve Hofeller's testimony that he used solely that electoral data to draw District 12's lines. See *supra,* at 1476 – 1477. And Ansolabehere contended that even if Hofeller did so, that choice of data could itself suggest an intent to sort voters by race. Voting results from a "single [Presidential] election with a Black candidate," Ansolabehere explained, would be a "problematic and unusual" indicator of future party preference, because of the racial dynamics peculiar to such a match-up. App. 341; see *id*., at 342–343. That data would, indeed, be much more useful as a reflection of an area's racial composition: "The Obama vote," Ansolabehere found, is "an extremely strong positive indicator of the location of Black registered voters" and, conversely, an "extremely strong negative

indicator of the location of White registered voters." *Id*., at 342; see *id*., at 2546–2550.

15 The dissent responds that an alternative-map requirement "should not be too hard" for plaintiffs (or at least "sophisticated" litigants "like those in the present case") to meet. *Post,* at 1491 – 1492. But if the plaintiffs have already proved by a preponderance of the evidence that race predominated in drawing district lines, then we have no warrant to demand that they jump through additional evidentiary hoops (whether the exercise would cost a hundred dollars or a million, a week's more time or a year's). Or at least that would be so if we followed the usual rules. Underlying the dissent's view that we should not—that we should instead create a special evidentiary burden—is its belief that "litigation of this sort" often seeks to "obtain in court what [a political party] could not achieve in the political arena," *post,* at 1490, and so that little is lost by making suits like this one as hard as possible. But whatever the possible motivations for bringing such suits (and the dissent says it is *not* questioning "what occurred here," *ibid.*), they serve to prevent legislatures from taking unconstitutional districting action—which happens more often than the dissent must suppose. State lawmakers sometimes misunderstand the VRA's requirements (as may have occurred here with respect to § 5), leading them to employ race as a predominant districting criterion when they should not. See *supra,* at 1475 – 1476, and n. 10. Or they may resort to race-based districting for ultimately political reasons, leveraging the strong correlation between race and voting behavior to advance their partisan interests. See nn. 1, 7, *supra*. Or, finally—though we hope less commonly—they may simply seek to suppress the electoral power of minority voters. When plaintiffs meet their burden of showing that such conduct has occurred, there is no basis for subjecting them to additional—and unique—evidentiary hurdles, preventing them from receiving the remedy to which they are entitled.

1 I concur in the judgment of the Court regarding Congressional District 1. The State concedes that the district was intentionally created as a majority-minority district. See Brief for Appellants 44. And appellants have not satisfied strict scrutiny.

2 Article I, § 4, of the Constitution reserves to state legislatures the power to prescribe "[t]he Times, Places and Manner of holding Elections for Senators and Representatives," subject to Congress's authority to "make or alter such Regulations, except as to the Places of chusing Senators."

3 According to polling data, around 90% of African–American voters have voted for the Democratic candidate for President in recent years. See https://ropercenter.cornell.edu/polls/us–elections/how–groups–voted/groups–voted–2016/ (all Internet materials as last visited May 19, 2017) (in 2016, 88%); https://ropercenter.cornell.edu/polls/us–elections/how–groups–voted/how–groups–voted–2012/ (in 2012, 93%); https://ropercenter.cornell.edu/polls/us–elections/how–groups–voted/how–groups–voted–2008/ (in 2008, 95%); https://ropercenter.cornell.edu/polls/us–elections/how–groups–voted/how–groups–voted–2004/ (in 2004, 88%); https://ropercenter.cornell.edu/polls/us–elections/how–groups–voted/how–groups–voted–2000/ (in 2000, 90%).

4 The challengers' failure to do so is especially glaring given that at least two alternative maps *were* introduced during the legislative debates over the 2011 map, see 2 Record 357–366, 402–411; App. 883–887, though neither party contends that those maps met the legislature's political goals.

5 Ignoring all of these well-founded reasons supporting the alternative-map requirement, the majority mischaracterizes my argument as, at bottom, resting on the proposition that "little is lost by making suits like this one as hard as possible." *Ante,* at 1480, n. 15. That is not my view, and it is richly ironic for the Court that announced the alternative-map requirement to accuse those who defend the requirement of erecting illegitimate and unnecessary barriers to the vindication of constitutional rights.

6 The majority cites *Bush v. Vera,* 517 U.S. 952, 116 S.Ct. 1941, 135 L.Ed.2d 248 (1996), as proof that the lack of an alternative-map requirement has not "made any difference" in our past cases. *Ante,* at 1479. *Vera* was decided before *Cromartie II,* 532 U.S. 234, 121 S.Ct. 1452, 149 L.Ed.2d 430 (2001), announced the alternative-map requirement, so its failure to mention that

requirement is hardly surprising.

7 The majority accuses me of failing to accord proper deference to the District Court's factual findings and of disregarding the clear-error standard of review, *ante,* at 1474, n. 8, but that is nonsense. Unlike the majority, I simply follow *Cromartie II* by evaluating the District Court's findings *in light of the plaintiffs' burden*. See 532 U.S., at 241, 257, 121 S.Ct. 1452. The heavier a plaintiffs' evidentiary burden, the harder it is to find that plaintiffs have carried their burden—and the more likely that it would be clearly erroneous to find that they have. In this context, we are supposed to presume that the North Carolina Legislature acted in good faith and exercise "extraordinary caution" before rejecting the legislature's political explanation. *Miller v. Johnson,* 515 U.S. 900, 915–916, 115 S.Ct. 2475, 132 L.Ed.2d 762 (1995). Given that the State has offered a coherent and persuasive political explanation for District 12's boundaries, plaintiffs bear a "demanding" burden in attempting to prove racial predominance. *Cromartie II, supra,* at 241, 257, 121 S.Ct. 1452. Because the evidence they have put forward is so weak, see Part III–C, *infra,* they have failed to carry that burden, and it was clear error for the District Court to hold otherwise. See *Cromartie II, supra,* at 241, 257, 121 S.Ct. 1452 (applying the same clear-error analysis that I apply here).

8 This same basic shape was retained in the map proposed in the state legislature by the Democratic leadership and in the map submitted by the Southern Coalition for Social Justice. See 2 Record 402, 357.

9 A fifth district, District 2, appears to touch District 12 at the border of Guilford and Randolph Counties, but only to a *de minimis* extent.

10 District 12 was overpopulated by 2,847 people heading into the 2011 redistricting cycle. App. 1115; 2 Record 347.

11 North Carolina State Board of Elections, 11/02/2010 Official General Election Results—Statewide, http://er.ncsbe.gov/?election_dt =11/02/2010&county_id=0&office=FED&contest=0.

12 North Carolina State Board of Elections, 11/08/2016 Official General Election Results—Statewide, http://er.ncsbe.gov/?election_dt =11/08/2016&county_id=0&office=FED&contest=0.

13 As noted, Dr. Hofeller used the results of the 2008 Presidential election as a measure of party preference. In 2008, the Democratic candidate for President was then-Senator Barack Obama, the first black major party Presidential nominee, and it is true that President Obama won a higher percentage of the nationwide African–American vote in 2008 (95%) than did the Democratic Presidential candidates in 2000 (90%), 2004 (88%), and 2016 (88%). See *supra,* at 1488, n. 3. But as these figures show, the correlation between race and political party preference was very high in all these elections. Therefore, the use of 2008 statistics does not appear to have substantially affected the analysis.

14 Even two alternative redistricting plans offered prior to the enactment of the 2011 map—one submitted by the Southern Coalition for Social Justice and the other submitted by Democratic leaders in the state legislature—retained the basic shape of District 12 and resulted in black voters constituting 71.53% and 69.14% of registered Democrats, respectively. 2 Record 361 (Southern Coalition for Social Justice map), 406 (Congressional Fair and Legal map); see also App. 883–887, 2071 (Finding 34), 2145 (Finding 173).

15 To minimize jargon, I will use the term "precincts" to refer to vote tabulation districts (VTDs). See *id*., at 1609–1610, for an explanation of VTDs.

16 The District Court's description of the legislature's political strategy was cursory, and it spent no time analyzing the demographics of the region. See *Harris v. McCrory,* 159 F.Supp.3d 600, 618–619 (M.D.N.C.2016).

17 The majority concedes that this is a "thoroughly two-sided case," *ante,* at 1473, n. 6, yet the majority's opinion is thoroughly one sided. It offers no excuse for its failure to meaningfully describe—much less engage with—the State's political explanation for District 12's boundaries. Instead, it tries to change the subject, accusing me of treating the State's account as essentially uncontested. *Ante,* at 1473, n. 6. This is a hollow accusation. In this opinion, I lay out the evidence supporting the State's political explanation in Parts III–A and III–B, but I do not accept that account at face value. Instead, I go on to demonstrate that the plaintiffs' contrary arguments are exceedingly weak (Part III–C). Only after considering the evidence on both sides do I conclude that the State's explanation holds up.

18 That being said, Congressman Watt's testimony was double-hearsay: Congressman Watt testified about what Senator Rucho said *someone else* said. See App. 1345 (state trial court evidentiary ruling). For unknown reasons, Appellants failed to raise this objection below, but that only means that the testimony was *admitted*. The *weight* of that testimony is a different matter, and in general, hearsay should be viewed with great skepticism. *Ellicott v. Pearl,* 10 Pet. 412, 436, 9 L.Ed. 475 (1836) (majority opinion of Story, J.) (hearsay is "exceedingly infirm, unsatisfactory and intrinsically weak in its very nature and character"); *Queen v. Hepburn,* 7 Cranch 290, 296, 3 L.Ed. 348 (1813) (majority opinion of Marshall, C.J.) ("Its intrinsic weakness, its incompetency to satisfy the mind of the existence of the fact, and the frauds which might be practiced under its cover, combine to support the rule that hearsay evidence is totally inadmissible"); see also *Chambers v. Mississippi,* 410 U.S. 284, 298, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973).

19 Significantly, while the District Court doubted Dr. Hofeller's contention that politics, not race, dictated the boundaries of District 12 and that Dr. Hofeller was unaware of the relevant racial demographics in the region, see 159 F.Supp.3d, at 619–620, and n. 8, it did not dispute that only political data was displayed on his screen when he drew the district. The state trial court expressly found that only political data was displayed on Dr. Hofeller's screen. See App. 2150 (Finding 188).

20 The District Court relied on other evidence as well, but its probative value is so weak that even the majority does not cite it.

32 Misc.3d 709
Supreme Court, Albany County, New York.

COUNTY OF NASSAU, Nassau County Board of Elections, John A. Degrace, in his official capacity as Nassau County Republican Commissioner of Elections, and William T. Biamonte, in his official capacity as Nassau County Democratic Commissioner of Elections, Petitioners-, Plaintiffs,
v.
STATE of New York, NEW YORK STATE BOARD OF ELECTIONS, and James A. Walsh, Douglas A. Kellner, Evelyn J. Aquila, Gregory P. Peterson as Commissioners constituting the Board, Respondents-, Defendants.

7193-10
|
June 20, 2011.

Synopsis

Background: County and two county election commissioners commenced combined action against State of New York and New York State Board of Elections, challenging constitutionality of New York Election Modernization and Reform Act (EMRA) and Board's resolution certifying use of electronic voting machines that county alleged were defective and subject to electronic tampering.

Holdings: The Supreme Court, Albany County, Michael C. Lynch, J., held that:

action was not preempted by federal litigation against Board;

United States Attorney was not necessary party;

county lacked legal capacity to challenge EMRA on disenfranchisement ground;

county lacked legal capacity to challenge EMRA on bipartisan canvassing ground;

county lacked legal capacity to challenge EMRA on voting secrecy ground;

county lacked legal capacity to challenge EMRA on overvote and undervote ground; and

county lacked legal capacity to challenge EMRA as arbitrary or capricious.

Ordered accordingly.

Attorneys and Law Firms

****550** John Ciampoli, Esq., Mineola, Attorney for Petitioners–Plaintiffs.

Paul M. Collins, Esq., Deputy Special Counsel, Albany, Attorney for Respondents–Defendants New York State Board of Elections and Commissioners.

State of New York, Office of the Attorney General, Bruce J. Boivin, Esq., of Counsel, Albany, Attorneys for the State of New York.

Opinion

MICHAEL C. LYNCH, J.

***710** In March, 2010, the County of Nassau and its two election commissioners (hereinafter the County plaintiffs), commenced this combined action/proceeding in the County of Nassau essentially challenging the constitutionality of the New York Election Modernization and Reform Act ("EMRA") (L. 2005, Ch. 181, as amended by L. 2007, Ch. 506) and the December 15, 2009 resolution of the New York State Board of Elections (hereinafter Board) certifying the use of electronic voting machines or systems pursuant to Election Law § 7–201.

By Decision and Order (Woodard, J.) dated October 13, 2010, the Court granted the State of New York's (hereinafter State) application changing the venue of the entire action from Nassau County to the County of Albany. In so finding, the Court referred the respective motions of the State and the Board seeking to dismiss the petition-complaint to Albany County for resolution. Those motions to dismiss are addressed in this decision.

Following oral argument in Albany County on March 18, 2011, and at the Court's invitation, the parties submitted supplemental memorandum, as listed below, intended to address certain developments since the motions were filed.

In *United States of America v. NYS Board of Elections, et al.,* 06 CV 263 (N.D.N.Y.), the Federal District Court issued various remedial orders including a May 20, 2010 Order (Sharpe, J.) directing the County to utilize optical scan voting machines compliant with the Help America Vote Act (42 USC §§ 's 15301–15545 [HAVA]) for the Fall, 2010 elections (see ****551** Exhibit "Nassau 39" annexed to State's motion to dismiss). As a predicate to issuing the injunction, the District Court found that lever voting machines utilized in New York were not in compliance with HAVA. As such, the District Court directed the County to accept and utilize HAVA-compliant optical scanning voting systems. The County complied and utilized the ES & S scanners in the Fall 2010 elections.

Following the County's appeal from the May 20, 2010 injunction order, the United States Court of Appeals for the Second Circuit issued an Order, dated September 7, 2010, affirming the injunction. Pertinent here, the Second Circuit recognized that ***711** the County had "commenced litigation in state court challenging the constitutionality of EMRA under the constitution of New York State. Nothing is preventing Nassau from pursuing that litigation". The quoted phrase confirms that the present action/proceeding is not preempted by the federal litigation. Nor, as the State and Board claim, is the U.S. Attorney a necessary party in this litigation, given the Second Circuit's recognition that even if the County is successful in State court, the County would not be precluded "from filing suit in federal district court to dispute whether its lever voting machines are HAVA-compliant". The point of distinction is that the County plaintiffs' challenge in this litigation pertains to EMRA, not HAVA.

It is also important to recognize that Article 9 of the Election Law was amended during 2010 to provide for the canvassing of ballots when ballot scanners have been utilized (L. 2010, c. 163 eff. July 7, 2010). While this legislation was enacted after the subject motions were filed, the issues presented will be addressed in accord with the law as it exists today (see *Black Riv. Regulating Dist. v. Adirondack League Club,* 307 N.Y. 475, 486–487, 121 N.E.2d 428, appeal dismissed 351 U.S. 922, 76 S.Ct. 780, 100 L.Ed. 1453).

In 2007, EMRA was amended to require the replacement of the lever voting machines then utilized in New York elections with voting machines or systems compliant with Election Law § 7–202 and HAVA (L. 2007 Ch. 506). Pursuant to Election Law § 7–202[4], local boards of election are authorized to "purchase direct recording electronic machines or optical scan machines ..." In effect, this legislation precludes the continued use of lever voting machines in New York. This mandate deflates the argument of the State and Board that the County plaintiffs failed to exhaust their administrative remedy by presenting lever voting machines as an alternative.

The Board is authorized to examine and certify the use of voting machines and systems pursuant to Election Law § 7–201. In

so doing, the standard is to assure compliance with HAVA and Election Law § 7–202. The examination requires "a thorough review and testing of any electronic or computerized features of the machine or system" (EL § 7–201[1]).

The County plaintiffs' core thesis is that the voting systems approved by the Board are not secure and thus compromise the voting process protected under the State Constitution (see Preliminary Statement in Verified Petition–Complaint annexed as Exhibit "A" to the County's Notice of Cross Motion). During oral ***712** argument, the County expanded on this premise by asserting the approved systems fail to comply with Election Law § 7–202[1][t], which specifies that a voting machine or system "not include any device or functionality potentially capable of externally transmitting or receiving data via the internet or via radio waives or via other wireless means". The approved machines have both Ethernet ports and USB ports, features which the County plaintiffs contend ****552** are violative of Election Law § 7–202[1][t]. The County plaintiffs have requested an evidentiary hearing to demonstrate that the approved systems do not comply with Election Law § 7–202. As explained during oral argument, the County plaintiffs maintain they do not object to the use of electronic voting machines per se, but challenge the approved machines as defective and subject to being compromised by electronic or computerized tampering.

As a threshold matter, the State and Board contend that the County plaintiffs lack the legal capacity to commence this lawsuit. The traditional rule, followed in New York, is that municipalities and their officials do not have legal capacity to challenge acts of the State and State legislation, either directly or in a representative capacity on behalf of their citizens (*City of New York v. State of New York,* 86 N.Y.2d 286, 289–290, 631 N.Y.S.2d 553, 655 N.E.2d 649; *County of Albany v. Hooker,* 204 N.Y. 1, 97 N.E. 403). The only exception pertinent here is where compliance with a State statute would force municipal officials "to violate a constitutional proscription" (*Id.* pp. 291–292, 631 N.Y.S.2d 553, 655 N.E.2d 649 [citations omitted]). By compelling the County to utilize electronic voting machines, the County basically maintains that EMRA is forcing county officials to compromise the voting process protected under the State constitution.

Specifically, the County plaintiffs allege six causes of action in their complaint: (1) that the use of unsecure electronic voting machines required by EMRA will disenfranchise voters in violation of Article I, Section 1 of the State Constitution; (2) that EMRA violates Article II Section 8 of the State Constitution by preventing bi-partisan canvassing of ballots; (3) that EMRA violates Article II, Section 8 because it requires local boards of election to delegate their canvassing authority to private vendors; (4) that the use of optical scan voting machines mandated by EMRA violates Article II Section 7 by failing to preserve secrecy in voting; (5) that the electronic voting machines certified by the Board disregard voter intent by accepting ballots containing an overvote or undervote; and (6) that the Board's certification of voting systems ***713** in December 2009, including the ES & S system utilized by the County during the 2010 election cycle, was arbitrary and capricious.

"Legislative enactments enjoy a presumption of constitutionality imposing a heavy burden on a party trying to overcome it" (*Matter of Griffiss Local Development Corporation v. State of New York Authority Office,* 85 A.D.3d 1402, 925 N.Y.S.2d 712 [internal quotations and citations omitted]).

Article 2 Section 7 of the State Constitution specifies the manner of voting in elections "shall be by ballot or by such other method as may be prescribed by law, provided that secrecy in voting be preserved". This constitutional authorization empowers the State legislature to define alternate methods of voting. It follows that the State Constitution does not prohibit the use of electronic voting machines or systems; or mandate the use of lever voting machines. That the State legislature, through EMRA, has opted to require the use of electronic voting machines is within its constitutional authority. The County plaintiffs' thesis that they are being compelled to disenfranchise voters through the use of these machines is simply not persuasive. The claim is akin to that of the city officials in the *City of New* case asserting that inadequate state funding compelled them to compromise the constitutional rights of students to a viable education. In response, Judge Levine reasoned, as follows:

> ****553** "Surely, it cannot be persuasively argued that the City Officials in question should be held accountable either under the Equal Protection Clause or the State Constitution's public Education Article by reason of the alleged State underfunding of the New York City school system over which they have absolutely no control" (*City of New York,* supra at 295, 631 N.Y.S.2d 553, 655 N.E.2d 649).

The same holds true here.

With respect to the second and third causes of action, the 2010 amendments to Election Law Article 9, implement a canvassing process to accommodate bi-partisan board review. This is not a situation where the bi-partisan requirements of Article II Section 8 have been implicated (compare *Matter of Graziano v. County of Albany,* 3 N.Y.3d 475, 481, 787

N.Y.S.2d 689, 821 N.E.2d 114). Similarly unconvincing is the County's contention EMRA compromises a voters right to secrecy protected under Article II Section 7. Indeed, the statute expressly requires that approved voting machines or ***714** systems "provide the voter an opportunity to privately and independently verify votes selected and the ability to privately and independently change such votes or correct any error before the ballot is cast and counted" (Election Law § 7–202[1][e]); and "be provided with a screen or hood or curtain or privacy features with equivalent function which shall be so made and adjusted as to conceal the voter and his or her action while voting" (Election Law § 7–202[1][m]). As for disregarding a voter's intent in an instance of an undervote or overvote, the County plaintiffs acknowledge in their complaint that the electronic voting machines include a display screen alerting voters of an undervote or overvote (Verified Petition Complaint at para 183; Election Law § 7–202[1][d]).

In sum, the County plaintiffs have failed to bring their constitutional claims within any recognized exception and thus lack legal capacity to pursue these claims. The same holds true for their sixth cause of action pursuant to Article 78 challenging the Board's certification as arbitrary and capricious. As noted above, the State legislature has empowered the Board to examine and certify the propriety of the electronic voting machines (Election Law § 7–201). That the County plaintiffs object to the machines certified by the Board does not translate into legal capacity to challenge the Board's decision. Insofar as the County plaintiffs emphasize the restrictions defined in Election Law § 7–202[1][t], which are designed to prevent external tampering with the recorded vote through the internet or other wireless means, the Board necessarily must have the means to input ballot information into the electronic voting machines, and the ability to preserve such data. Under Election Law § 9–102[c], voting machines may be equipped with "a removable electronic or computerized device" for recording the vote. That the electronic voting machines approved by the Board include Ethernet ports and USB ports does not sustain the County plaintiffs' assertion that these machines are compromised under Election Law § 7–202[1][a], [t].

Since the County plaintiffs lack the legal capacity to pursue this litigation, the motions to dismiss the petition-complaint are granted, without costs.

This Memorandum constitutes the Decision and Order of the Court. This original Decision and Order is being returned to the Office of the Attorney General.

All Citations

32 Misc.3d 709, 927 N.Y.S.2d 548, 2011 N.Y. Slip Op. 21223

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56 N.Y.2d 306
Court of Appeals of New York.

In the Matter of John ESLER et al., Appellants,
v.
Carl J. WALTERS, as Supervisor of the Town of Guilderland, et al., Respondents.

June 15, 1982.

Synopsis
Appeal was taken from judgment of the Supreme Court at Special Term, Albany County, John H. Pennock, J., which granted application to annul special town election. After transfer by the Court of Appeals, 53 N.Y.2d 642, 438 N.Y.S.2d 787, 420 N.E.2d 979, the Supreme Court, Appellate Division, 83 A.D.2d 91, 444 N.Y.S.2d 961, reversed. On appeal, the Court of Appeals, Wachtler, J., held that statute which provides that in special elections on propositions to consolidate water districts, eligibility to vote be restricted to property owners was not unconstitutional as violation of equal protection or sections of State Constitution specifically dealing with voter rights.

Order of Appellate Division affirmed.

Fuchsberg, and Meyer, JJ., dissented and filed opinions.

Attorneys and Law Firms

***307 ***334 **1091** Jeffrey E. Stockholm, Albany, for appellants.

John W. Tabner and Edward M. Scher, Albany, for respondents.

***308** Robert Abrams, Atty. Gen. (Shirley Adelson Siegel, Sol. Gen., and William J. Kogan, Asst. Sol. Gen., Albany, of counsel), in his statutory capacity under section 71 of the Executive Law.

OPINION OF THE COURT

***309** WACHTLER, Judge.

On this appeal we are asked to consider the constitutionality of a statute (Town Law, § 206, subd. 7) which provides that in special elections on propositions to consolidate water districts, no person shall be entitled to vote unless he or she is an elector of the town and also "is the owner of taxable property situate within one of the districts". The trial court found the statute unconstitutional, but the Appellate Division, 83 A.D.2d 91, 444 N.Y.S.2d 961, reversed. The petitioners appeal claiming that the real property ownership requirement violates the equal protection guarantees of the State and Federal Constitutions as well as certain sections of the State Constitution specifically relating to the right to vote (N.Y.Const., art. I, § 1; art. II, § 1).

*****335** In July of 1980 the Town Board of the Town of Guilderland adopted, after a hearing, a resolution consolidating two

water districts, known as the McKownville and Westmere Water Districts. The resolution **1092 provides that the consolidated water districts shall be financed "on and ad Valorum basis" as well as by the imposition of water rents. The resolution also states that it is subject to a permissive referendum.

A valid petition for a referendum was submitted to the town clerk and accordingly an election was scheduled for August 27, 1980. The public notice of the election states: "No person is entitled to vote at said election unless he or she: (a) Is an elector of said Town of Guilderland, and (b) Is the owner of property assessed upon the last preceding Town Assessment Roll and situated within the said McKownville Water District and/or said Westmere Water District". This statement concerning voter qualifications for this type of special election is based upon and accords with subdivision 7 of section 206 of the Town Law.[1] At the special election a majority of those voting approved the proposed consolidation.

*310 In September this proceeding was commenced by three town residents who do not own real property in the township and thus were not entitled to vote in the special election. Two of the petitioners, Esler and Smith, were turned away at the polls; the other petitioner, Gaffney, made no attempt to vote because he was "aware of the public notice concerning [voter] qualifications". They claimed that as a result of the land ownership requirement the election was "performed in an unconstitutional manner, in violation of the petitioners' equal protection guarantees and effected the disenfranchisement of the petitioners in violation of the Constitution of this State and of the United States". They asked that the election be annulled and that an order be issued declaring subdivision 7 of section 206 of the Town Law unconstitutional.
The trial court agreed with the petitioners, relying primarily on *Matter of Wright v. Town Bd. of Town of Carlton*, 41 A.D.2d 290, 342 N.Y.S.2d 577, affd. 33 N.Y.2d 977, 353 N.Y.S.2d 739, 309 N.E.2d 137, in which a comparable section of the Town Law was held to be unconstitutional when measured against the guidelines enunciated in certain United States Supreme Court decisions.

The Appellate Division reversed and dismissed the petition. The court found that the Supreme Court's recent decision in *Ball v. James*, 451 U.S. 355, 101 S.Ct. 1811, 68 L.Ed.2d 150, upholding a land ownership requirement for voters in a water district election, was dispositive with respect to the petitioners' right to vote under the Federal Constitution. It did not address, and thus presumably found no merit to, the petitioners' State constitutional contentions.

The equal protection guarantee of the Fourteenth Amendment applies to the right to vote and generally places a heavy burden on the State to justify any departure from the "one-man, one-vote" principle (e.g., *Reynolds v. Sims*, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506). However, in *Salyer Land Co. v. Tulare Water Dist.*, 410 U.S. 719, 93 S.Ct. 1224, 35 L.Ed.2d 659) the Supreme Court recognized a narrow exception to that requirement when the election relates to a governmental body which performs a special limited function having a disproportionate effect on a definable segment of the community. In such a case, the court held that a statute limiting the right to vote to a specified group would be sustained unless the basis for the *311 limitation was " 'wholly irrelevant to achievement of the regulation's objectives' " (*Salyer Land Co. v. Tulare Water Dist., supra*, at p. 730, 93 S.Ct. at p. 1230), the minimal equal protection requirement.

Applying those principles in the *Salyer* case the court found no constitutional impediment in legislation permitting only ***336 landowners to vote in elections for directors of a particular water district, and also providing that the votes be weighted according to the assessed valuation of the voter's land. The court emphasized **1093 (at pp. 728–729, 93 S.Ct. at pp. 1229–1230) that the district had "relatively limited" governmental powers, its primary purpose being "to provide for the acquisition, storage, and distribution of water for farming in the Tulare Lake Basin. It provides no other general public services". The court also noted (at p. 729, 93 S.Ct. at p. 1230) that the water district's actions "disproportionately affect landowners" who alone bear the costs of district projects and services assessed in proportion to the benefits received, which would become a lien against the land in the case of delinquency.[2]

Subsequently in *Matter of Wright v. Town Bd. of Town of Carlton*, 41 A.D.2d 290, 342 N.Y.S.2d 577, *supra* the Appellate Division held the *Salyer* exception inapplicable to a statute imposing a land ownership requirement for voters in a special election to create a town water district (Town Law, § 209–e, subd. 3). The court noted that in *Salyer* (at p. 294, 342 N.Y.S.2d 577) "The Supreme Court concluded that the storage district's primary purpose was to provide for farming and not for general public services ordinarily financed by a municipal body." Thus applying the more demanding standards applicable to elections generally the Appellate Division found the statute unconstitutional because the State had failed to demonstrate that residents who do not own land were substantially less interested in the outcome of the election and that the statutory restriction on the right to vote served a compelling State interest. When that case was appealed to this court we affirmed on

the opinion at the Appellate Division (33 N.Y.2d 977, 353 N.Y.S.2d 739, 309 N.E.2d 137, *supra*).

***312** The Supreme Court's latest decision in this area now indicates that the exception recognized in *Salyer* is broader than it was perceived to be when the *Wright* case was decided. In *Ball v. James*, 451 U.S. 355, 101 S.Ct. 1811, 68 L.Ed.2d 150, *supra*, involving the Salt River District in Arizona, the court again found no equal protection violation in a statutory scheme which limited voting eligibility in a directors' election to landowners and apportioned voting power according to the amount of land a voter owns. Although the district was a major generator of hydroelectric power supplying virtually half of the State and delivered approximately 40% of its water to urban areas for nonagricultural purposes, the court held (at pp. 367–368, 101 S.Ct. at pp. 1818–1819) that the "constitutionally relevant fact is that all water delivered by the Salt River District, like the water delivered by the Tulare Lake Basin District, is distributed according to land ownership, and the District does not and cannot control the use to which the landowners who are entitled to the water choose to put it." Thus, noting that the district's primary and originating function was simply to store and deliver water to landowners who were the only residents subject to liens, taxes and other costs of the district, the court held (at p. 357, 101 S.Ct. at p. 1813) that "the peculiarly narrow function of this local governmental body and the special relationship of one class of citizens [landowners] to that body releases it from the strict demands of the one-person, one-vote principle of the * * * Fourteenth Amendment".
The role of the consolidated water district in the case now before us is similarly limited to the storage and delivery of water to landowners throughout the district. It does not exercise general governmental authority or provide general public services such as housing, transportation, schools or fire and police protection (see, e.g., *Salyer Land Co. v. Tulare Water Dist., supra*, 410 U.S. at pp. 728–729, 93 S.Ct. at pp. 1229–1230). In short the water district is a supplier of water owned and operated by the town, and thus possessing some of the attributes of a governmental entity, but *****337** having no greater governmental powers than those possessed by the water districts involved in the *Salyer* and *Ball* cases.

****1094** With respect to the effect of the water district's activities, the petitioners note that both landowners and tenants ***313** share a common interest in the availability of public water facilities and that the costs of the district, directly imposed on landowners will also be passed along to tenants through increased rents. These factors were found persuasive in the *Wright* case but it is now clear from the Supreme Court's decision in the *Ball* case that the question is not whether those entitled to vote are the only ones affected by the operations of this type of special public entity, but whether the effect on them is disproportionately greater than on those claiming an equal right to vote (*Ball v. James, supra*, 451 U.S. at p. 371, 101 S.Ct. at p. 1820).

In the case now before us it is conceded that the costs of the consolidation and the district's subsequent operation are not assessed against all residents, but only against landowners whose property alone is subject to assessments and charges for the benefits conferred, and is also subject to liens for delinquencies. This special burden was found to demonstrate a disproportionate effect on resident landowners, as opposed to other residents, in the *Salyer* and *Ball* cases and must be given the same weight in the present case.

Thus in an election to consolidate two water districts within a town, the Legislature could limit the franchise to a select group of voters because of the limited purpose of the district and the disproportionate effect of its activities on one segment of the population. In addition, it cannot be said that the Legislature acted irrationally or inequitably by providing, as it did in subdivision 7 of section 206 of the Town Law, that only those residents who own real property within the districts are eligible to vote on the consolidation since only their property would be permanently subject to the resulting costs.

The only remaining question then is whether the statute violates the State Constitution. In certain areas, of course, the State Constitution affords the individual greater rights than those provided by its Federal counterpart. We have noted, however, that the wording of the State constitutional equal protection clause (N.Y.Const., art. I, § 11)[3] "is no ***314** more broad in coverage than its Federal prototype" and that the history of this provision shows that it was adopted to make it clear that this State, like the Federal Government, is affirmatively committed to equal protection, and was not prompted by any perceived inadequacy in the Supreme Court's delineation of the right (*Dorsey v. Stuyvesant Town Corp.*, 299 N.Y. 512, 530–531, 87 N.E.2d 541). In election matters we have simply observed that the State guarantee of equal protection "is as broad in its coverage as that of the Fourteenth Amendment" (*Seaman v. Fedourich*, 16 N.Y.2d 94, 102, 262 N.Y.S.2d 444, 209 N.E.2d 778).

Limiting voter eligibility in water district elections to landowning residents does not violate those sections of the State Constitution specifically dealing with voter rights. The guarantee that "[n]o member of this state shall be disfranchised * * *

unless by the law of the land, or the judgment of his peers" (N.Y.Const., art. I, § 1) does not by its terms create an independent right to vote but simply insures that whatever voting rights an individual possesses may not be taken away or diminished except under certain extraordinary circumstances. The section of the Constitution setting forth qualifications for voters in this State (N.Y.Const., art. II, § 1) makes no reference to land ownership, but that does not preclude the Legislature from imposing such a requirement in water district elections because it has long been "the established policy of this state * * * to limit the right of suffrage" in such elections to resident landowners (*Spitzer v. Village of Fulton* ***338 , 172 N.Y. 285, 290, 64 N.E. 957; cf. *Johnson v. City of New York*, 274 N.Y. 411, 419, 9 N.E.2d 30; *Matter of Blaikie v. Power* **1095 , 13 N.Y.2d 134, 140, 243 N.Y.S.2d 185, 193 N.E.2d 55).

In conclusion it should be emphasized that this court, like the Federal courts, has consistently held that the equal protection guarantee forbids the State from imposing land ownership as a prerequisite to vote in general elections or to hold public office (*Landes v. Town of North Hempstead*, 20 N.Y.2d 417, 284 N.Y.S.2d 441, 231 N.E.2d 120). But limiting voter eligibility to landowning residents in certain types of special elections, including those dealing with the creation of water districts, does not violate the public policy of this State embodied in the State Constitution. In this respect the demands of the *315 State and Federal Constitutions are consistent which, in our view, is a desirable result in an area involving such a fundamental right as the right to vote.

Accordingly, the order of the Appellate Division should be affirmed.

FUCHSBERG, Judge (dissenting).

I would have thought that a cornerstone of democracy is universal suffrage. Antithetical to this belief is a pecuniary or propertied qualification for voting, for it seems obvious that one's influence in government should bear no relation to such a consideration.

It was in deference to this credo that this court some 10 years ago, in *Matter of Wright v. Town Bd. of Town of Carlton*, 33 N.Y.2d 977, 353 N.Y.S.2d 739, 309 N.E.2d 137, affg, 41 A.D.2d 290, 342 N.Y.S.2d 577, a case foursquare with the one before us now, declared a section of the Town Law which, for present purposes, cannot be differentiated from the one whose constitutionality we now weigh, violative of the one person-one vote principle. We then subscribed to the declaration that "insofar as it limits the franchise at the referendum to the 'owners of taxable real property situate in the proposed district' is unconstitutional" (41 A.D.2d, at p. 294, 342 N.Y.S.2d 577).

So saying, we but reiterated the policy pictured 15 years earlier when, in unmistakable terms, we held that, "the ownership of land, however, as a prerequisite, a condition precedent, to holding elective town office constitutes an 'invidious discrimination' against nonlandowners, a sort of economic gerrymandering which runs afoul of the equal protection and due process clauses of both Federal and State Constitutions * * * 'Wealth, like race, creed, or color, is not germane to one's ability to participate intelligently in the electoral process. Lines drawn on the basis of wealth or property, like those of race * * *, are traditionally disfavored' " (*Landes v. Town of North Hempstead*, 20 N.Y.2d 417, 420, 284 N.Y.S.2d 441, 231 N.E.2d 120).

Yet today, a time when antidiscrimination legislation heightens concern for equality as never before, the court reverses its position. This it rationalizes, impermissibly I suggest, on the theory that two decisions of the United States Supreme Court, *316 *Salyer Land Co. v. Tulare Water Dist.*, 410 U.S. 719, 93 S.Ct. 1224, 35 L.Ed.2d 659 and *Ball v. James*, 451 U.S. 355, 101 S.Ct. 1811, 68 L.Ed.2d 150, found no Federal constitutional impediment to such legislation. But ignored is the fact that, as for instance in *Ball*, in both cases the "water districts", when stripped of pretense, consisted of select groups which had formed private enterprises which were allowed "to become *nominal* public entities in order to obtain inexpensive bond financing" while they "remain[ed] essentially business enterprises, created by and chiefly benefiting a specific group of landowners" (*Ball v. James*, at p. 368, 101 S.Ct. at p. 1819 [emphasis added]).

In contrast, in *Matter of Wright*, as in today's case, all registered voters, property owners and nonproperty owners alike, shared the same vital concern for the "availability of good drinking water, sufficient water to run their homes and businesses

and to protect their property from fire. * * * [The payment of] real property taxes does not necessarily effect a reduction ***339** in the interest of those who do not own property because they pay increased taxes through increases in rent and the prices of **1096** goods and services * * * Thus, * * * voters who do not own real property are equally, and not less, interested in the outcome of the referendum as those authorized to vote by the property ownership qualification" (*Matter of Wright v. Town Bd. of Town of Carlton, supra*, 41 A.D.2d at p. 293, 342 N.Y.S.2d 577). Not surprisingly, then, *Wright*, after expressly considering the *Salyer* case (*Ball* not yet having been decided), rejected it as "not controlling".

Now, however, the majority in today's decision suddenly decides 10 years later "that the exception recognized in *Salyer* is broader than it was perceived to be when the *Wright* case was decided". But, even if such a metamorphosis of *Salyer* were possible, there would be no need to blindly march to the Supreme Court's drumbeat. For, as a sovereign State, New York has a Constitution of its own and section 1 of article II thereof expressly provides that "[E]very citizen shall be entitled to vote at every election * * * upon all questions submitted to the vote of the people" with the only limitation that the citizen be 21 years of age and have been a resident for at least three months next preceding the election. And this guarantee of the right to vote is available to New York citizens, all the *317 more so when the Federal Constitution is read in a less protective vein. Nor has New York hesitated to avail itself of this fundamental principle of federalism (e.g., *Bellanca v. State Liq. Auth.*, 54 N.Y.2d 228, 445 N.Y.S.2d 87, 429 N.E.2d 765; *People v. Elwell*, 50 N.Y.2d 231, 428 N.Y.S.2d 655, 406 N.E.2d 471; *Cooper v. Morin*, 49 N.Y.2d 69, 424 N.Y.S.2d 168, 399 N.E.2d 1188, cert. den. *sub nom. Lombard v. Cooper*, 446 U.S. 984, 100 S.Ct. 2965, 64 L.Ed.2d 840; *Sharrock v. Dell Buick-Cadillac*, 45 N.Y.2d 152, 159–161, 408 N.Y.S.2d 39, 379 N.E.2d 1169; *People v. Isaacson*, 44 N.Y.2d 511, 406 N.Y.S.2d 714, 378 N.E.2d 78; *People v. Hobson*, 39 N.Y.2d 479, 384 N.Y.S.2d 419, 348 N.E.2d 894). No less was to be expected, for the United States Constitution, from its beginning, inevitably was bound to reflect a broad consensus of the political and social conditions and aspirations of a union of many States, among which at least some were sure to adhere to higher than average standards. (See, generally, Brennan, State Constitutions and the Protection of Individual Rights, 90 Harv.L.Rev. 489.)

Nevertheless, in apparent anticipation of this dissertation, the majority, correctly noting that the verbiage employed by the State Constitution's equal protection clause (N.Y.Const., art. I, § 11) is comparable to that found in the United States Constitution (14th Amdt.), contends, at least by inference, that the one Constitution, therefore, grants no greater voting rights than does the other. The simple answer, though, is that, even where the language of the two Constitutions is *precisely* the same, there need be no uniformity of interpretation (see *People v. Elwell*, 50 N.Y.2d 231, 428 N.Y.S.2d 655, 406 N.E.2d 471, *supra; Sharrock v. Dell Buick-Cadillac*, 45 N.Y.2d 152, 159–161, 408 N.Y.S.2d 39, 379 N.E.2d 1169, *supra; People v. Isaacson*, 44 N.Y.2d 511, 519–520, 406 N.Y.S.2d 714, 378 N.E.2d 78, *supra; Brooklyn Union Gas Co. v. New York State Human Rights Appeal Bd.*, 41 N.Y.2d 84, 390 N.Y.S.2d 884, 359 N.E.2d 393; see Mosk, State Courts in American Law: The Third Century [Schwartz ed], at pp. 216–220).

Resort to the State Constitution, if here necessary, is obviously of especial urgency in an age when the growth of government has absorbed many functions which at one time were the province of the private sector. Moreover, many such activities are now carried out as a matter of governmental convenience, in agency form, as, for example, via the ever present school district, fire district, sanitary district, water district, etc. Were it permissible, therefore, to deprive citizens of their right to vote in elections in any of these "districts" on the theory that no one of them *318 performed a generalized governmental function, it would not be too long before, segment by segment, the right to vote would well-nigh disappear entirely. So, our courts, one by one, have struck down statutory attempts ***340** at the perpetuation of voting property qualifications (e.g., **1097** *Kramer v. Union School Dist.*, 395 U.S. 621, 89 S.Ct. 1886, 23 L.Ed.2d 583; *Matter of Light v. MacKenzie*, 78 Misc.2d 315, 356 N.Y.S.2d 991 [fire district]; *Matter of Romano v. Redman*, 60 Misc.2d 859, 304 N.Y.S.2d 261 [sanitary district]; *Lippe v. Jones*, 59 Misc.2d 843, 300 N.Y.S.2d 396 [improvement district]). Concordantly, in 1976, the Law Revision Commission warned that any statute which might still carry a property voting qualification would be "out of step with current constitutional thinking" (McKinney's Session Laws of NY, 1976, pp. 2177, 2178).[1]

Finally, to keep the depth of our commitment to freedom of the ballot in the broad perspective in which such a "fundamental matter" belongs (*Reynolds v. Sims*, 377 U.S. 533, 561–562, 84 S.Ct. 1362, 1381, 12 L.Ed.2d 506 [Warren, Ch. J.]), I note the unanimity of the sentiments of political and legal philosophies as disparate in time and place as Jeremy Bentham's eighteenth century observation that, "The right to elect * * * is the highest law of sovereignty"[2] and William O. Douglas' opinion that "all * * * are to have an equal vote—whatever their race, whatever their sex, whatever their occupation, whatever their income, and wherever their home may be * * *. This is required by the Equal Protection Clause".[3]

From all this, it follows that subdivision 7 of section 206 of the Town Law of New York should be declared unconstitutional

and the special election declared null and void.

MEYER, Judge (dissenting).

The pervasiveness of special districts in modern living is clear, the Metropolitan Regional Planning Council having documented some years ***319** ago the existence of no less than 1,500 such districts in the metropolitan area for such diverse purposes as the operation of schools and fire departments on the one hand and the operation of an escalator in a railroad station on the other. While there may properly be a basis for distinction as to the latter type district, I cannot agree that the community interest in the quality of a factor of life as important as water is less than its interest in public education (cf. *Kramer v. Union School Dist.*, 395 U.S. 621, 630, 89 S.Ct. 1886, 1891, 23 L.Ed.2d 583), and would, therefore, reverse.

COOKE, C. J., and JASEN, GABRIELLI and JONES, JJ., concur with WACHTLER, J.

FUCHSBERG and MEYER, JJ., dissent and vote to reverse in separate dissenting opinions.

Order affirmed, with costs.

All Citations

56 N.Y.2d 306, 437 N.E.2d 1090, 452 N.Y.S.2d 333

Footnotes

1 The relevant portion of the statute provides: "No person shall be entitled to vote upon any such proposition unless he or she has the following qualifications: (a) is an elector of the town, and (b) is the owner of taxable property situate within one of the districts assessed upon the last preceding town assessment roll".

2 In a companion case (*Associated Enterprises v. Toltec Dist.*, 410 U.S. 743, 93 S.Ct. 1237, 35 L.Ed.2d 675), the court also upheld a statute imposing a land ownership requirement in a referendum concerning the creation of a water district.

3 (Art. I, § 11 states: "No person shall be denied the equal protection of the laws of this state or any subdivision thereof".)

1 Hardly supportive of a contrary position are the three cases cited by the majority. One of these, *Spitzer v. Village of Fulton*, 172 N.Y. 285, 64 N.E. 957, a waterworks case in which no equal protection challenge was made, antedates *Wright* by just 70 years. Neither of the other two, *Johnson v. City of New York*, 274 N.Y. 411, 9 N.E.2d 30 [proportional representation] and *Matter of Blaikie v. Power*, 13 N.Y.2d 134, 243 N.Y.S.2d 185, 193 N.E.2d 55 [councilman-at-large], involved property qualification.

2 (Bentham, Introduction to a Project for a Constitutional Code, reprinted in Engelmann, Political Philosophy, p. 370.)

3 (*Gray v. Sanders*, 372 U.S. 368, 379, 83 S.Ct. 801, 807, 9 L.Ed.2d 821.)

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38 N.Y.3d 494
Court of Appeals of New York.

In the Matter of Tim HARKENRIDER, et al., Respondents-Appellants, v. Kathy HOCHUL, as Governor, et al., Appellants-Respondents, et al., Respondents.

No. 60
|
Decided April 27, 2022

Synopsis

Background: Voters initiated special proceeding against Governor, Senate Majority Leader, Speaker of Assembly, and New York State Board of Elections, challenging constitutionality of congressional and senate maps redrawn by majority party in both senate and assembly. Following trial, the Supreme Court, Steuben County, Patrick F. McAllister, J., declared congressional, state senate, and state assembly maps void as violative of New York Constitution. Respondents appealed. The Supreme Court, Appellate Division, 2022 WL 1193180, modified Supreme Court's order by vacating declaration that senate and assembly maps and legislation were unconstitutional, but otherwise affirmed and remitted. Voters and respondents filed cross-appeals.

Holdings: The Court of Appeals, DiFiore, C.J., held that:

voters had standing to challenge state legislature's redistricting maps;

as matter of first impression, legislature violated constitutional procedural mandate by unilaterally redrawing district maps;

evidence supported trial court's finding that congressional map unilaterally redrawn by controlling party in state legislature violated constitutional prohibition against partisan gerrymandering; and

remission of case to Supreme Court for purposes of ordering redrawing of congressional and senate maps in accordance with procedural mandates of Constitution, with assistance of special master, was appropriate remedy.

Judgment of Appellate Division affirmed as modified; remitted to Supreme Court.

Troutman, J., filed opinion dissenting in part in which Wilson, J., concurred in part.

Wilson, J., filed dissenting opinion in which Rivera, J., concurs in part.

Rivera, J., filed dissenting opinion in which Wilson, J., concurred.

Attorneys and Law Firms

****439 ***159** Phillips Lytle LLP, Buffalo (Craig R. Bucki, Steven B. Salcedo and Rebecca A. Valentine of counsel), and Graubard Miller, New York City (C. Daniel Chill and Elaine Reich of counsel), for Carl Heastie, appellant-respondent.

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Letitia James, Attorney General, Albany (Jeffrey W. Lang and Jennifer L. Clark of counsel), for Kathy Hochul and an- other, appellants-respondents.

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Campaign Legal Center, Washington, D.C. (Paul M. Smith, Mark P. Gaber and Simone T. Leeper of counsel), and Chicago, Illinois (Annabelle E. Harless of counsel), for Campaign Legal Center and another, amici curiae.

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OPINION OF THE COURT

Chief Judge DiFIORE.

*****160 **440 *501** In 2014, the People of the State of New York amended the State Constitution to adopt historic reforms of the redistricting process by requiring, in a carefully structured process, the creation of electoral maps by an Independent Redistricting Commission (IRC) and by declaring unconstitutional certain undemocratic practices such as partisan and racial gerrymandering. No one disputes that this year, during the first redistricting cycle to follow adoption of the 2014 amendments, the IRC and the legislature failed to follow the procedure commanded by the State Constitution. A stalemate within the IRC resulted in a breakdown in the mandatory process for submission of electoral maps to the legislature. The legislature responded by creating and enacting maps in a nontransparent manner controlled exclusively by the dominant political party — doing exactly what they would have done had the 2014 constitutional reforms never been passed. On these appeals, the primary questions before us are whether this failure to follow the prescribed constitutional procedure warrants invalidation ***502** of the legislature's congressional and state senate maps and whether there is record support for the determination of both courts below that the district lines for congressional races were drawn with an unconstitutional partisan intent. We answer both questions in the affirmative and therefore declare the congressional and senate maps void. As a result, judicial oversight is required to facilitate the expeditious creation of constitutionally conforming maps for use in the 2022 election and to safeguard the constitutionally protected right of New Yorkers to a fair election.

I.

Every ten years, following the federal census, reapportionment of the state senate, assembly, and congressional districts in New York must be undertaken to account for population shifts and potential changes in the state's allocated number of congressional representatives (*see* NY Const, art III, § 4). Redistricting — which is "primarily the duty and responsibility of the State" (*Perry v. Perez*, 565 U.S. 388, 392, 132 S.Ct. 934, 181 L.Ed.2d 900 [2012] [internal quotation marks and citation omitted]; *see Growe v. Emison*, 507 U.S. 25, 34, 113 S.Ct. 1075, 122 L.Ed.2d 388 [1993]) — is a complex and contentious process that, historically, has been "within the legislative power ... subject to constitutional regulation and limitation" (*Matter*

of Orans, 15 N.Y.2d 339, 352, 258 N.Y.S.2d 825, 206 N.E.2d 854 [1965]). In New York, prior to 2012, the process of drawing district lines was entirely within the purview of the legislature,[1] subject to state and ***161 **441** federal constitutional restraint and federal voting laws, as well as judicial review.

Particularly with respect to congressional maps, exclusive legislative control has repeatedly resulted in stalemates, with opposing political parties unable to reach consensus on district lines — often necessitating federal court involvement in the development of New York's congressional maps (*see e.g. Favors v. Cuomo*, 2012 WL 928223 *2, 2012 US Dist LEXIS 36910 [E.D. N.Y., Mar. 19, 2012, No. 11-CV-5632, Raggi, Lynch, and Irizarry, JJ.]; *Rodriguez v. Pataki*, 2002 WL 1058054, *7, 2002 US Dist LEXIS, [S.D. N.Y. 2002, May 24, 2002, No. 02 Civ. 618, Walker, Ch. J., Koeltl, and Berman, JJ.]; ***503** *Puerto Rican Legal Defense & Educ. Fund, Inc. v. Gantt*, 796 F. Supp. 681, 684 [E.D. N.Y. 1992]). Among other concerns, the redistricting process has been plagued with allegations of partisan gerrymandering — that is, one political party manipulating district lines in order to disproportionately increase its advantage in the upcoming elections, disenfranchising voters of the opposing party (*see generally Rucho v. Common Cause*, 588 U.S. ——, 139 S. Ct. 2484, 2494, 204 L.Ed.2d 931 [2019]).

By adopting the 2014 constitutional amendments, the People significantly altered both substantive standards governing the determination of district lines and the redistricting process established to achieve those standards. Given the history of legislative stalemates and persistent allegations of partisan gerrymandering, the constitutional reforms were intended to introduce a new era of bipartisanship and transparency through the creation of an independent redistricting commission and the adoption of additional limitations on legislative discretion in redistricting, including explicit prohibitions on partisan and racial gerrymandering (*see* Assembly Mem in Support, 2012 NY Senate-Assembly Concurrent Resolution S6698, A9526 Sponsor Memo, S2107). The Constitution now requires that the IRC — a bipartisan commission working under a constitutionally mandated timeline — is charged with the obligation of drawing a set of redistricting maps that, with appropriate implementing legislation, must be submitted to the legislature for a vote, without amendment (*see* NY Const, art III, § 4 [b]; § 5-b [a]).[2] If this first set of maps is rejected, the IRC is required to prepare a second set that, again, would be subject to an up or down vote by the legislature, without amendment (*see* NY Const, art III, § 4 [b]). Under that constitutional framework, only upon rejection of a second ***504** set of IRC maps is the legislature free to offer amendments to the maps created by the IRC (*see* NY Const, art III, § 4 [b]) and, even then, a statutory restriction enacted as a companion to the constitutional reforms precluded legislative alterations that would affect more than two percent of the population in any district (*see* L 2012, ch 17, § 3).

***162 **442** II.

Following receipt of the results of the 2020 federal census, the redistricting process began in New York — the first opportunity for district lines to be drawn under the new IRC procedures established by the 2014 constitutional amendments. Due to shifts in New York's population, the state lost a congressional seat and other districts were malapportioned, undisputedly rendering the 2012 congressional apportionment — developed by a federal court following a legislative impasse (*see Favors*, 2012 WL 928223, *2, 2012 US Dist LEXIS 36910) — unconstitutional and necessitating the drawing of new district lines. Throughout 2021, the IRC held the requisite public hearings, gathering input from stakeholders and voters across the state to inform their composition of redistricting maps. In December 2021 and January 2022, however, negotiations between the IRC members deteriorated and the IRC, split along party lines, was unable to agree upon consensus maps. According to the IRC members appointed by the minority party, after agreement had been reached on many of the district lines, the majority party delegation of the IRC declined to continue negotiations on a consensus map, insisting they would proceed with discussions only if further negotiations were based on their preferred redistricting maps.

As a result of their disagreements, the IRC submitted, as a first set of maps, two proposed redistricting plans to the legislature — maps from each party delegation — as is constitutionally permitted if a single consensus map fails to garner sufficient votes (*see* NY Const, art III, § 5-b [g]). The legislature voted on this first set of plans without amendment as required by the Constitution and rejected both plans. The legislature notified the IRC of that rejection, triggering the IRC's obligation to compose — within 15 days — a second redistricting plan for the legislature's review (*see* NY Const, art III § 4 [b]). On January 24, 2022 — the day before the 15-day deadline but more than one month before the February 28, 2022 deadline— the IRC announced that it was deadlocked and, as a result, would ***505** not present a second plan to the legislature. Within a

week, the Democrats in the legislature — in control of both the senate and assembly — composed and enacted new congressional, senate, and assembly redistricting maps (*see* 2022 NY Assembly Bill A9167, 2022 NY Senate Bill S8196, 2022 NY Assembly Bill A9039-A, 2022 NY Senate Bill S8172-A, 2022 NY Assembly Bill A9168, 2022 NY Senate Bill S8197, 2022 NY Senate Bill S8185-A, 2022 NY Assembly Bill A9040-A), undisputedly without any consultation or participation by the minority Republican Party.[3] On February 3rd, the Governor signed into law this new redistricting legislation, which also superseded the two percent limitation imposed in 2012 on the legislature's authority to amend IRC plans (Senate Introducer's Mem in Support, Bill Jacket, L 2012, ch 17, at 11).

That same day, petitioners — New York voters residing in several different congressional districts — commenced this special proceeding under Article III, § 5 of the State Constitution and Unconsolidated Laws § 4221 against various State respondents, ****443 ***163** including the Governor,[4] Senate Majority Leader, Speaker of the Assembly, and the New York State Board of Elections, challenging the congressional and senate maps. Petitioners alleged that the process by which the 2022 maps were enacted was constitutionally defective because the IRC failed to submit a second redistricting plan as required under the 2014 constitutional amendments and, as such, the legislature lacked authority to compose and enact its own plan. Petitioners also asserted that the congressional map is unconstitutionally gerrymandered in favor of the majority party because it both "packed" minority-party voters into a select few districts and "cracked" other pockets of those voters across multiple districts, thereby diluting the competitiveness of those districts. Petitioners asked Supreme Court to enjoin ***506** any elections from proceeding on the 2022 congressional map and to either adopt its own map or direct the legislature to cure the infirmities. Petitioners subsequently sought to amend their petition to include similar challenges to the state senate map. The State respondents answered that petitioners lacked standing to challenge most of the districts they claimed were gerrymandered, that the IRC's failure to perform its duty did not strip the legislature of its enduring authority to enact redistricting plans, and that petitioners could not meet their burden of proving that the maps were unconstitutionally partisan.

A trial ensued, at which petitioners and the State respondents presented expert testimony regarding the maps. Petitioners' expert, Sean P. Trende — a doctoral candidate who has a juris doctorate, a master's degree in political science, and a master's degree in applied statistics, and who has participated as an expert in several redistricting proceedings in other states — was qualified as an expert in election analysis with particular knowledge in redistricting, with no objection from the State respondents or any request for a *Frye* hearing to challenge the efficacy of his methodology or the basis of his opinion. Trende testified that a comparison of the enacted congressional map to ensembles of 5,000 or 10,000 maps created by computer simulation revealed that the enacted map was an "extreme outlier" that likely reduced the number of Republican congressional seats from eight to four by "packing" Republican voters into four discrete districts and "cracking" Republican voter blocks across the remaining districts in such manner as to dilute the strength of their vote and render such districts noncompetitive.

Opposing experts called by the State respondents challenged Trende's methodology and asserted that the enacted congressional map actually resulted in more Republican districts than the simulated maps, although several conceded that they did not analyze the level of competitiveness of the new districts. Further, the State's experts defended various choices made by the legislature as justifiable based on constitutionally required considerations, contending that the enacted maps were not reflective of partisan intent.

After determining petitioners had standing to challenge the statewide maps, Supreme Court declared the congressional, state senate, and state assembly maps "void" under the State Constitution, reasoning that the legislature's enactment of ***507** redistricting maps absent submission of *****164 **444** a second redistricting plan by the IRC was unconstitutional and that 2021 legislation purporting to authorize the enactment ("the 2021 legislation") was also unconstitutional. Further, crediting Trende's testimony, Supreme Court found that petitioners had proven that the congressional map violated the constitutional prohibition on partisan gerrymandering by packing republican voters into four districts while ensuring there were "virtually zero competitive districts." Supreme Court declared all three maps void, enjoined the State respondents from using the maps in the impending 2022 election, and directed the legislature to submit new "bipartisanly-supported" maps that meet constitutional requirements for the court's review by a particular date.

The State respondents appealed, and a Justice of the Appellate Division stayed much of Supreme Court's order pending that appeal, including the deadline for submission of new redistricting maps by the legislature. However, the stay order did not prohibit Supreme Court from retaining a neutral expert to prepare a proposed new congressional map, which would have no force and effect until certain contingencies occurred, including the legislature's failure to proffer its own new congressional maps by April 30th — 30 days after the date of Supreme Court's order.[5] Thereafter, in a divided decision, the Appellate

Division modified Supreme Court's order by denying the petition, in part, vacating the declaration that the senate and assembly maps and the 2021 legislation were unconstitutional, but otherwise affirmed and remitted, with three Justices agreeing with Supreme Court that petitioners had met their burden of proving that the constitutional prohibition against partisan gerrymandering had been violated with respect to the 2022 congressional map, rendering that map void and unenforceable (204 A.D.3d 1366, 167 N.Y.S.3d 659 [4th Dept. 2022]).[6] In reaching that conclusion, the Appellate Division relied on "evidence ***508** of the largely one-party process used to enact the 2022 congressional map, a comparison of the 2022 congressional map to the 2012 congressional map, and the expert opinion and supporting analysis of Sean P. Trende" (*id.* at *3). However, the Court rejected petitioners' argument that both the congressional and senate maps were void due to the failure to adhere to the constitutional procedure, with one Justice dissenting on that point. The parties now cross appeal as of right (*see* CPLR 5601 [b] [1]), challenging certain aspects of the Appellate Division order.

III.

As a threshold matter, relying on common law standing principles, the State respondents assert that petitioners lack standing to challenge many of the districts that they claim reflect unconstitutional partisan gerrymandering because none of the individual petitioners reside in those *****165 **445** districts. Even absent the procedural challenge applicable to all districts, this contention is unavailing because standing is expressly conferred by constitution and statute. Article III, § 5 of the New York Constitution provides that "[a]n apportionment by the legislature, or other body, shall be subject to review by the supreme court, *at the suit of any citizen*, under such reasonable regulations as the legislature may prescribe" (NY Const art III, § 5 [emphasis added]; *see* 3 Rev Rec, 1894 NY Constitutional Convention at 987; *see Matter of Dowling*, 219 N.Y. 44, 50, 113 N.E. 545 [1916]; *Schieffelin v. Komfort*, 212 N.Y. 520, 529, 106 N.E. 675 [1914]). Moreover, statutes may identify the class of persons entitled to challenge particular governmental action, relieving courts of the need to resolve the question under common law principles (*see Matter of Mental Hygiene Legal Serv. v. Daniels*, 33 N.Y.3d 44, 50 n. 2, 98 N.Y.S.3d 504, 122 N.E.3d 21 [2019]; *Society of Plastics Indus., Inc. v. County of Suffolk*, 77 N.Y.2d 761, 769, 570 N.Y.S.2d 778, 573 N.E.2d 1034 [1991]; *Wein v. Comptroller of State of N.Y.*, 46 N.Y.2d 394, 399, 413 N.Y.S.2d 633, 386 N.E.2d 242 [1979]; *see e.g.* State Finance Law § 123) and, here, Unconsolidated Laws § 4221 likewise authorizes "any citizen" of the state to seek judicial review of a legislative act establishing electoral districts. We therefore turn to consideration of the merits of petitioners' challenges to the 2022 redistricting maps.

Petitioners first assert that, in light of the lack of compliance by the IRC and the legislature with the procedures set forth in ***509** the Constitution, the legislature's enactment of the 2022 redistricting maps contravened the Constitution. To conclude otherwise, petitioners contend, would be to render the 2014 amendments — touted as an important reform of the redistricting process — functionally meaningless. We agree.

Legislative enactments, including those implementing redistricting plans, are entitled to a "strong presumption of constitutionality" and redistricting legislation will be declared unconstitutional by the courts " 'only when it can be shown beyond reasonable doubt that it conflicts' " with the Constitution after " 'every reasonable mode of reconciliation of the statute with the Constitution has been resorted to, and reconciliation has been found impossible' " (*Matter of Wolpoff v. Cuomo*, 80 N.Y.2d 70, 78, 587 N.Y.S.2d 560, 600 N.E.2d 191 [1992], quoting *Matter of Fay*, 291 N.Y. 198, 207, 52 N.E.2d 97 [1943] [internal quotation marks omitted]; *see Cohen v. Cuomo*, 19 N.Y.3d 196, 201-202, 946 N.Y.S.2d 536, 969 N.E.2d 754 [2012]). Nevertheless, invalidation of a legislative enactment is required when such act amounts to " 'a gross and deliberate violation of the plain intent of the Constitution and a disregard of its spirit and the purpose for which express limitations are included therein' " (*Cohen*, 19 N.Y.3d at 202, 946 N.Y.S.2d 536, 969 N.E.2d 754, quoting *Matter of Sherrill v. O'Brien*, 188 N.Y. 185, 198, 81 N.E. 124 [1907]).

To determine whether the legislature's 2022 enactment of redistricting legislation comports with the Constitution, our starting point must be the text thereof. "In construing the language of the Constitution as in construing the language of a statute, ... [we] look for the intention of the People and give to the language used its ordinary meaning" (*Matter of Sherrill*, 188 N.Y. at 207, 81 N.E. 124; *see White v. Cuomo*, 38 N.Y.3d 209, 217–19, 172 N.Y.S.3d 373, 192 N.E.3d 300 [2022]; *Burton v. New York State Dept. of Taxation & Fin.*, 25 N.Y.3d 732, 739, 16 N.Y.S.3d 215, 37 N.E.3d 718 [2015]; *****166 **446** *Matter of Carey v. Morton*, 297 N.Y. 361, 366, 79 N.E.2d 442 [1948]). Upon careful review of the plain language of the Constitution and the history pertaining to the adoption of the 2014 reforms, it is evident that the legislature and the IRC deviated from the

constitutionally mandated procedure.

From a procedural standpoint, the Constitution — as amended in 2014 — requires that, every ten years commencing in 2020, an "independent redistricting commission" comprising 10 members — eight of whom are appointed by the majority and minority leaders of the senate and assembly and the remaining two by those eight appointees — shall be established (*see* NY Const, art III, § 5-b [a]). The members must be a diverse group of registered voters and cannot be (or recently have been) ***510** members of the state or federal legislature, statewide elected officials, state officers or legislative employees, registered lobbyists, or political party chairmen, or the spouses of state or federal elected officials (*see* NY Const, art III, § 5-b [b], [c]).

Under the Constitution, the IRC must make its draft redistricting plans available to the public and hold no less than 12 public hearings throughout the state regarding proposals for redistricting, ensuring transparency and giving New Yorkers a voice in the redistricting process (*see* NY Const, art III, § 4 [c]). After considering public comments and working together across party lines to compose new redistricting lines, the IRC must submit its approved plan and implementing legislation to the legislature no later than January 15th in a redistricting year (*see* NY Const, art III, § 4 [b]), with the caveat that, if the IRC is unable to muster the requisite number of votes for a single plan, it must provide the legislature with each plan that "garnered the highest number of votes in support of its approval by the [IRC]" (NY Const, art III, § 5-b [g]). If the legislature rejects the IRC's first plan, the Constitution requires the IRC to go back to the drawing board, work to reach consensus, and "prepare and submit to the legislature a second redistricting plan and the necessary implementing legislation" to the legislature within 15 days and in no case later than February 28th (NY Const, art III, § 4 [b]). "If" the legislature fails to approve the second plan without amendment, the Constitution then directs that "each house shall introduce such implementing legislation" — a clear reference to the IRC's second plan — with any amendments each house of the legislature deems necessary (NY Const, art III § 4 [b]). As a further safeguard against one party dominating redistricting, the Constitution dictates that the number of votes required for the IRC and legislature to approve a plan differs depending on whether the legislature is controlled by one political party or control of the houses are split between the parties (*see* NY Const, art III, §§ 4 [b] [1] – [3]; 5-b [f] [1], [2]).

The Redistricting Reform Act of 2012, legislation enacted in conjunction with the 2012 constitutional resolution, further provides as a matter of statutory law that "[a]ny amendments by the senate or assembly to a redistricting plan submitted by the [IRC] shall not affect more than two percent of the population of any district contained in such plan" (L 2012, ch 17, § 3). As the sponsor of the legislation explained, "[i]f the [IRC's] second plan [was] also rejected ..., each house may ***511** then amend *that plan* prior to approval except that such amendments ... cannot affect more than two percent of the population of any district *in the commission's plan*," a limitation designed to "provide reasonable restrictions on the legislature's changes to the commission's plans" (Senate Introducer's Mem in Support, Bill *****167 **447** Jacket, L 2012, ch 17, at 15 [emphasis added]).

The plain language of Article III, § 4 dictates that the IRC "*shall* prepare" and "*shall* submit" to the legislature a redistricting plan with implementing legislation, that IRC plan "*shall* be voted upon, without amendment" by the legislature, and — in the event the first plan is rejected — the IRC "*shall* prepare and submit to the legislature a second redistricting plan and the necessary implementing legislation," which again "*shall* be voted upon, without amendment" (NY Const, art III, § 4 [b] [emphasis added]). "*If*" and only "if" that second plan is rejected, does the Constitution permit the legislature to introduce its own implementing legislation, "with any amendments" to the IRC plans deemed necessary that otherwise comply with constitutional directives (NY Const, art III, § 4 [b] [emphasis added]).

"In the construction of constitutional provisions, the language used, if plain and precise, should be given its full effect" and "[i]t must be presumed that its framers understood the force of the language used and, as well, the people who adopted it" (*People v. Rathbone*, 145 N.Y. 434, 438, 40 N.E. 395 [1895]). Our Constitution is "an instrument framed deliberately and with care, and adopted by the people as the organic law of the State" and, when interpreting it, we may "not allow for interstitial and interpretative gloss ... by the other [b]ranches [of the government] that substantially alters the specified law-making regimen" set forth in the Constitution (*Matter of King v. Cuomo*, 81 N.Y.2d 247, 253, 597 N.Y.S.2d 918, 613 N.E.2d 950 [1993]).

Article III, § 4 is permeated with language that, when given its full effect, permits the legislature to undertake the drawing of district lines *only* after two redistricting plans composed by the IRC have been duly considered and rejected.[7] Moreover, the text of section 4 contemplates that any redistricting act ***512** ultimately adopted must be founded upon a plan submitted by the IRC; in the event the IRC plan is rejected, the Constitution authorizes "amendments" to such plan, not the wholesale drawing of entirely new maps (NY Const, art III, § 4 [b]; *see* NY Assembly Debate on Assembly Bill A9557 Mar. 15, 2012

at 39 ["The Constitutional amendment allows the (l)egislature to *amend* the plan submitted by the independent redistricting commission *if* the (l)egislature has twice rejected submitted plans" (emphasis added)]).[8]

Despite clear constitutional language, the State respondents posit that it is wrong to interpret the 2014 constitutional amendments as requiring two separate IRC plans as a precondition to the legislature's exercise of its longstanding and historically unbridled authority to enact redistricting legislation.[9] They further rely *****168 **448** on the 2021 legislation authorizing the legislature to move forward on redistricting even if the IRC fails to submit maps as permissibly filling a purported gap in the constitutional design. However, in addition to being contrary to the text of the Constitution as we have explained, the State respondents' arguments are also belied by the purpose of the 2014 amendments and the relevant legislative history — including the legislature's own statements regarding the intent and effect of the 2014 constitutional reform effort.

***513** Indeed, the State respondents studiously ignore events that gave rise to the 2014 amendments. During the previous redistricting cycle in 2012, the New York legislature was unable to reach agreement on legislation setting the congressional district lines and, as a result, a federal court ordered the adoption of a judicially-drafted congressional redistricting plan (*see Favors*, 2012 WL 928223, *2, 2012 US Dist LEXIS 36910). While the 2012 legislature did agree on state senate and assembly maps, the proposed maps were widely criticized as a product of partisan gerrymandering, prompting the then-Governor to threaten to veto the plans absent a concrete legislative commitment to redistricting reform (*see* Micah Altman & Michael P. McDonald, *A Half-Century of Virginia Redistricting Battles: Shifting from Rural Malapportionment to Voting Rights to Public Participation*, 47 U Rich L Rev 771, 829 [2013]; Thomas Kaplan, *An Update on New York Redistricting*, NY Times, March 7, 2012; Thomas Kaplan, *An Update on New York Redistricting*, NY Times, March 9, 2012). Thus, as we have discussed, in conjunction with enactment of the 2012 redistricting acts (*see* L 2012, ch 16), the legislature affirmed its commitment to redistricting reform by passing the Redistricting Reform Act of 2012 (*see* L 2012, ch 17) and the first of the two concurrent resolutions proposing the constitutional amendments creating the IRC process (*see* 2012 NY Assembly Bill A9526 [Mar. 11, 2012]). Characterizing the legislature's 2012 senate and assembly district lines as "significantly flawed," the Governor nevertheless approved the redistricting legislation that year in light of the legislature's demonstrated agreement to "permanent[ly]" and "meaningful[ly]" reform the redistricting process for future years and "provide transparency to a process [otherwise] cloaked in secrecy and largely immune from legal challenges to partisan gerrymandering" (Governor's Approval Mem, Bill Jacket, L 2012, ch 17 at 5; 2012 NY Legis Ann at 12-13).

As the surrounding context and history of the 2014 amendments illustrate, the constitutional amendments adopted by the two consecutive legislatures and the voters — from the provisions detailing the composition of the IRC to those setting forth the voting metrics — were carefully crafted to guarantee that redistricting maps have their origin in the collective and transparent work product of a bipartisan commission that is constitutionally required to pursue consensus to draw district ****449 ***169 *514** lines. The procedural amendments — along with a novel *substantive* amendment of the State Constitution expressly prohibiting partisan gerrymandering, discussed further below — were enacted in response to criticism of the scourge of hyper-partisanship, which the United States Supreme Court has recognized as "incompatible with democratic principles" (*Arizona State Legislature v. Arizona Independent Redistricting Comm'n*, 576 U.S. at 791, 135 S.Ct. 2652 [internal quotation marks, punctuation and citation omitted]).

As reflected in the legislative record, the IRC's fulfillment of its constitutional obligations was unquestionably intended to operate as a necessary precondition to, and limitation on, the legislature's exercise of its discretion in redistricting. The legislative record shows that the 2012 legislature — the drafters of the constitutional amendments — intended to "comprehensively" reform and "implement historic changes to achieve a fair and readily transparent process" to "ensure that the drawing of legislative district lines in New York will be done by a bipartisan, independent body" — rather than entirely by the legislature itself (Assembly Mem in Support, 2012 NY Senate-Assembly Concurrent Resolution S6698, A9526; Sponsor's Mem, 2013 NY Senate Bill S2107). As the sponsors explained, the reforms were designed to "substantively and fundamentally" alter the redistricting process, allowing "[f]or the first time, both the majority and minority parties in the legislature [to] have an equal role in the process of drawing lines," with these "far-reaching" constitutional reforms touted as a template "for independent redistricting throughout the United States" (Assembly Mem in Support, 2013 NY Senate-Assembly Concurrent Resolution S2107, A2086).

The Senate debate indicates that the constitutional provision allowing the legislature to amend the second redistricting plan submitted by the IRC only after twice voting on and rejecting IRC plans was intended to encourage bipartisan participation by the legislature in the redistricting process. The Senate sponsor explained that "[o]n the third enactment, there could be

amendments under this provision. But again, it would be the third time – not first time, not the second time, but the third time in order to get ultimately a product produced" (NY Senate Debate on AB2086, January 23, 2013 at 222). In other words, "[i]f there cannot be agreement, if the Governor vetoes the provision twice, ... that third time the Legislature ***515** would be acting. But not until that time" (*id.* at 224) because "the intent of th[e] resolution [wa]s to have the Legislature act and vote on ... a [second] plan" before undertaking any amendments of its own (*id.* at 226). Answering a charge that the IRC would essentially be only "an advisory commission" since the legislature could ultimately reject both sets of IRC maps, the Senate sponsor explained that the IRC process was intended, in part, to impose consequences on the legislature for rejecting plans developed through a bipartisan process by forcing it to take a public position refusing to adopt district lines that were developed with an "enormous amount of citizen input" and effort (*id.* at 228).

It is no surprise, then, that the Constitution dictates that the IRC-based process for redistricting established therein "*shall* govern redistricting in this state *except* to the extent that a court is required to order the adoption of, or changes to, a redistricting plan as a remedy for a violation of law" (NY Const art III, § 4 [e] [emphasis added]). Contrary to the State respondents' contentions, the detailed amendments leave no room for legislative discretion regarding the particulars of implementation; *****170 **450** this is not a scenario where the Constitution fails to provide "specific guidance" or is "silen[t] on the issue" (*Cohen*, 19 N.Y.3d at 200, 202, 946 N.Y.S.2d 536, 969 N.E.2d 754). Under the 2014 amendments, compliance with the IRC process enshrined in the Constitution is the *exclusive* method of redistricting, absent court intervention following a violation of the law, incentivizing the legislature to encourage and support fair bipartisan participation and compromise throughout the redistricting process.[10]

That the IRC process was intended to operate as a limitation on the legislature's power to compose district lines is further ***516** underscored by the Redistricting Reform Act of 2012 (*see* L 2012, ch 17). That legislation, adopted simultaneously with the 2012 constitutional resolution, instituted the two percent limitation on the legislature's authority (*see* L 2012, ch 17, § 3). In describing this particular reform, the Sponsor of the bill explained that "[i]f the legislature fails to pass" the IRC's second plan "it may then amend such plans and vote upon them as amended. However, any such amendments shall be limited ... to affect no more than two percent of the population of any district in such plan" (Senate Introducer's Mem in Support, Bill Jacket, L 2012, ch 17, at 11). Thus, although the legislature retains the ultimate authority to enact districting maps upon completion of the IRC process, the constitutional reforms were clearly intended to promote fairness, transparency, and bipartisanship by requiring, as a precondition to redistricting legislation, that the IRC fulfill a substantial and constitutionally required role in the map drawing process.[11]

Indeed, recent events suggest that the legislature itself recognized that the Constitution did not permit it to proceed with redistricting absent compliance with the bipartisan IRC process. Apparently forecasting that the IRC would not comply with its constitutional obligations, in the summer of 2021 — before the IRC had even been given a chance to fulfill its constitutional role — the legislature attempted to amend the constitution to add language authorizing it to introduce redistricting legislation "[i]f ... the redistricting ****451 ***171** commission fails to vote on a redistricting plan and implementing legislation by the required deadline" for any reason (2021 NY Senate-Assembly Concurrent Resolution S515, A1916). After New York voters rejected this constitutional amendment (among others) — and with the first redistricting cycle since the 2014 amendments on the horizon — the legislature attempted to fill a purported "gap" in constitutional language by *statutorily* ***517** amending the IRC procedure in the same manner (*see* L 2021, ch 633). In this Court, the State respondents attempt to rely on the 2021 legislation to justify the deviation from constitutional requirements. Needless to say, the bipartisan process was placed in the State Constitution specifically to insulate it from capricious legislative action and to ensure permanent redistricting reform absent further amendment to the constitution, which has not occurred. The 2021 legislation is unconstitutional to the extent that it permits the legislature to avoid a central requirement of the reform amendments (*see Matter of King*, 81 N.Y.2d at 252, 597 N.Y.S.2d 918, 613 N.E.2d 950 ["The (l)egislature must be guided and governed in this particular function by the Constitution, not by a self-generated additive"]).

In sum, there can be no question that the drafters of the 2014 constitutional amendments and the voters of this state intended compliance with the IRC process to be a constitutionally required precondition to the legislature's enactment of redistricting legislation. In urging this Court to adopt their view that the IRC may abandon its constitutional mandate with no impact on the ultimate result and by contending that the legislature may seize upon such inaction to bypass the IRC process and compose its own redistricting maps with impunity, the State respondents ask us to effectively nullify the 2014 amendments. This we will not do. Indeed, such an approach would encourage partisans involved in the IRC process to avoid consensus, thereby permitting the legislature to step in and create new maps merely by engineering a stalemate at any stage of the IRC process, or even by failing to appoint members or withholding funding from the IRC. Through the 2014 amendments, the

People of this state adopted substantial redistricting reforms aimed at ensuring that the starting point for redistricting legislation would be district lines proffered by a bipartisan commission following significant public participation, thereby ensuring each political party and all interested persons a voice in the composition of those lines. We decline to render the constitutional IRC process inconsequential in the manner requested by the State respondents, a result that would "violat[e] ... the plain intent of the Constitution and ... disregard [the] spirit and the purpose" of the 2014 constitutional amendments (*Cohen*, 19 N.Y.3d at 202, 946 N.Y.S.2d 536, 969 N.E.2d 754 [internal quotation marks and citation omitted]).

***518** IV.

Having addressed the procedural violation, we turn to the substantive partisan gerrymandering claim. As a threshold matter, despite our invalidation of the maps on procedural grounds, we nevertheless must determine on the State respondents' cross appeal whether the courts below properly declared that the congressional map was also substantively unconstitutional.[12]

*****172 **452** In addition to the procedural amendments, in 2014, the People also amended the New York State Constitution to include certain substantive limitations on redistricting, including an express prohibition on partisan gerrymandering, commanding that "[d]istricts shall not be drawn to discourage competition or for the purpose of favoring or disfavoring incumbents or other particular candidates or political parties" (NY Const, art III, § 4 [c] [5]).[13] This amendment was made in recognition that the practice of partisan gerrymandering "jeopardizes [t]he ***519** ordered working of our Republic, and of the democratic process" and, "[a]t its most extreme, the practice amounts to 'rigging elections,' " which violates "the most fundamental of all democratic principles — that 'the voters should choose their representatives, not the other way around' " (*Gill v. Whitford*, —— U.S. ——, 138 S. Ct. 1916, 1940, 201 L.Ed.2d 313 [2018], quoting *Arizona State Legislature*, 576 U.S. at 824, 135 S.Ct. 2652).

In this case, petitioners asserted that, along with being procedurally flawed, the 2022 congressional map enacted by the legislature violates the constitutional provision prohibiting partisan gerrymandering. To prevail on such claim, petitioners bore the burden of proving beyond a reasonable doubt that the congressional districts were drawn with a particular impermissible intent or motive — that is, to "discourage competition" or to "favor[ ] or disfavor[ ] incumbents or other particular candidates or political parties" (NY Const, art III, § 4 [c] [5]). Such invidious intent could be demonstrated directly or circumstantially through proof of a partisan process excluding participation by the minority party and evidence of discriminatory results (i.e., lines that impactfully and unduly favor or disfavor a political party or reduce competition).

*****173 **453** Here, at the conclusion of the non-jury trial, Supreme Court — based on the partisan process, the map enacted by the legislature itself, and the expert testimony proffered by petitioners — found by "clear evidence and beyond a reasonable doubt that the congressional map was unconstitutionally drawn with political bias" to "significantly reduce[ ]" the number of competitive districts. The Appellate Division affirmed, similarly drawing an inference of invidious partisan purpose based on "evidence of the largely one-party process used to enact the 2022 congressional map, a comparison of the 2022 congressional map to the 2012 congressional map, and the expert opinion and supporting analysis of Sean P. Trende," finding that "the 2022 congressional map was drawn to discourage competition and favor democrats" (204 A.D.3d at 664, 167 N.Y.S.3d 659).

We reject respondents' assertion that the evidence was legally insufficient to establish an unconstitutional partisan ***520** purpose. Viewing the evidence in the light most favorable to petitioners and drawing every inference in their favor, there is a "valid line of reasoning and permissible inferences" which could possibly lead [a] rational [factfinder] to the conclusion reached by the [factfinder] on the basis of the evidence presented at trial" (*Cohen v. Hallmark Cards, Inc.*, 45 N.Y.2d 493, 499, 410 N.Y.S.2d 282, 382 N.E.2d 1145 [1978]). Moreover, where, as here, this Court is presented with affirmed findings of fact in a civil case, our review is limited to whether there is record support for those findings (*see Matter of Rittersporn v. Sadowski*, 48 N.Y.2d 618, 421 N.Y.S.2d 49, 396 N.E.2d 197 [1979]). There is record support in the undisputed facts and evidence presented by petitioners for the affirmed finding that the 2022 congressional map was drawn to discourage competition. Indeed, several of the State respondents' experts, who urged the court to draw the contrary inference, concededly did not take into account the reduction in competitive districts. Thus, we find no basis to disturb the determination of the courts below (*see Matter of Rittersporn*, 48 N.Y.2d at 619, 421 N.Y.S.2d 49, 396 N.E.2d 197).[14]

*****174 **454 *521** V.

Based on the foregoing, the enactment of the congressional and senate maps by the legislature was procedurally unconstitutional, and the congressional map is also substantively unconstitutional as drawn with impermissible partisan purpose, leaving the state without constitutional district lines for use in the 2022 primary and general elections.[15] The parties dispute the proper remedy for these constitutional violations, with the State respondents arguing no remedy should be ordered for the 2022 election cycle because the election process for this year is already underway. In other words, the State respondents urge that the 2022 congressional and senate elections be conducted using the unconstitutional maps, deferring any remedy for a future election.[16] We reject this invitation to subject the People of this state to an election conducted pursuant to an unconstitutional reapportionment.

"The power of the judiciary of a State to require valid reapportionment or to formulate a valid redistricting plan has not only been recognized by [the United States Supreme] Court but appropriate action by the States in such cases has been specifically encouraged" (*Scott v. Germano*, 381 U.S. 407, 409, 85 S.Ct. 1525, 14 L.Ed.2d 477 [1965]; *see Growe*, 507 U.S. at 33, 113 S.Ct. 1075).[17] Indeed, our State Constitution both requires expedited judicial review of redistricting ***522** challenges (*see* NY Const, art III, § 5) — as occurred here — and authorizes the judiciary to "order the adoption of, or changes to, a redistricting plan" in the absence of a constitutionally-viable legislative plan (NY Const, art III, § 4 [e]). Where, as here, legislative maps have been determined to be unenforceable, we are left in the same predicament as if no maps had been enacted. Prompt judicial intervention is both necessary and appropriate to guarantee the People's right to a free and fair election.

We are cognizant of the logistical difficulties involved in preparing for and executing an election — and appreciate that rescheduling a primary election impacts *****175 **455** administrative officials, candidates for public office, and the voters themselves. Like the courts below, however, we are not convinced that we have no choice but to allow the 2022 primary election to proceed on unconstitutionally enacted and gerrymandered maps. With judicial supervision and the support of a neutral expert designated a special master, there is sufficient time for the adoption of new district lines.[18] Although it will likely be necessary to move the congressional and senate primary elections to August, New York routinely held a bifurcated primary until recently, with some primaries occurring as late as September. We are confident that, in consultation with the Board of Elections, Supreme Court can swiftly develop a schedule to facilitate an August primary election, allowing time for the adoption of new constitutional maps, the dissemination of correct information to voters, the completion of the petitioning process, and ***523** compliance with federal voting laws, including the Uniformed and Overseas Citizens Absentee Voting Act (*see* 52 USC § 20302).

Finally, the State respondents' protest that the legislature must be provided a "full and reasonable opportunity to correct ... legal infirmities" in redistricting legislation (NY Const, art III, § 5). The procedural unconstitutionality of the congressional and senate maps is, at this juncture, incapable of a legislative cure. The deadline in the Constitution for the IRC to submit a second set of maps has long since passed.[19] Although the State respondents assert that, even following a constitutional violation, the legislature possesses exclusive jurisdiction and unrestricted power over redistricting, the Constitution explicitly authorizes judicial oversight of remedial action in the wake of a determination of unconstitutionality — a function familiar to the courts given their obligation to safeguard the constitutional rights of the People under our tripartite form of government. Thus, we endorse the procedure directed by Supreme Court to "order the adoption of ... a redistricting plan" (NY Const, art III, § 4 [e]) with the assistance of a neutral expert, designated a special master, following submissions *****176 **456** from the parties, the legislature, and any interested stakeholders who wish to be heard.[20]

***524** Nearly a century and a half ago, we wrote that "[t]he Constitution is the voice of the people speaking in their sovereign capacity, and it must be heeded" (*Matter of New York El. R.R. Co.*, 70 N.Y. 327, 342 [1877]). Thirty years later, we relied on that fundamental principle to conclude that "[a] legislative apportionment act cannot stand as a valid exercise of discretionary power by the legislature when it is manifest that the constitutional provisions have been disregarded ... [because] [a]ny other determination by the courts might result in the constitutional standards being broken down and wholly disregarded" (*Matter of Sherrill v. O'Brien*, 188 N.Y. at 198, 81 N.E. 124). Today, we again uphold those constitutional standards by adhering to the will of the People of this State and giving meaningful effect to the 2014 constitutional amendments.

We therefore remit the matter to Supreme Court which, with the assistance of the special master and any other relevant

submissions (including any submissions any party wishes to promptly offer), shall adopt constitutional maps with all due haste. Accordingly, the Appellate Division order should be modified, with costs to petitioners, in accordance with this opinion and, as so modified affirmed.

TROUTMAN, J. (dissenting in part).

I agree with the majority that petitioners have standing, and I further agree with the majority's holding that the 2022 congressional and state senate redistricting plans (2022 plans) were not enacted by the legislature in compliance with the constitutional process. However, I dissent as to the majority's advisory opinion on the substantive issue of whether the plans constitute political gerrymandering and as to the remedy.

The majority correctly concludes that sections 4, 5, and 5-b of article III of the State Constitution, as ratified by the citizens of the State, provide the exclusive process for redistricting (*see* NY Const, art III, § 4 [e]). This process requires, among other things, that any redistricting plan to be voted on by the legislature must be initiated by the Independent Redistricting Committee (IRC) (*see* § 4 [b]). Once this Court holds that the ***525** 2022 plans were unconstitutionally enacted and must be stricken on that threshold basis, it should not then step out of its judicial role to further opine on the purely academic issue of whether the 2022 congressional *****177 **457** map failed to comply with the substantive requirements of section 4 (c) (5). The 2022 plans, which the majority concludes are void ab initio, are no longer substantively at issue, nor can the majority seriously claim them to be so. Furthermore, although the majority purports to provide "necessary guidance to inform the development of a new congressional map on remittal" (majority op. at 518 n. 12, 176 N.Y.S.3d at 172, 197 N.E.3d at 452 n.12), the majority's opinion provides no such guidance. Its conclusion, based on affirmed findings of fact that the congressional map was drawn with partisan intent, is not illuminating in the least because the majority does not engage in the kind of careful district-specific analysis that might provide any practical guidance to an actual mapmaker, nor could it on this record (*cf.* Wilson dissenting op. at 534-543, 176 N.Y.S.3d at 183–90, 197 N.E.3d at 463–70). By opining on this academic issue, the majority renders "an inappropriate advisory opinion" by "prospectively declar[ing] the [redistricting] invalid on additional ... constitutional grounds" (*T.D. v. New York State Off. of Mental Health*, 91 N.Y.2d 860, 862, 668 N.Y.S.2d 153, 690 N.E.2d 1259 [1997]; *see Self-Insurer's Assn. v. State Indus. Commn.*, 224 N.Y. 13, 16, 119 N.E. 1027 [1918] [Cardozo, J.] ["The function of the courts is to determine controversies between litigants ... They do not give advisory opinions. The giving of such opinions is not the exercise of the judicial function"]).

Given the procedural violation flowing from the breakdown in the constitutional process, we must fashion a remedy that matches the error.* The Constitution contemplates that a court may be "required to order the adoption of ... a redistricting plan as a remedy for a violation of law" (NY Const, art III, § 4 [e]). In so ordering, where a court finds that redistricting legislation violates article III, "the legislature shall have a full and reasonable opportunity to correct the law's legal infirmities" (§ 5). Consistent with these provisions, this Court should order the legislature to adopt either of the two plans that the IRC has already approved pursuant to section 5-b (g). Those plans show significant areas of bipartisan consensus among the IRC commissioners. The boundaries of the districts of Upstate New York, in particular, are nearly identical between the two plans and similar to those in the procedurally infirm plan ***526** enacted by the legislature (*see Matter of Harkenrider v. Hochul*, 204 A.D.3d 1366, 167 N.Y.S.3d 659 [4th Dept. April 21, 2022] [Whalen, P.J. & Winslow, J., dissenting in part]). Given the existence of these IRC-approved plans, there is no need for a redistricting plan to be crafted out of whole cloth and adopted by a court. Rather, the legislature should be ordered to adopt one of the IRC-approved plans on a strict timetable, with limited opportunity to make amendments thereto. As part of our judicially crafted remedy, we could order that any amendments to either plan "shall not affect more than [2%] of the population of any district contained in such plan" (Legislative Law former § 94). In other words, the legislature would be bound by its own self-imposed restrictions, which were in effect at the time these plans were first presented for legislative approval.

Such a remedy not only adheres more closely to the constitutional redistricting process, but it discourages political gamesmanship. Throughout this proceeding, respondents have asserted that the legislature has near-plenary authority to adopt a *****178 **458** redistricting plan, whereas petitioners have sought to take the process out of the hands of the legislature and to place it into the hands of the judiciary. It is of course disputed why the constitutional process broke down, but it is readily apparent that the IRC's bipartisan commissioners failed to fulfill their constitutional duty. None of the parties is entitled to

the resolution that he or she seeks.

In addition, this remedy allows the legislature to enact a plan that minimizes the impact on the reliance interests of both the voters and candidates. Petitions have been circulated, citizens have contributed monetary donations to the candidates of their choice, and eligible voters have had the opportunity to educate themselves on the candidates who are campaigning for their votes, all in reliance on the procedurally infirm redistricting plan enacted by the legislature. Of course, entrenched candidates have the party apparatus to support them in the event that further redistricting causes excessive upset to the current plan. In such a circumstance, outside candidates, upstart candidates, and independent candidates, who lack the resources of the well-heeled, will be disadvantaged most, leaving the voters who support them without suitable options. The legislature, duly elected by the citizens of this State, is in the best position to take these considerations into account.

Yet, the remedy ordered by the majority takes the ultimate decision-making authority out of the hands of the legislature ***527** and entrusts it to a single trial court judge. Moreover, it may ultimately subject the citizens of this State, for the next 10 years, to an electoral map created by an unelected individual, with no apparent ties to this State, whom our citizens never envisioned having such a profound effect on their democracy. That is simply not what the people voted for when they enacted the constitutional provision at issue. Although the IRC process is not perfect, it is preferable to a process that removes the people's representatives entirely from the process. The majority states that it "decline[s] to render the constitutional IRC process inconsequential in the manner requested by the State respondents" (majority op. at 517, 176 N.Y.S.3d at 171, 197 N.E.3d at 451); however, the majority does just that by crafting a remedy that cuts the legislature out of the process. The citizens of the State are entitled to a resolution that adheres as closely to the constitutional process as possible. By ordering the legislature to enact redistricting legislation duly initiated by the IRC, this Court could afford the legislature its "full and reasonable" opportunity while honoring the constitutional process ratified by the people.

WILSON, J. (dissenting).

I agree with Judge Troutman that Article III, Section 5 of the Constitution means that the majority's referral of this matter to a special referee is not allowable, and I further agree that her proposed solution of requiring the Legislature to act on the Independent Redistricting Commission ("IRC") maps that have been submitted, though novel, would be acceptable in the unusual circumstances presented here. I also fully concur in Judge Rivera's dissenting opinion, and I do not view Judge Rivera's opinion as necessarily inconsistent with Judge Troutman's proposed remedy. Therefore, I address the merits of the claim that the 2022 redistricting itself violates the Constitution. It does not.

The burden a plaintiff must meet to overturn legislative action as violative of the New York Constitution is extraordinarily high. We have often (though not always) described that burden as proving unconstitutionality "beyond a reasonable *****179 **459** doubt" (*Matter of Wolpoff v. Cuomo*, 80 N.Y.2d 70, 78, 587 N.Y.S.2d 560, 600 N.E.2d 191 [1992]; *but see Matter of City of Utica*, 91 N.Y.2d 964, 672 N.Y.S.2d 844, 695 N.E.2d 713 [1998] [upholding a state statute's constitutionality without reference to the beyond a reasonable doubt standard]; *Matter of Sherrill v. O'Brien*, 188 N.Y. 185, 198, 81 N.E. 124 [1907] ["A legislative apportionment act cannot stand as a valid exercise of discretionary power by the legislature when it is manifest that the constitutional provisions ***528** have been disregarded"]; *Matter of Whitney*, 142 N.Y. 531, 533, 37 N.E. 621 [1894] [upholding the apportionment of Kings County into assembly districts because, although flawed, "the division has seemed to us a reasonable approach to equality, and under all the circumstances of the case a substantial obedience to the writ"]). Both Supreme Court and the Appellate Division described the test that way. Thus, to prevail, the petitioners need to have proved beyond a reasonable doubt that the Legislature's 2022 Congressional and State Senatorial districts were "drawn to discourage competition or for the purpose of favoring or disfavoring incumbents or other particular candidates or political parties" (NY Const, art III, § 4 [c] [5]). It is important to pay close attention to the wording of the Constitution. It does not prohibit the creation (or maintenance) of districts that are highly partisan in one direction or the other. Indeed, both in New York and around the rest of the nation, voters tend to cluster in geographic areas that reflect party affiliation. As a simple example, rural areas in New York and in the United States generally tend to have much higher concentrations of Republican voters than do urban areas. What the Constitution prevents is purposefully drawing districts to discourage competition or favor particular parties or candidates.

After a review of the record, I am certain that the petitioners failed to satisfy the "beyond a reasonable doubt" standard. By that, I do not mean to say that I know the Legislature did not draw some districts in a way that violated our State Constitution; rather, the evidence here does not prove that to be the case at the level of certainty required to invalidate the 2022 redistricting as unconstitutional. Perhaps with a different record, petitioners could make such a showing, but they have failed to do so here.

The question before us, then, is whether the petitioners introduced sufficient evidence to discharge their very high burden of proving that the Legislature adopted gerrymandered district lines in violation of the Constitution. That is unequivocally a question of law, and thus within the heartland of our Court's power of review (*see Glenbriar Co. v. Lipsman*, 5 N.Y.3d 388, 392, 804 N.Y.S.2d 719, 838 N.E.2d 635 [2005]; *see also People v. Jin Cheng Lin*, 26 N.Y.3d 701, 719, 27 N.Y.S.3d 439, 47 N.E.3d 718 [2016] [noting that whether "the proof (does not meet) the reasonable doubt standard" is "a matter of law" (alterations in original)]; *People v. Tarsia*, 50 N.Y.2d 1, 13, 427 N.Y.S.2d 944, 405 N.E.2d 188 [1980] [evaluating "the total evidence" as to whether "the proof was insufficient as a matter of law to support the affirmed findings that defendant's ***529** inculpatory statements ... were voluntary"]; *People v. Anderson*, 42 N.Y.2d 35, 39, 396 N.Y.S.2d 625, 364 N.E.2d 1318 [1977] ["(W)hether the proof met the reasonable doubt standard at all is a matter of law"]; *People v. Leonti*, 18 N.Y.2d 384, 389, 275 N.Y.S.2d 825, 222 N.E.2d 591 [1966] ["(W)hether the evidence adduced meets the standard required is one of law for our review"]). The majority incorrectly treats this as an unreviewable question of fact, characterizing Supreme Court's finding that the 2022 congressional map was drawn to discourage *****180 **460** competition as a factual "determination" that has "record support" and thus should not be "disturb[ed]" (majority op. at 520, 176 N.Y.S.3d at 173, 197 N.E.3d at 453)—a distinct, and here inapt, standard (*see Stiles v. Batavia Atomic Horseshoes, Inc.*, 81 N.Y.2d 950, 951, 597 N.Y.S.2d 666, 613 N.E.2d 572 [1993]).

Indeed, it is remarkably inaccurate to suggest that our Court is without power to review the Appellate Division's ruling on the partisan gerrymander claim. This case is before us as an appeal as of right based on CPLR 5601 (b). This case satisfies the conditions for an appeal as of right because the question presented—whether a congressional map, *i.e.*, a legislative enactment, is constitutionally invalid—is a question of law that is reviewable by this court (*see Cayuga Indian Nation of New York v. Gould*, 14 N.Y.3d 614, 635, 904 N.Y.S.2d 312, 930 N.E.2d 233 [2010] ["(A) query concerning the scope and interpretation of a statute or a challenge to its constitutional validity" is a "pure question of law"]).

Petitioners' evidence falls into three basic categories. First, petitioners primarily rely on the testimony of Sean P. Trende, an elections analyst and doctoral candidate at Ohio State University. At best, Mr. Trende's results are incomplete and inconclusive, but they are also legally insufficient to meet the above standard. Second, petitioners rely on the projected loss of four Republican Congressional seats (out of eight that currently exist). The difficulty with that proof is that it assumes that factors unrelated to how the districts were drawn have not caused the result. Third, petitioners contend that the 2022 redistricting was accomplished through the complete exclusion of Republican members of the Legislature from the process and a failed attempt by Democrats to further amend the Constitution, followed by the enactment of a statute. I view that as their best argument in support of their gerrymander claim but one that, without more, does not meet the high bar for invalidating the Legislature's 2022 redistricting plan.

I.

The petitioners, Supreme Court, and the Appellate Division plurality each relied heavily on the testimony of Mr. Trende. ***530** Mr. Trende's testimony is based on simulations in which a computer algorithm uses demographic data, takes parameters set by the user, and draws districting maps for the region (in this case, New York State) specified by the user. This is the first time Mr. Trende has testified in a case in which he prepared redistricting simulations of any kind. Instead of using the Markov Chain Monte Carlo simulation algorithm, which has been regularly used in redistricting cases, Mr. Trende used a new simulation algorithm developed by Dr. Kosuke Imai, a Harvard professor, along with publicly available political and demographic data at the census block and precinct levels. Dr. Imai's new algorithm appeared in an unpublished paper that had yet to be peer-reviewed. In that paper, Dr. Imai reported that he had tested the reliability of his new model by

applying it to a 50-precinct map and running 10,000 simulations. By comparison, New York State has more than 140,000 precincts; uncontroverted evidence (including from Mr. Trende) establishes that the complexity of producing a working algorithm increases as the number of precincts increases.

In brief, Dr. Imai's algorithm draws possible maps, starting from a blank page, but taking into account parameters the user sets. For example, a user can specify to avoid splitting a county (or city) into different districts, though sometimes splitting is inevitable and may be accomplished in myriad ways. By running thousands of simulations and comparing them to what the Legislature has done, the model allows ***181 **461** for measurement of the difference in party breakdown between the collection of simulated maps and the legislatively drawn map. The model can produce summary statistics showing, for example, that, when compared to the legislative map, the simulated maps distribute voters of one party or another (here, Republicans) in a way that concentrates a lot of them into some districts where Republicans would likely have won elections anyway, thus removing them from districts where Democrats might have faced a close election. In simple terms, Mr. Trende concluded that the legislative map consolidated Republican voters into a few Republican-leaning districts and spread Democratic voters in an efficient fashion. Of course, the model cannot tell you *why* the Legislature drew the districts that way, but, provided that a scientific method is proven to be reliable, the data entered is of good quality, the parameters chosen are correct, and the results are robust (*i.e.*, not susceptible to material swings in output when parameters are varied within reasonable ***531** ranges for those parameters), the law allows intent to be inferred from results in a variety of areas (*e.g.*, *People v. Guzman*, 60 N.Y.2d 403, 412, 469 N.Y.S.2d 916, 457 N.E.2d 1143 [1983] [discriminatory intent inferred from underrepresentation in Grand Jury selection]; *303 W. 42nd St. Corp. v. Klein*, 46 N.Y.2d 686, 695, 416 N.Y.S.2d 219, 389 N.E.2d 815 [1979] [discriminatory intent inferred from "a convincing showing of a grossly disproportionate incidence of nonenforcement against others similarly situated in all relevant respects save for that which furnishes the basis of the claimed discrimination"]).

Again, Article III, Section 4 of the Constitution states that "[d]istricts shall not be drawn *to* discourage competition or *for the purpose of* favoring or disfavoring incumbents or other political candidates or other political parties" (emphasis added). The prohibition, then, is against drawing maps *with the intention to* discourage competition or favor or disfavor incumbents, political candidates, or political parties. In other words, if a given map ends up discouraging competition or favoring a political party, that map does not necessarily run afoul of the Constitution's prohibition. Instead, an *intent* to discourage competition or to favor that political party must be shown for the map to violate the Constitution.

Staten Island provides a good example to keep in mind, one to which I will return later. Staten Island is traditionally Republican. It does not have quite enough people in it to constitute an entire congressional district, but it forms the vast portion of Congressional District 11, both in the 2010 districting and the Legislature's 2022 districting, with the added voters coming from Brooklyn. No one suggests that, by keeping Staten Island intact within a single congressional district instead of splitting it across two districts with more Brooklynites, the Legislature in 2010 or 2022 did so with the intent to advantage Republicans. If you split Staten Island into two different congressional districts and added enough Brooklynites to fill out those districts, each of the districts would have more Brooklynites than Staten Islanders, and the strength of the Republican voting of Staten Island would be diluted. The two new districts might be more competitive—*i.e.*, closer to 50/50 than District 11 is or has been—but it is sufficient, to reject a claim of intent to advantage Republicans by keeping Staten Island whole within a single district, to say that it is an island and people there live in communities that are distinct from those in Brooklyn. Again, the *why* is important, not the *what.*

***532** Mr. Trende's testimony and analysis were legally insufficient to bear on the question of intent for three reasons. First, the New York Constitution *requires* the ***182 **462** consideration of several specifically identified factors when creating congressional districts, with some additional factors required for State Senatorial districts. Thus, Mr. Trende's results at most show that if we amended the New York Constitution to strike out those factors, he could conclude the Legislature acted with intent to disfavor Republicans or reduce competition. Second, close examination of districts in the real world, as compared to those hidden in thousands of hypothetical unseen maps, further exposes the unreliability of Mr. Trende's conclusions. Finally, the novelty of Dr. Imai's algorithm and the opacity of Mr. Trende's implementation of it create very substantial doubt as to his conclusions. The method is novel and not peer reviewed. Mr. Trende did not attempt the established Markov Chain Monte Carlo simulation to compare it to his results, nor did he provide the model, inputs, data sets, or output maps that formed the basis for his analysis. Indeed, neither he nor anyone has seen the algorithm-produced maps underlying his analysis. We are being asked to determine unconstitutionality based on shadows.

New York's Constitution requires that the following factors be considered when drawing congressional districts:

1. Compliance with "the federal constitution and statutes" (NY Const, art III, § 4 [c]);

2. "whether such lines would result in the denial or abridgement of racial or language minority voting rights, and districts shall not be drawn to or have the purpose of, nor shall they result in, the denial or abridgement of such rights" (*id.* § 4 [c] [1]);

3. "Districts shall be drawn so that, based on the totality of the circumstances, racial or minority language groups do not have less opportunity to participate in the political process than other members of the electorate and to elect representatives of their choice" (*id.*);

4. "Each district shall consist of contiguous territory" (*id.* § 4 [c] [3]);

5. "Each district shall be as compact in form as practicable" (*id.* § 4 [c] [4]);

***533** 6. "Districts shall not be drawn to discourage competition or for the purpose of favoring or disfavoring incumbents or other particular candidates or political parties" (*id.* § 4 [c] [5]);

7. Consideration of "the maintenance of cores of existing districts" (*id.*); and

8. Consideration of the maintenance of "pre-existing political subdivisions, including counties, cities and towns, and of communities of interest" (*id.*).

For senatorial districts, the Constitution adds requirements that "senate districts not divide counties or towns, as well as the 'block-on-border' and 'town on border' rules" (*id.* § 4 [c] [6]).

Mr. Trende admittedly did not attempt to have his simulations account for several of the constitutionally required factors listed above. For that reason alone, his simulations do not provide evidence of the Legislature's intent to disfavor Republicans or reduce competition. Putting aside all other methodological and implementation problems, a proper comparison would ask: what would an unbiased mapmaker (the algorithm) do if given the same constitutional requirements as the Legislature has? Instead, Mr. Trende has attempted to answer a different question: what would an unbiased mapmaker do if it lacked some of the constitutional requirements the Legislature is required to follow?

This is not merely a conceptual problem, which is readily seen by identifying the constitutional factors Mr. Trende omitted. First, under the Equal Protection Clause and the federal Voting Rights Act *****183 **463** ("VRA"), the composition of congressional districts must not discriminate on the basis of race or color (52 USC § 10301; US const, amend XIV, § 1). New York's Constitutional requirements, listed as items 2 and 3 above, represent similar protections not just on the basis of race, but language as well. Mr. Trende gave no instruction to his algorithm to take any consideration of those constitutional requirements for drawing districts. Mr. Trende noted that his "simulated maps are not drawn with any racial data available to the simulation"—that is, the simulation could not even take race into account in drawing districts if Mr. Trende had specified that as a parameter. Likewise, nothing in the record suggests that Mr. Trende's simulation used any data concerning the language of inhabitants, and he made no claim to have done so.

Faced with criticism that he had omitted consideration of factors 1 through 3 above, Mr. Trende responded generally that, ***534** "every one of Respondent's experts could readily demonstrate that ... fixing the purported omissions might lead this Court to arrive at different conclusions," which, as explained below, attempts to shift the burden of proof onto respondents. He then explained his omission on the ground that "there is no evidence proffered by any party of racially polarized voting in New York City or in particularized boroughs, nor is there any evidence that any single minority group can form a reasonably compact majority in a district." Besides lacking any evidentiary support, his assertion is patently and commonly understood to be wrong. Looking just to last year's New York City mayoral election, Curtis Sliwa, the Republican nominee, "scored 44% of the vote in precincts where more than half of residents are Asian — surpassing his 40% of votes in white enclaves, 20% in majority-Hispanic districts and 6% in majority-Black districts" (Rong Xiaoqing et al., Chinese Voters Came Out in Force for the GOP in NYC, Shaking Up Politics, The City [Nov 11, 2021], https://www.thecity.nyc/politics/2021/11/11/22777346/chinese-new-yorkers-voted-for-sliwa-gop-republicans). In the same election, now-Mayor Eric Adams "dominated" the "Black Bloc," a "63 percent non-Hispanic Black and 23 percent college-educated swath of Brooklyn and Queens," where Adams grew up and where he won "63 percent of first-place votes" (Nathaniel Rakich, How Eric Adams Won The New York City Mayoral Primary, FiveThirtyEight [Aug 25, 2021],

https://fivethirtyeight.com/features/how-eric-adams-won-the-new-york-city-mayoral-primary/).

Mr. Trende attempted to make some account of the omission of the federal and state protections for racial minority voting rights by "freezing" certain census blocks in nine districts to remove them from his analysis, explaining that those districts are "plausible candidates for protection under the VRA or the State Constitution." Even assuming that his choice of districts is sound, his results demonstrate the importance of his omission of constitutionally required factors: his "frozen" simulations produced results that "ma[ke] Petitioner's case more difficult." Specifically, those "plausible" protections for minority voters produced results that "accept[ ] the Legislature's decision to pair Yorktown with Yonkers in the Sixteenth District, and to crack Republican-leaning areas in Midwood and Sheepshead Bay between the Ninth and Eighth districts." In other words, by including even a rough proxy for protection of minorities, he admits that some of what he described as gerrymandering ***535** is explainable instead by protection of minority voting rights. Mr. Trende's utter lack of consideration of the constitutional requirement to consider protection of non-English language groups inherently *****184 **464** means his simulations do not show what an unbiased mapmaker would do if that constitutional command mattered.

Likewise, Mr. Trende completely neglected considering keeping "communities of interest" together (item 8 above), as the Constitution requires. Keeping in mind that differences in party affiliation within a district do not matter unless they were created with the *intent* to disadvantage a party or candidate or to reduce competition, Mr. Trende ignored that the IRC—composed in equal parts of persons appointed by Democrats and Republicans—reached agreement on keeping together many communities of interest. For example, both sets of IRC maps (one produced by the Democratic faction and the other by the Republican faction) agreed that the Southern Tier of New York should be unified in a district. The Southern Tier is a strip of eight counties along upstate New York's southern edge, the part of the state that shares a border with Pennsylvania.[1] Those counties are grouped as a region in New York State's materials on economic development (*see* New York State, Empire State Development: Southern Tier, https://esd.ny.gov/regions/southern-tier [last accessed Apr 26, 2022]). Indeed, the region has a storied history of being a manufacturing powerhouse, though the region also faced struggles within the past decade due to a decline in manufacturing and uncertain economic development (Susanne Craig, New York's Southern Tier, Once a Home for Big Business, Is Struggling, NY Times [Sept 29, 2015], https://www.nytimes.com/2015/09/30/nyregion/new-yorks-southern-tier-once-a-home-for-big-business-is-struggling.html). Those counties are more Republican than Democratic; in a show of how culturally distinct the region is, hundreds of residents in the Southern Tier in 2015 rallied in support of seceding from the state of New York (*id.*). One Republican lawmaker even applauded the fact that the maps proposed by the Democratic and Republican commissioners to the IRC both kept the Southern Tier intact (Rick Miller, Southern Tier Congressional District Essentially Maintained in NY ***536** Redistricting Maps, Olean Times Herald [Jan 4, 2022], https://www.oleantimesherald.com/news/southern-tier-congressional-district-essentially-maintained-in-ny-redistricting-maps/article_56c5d543-6c8a-55d3-a3de-e662bdb0f6dd.html). For upstate New York, the Democratic Commissioners and the Republican Commissioners agreed that there should be three Republican-leaning districts: one uniting the Southern Tier, one uniting the North Country, and one by Lake Ontario. The Commissioners from the two parties also agreed that there should be Democratic-leaning districts in the four urban areas in upstate New York: in and around Albany, Syracuse, Rochester, and Buffalo. The result of those bipartisan decisions by the IRC demonstrates that those districts (broadly, all of upstate New York, about which the IRC had no substantial disagreements) should have been excluded from Mr. Trende's simulations. But even though the Southern Tier and the other upstate counties and cities were bipartisanly districted as "communities of interest," Mr. Trende made no effort to keep the Southern Tier, or other communities of interest, intact in his model. Indeed, Mr. Trende "didn't pay any attention to what any of those [IRC] commissioners [had] done in their proposals," had not read any of the testimony before the IRC, and did not know whether there *****185 **465** was any testimony before the IRC about communities of interest.

Instead, he told Supreme Court that such communities are too difficult to code, even though he also acknowledged that in a redistricting exercise he undertook for Virginia, he and his co-researcher accounted for communities of interest. Mr. Trende did not do any sort of proxy analysis as he did for race, and because neither he nor anyone else ever looked at the 10,000 maps his simulation drew, he has no idea what his algorithm did to the Southern Tier or any other upstate areas. But Dr. Imai's own data provides some insight.

Mr. Trende used Dr. Imai's model and data. The record includes four sample maps from a set of 5,000 simulations for New York prepared by Dr. Imai himself. Two of the sample maps from Dr. Imai's simulations broke up the North Country. All three of the sample maps broke up the Southern Tier. None of Dr. Imai's sample maps maintained Democratic-leaning districts around all of Albany, Syracuse, Rochester, and Buffalo. Those samples strongly suggest that Mr. Trende's

conclusions about intentional gerrymandering depend on comparison to maps that would have broken up congressional districts arrived ***537** at by bipartisan consensus. Of course, had Mr. Trende looked at his own maps, or even turned them over for respondents to examine, we would be able to know how many of his "less gerrymandered" simulations were incompatible with districting actually arrived at bipartisanly, with regard for the constitution's directions.[2] Instead, it is clear that, just as with the racial and language protections in the constitution, Mr. Trende's exclusion of communities of interest has made his analysis legally irrelevant: at most, it answers what an unbiased mapmaker would do if that mapmaker was told to disregard protection of racial minorities, language minorities and communities of interest.

One final example from Dr. Imai's work illustrates the unsoundness of Mr. Trend's conclusions. His conclusions are based on comparing the algorithm-drawn simulated districts, which purportedly are "less gerrymandered," against the Legislature's redistricting plan. Because neither we nor Mr. Trende knows what his "less gerrymandered" maps look like, we cannot know whether they are sensible maps that should be included in such a comparison. But because Dr. Imai, using the same data and same model, displayed some sample maps, we can observe the kind of maps Mr. Trende has relied on for his conclusions. Sample Plan 1 from Dr. Imai's simulation placed Schuyler County and Franklin County into the same congressional district. Schuyler County is near upstate New York's southern border with Pennsylvania, and Franklin County is one of the *****186 **466** northernmost counties in New York, on the border with Canada—that is, those two counties are on opposite ***538** sides of upstate New York. Their county seats are 262 miles away via highway (Google, Google Maps Driving Directions for Driving from Watkins Glen, New York to Malone, New York, https://perma.cc/L3KH-DN5B [last accessed Apr 26, 2022]). In essence, what Mr. Trende is showing is that the partisan imbalance of some congressional districts could be reduced by radically rejiggering them in a way that no human mapmaker (or resident of either of those counties) would think remotely sensible. Interesting though it may be, it is legally irrelevant.

Apart from the omitted constitutional requirements, the creation of districts requires balancing among the different constitutional requirements. Some are relatively inflexible—such as districts of equal population (*see Baker v. Carr*, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 [1962]), compliance with the VRA or, for senatorial districts, the "block-on-block" rule; others, such as compactness or protection of communities of interest, allow for an exercise of judgment in how to balance them. Mr. Trende made no explicit decision in how to balance the factors he did include, was uninformative about what balance was implied, and did not vary the relative weights of his parameters to determine the robustness of his conclusions. For instance, Mr. Trende included a parameter for the compactness of districts, which the constitution instructs should be considered. When asked how he valued compactness, he testified to selecting a value of "1" in Dr. Imai's model because he knew that "the other choices don't work well." He agreed that the compactness parameter could be set at less than 1, or more than 1, but provided no explanation for what the settings meant, how much priority a change in setting gave to compactness versus any other factor, or even what was meant by other values not working well—which may simply mean that when he tested for robustness of the parameter, he found that changing the relative weight given to compactness resulted in statistics that did not support his conclusions or that the model ceased to function, neither of which should give us confidence sufficient to hold the redistricting unconstitutional.

Similarly, Mr. Trende said that Dr. Imai's model allowed an "on" or "off" switch on whether to split counties. He put that switch "on," even though New York map drawers must balance county preservation with other considerations—effectively meaning he gave county integrity a superpriority over other constitutional factors. Nothing in the Constitution requires the Legislature to prefer county integrity over any other factor, or ***539** even to give the same priority to county integrity for every county. Rather, the Constitution gives the Legislature flexibility in weighting many of the required considerations differently in different circumstances, but Mr. Trende implicitly assigned fixed and universal relative weights to every one of those that he included. Faced with the potential for differently weighting parameters, responsible modelers alter the parameters within reasonable bounds to see whether the alterations make a difference. When the difference is not great, models are robust; when they are great, models are lacking in probative value (*see, e.g.,* Amariah Becker et al., Computational Redistricting and the Voting Rights Act, 20 Election L J 407, 430 & n 31 [2021]). When nobody tests for robustness, invalidating districts as unconstitutional beyond a reasonable doubt is sheer guesswork.

Respondents pointed out the many deficiencies in Mr. Trende's model. In addition to the examples explained in detail above, Mr. Trende repeatedly and improperly answered in a way that attempted to shift *****187 **467** the burden of proof from petitioners onto respondents. For instance, in response to respondents' assertion that his failure to consider all the relevant constitutional considerations undermined the validity of his methodology, Mr. Trende asserted that "[e]very one of Respondents' experts is more than capable of either re-running the relevant simulation algorithm that I employed or executing a competing algorithm" and "[i]f there are indeed important communities of interest to be protected, however, any

of Respondents' experts could program a simulation that respected those communities of interest and potentially harm Petitioners' case." On cross-examination, he reiterated that "if there is something that [the respondents'] experts believe ... is missing that makes a difference -- they think makes a difference, they can do it."

The lower courts erroneously acceded to Mr. Trende's burden shifting, which itself is a legal error requiring reversal (*Harkenrider v. Hochul*, 204 A.D.3d 1366, 167 N.Y.S.3d 659 [4th Dept. 2022] [Whalen, P.J., dissenting]).[3] Proof beyond a reasonable doubt is an exacting standard: a party bearing that ***540** burden must remove all reasonable doubt, which is not met by saying that the opponent has the ability to disprove an assertion. Faulting the respondents for the petitioners' failure to account for constitutionally required redistricting criteria improperly reverses the burden of proof; it is the *petitioner*'s burden to prove unconstitutional partisan intent beyond a reasonable doubt.

In short, the factors set out in the Constitution must be considered during redistricting with flexibility in the relative weighting on a case-by-case basis. Maintaining the Southern Tier as a community of interest may be powerfully important; maintaining the Upper West Side as one may not be. Mr. Trende acknowledged that his algorithm cannot undertake that balancing, and to his credit explained that "the more that you adequately control all of the variables that the actual mapmakers actually used, the more you can infer intent, and the less you adequately control for those variables, the less you can infer intent" to gerrymander. Because Mr. Trende's analysis omitted constitutionally required factors and fixed implicit weights for others without allowing for flexibility, all his analysis demonstrates, at best, is that if our Constitution read very differently, he could find an intent to gerrymander. That conclusion is orthogonal to the issue here.[4]

II.

Apart from Mr. Trende's opinion, the Appellate Division plurality concluded that *****188 **468** the " 'application of simple common sense' from the enacted map itself and its likely effects on particular districts" supports petitioners' argument that the legislative districts were intentionally created to disfavor a party or candidate or render certain districts less competitive (2022 N.Y. Slip Op. 02648, *5 [citations omitted]). There are three significant problems with that conclusion. First, as noted above, for the great majority of congressional (and senatorial) districts, ***541** the Republican and Democratic factions of the IRC substantially agreed as to the district boundaries, and the legislative plan does not deviate materially in the case of those districts. Of course, that does not resolve the question for districts on which the IRC factions disagreed or for which the Legislature's plan was materially different, but it should remove most districts from the dispute.

Second, the Appellate Division relied on the following observation: "under the 2012 congressional map there were 19 elected democrats and 8 elected republicans and under the 2022 congressional map there were 22 democrat-majority and 4 republican-majority districts" (2022 N.Y. Slip Op. 02648, *3). The majority acknowledged that, standing alone or even in conjunction with the lack of Republican input into, or vote for, the 2022 map, the evidence would not be strong enough to surmount the high standard for invalidating the 2022 redistricting as unconstitutional. However, the mere change in the number of majority Democratic and Republican districts says nothing about *why* those changes occurred or about intent. The inference that the change is nefarious ignores important undisputed data.

The 2012 districts are obsolete and not a relevant source of comparison. Population and registration shifts demonstrate that New York's voting populace has changed in the Democrats' favor. In the past ten years, Democratic voter registration has outstripped Republican voter registration ten-to-one: Democratic voter registration increased by more than one million people statewide between April 2012 and February 2021, whereas Republican voter registration increased by less than 100,000 people during the same period. Similarly, over the decade, Democrat-leaning counties have increased in population, whereas Republican-leaning counties have decreased in population. It is unsurprising that such drastic shifts would occur in just a ten-year time horizon; that's why the Constitution requires decennial redistricting (NY Const, art III, § 4 [a]).

The characterization of the outgoing 2012 map as having 19 Democrat-leaning and eight Republican-leaning districts—in comparison to the four Republican-leaning districts in the 2022 map—is misleading because it disregards the changes of the

last decade. To start, it is undisputed that one Republican seat under the 2012 map, former District 22, was eliminated due to substantial population shifts and New York's loss of a congressional seat. But more importantly, it is undisputed that, based on the 2020 census data, the 2012 map would also produce only four Republican-leaning districts.

***542** Third, and most importantly, it is undisputed that the 2022 legislative redistricting was slightly *more* favorable for Republicans than the array of simulated "unbiased" maps produced by Mr. Trende's simulation. The Appellate Division contended that, by "boldly asserting" that the Democratically created 2022 plan tended to favor Republicans more than Mr. Trende's supposedly neutral maps, "respondents have created a further inference that they acted with a partisan purpose favoring democrats" (2022 N.Y. Slip Op. 02648, *4). That claim confuses intent *****189 **469** with effect. I return to Staten Island to illustrate the point.

Staten Island has historically been treated as a community of interest and not split into different congressional districts. If Staten Island is to be kept that way (wholly within District 11), it needs to include voters from somewhere else because Staten Island does not have enough people to make up a full congressional district. Because of contiguity requirements, that must be Brooklyn. The 2012 map of District 11 included all of Bay Ridge (which is just north of the Verrazano Bridge) and Bath Beach, a few blocks of Bensonhurst, and Gravesend (all south of the bridge). The Legislature's 2022 redistricting keeps Bay Ridge to the north (itself a community of interest) with Staten Island, but instead of then going south, it drops out Bath Beach, the bit of Bensonhurst and Gravesend, and goes north and incorporates Sunset Park and a small bit of Park Slope.

Among the thousands of comments sent to the IRC after it publicly released its draft report for comments, looking just at the Richmond and Kings County submissions (https://nyirc.gov/storage/archive/Kings_Richmond_Redacted.pdf), numerous letters asked the IRC to keep various groups together. Among those is a letter from OCA-NY (formerly known as the Organization of Chinese Americans), a "non-profit, non-partisan organization dedicated to protecting the rights of Asian Americans in New York City." That letter urged the IRC that, with regard to District 11, which contained Staten Island, "Bensonhurst and Bath Beach should NOT be with Staten Island. ... Staten Island does not share a similar concentration of Asians, nor the culture of Asian businesses as Bath Beach/Bensonhurst, nor do residents in Bath Beach/Bensonhurst travel on a regular basis to Staten Island and vice versa." Justin Wood, a Staten Islander, asked the IRC to "counter decades of artificial gerrymandering" by "extend[ing] NY11 northward into Bay ***543** Ridge and Sunset Park to unify linguistic and ethnic communities with shared interests." Karen Zhou, the past president of Homecrest Community Services, wrote the IRC noting that "Sunset Park, Bensonhurst, Homecrest, Sheepshead Bay, Dyker Heights, Bath Beach and Gravesend ... [have] an interconnection bounded by common culture, language and socioeconomic factors," further requesting that Bensonhurst and Homecrest be "together in one Congressional district ... [to] ensur[e] communities of interest are not ignored or neglected."

District 11 has been made less Republican by paying attention to unifying Asian American communities (which relates to the racial, language and community of interest requirements in the Constitution), for which the comments to the IRC were uniformly supportive. Because of contiguity requirements, there was nowhere to go but further north. The Appellate Division's observation that the reduction in Republican-leaning districts (or in the strength of the Republican lean) demonstrates an *intent* to gerrymander rather than an attempt to pay attention to the Constitution is unsupportable. Data tells you effect only. But the record before the IRC shows that various members of the Asian American community—and one Staten Islander—urged the IRC to go north instead of south specifically to serve the ends of the VRA and the constitutional provision requiring weight be given to communities of interest. The algorithmic comparators on which the lower courts relied, by omitting considerations required by the Constitution, gave zero weight to those considerations, effectively saying that the Asian American community does not matter. That, in turn, leads to an unfounded inference that the 2022 redistricting was *intended* ****470 ***190** to disadvantage Republicans, when, in the case of Staten Island, it was intended to protect Asian American voting rights and community interests, as the Constitution requires.

III.

The remaining evidence on which petitioners rely to demonstrate that the 2022 redistricting was done with intent to disfavor

Republicans or make certain districts less competitive relates to procedural issues concerning the 2021 legislation, a failed 2021 constitutional amendment, and the creation of the 2022 districts in a three-day period after the IRC failed to deliver a revised report. Unlike the prior two factors, these are ***544** not legally irrelevant. As the Appellate Division concluded, however, as to petitioners' arguments on the process pursued to enact the 2022 map and its projected loss of Republican seats: without more and even with every reasonable inference taken in petitioner's favor, they do not meet the standard to declare the 2022 redistricting plan unconstitutional (2022 N.Y. Slip Op. 02648, *3).

First, petitioners claimed that Democrats unilaterally drafted the 2022 redistricting map without any input or involvement from Republicans. The Appellate Division plurality further pointed to the "largely one-party process used to enact the 2022 congressional map" as partial support for its conclusion that petitioners met their burden of proving an inferred intent to favor the Democratic party (2022 N.Y. Slip Op. 02648, *3). That the process was dominated by one party, however, is a result of the current political reality of the Legislature. Put another way, the Legislature reflects the current choice of the people as to who will best represent their interests. Indeed, even had the IRC not shirked its duty, the Democratic supermajority in both houses could have rejected all IRC plans and then, consistent with the Constitution, adopted a plan without any Republican support. That result would be "partisan" in a sense, but not in the sense that would be necessary to show an intent to violate the Constitution. That the vote was along party lines could just as well suggest that the Republicans wanted to prevent a redistricting map that corrected past gerrymandering favoring Republicans (or an electoral shift that diminished their chances) as it could that Democrats sought to exclude Republicans for their party's benefit.

Next, petitioners contend that the (Democratically controlled) Legislature, in June 2021, passed legislation providing for the possibility that the IRC might not vote on any redistricting plans, which the Governor signed in November 2021, and that the statute provides evidence of partisan intent to gerrymander because it provides that the Legislature will conduct the redistricting in that eventuality. As with the above claim, the statute's adoption is not particularly probative as to intent. It is equally possible that the Legislature, seeing the possibility of electoral chaos in the event that the IRC failed to act as required, clarified that the outcome would be the same as if the IRC produced plans that the Legislature rejected. The fact that the statute was passed without Republican support might suggest a future intent by Democrats to gerrymander. It might ***545** suggest an intent by Republicans to oppose any measures that would correct existing imbalances. Or it might suggest that legislators simply sought to provide for something not contemplated by the Constitution.

Finally, petitioners point to a failed attempt by Democrats to further amend the Constitution as supporting an inference that the Democrats intended to favor a *****191** ****471** political party through the 2022 map. In November 2021, the Legislature proposed a constitutional amendment to the voters. Under that proposed constitutional amendment—if the IRC failed to vote on any redistricting plan or plans by the date required—the Commission would submit to the Legislature all plans in its possession, completed and in draft form, and the data upon which those plans were based (2021 SB 515 § 5-b [g-1]). If the IRC so failed in voting and had to submit its plans to the Legislature, that failure would require the Legislature to create its own redistricting plan, to be enacted by the Governor (*id.* § 4-b). The proposed constitutional amendment also included other changes, including increasing the number of state senators (*id.* § 2), establishing a timeline for 2022 redistricting (*id.* § 4 [b]), and requiring that incarcerated people be re-numerated to their last place of residence for the purpose of drawing redistricting lines (*id.* § 4 [c] [6]). On one hand, the petitioners argue that the voters' rejection of the amendment shows that the voters would also have disapproved of the statute, and that both the failed amendment and statute were part of a plan by Democrats to bypass the IRC. On the other hand, as with the statute, it is perfectly feasible that Democrats worried that the IRC process would break down and wanted to clarify what should occur in that instance for the sake of election efficiency and integrity.

Taking all of this together, and taking every inference in favor of petitioners, one could colorably believe that the Legislature was attempting to position itself to be able to draw legislative districts unfettered by the IRC if the IRC deadlocked. As the Appellate Division concluded, however, that evidence, standing alone, does not prove intent to gerrymander beyond a reasonable doubt (2022 N.Y. Slip Op. 02648, *3).

***546** IV.

I agree with the principles underlying the majority's opinion. Election districts should not be created for the purpose of disadvantaging political opponents. Nor should they be created to disadvantage racial or ethnic minorities, or constructed in ways that minimize the responsiveness of elected officials to their constituents by, for example, splitting cities or communities of interest apart. I also do not rule out that, with a sound analysis, these plaintiffs or others could prove that the 2022 legislative plan violated the Constitution, at least in some districts. My disagreements are threefold:

- I read the constitutional provision as Judge Rivera does—leaving the redistricting authority ultimately in the hands of the Legislature;

- I am convinced these petitioners have not adduced legally sufficient evidence to demonstrate gerrymandering; and

- given my first two disagreements, I believe the majority's remedy inappropriately strips from the Legislature the right clearly provided in Article III, Section 5: "In any judicial proceeding relating to redistricting ... [i]n the event that a court finds such a violation, the legislature shall have a full and reasonable opportunity to correct the law's legal infirmities." This case is such a proceeding. As the majority says, "[t]he Constitution is the voice of the people speaking in their sovereign capacity, and it must be heeded" (majority op. at 524, 176 N.Y.S.3d at 176, 197 N.E.3d at 456, quoting *Matter of New York El. R.R. Co.*, 70 N.Y. 327, 342 [1877]). Why, then, does the majority not heed the Constitution's command that the Legislature must ***192 **472 be given a "full and fair opportunity" to address the legal infirmities identified in this judicial proceeding?

RIVERA, J. (dissenting).

I would reverse the Appellate Division judgment because petitioners failed to establish that the legislature violated the state's redistricting procedures or constitutional mandates. The legislature acted within its authority by adopting the redistricting legislation challenged here after the Independent Redistricting Commission (IRC) chose not to submit a redistricting plan by the second constitutional deadline. Thus, there is no procedural error rendering the redistricting legislation *void ab initio.* Petitioners' claim of *547 a substantive violation based on gerrymandering is also without merit as their evidence fell far short of proving that the legislature's congressional map was unconstitutional beyond a reasonable doubt.

I.

In interpreting a constitutional provision, the primary role of this Court is to give effect to its unambiguous text and the intent of the People in adopting the provision (*see White v. Cuomo*, 38 N.Y.3d 209, 217–18, 172 N.Y.S.3d 373, 192 N.E.3d 300 [2022]). This appeal requires that we interpret Article III, §§ 4 and 5 of the New York Constitution. Under section 4, the IRC shall prepare decennially a redistricting plan to establish State Assembly and Senate and federal congressional districts and submit such plan and implementing legislation to the legislature for its consideration, without amendment (*see* NY Const, art III, § 4 [b]). If the legislature fails to approve the proposed legislation, the IRC shall prepare and submit a second redistricting plan and necessary implementing legislation for consideration (*see id.*). If the legislature fails to approve the second plan, the legislature shall approve its own implementing legislation (*see id.*). Section 4 (e) acknowledges that the redistricting procedure may not be followed where "a court is required to order the adoption of, or changes to, a redistricting plan as a remedy for a violation of law." Section 5 further provides that upon a judicial finding that a redistricting law violates Article III, such law shall be "invalid in whole or in part," and that "the legislature shall have a full and reasonable opportunity to correct the law's legal infirmities." Here, the IRC initially submitted two redistricting plans by the first deadline. The legislature failed to approve either. When the IRC chose not to make another submission by the second deadline, the legislature drafted and approved redistricting implementing legislation which the Governor signed.[1]

***548** Petitioners, residents of several New York districts, claim that the legislature avoided the exclusive redistricting process set forth in sections 4 and 5 by enacting redistricting legislation in the absence of an IRC submission by the second deadline, because a second IRC submission is a constitutional requirement that triggers the legislature's authority to act. Petitioners further claim that the redistricting legislation ****473 ***193** is the product of intentional gerrymandering by the democratic members of the State legislature, in violation of section 4 (c) (5) of article III of the Constitution. As I discuss, petitioners are wrong as a matter of law on their procedural challenge and have failed to prove their gerrymandering allegation.

II.

There is no procedural error of constitutional magnitude warranting invalidation of the legislature's redistricting implementing legislation. That conclusion is supported by either of two analytic paths.

A.

By one view, the process followed by the legislature here does not violate the text or purpose of article III because the IRC in fact submitted two plans, albeit all at once, in furtherance of the purpose of section 4, and, in any case, the legislature is not bound to approve an IRC plan as drafted.[2] Under that view, the legislature acted appropriately on the unique facts of this case. First, the Constitution does not mandate legislative adoption of any IRC-proposed implementing legislation; the legislature may opt to reject the IRC submissions and proceed to draft implementing legislation, which would then be submitted to the Governor for action (*see* NY Const, art III, § 4 [b]).[3] That is exactly what happened here. Second, the Constitution requires that in the event that more than one draft plan receives an equal number of IRC member votes for approval, ***549** above the votes garnered for any other plan, the IRC must submit all of those plans to the legislature in accordance with section 4 (b) of article III of the Constitution (*see id.* § 5-b [g]). Thus, if the IRC fails to garner a majority vote, the IRC is empowered to submit more than one redistricting plan and implementing legislation for the legislature's consideration. That is also what happened here. Third, nothing in the Constitution expressly prohibits the legislature from acting if the IRC chooses not to submit yet another plan after the legislature has considered and failed to approve all the plans with the highest number of IRC votes. The Constitution is simply silent on how to address the IRC's choice to forego submission of a redistricting plan and implementing legislation before the second deadline. Nor does the constitutional framework command that the legislature remain idle in the face of an IRC decision not to submit a plan despite section 4 (b)'s mandatory language setting forth deadlines for submission. The Constitution requires the legislature approve redistricting legislation, upon consideration of one IRC plan and, if necessary, a second plan. The legislature did exactly that, reviewing two IRC plans and determining not to approve either, but instead adopting legislation which it maintains wholly comports with the Constitution.[4] The majority's decision leaves *****194 **474** the legislature hostage to the IRC, and thus incentivizes political gamesmanship by the IRC members—the exact scenario the majority claims it avoids by interpreting the second IRC submission as a mandatory predicate to legislative action (*see* majority op. at 515, 176 N.Y.S.3d at 169–70, 197 N.E.3d at 449–50).

The majority claims that upholding the legislative action here would undermine the redistricting process adopted by the 2014 constitutional amendment and thwart the purpose of the amendment (*see id.* at 517, 176 N.Y.S.3d at 171, 197 N.E.3d at 451). That is only true if we ignore the salutary aspects of the entire redistricting process and how it informs the legislature's decisions. Under the Constitution, the IRC is tasked with drafting proposed districts that are contiguous, compact, and equipopulous, while considering the maintenance ***550** of cores of existing districts and political subdivisions, and avoiding line-drawing that denies or abridges the rights of communities of interest, including racial and minority language groups, or the formation of districts that favor or disfavor political candidates or parties (*see* NY Const, art III, § 4 [c]). The goal of fair, non-gerrymandered line drawing is furthered, in part, by a robust public hearing and comment process that allows the IRC to

consider diverse viewpoints when preparing its redistricting plan (*see id.*). In turn, the legislature benefits from this same process when it considers the IRC's draft plan. Here, in accordance with the Constitution, the legislature considered both of the plans submitted by the IRC, fully aware of the public process that preceded the approval of both plans by a concededly split IRC membership. Unfortunately, like the IRC, the legislature could not agree on only one of those plans. When the IRC chose not to make a submission by the second deadline—of a plan that would be subject to legislative amendment, unlike the two plans submitted by the first deadline—nothing in the Constitution prohibited the legislature from drafting and approving redistricting legislation that it determined was in compliance with the constitutional mandates set forth in article III.

The majority also concludes that the legislature may only may "amend[ ]" redistricting plans submitted by the IRC (*see* majority op. at 510, 176 N.Y.S.3d at 166, 197 N.E.3d at 446, quoting NY Const, art III, § 4 [b]). The extent of the legislature's authority to redraw the IRC's proposed maps, however, is not before us since that did not occur here. Moreover, the majority's interpretation ignores that legislative plans may include "*any* amendments" that are "deem[ed] necessary" (NY Const, art III, § 4 [b]), giving the legislature significant discretion to reject the IRC's proposals. Likewise, the two percent rule—which the majority seems to interpret as a constitutional requirement (*see* majority op. at 516 n. 11, 176 N.Y.S.3d at 170 n.11, 197 N.E.3d at 450 n.11)—is also not properly before us, and in any case, that statutory rule applies only when the IRC submits a plan by the second deadline, which concededly it did not do. In sum, the majority is incorrect that the legislature's authority to approve redistricting legislation is subject to the two percent rule after it decides not to approve the first IRC plan as drafted because that legislative authority can ***195 **475 only be triggered after the IRC submits a plan pursuant to the second deadline.

Even assuming the majority is correct that the Constitution provides the legislature with express and exclusive choices—either ***551** approve, as drafted, the IRC implementing legislation submitted by the first or the second constitutional deadlines, or don't approve either and amend and approve bicamerally the second submission which is then presented to the governor for action—the majority correctly concedes that the legislature is not required to adopt, without change, the IRC recommendations (*see* majority op. at 510, 176 N.Y.S.3d at 166, 197 N.E.3d at 446). Instead, the legislature must exercise its constitutional duty to ensure that New York's district lines comply with the constitutional factors set forth in Article III and do not otherwise violate federal or state law (*see* NY Const, art III, § 4 [c]; Voting Rights Act of 1965, 52 USC § 10101 *et seq.*, as added by Pub L 89-110, 79 US Stat 437). As this Court has made clear, redistricting is a complex and intricate task, involving a "[b]alancing" of "myriad requirements imposed by both the State and the Federal Constitution," which is ultimately "entrusted to the legislature" (*Matter of Wolpoff v. Cuomo*, 80 N.Y.2d 70, 79, 587 N.Y.S.2d 560, 600 N.E.2d 191 [1992]; *see Matter of Schneider v. Rockefeller*, 31 N.Y.2d 420, 431, 340 N.Y.S.2d 889, 293 N.E.2d 67 [1972] ["The gerrymandering is ... rather deep in the 'political thicket' "]). Thus, and contrary to the majority's conclusion (*see* majority op. at 514-515, 176 N.Y.S.3d at 169–70, 197 N.E.3d at 449–50), the legislature was not required to ignore its constitutional duty because the IRC "abandon[ed] its constitutional mandate" (*id.* at 517, 176 N.Y.S.3d at 171, 197 N.E.3d at 451). And, despite the majority rhetoric about redistricting reform—that the IRC process was designed to "incentiviz[e] the legislature to encourage and support fair bipartisan participation and compromise throughout the redistricting process" (*id.* at 515, 176 N.Y.S.3d at 170, 197 N.E.3d at 450)—it is the majority's interpretation of the Constitution that effectively places the redistricting process at the mercy of the IRC, which cannot be what the People of the State of New York intended when they approved the amendment and even though the Constitution does not mandate legislative approval of any IRC plan. Indeed, recognition that the legislature retains the ultimate authority to enact a redistricting plan does not, as the majority posits, "render the 2014 amendments ... functionally meaningless" (*id.* at 508-509, 176 N.Y.S.3d at 165, 197 N.E.3d at 445); it merely confirms that the legislature must step in when the IRC fails in its task.

B.

Even if the plain text of the Constitution did not support the legislative action taken here, there is an alternative analytic basis for rejecting the petitioners' procedural argument. The constitution is silent as to how to respond when the IRC does ***552** not submit a plan in accordance with Article III, as in this case where the IRC chooses not to make a second deadline submission. Notably, petitioners did not sue the IRC to secure compliance with what they and the majority maintain is the "*exclusive*

method of redistricting" (majority op. at 515, 176 N.Y.S.3d at 170, 197 N.E.3d at 450). Nor have petitioners requested the courts to adopt either of the IRC plans even though petitioners, like the majority, claim that the IRC's submissions are a constitutional predicate to legislative action (*see id.* at 515-516, 176 N.Y.S.3d at 169 71, 197 N.E.3d at 449–51).

However, the legislature anticipated just such a failure in the IRC process by passage ****476 ***196** of an amendment to the Redistricting Reform Act of 2012 (L 2012, ch 17), which provides that

> "if the commission does not vote on any redistricting plan or plans, for any reason, by the date required for submission of such plan and the commission submitted to the legislature ... all plans in its possession, both completed and in draft form, and the data upon which such plans are based, each house shall introduce such implementing legislation with any amendments each house deems necessary"(*see* Redistricting Reform Act § 3 [c], as amended by L 2021, ch 633, § 1).[5]

That statute, having been properly enacted, controls and provided the legislature with the authority to act as it did here.[6]

III.

Turning to petitioners second claim, that the legislative plan is an unlawful gerrymander, we review this challenge, like other constitutional attacks on redistricting plans, de novo and not, as the majority suggests, under a deferential standard of ***553** review (*see Matter of Wolpoff*, 80 N.Y.2d at 78, 587 N.Y.S.2d 560, 600 N.E.2d 191 ["(W)e examine the balance struck by the (l)egislature in its effort to harmonize competing Federal and State requirements"]; *Matter of Schneider*, 31 N.Y.2d at 427, 340 N.Y.S.2d 889, 293 N.E.2d 67 ["Our duty is ... to determine whether the legislative plan substantially complies with the Federal and State Constitutions"]). Thus, petitioners are held to the highest burden in our law—one generally enshrined in criminal law—proof beyond a reasonable doubt:

> "A strong presumption of constitutionality attaches to the redistricting plan and we will upset the balance struck by the Legislature and declare the plan unconstitutional 'only when it can be shown beyond reasonable doubt that it conflicts with the fundamental law, and that until every reasonable mode of reconciliation of the statute with the Constitution has been resorted to, and reconciliation has been found impossible' " (*Matter of Wolpoff*, 80 N.Y.2d at 78, 587 N.Y.S.2d 560, 600 N.E.2d 191, quoting *Matter of Fay*, 291 N.Y. 198, 207, 52 N.E.2d 97 [1943]; *accord Cohen v. Cuomo*, 19 N.Y.3d 196, 201-202, 946 N.Y.S.2d 536, 969 N.E.2d 754 [2012]).

Upon review of the record before us, I conclude that petitioners failed to meet their heavy burden. As three justices concluded below, and as Judge Wilson explains, other than the petitioners' expert analysis alleging gerrymandering, the petitioners' other evidence cannot satisfy their burden of proof (*see Matter of Harkenrider*, 204 A.D.3d at 1370-72, 167 N.Y.S.3d 659 [plurality]; Wilson dissenting op. at 543-545, 176 N.Y.S.3d at 189–91, 197 N.E.3d at 469–71).[7] I have already discussed ****477 ***197** why there was no constitutional procedural violation, but even if there had been, the legislature's approval of a redistricting plan in the absence of a second IRC submission does not establish intentional gerrymandering. This case does not rest on "the credibility issue routinely seen in battle-of-the-experts cases," but rather turns on petitioners' expert evidence and its "probative ***554** force ... regardless of respondents' opposition" (*id.* at 1378, 167 N.Y.S.3d 659 [Whalen, P.J., and Winslow, J., dissenting in part]). For reasons discussed at length in Judge Wilson's thorough and compelling analysis of petitioner's evidence and gerrymandering claim, which I fully join, petitioners failed to carry their burden. In sum, petitioners relied on an expert who failed to account for several constitutional requirements and who used an untested, unverified algorithm (*see* Wilson dissenting op. at 529-530, 176 N.Y.S.3d at 179–81, 197 N.E.3d at 459–61; *cf. People v. Wakefield*, 38 N.Y.3d 367, 391–98, 174 N.Y.S.3d 312, 195 N.E.3d 19 [2022, Rivera, J., concurring in result]). No district line drawer could do so and still comply with the Constitution.

I dissent.

Judges Garcia, Singas and Cannataro concur. Judge Troutman dissents in part in an opinion, in which Judge Wilson concurs

in part in a dissenting opinion, in which Judge Rivera concurs in part. Judge Rivera dissents in a separate dissenting opinion, in which Judge Wilson concurs.

Order modified, with costs to petitioners, in accordance with the opinion herein and, as so modified, affirmed.

All Citations

38 N.Y.3d 494, 197 N.E.3d 437, 176 N.Y.S.3d 157, 2022 N.Y. Slip Op. 02833

Footnotes

1 A legislative advisory task force on apportionment — created by statute and comprising lawmakers and staff selected by legislative leaders — conducted studies and proffered recommendations and proposed maps for the legislature's consideration (*see* Legislative Law § 83-m; L 1978, ch 45, § 1).

2 Many other states have also turned to independent redistricting commissions to curtail partisan gerrymandering (*see e.g.* Ariz Const, art IV, pt. 2, § 1; Cal Const, art XXI, § 2; Colo Const, art V, §§ 44 44-48.4; Conn Const, art III, § 6; Haw Const, art IV, § 2; Idaho Const, art III, § 2; Me Const, art IV, part 3, § 1-A; Mich Const, art 4, § 6; Mont Const, art V, § 14; NJ Const, art II, § 2; Ohio Const, arts XI, XIX; Va Const, art II, § 6-A; Wash Const, art II, § 43). In upholding a state constitutional delegation of redistricting authority to an IRC, the United States Supreme Court has recognized that IRCs "generally draw their maps in a timely fashion and create districts both more competitive and more likely to survive legal challenge" and "have succeeded to a great degree [in limiting the conflict of interest implicit in legislative control over redistricting]" (*Arizona State Legislature v. Arizona Independent Redistricting Comm'n*, 576 U.S. 787, 798, 821, 135 S.Ct. 2652, 192 L.Ed.2d 704 [2015] [internal quotation marks and citation omitted]).

3 As one house of the legislature explained during this litigation, in their view "there [was no] reason for the Democratic super-majorities in both houses of the [l]egislature to seek 'input or involvement' from the Republican minorities" regarding the development of these legislative maps, characterizing such communications as inviting "time-wasting political theater" (App Div reply brief for respondent-appellant Senate Majority Leader, at 13).

4 Notwithstanding respondent Governor's contentions to the contrary, any petition challenging redistricting legislation must be served upon the Attorney-General, President of the Senate, Speaker of the Assembly and the Governor, who are proper parties to this proceeding (*see* Uncons Laws § 4221).

5 Supreme Court also analyzed whether the state senate map was an unconstitutional partisan gerrymander after granting petitioners' request to amend the petition to challenge the senate map but concluded petitioners did not meet their burden of proof on such claim. Petitioners have not sought review of that determination.

6 Supreme Court, as permitted by the stay, has procured the services of a neutral redistricting expert "to serve as special master to prepare and draw a new neutral, non-partisan [c]ongressional map" and has established a schedule by which the parties and other interested persons may submit commentary and proposed redistricting plans for consideration prior to a planned hearing. Petitioners and several interested parties have already proffered submissions to that court.

7 Indeed, the description on the 2014 ballot informed voters considering whether to support the constitutional amendments that "the legislature may only amend the redistricting plan ... if the commission's plan is rejected twice by the legislature."

8 Judge Rivera's contention that the IRC process was not violated because two sets of maps were simultaneously submitted by the IRC in the first round — one by the Democratic delegation and one by the Republican delegation — is remarkable. Under her view, this was the functional equivalent of the successive presentations required by the Constitution. Aside from being directly contrary to the text of the constitution, the intent of the People who adopted the 2014 reforms, and the relevant legislative history, such contention has not been advanced by any party before this Court, a reflection of its total lack of merit.

9 In a reply brief submitted in the Appellate Division, one of the State respondents candidly acknowledged that the constitutional process was not followed here, asserting that "[e]veryone agrees" that the Constitution requires two rounds of IRC recommendations "and that the [l]egislature vote up or down on each Commission proposal without amendment before exercising its authority to make any amendments"; and "that nobody suggests that 'the process' is optional" (App Div reply brief for respondent-appellant Senate Majority Leader, at 2-3). Despite acknowledging the constitutional violation, however, they essentially view it as irrelevant because the legislature could ultimately have adopted its own maps through the amendment process following a properly completed IRC procedure. This view ignores the fact that procedural requirements matter and are imposed precisely because, as here, they safeguard substantive rights.

10 The State respondents and Judge Rivera assert that giving force to the constitutional language risks gamesmanship by minority members of the IRC, claiming such members could potentially derail the redistricting process by refusing to participate. In giving effect to the constitutional reforms endorsed by the People of this state, our decision does not leave the legislature hostage to that body as Judge Rivera contends. Legislative leaders appoint a majority of the IRC members and, in the event those members fail either to appear at IRC meetings or to otherwise perform their constitutional duties, judicial intervention in the form of a mandamus proceeding, political pressure, more meaningful attempts at compromise, and possibly even replacement of members who fail to faithfully perform their duties, are among the many courses of action available to ensure the IRC process is completed as constitutionally intended. The IRC may not be a panacea, but to accept the crabbed description of that body proffered by the State respondents and Judge Rivera would be to render the body nothing more than "window dressing" masquerading as meaningful reform.

11 In 2022 — the very first time that the legislature had occasion to implement the IRC procedure and the two percent rule (L 2012, ch 17, § 3) — that provision was disregarded. The legislature wholly superseded the two percent rule by prefacing the 2022 redistricting legislation with language indicating that such districts were enacted as provided therein "notwithstanding any other provision of law to the contrary" and providing that the new legislation "shall supersede any inconsistent provision of law including but not limited to" the two percent rule (L 2022, chs 13, 14, 15, 16). Despite this attempted end run, however, the 2012 redistricting reform legislation provides relevant evidence of the drafters' intent.

12 While we agree with Judge Troutman that this Court should not issue advisory opinions, her suggestion that no actual case or controversy is presented by the State respondents' appeal — here as of right on the substantial constitutional question of whether the Appellate Division erred in invalidating the congressional map on the ground of partisan gerrymandering — is quite extraordinary. Even if the State respondents were not otherwise entitled to review of the declaration that the apportionment legislation was infected by such invidious intent, there are substantial arguments before this Court concerning the proper remedy in the event of a constitutional violation — arguments that turn, in part, on whether the violation involved procedural or substantive constitutional provisions. The question of whether the congressional map amounts to a partisan gerrymander is also relevant to the issue of whether the primary election should be permitted to proceed on the maps drawn by the legislature, despite the determination of procedural unconstitutionality. Moreover, given our conclusion that new maps must be drawn in light of the procedural violation — a conclusion with which Judge Troutman agrees — resolution of the issue is critical to provide necessary guidance to inform the development of a new congressional map on remittal.

13 The 2014 constitutional amendments also forbid racial gerrymandering, in a provision that similarly prohibits an invidious intent or motive, requiring that district lines "shall not be drawn to have the purpose of, nor shall they result in, the denial or abridgement of" the voting rights of racial or minority language groups (NY Const, art III, § 4 [c] [1]). Other requirements added that year directed certain results, namely, that redistricting, to the extent possible, maintain cores of existing districts, pre-existing political

subdivisions — such as counties, cities, and towns — and communities of interest (*see* NY Const, art III, § 4 [c] [5]). These requirements supplement the longstanding constitutional constraints on redistricting embodied in the State Constitution requiring, to the extent practical, that districts "contain as nearly as may be an equal number of inhabitants," "consist of contiguous territory," and be "as compact in form as practicable" (NY Const, art III, § 4 [c] [2] – [4]), and those required by federal law — such as conformity with the "one person, one vote" principle (*Abrams v. Johnson*, 521 U.S. 74, 98, 117 S.Ct. 1925, 138 L.Ed.2d 285 [1997]; *see Wesberry v. Sanders*, 376 U.S. 1, 8, 84 S.Ct. 526, 11 L.Ed.2d 481 [1964]) and with the federal Voting Rights Act (*see generally* 52 USC § 10301).

14 Although purporting to treat the question as an issue of law, Judge Wilson impermissibly performs a weight of the evidence analysis, largely parroting the points in the State respondents' briefs. Tellingly, however, Judge Wilson repeatedly acknowledges that an inference of intent could rationally be drawn from proof in the record. Determining whether to draw such an inference when multiple inferences are possible is a quintessential function of a finder of fact and, here, the courts below — which, unlike this Court, possessed fact-finding authority — credited Trende's testimony. Contrary to Judge Wilson's contention, the burden of proof was not impermissibly shifted to the State respondents. As noted, respondents did not seek exclusion of Trende's testimony on the basis that his methodology or the computer algorithm on which he relied — drafted by a recognized expert and, according to Trende, a "state of the art" program repeatedly accepted by other courts — was insufficiently reliable. Although Trende did observe that the State respondents completely failed to refute any of his simulations with simulations of their own, he also responded substantively to the criticisms of his methodology. Trende explained that his map ensemble "perform[ed] comparably to the enacted plan in terms of compactness," "minority-majority districts," and county lines. He ran additional simulations, freezing municipalities kept intact by the enacted plan, freezing district cores, freezing every "ability-to-elect district," and even conceding the split in southeast Brooklyn to respondents. Trende testified that even when the simulations were run in a manner "incredibly generous" to the State respondents by "ced[ing] to [respondents] ... a third of the districts drawn in New York," the simulations produced "the same basic output," showing the same cracking and packing patterns in the enacted maps. As even a short rendition of just some of the proof presented by petitioners demonstrates, Judge Wilson refuses to apply the proper standard of review, which — even in cases where the legal standard is proof beyond a reasonable doubt — requires that the evidence be viewed in the light most favorable to petitioners, the prevailing party at trial.

15 Inasmuch as petitioners neither sought invalidation of the 2022 state assembly redistricting legislation in their pleadings nor challenge in this Court the Appellate Division's vacatur of the relief granted by Supreme Court with respect to that map, we may not invalidate the assembly map despite its procedural infirmity.

16 The State respondents' reliance on the federal *Purcell* principle is misplaced (*see Purcell v. Gonzalez*, 549 U.S. 1, 127 S.Ct. 5, 166 L.Ed.2d 1 [2006]). The *Purcell* doctrine cautions *federal* courts against interfering with state election laws when an election is imminent (*see Republican National Committee v. Democratic National Committee*, 589 U.S. ——, ——, 140 S. Ct. 1205, 1207, 206 L.Ed.2d 452 [2020]) and does not limit state judicial authority where, as here, a *state* court must intervene to remedy violations of the State Constitution. Indeed, most recently the principle was cited to justify the United States Supreme Court's decision not to disturb a state court order requiring alteration of North Carolina's existing congressional maps for the upcoming 2022 primary (*Moore v. Harper*, 595 U.S. ——, 142 S. Ct. 1089, 1089, 212 L.Ed.2d 247 [2022, Kavanaugh, J., concurring in denial of application for stay]).

17 A number of other state courts have been called upon to intervene in redistricting just this year (*see League of Women Voters of Ohio v. Ohio Redistricting Commn.*, 168 Ohio St.3d 309, 2022-Ohio-789, 198 N.E.3d 812 [2022]; *Harper v. Hall*, 2022-NCSC-17, ¶ 6, 868 S.E.2d 499, 510 [2022]; *Johnson v. Wisconsin Elections Commn.*, 2022 WI 19, ¶ 3, 972 N.W.2d 559; *Carter v. Chapman*, —— Pa. ——, 270 A.3d 444, 450 [2022]).

18 Delaying a remedy until the next election would substantially undermine the People's efforts to temper partisan gerrymandering. Here, the legislature enacted maps within one week of the IRC's abdication—which itself came more than a month before the Constitution's outer end date for the IRC process—and petitioners commenced this proceeding on the same day. If there is insufficient time to order a remedy for the 2022 primary election under these circumstances, it is unlikely there would ever be sufficient time to challenge a redistricting plan and obtain relief before an upcoming primary election. Such a conclusion would be contrary to the Constitution, which contemplates that the IRC process may not be completed until February 28th (to be followed by

legislative action) but nevertheless expressly authorizes expedited judicial review and modification or adoption of redistricting plans by the courts. Delaying a remedy in this election cycle — permitting an election to go forward on unconstitutional maps — would set a troubling precedent for future cases raising similar partisan gerrymandering claims, as well as other types of challenges, such as racial gerrymandering claims.

19 To the extent the 2022 redistricting legislation, which we invalidate here, purported to render any court order "tentative" for a period of 30 days (L 2022, ch 13, § 3, [5] [i]) such a limitation on judicial authority appears inconsistent with (among other things) the constitutional provision authorizing judicial review without limitation and requiring "disposition" of the claim by Supreme Court within 60 days. The Constitution does not contemplate an advisory order. In any event, here, due to the procedural constitutional violations and the expiration of the outer February 28th constitutional deadline for IRC action, the legislature is incapable of unilaterally correcting the infirmity.

20 While accusing this Court of "step[ping] out of its judicial role" (Troutman, J. dissenting in part op, at 176 N.Y.S.3d at 176, 197 N.E.3d at 456), Judge Troutman crafts a remedy that is neither consistent with the constitutional text nor requested by any of the parties to this proceeding. She proposes that the legislature should be directed to adopt one of the two plans submitted by the IRC and already rejected by the legislature (although she does not specify which one). Judge Troutman's position is incongruous; she agrees that the legislature lacked authority to enact redistricting legislation absent a second submission from the IRC but, paradoxically, she suggests that we should now order the legislature to enact redistricting legislation despite their inability to cure the procedural violation. Moreover, although Judge Troutman posits that the People would not approve of a court-ordered redistricting map that is, in fact, exactly what the People have approved in the State Constitution as a remedy by declaring that the IRC "process ... shall govern ... except to the extent that a court is required to order the adoption of, or changes to, a redistricting plan as a remedy for a violation of law" (NY Const, art. III, § 4 [e]). Just as puzzling, Judge Wilson begins his dissent with a nonsensical advisory opinion, indicating that although he concludes no violation of the constitution occurred, he nonetheless agrees with Judge Troutman's proposed remedy – a solution to a problem that, in his view, does not exist.

* The majority seems unwilling to grasp this concept (majority op. at 523-524 n. 20, 176 N.Y.S.3d at 176, 197 N.E.3d at 456 n.20).

1 The Southern Tier has long been recognized as a cohesive political unit (*see* Warren Moscow, GOP Held Strong in Southern Tier, NY Times [Oct 16, 1946], https://timesmachine.nytimes.com/timesmachine/1946/10/16/107146657.html?pageNumber=31).

2 Mr. Trende's decision not to examine his own maps and not to permit anyone else to see them poses a separate reliability issue. Dr. Imai's algorithm generates huge numbers of redundant maps, which should be weeded out before analysis is conducted. Mr. Trende himself did so when working on a redistricting map for Maryland. There, he completed three sets of 250,000 simulations. He then eliminated the duplicates, which ranged from 220,000 to 160,000 for each of his sets—that is, 64% to 88% of the maps produced were duplicates that he discarded (*Szeliga v. Lamone*, Nos. C-02-CV-21-00173, Slip Op at 99, 102-104). Furthermore, New York State is significantly larger than Maryland; whereas Maryland only has 8 congressional districts, New York has 26 congressional districts. Mr. Trende acknowledged that that the more precincts are involved, the more complicated it becomes to accurately use redistricting simulations to draw conclusions. Yet, in spite of acknowledging that using simulations for New York would be more difficult than for Maryland, Mr. Trende inexplicably generated only 10,000 simulations for New York and subsequently failed to check even that small set for duplicates.

3 For example, Supreme Court noted that Mr. Trende "did not include every constitutional consideration"—which should render his evidence legally insufficient. Supreme Court explained away that deficiency by saying that "[n]one of Respondents' experts attempted to draw computer generated maps using all the constitutionally required considerations," a clear example of improper burden shifting.

4 The error in the majority's sole, footnoted response, contending that I have performed a weight of the evidence analysis (majority

op. at 520-521 n. 14, 176 N.Y.S.3d at 173–74, 197 N.E.3d at 453–54 n.14), can be illustrated as follows: Mr. Trende uses a Ouija board to determine that the districts have been gerrymandered, and, when communicating with the spirits in the netherworld, directs them to the provisions in North Carolina's constitution instead of New York's. The lower courts rely on that evidence to hold that the New York Legislature has engaged in gerrymandering. According to the majority, the New York Court of Appeals could not conclude an error of law has been made. The majority is right about one thing: I disagree that my job is so limited.

1 Contrary to the majority's view, the IRC was not required to submit a different set of second plans. Indeed, the lead Republican IRC Commissioner noted that the Republican members of the IRC had considered agreeing to submit the same plans during the second round, but he concluded that "he would prefer for the Legislature to begin its process then postpone it one week with presumably voting down maps that he claims have not changed" (Joshua Solomon, *Independent Redistricting Commission Comes to a Likely Final Impasse*, Times Union [Jan. 24, 2022], https://www.timesunion.com/state/article/Independent-Redistricting-Commission-comes-to-a-16800357.php).

2 The majority incorrectly asserts that the legislature's alleged violation of the constitutional procedure is undisputed (*see* majority op. at 501, 176 N.Y.S.3d at 160, 197 N.E.3d at 440). In fact, respondents have maintained that the IRC, not the legislature, is at fault here.

3 Several of the states cited by the majority (*see* majority op. at 503 n. 2, 176 N.Y.S.3d at 161 n.2, 197 N.E.3d at 441 n.2) have adopted redistricting commissions which are not subject to legislative approval (*see e.g.* Cal Const, art XXI, § 2; Colo Const, art V, § 48; Mich Const, art 4, § 6; *see generally* Loyola Law School, *All About Redistricting: National Summary*, https://redistricting.lls.edu/national-overview/?colorby=Institution & level=Congress & cycle=2020 [last visited Apr. 27, 2022]).

4 The majority, in claiming that my view ignores the constitutional text and purpose (*see* majority op. at 512 n. 8, 176 N.Y.S.3d at 167 n.8, 197 N.E.3d at 447 n.8), ignores that under the unique facts here, we must harmonize the constitutional process with the overriding intent of the amendment—to create a process for public, bipartisan input in redistricting to provide the legislature with background data and options for redistricting. The majority view rests on a distinction without a difference; had the IRC merely submitted the competing plans in succession, and if the legislature had not approved either, the majority would conclude, as I do, that there was no procedural error.

5 The majority's discussion of the legislative history of the 2014 amendment is incomplete (*see* majority op. at 513-515, 176 N.Y.S.3d at 168–70, 197 N.E.3d at 448–50). Several legislators and commentators recognized, prior to adoption, that—contrary to the views of its sponsors—the amendment did not guarantee that the IRC would follow the constitutional process (*see e.g.* NY Senate Debate on Assembly Bill A2086, Jan. 23, 2013 at 252 [warning that an evenly-divided IRC might "foster gridlock"]).

6 The statute's two percent rule would also control. If failure to comply with that rule were the sole alleged problem with the legislature's redistricting plan, the courts could mandate compliance as a targeted and narrow remedy rather than reject the entire redistricting plan as the majority does, thus creating confusion for candidates and their supporters, and necessitating the adoption of new deadlines (*see* majority op. at 522-523, 176 N.Y.S.3d at 174–76, 197 N.E.3d at 454–56 ; Troutman dissenting op. at 526, 176 N.Y.S.3d at 177–78, 197 N.E.3d at 457–58).

7 With respect to one of those alleged grounds, the majority is incorrect to the extent that it suggests that the legislature did not consider Republican views (*see* majority op. at 505 n. 3, 176 N.Y.S.3d at 162 n.3, 197 N.E.3d at 442 n.3). As Judge Troutman and Judge Wilson explain in their dissents, the legislature enacted a plan that includes similar Upstate boundaries as the two IRC plans actually submitted to the legislature (*see* Troutman dissenting op. at 536, 176 N.Y.S.3d at 184–85, 197 N.E.3d at 464–65; Wilson dissenting op. at 535-536, 176 N.Y.S.3d at 183–85, 197 N.E.3d at 463–65). As for the other ground—that the legislature's redistricting differs from the 2012 district lines—the purpose of redistricting is to address demographic changes and so it is no surprise that population shifts in New York State would result in a different redistricting map in accordance with constitutional

requirements (*see* Wilson dissenting op. at 541, 176 N.Y.S.3d at 188, 197 N.E.3d at 468).

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119 S.Ct. 1545
Supreme Court of the United States

James B. HUNT, Jr., Governor of North Carolina, et al., Appellants,
v.
Martin CROMARTIE, et al.

No. 98–85
|
Argued Jan. 20, 1999.
|
Decided May 17, 1999.

Synopsis
North Carolina residents brought action against various state officials challenging North Carolina's congressional redistricting plan as racially motivated in violation of the Equal Protection Clause. Parties filed cross motions for summary judgment. A three-judge panel of the United States District Court for the Eastern District of North Carolina, 34 F.Supp.2d 1029, Terrence W. Boyle, Chief District Judge, granted summary judgment in residents' favor and entered injunction against defendants. State officials appealed. The Supreme Court, Justice Thomas, held that triable issues regarding whether state legislature drew congressional redistricting plan with impermissible racial motive precluded summary judgment.

Reversed.

Justice Stevens filed concurring opinion in which Justice Souter, Justice Ginsburg, and Justice Breyer joined.

****1546** Syllabus*

After this Court decided, in *Shaw v. Hunt,* 517 U.S. 899, 116 S.Ct. 1894, 135 L.Ed.2d 207, that North Carolina's Twelfth Congressional District was the product of unconstitutional racial gerrymandering, the State enacted a new districting plan in 1997. Believing that the new District 12 was also unconstitutional, appellees filed suit against several state officials to enjoin elections under the new plan. Before discovery and without an evidentiary hearing, the three-judge District Court granted appellees summary judgment and entered the injunction. From "uncontroverted material facts," the court concluded that the General Assembly in drawing District 12 had violated the Fourteenth Amendment's Equal Protection Clause.

Held: Because the General Assembly's motivation was in dispute, this case was not suitable for summary disposition. Laws classifying citizens based on race are constitutionally suspect and must be strictly scrutinized. A facially neutral law warrants such scrutiny if it can be proved that the law was motivated by a racial purpose or object, *Miller v. Johnson,* 515 U.S. 900, 913, 115 S.Ct. 2475, 132 L.Ed.2d 762, or is unexplainable on grounds other than race, *Shaw v. Reno,* 509 U.S. 630, 644, 113 S.Ct. 2816, 125 L.Ed.2d 511. Assessing a jurisdiction's motivation in drawing district lines is a complex endeavor requiring a court to inquire into all available circumstantial and direct evidence. *Arlington Heights v. Metropolitan Housing Development Corp.,* 429 U.S. 252, 266, 97 S.Ct. 555, 50 L.Ed.2d 450. Appellees here sought to prove their claim through circumstantial evidence. Viewed *in toto,* that evidence—*e.g.,* maps showing the district's size, shape, and alleged lack of continuity; and statistical and demographic evidence—tends to support an inference that the State drew district lines with an impermissible racial motive. Summary judgment, however, is appropriate only where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. The legislature's motivation is a factual question, and was in dispute. Appellants asserted that the legislature intended to make a strong Democratic district. They supported that contention with affidavits of two state legislators and, more important, of an expert who testified that the relevant data supported a political explanation at least as well as, and somewhat better than, a racial explanation for the district's lines. ***542** Accepting the

political explanation as true, as the District Court was required to do in ruling on appellees' summary judgment motion, appellees were not entitled to judgment as a matter of law for a jurisdiction may engage in constitutional political ****1547** gerrymandering, even if it so happens that the most loyal Democrats happen to be black Democrats and even if those responsible for drawing the district are *conscious* of that fact. See *Bush v. Vera,* 517 U.S. 952, 968, 116 S.Ct. 1941, 135 L.Ed.2d 248. In concluding that the State enacted its districting plan with an impermissible racial motivation, the District Court either credited appellees' asserted inferences over appellants' or did not give appellants the inference they were due. In any event, it was error to resolve the disputed fact of intent at the summary judgment stage. Summary judgment in a plaintiff's favor in a racial gerrymandering case may be awarded even where the claim is sought to be proved by circumstantial evidence. But it is inappropriate when the evidence is susceptible of different interpretations or inferences by the trier of fact. Pp. 1548–1553.

34 F.Supp.2d 1029, reversed.

THOMAS, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, SCALIA, and KENNEDY, JJ., joined, *post,* 1554. STEVENS, J., filed an opinion concurring in the judgment, in which SOUTER, GINSBURG, and BREYER, JJ., joined, *post,* p. 1554.

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Opinion

***543** Justice THOMAS delivered the opinion of the Court.

In this appeal, we must decide whether appellees were entitled to summary judgment on their claim that North Carolina's Twelfth Congressional District, as established by the State's 1997 congressional redistricting plan, constituted an unconstitutional racial gerrymander in violation of the Equal Protection Clause of the Fourteenth Amendment.

I

This is the third time in six years that litigation over North Carolina's Twelfth Congressional District has come before this Court. The first time around, we held that plaintiffs whose complaint alleged that the State had deliberately segregated voters into districts on the basis of race without compelling justification stated a claim for relief under the Equal Protection Clause of the Fourteenth Amendment. *Shaw v. Reno,* 509 U.S. 630, 658, 113 S.Ct. 2816, 125 L.Ed.2d 511 (1993) *(Shaw I).* After remand, we affirmed the District Court's finding that North Carolina's District 12 classified voters by race and further held that the State's reapportionment scheme was not narrowly tailored to serve a compelling interest. *Shaw v. Hunt,* 517 U.S. 899, 116 S.Ct. 1894, 135 L.Ed.2d 207 (1996) *(Shaw II).*

In response to our decision in *Shaw II,* the State enacted a new districting plan. See 1997 N.C. Sess. Laws, ch. 11. A map of the unconstitutional District 12 was set forth in the Appendix to the opinion of the Court in *Shaw I, supra,* and we described it as follows:

> "The second majority-black district, District 12, is ... unusually shaped. It is approximately 160 miles long and, for much of its length, no wider than the [Interstate]–85 ***544** corridor. It winds in snakelike fashion through tobacco country,

> financial centers, and manufacturing areas 'until it gobbles in enough enclaves of black neighborhoods.' Northbound and southbound drivers on [Interstate]–85 sometimes find themselves in separate districts in one county, only to 'trade' districts when they enter the next county. Of the 10 counties through which District 12 passes, 5 are cut into 3 different districts; even towns are divided. At one point the ****1548** district remains contiguous only because it intersects at a single point with two other districts before crossing over them." 509 U.S., at 635–636, 113 S.Ct. 2816 (citations omitted).

The State's 1997 plan altered District 12 in several respects. By any measure, blacks no longer constitute a majority of District 12: Blacks now account for approximately 47% of the district's total population, 43% of its voting age population, and 46% of registered voters. App. to Juris. Statement 67a, 99a. The new District 12 splits 6 counties as opposed to 10; beginning with Guilford County, the district runs in a southwestern direction through parts of Forsyth, Davidson, Rowan, Iredell, and Mecklenburg Counties, picking up concentrations of urban populations in Greensboro and High Point (both in Guilford), Winston–Salem (Forsyth), and Charlotte (Mecklenburg). (The old District 12 went through the same six counties but also included portions of Durham, Orange, and Alamance Counties east of Guilford, and parts of Gaston County west of Mecklenburg.) With these changes, the district retains only 41.6% of its previous area, *id.,* at 153a, and the distance between its farthest points has been reduced to approximately 95 miles, *id.,* at 105a. But while District 12 is wider and shorter than it was before, it retains its basic "snakelike" shape and continues to track Interstate 85. See generally Appendix, *infra.*

Appellees believed the new District 12, like the old one, to be the product of an unconstitutional racial gerrymander. ***545** They filed suit in the United States District Court for the Eastern District of North Carolina against several state officials in their official capacities seeking to enjoin elections under the State's 1997 plan. The parties filed competing motions for summary judgment and supporting materials, and the three-judge District Court heard argument on the pending motions, but before either party had conducted discovery and without an evidentiary hearing. Over one judge's dissent, the District Court granted appellees' motion and entered the injunction they sought. 34 F.Supp.2d 1029 (E.D.N.C.1998). The majority of the court explained that "the uncontroverted material facts" showed that "District 12 was drawn to collect precincts with high racial identification rather than political identification," that "more heavily Democratic precincts ... were bypassed in the drawing of District 12 and included in the surrounding congressional districts," and that "[t]he legislature disregarded traditional districting criteria." No. 4:96–CV–104–BO(3) (EDNC, Apr. 14, 1998), App. to Juris. Statement 21a. From these "uncontroverted material facts," the District Court concluded "the General Assembly, in redistricting, used criteria with respect to District 12 that are facially race driven," *ibid.,* and thereby violated the Equal Protection Clause of the Fourteenth Amendment, *id.,* at 22a. (Apparently because the issue was not litigated, the District Court did not consider whether District 12 was narrowly tailored to serve a compelling interest.)[1]

***546** The state officials filed a notice of appeal. We noted probable jurisdiction, 524 U.S. 980, 119 S.Ct. 28, 141 L.Ed.2d 788 (1998), and now reverse.

II

Our decisions have established that all laws that classify citizens on the basis of ****1549** race, including racially gerrymandered districting schemes, are constitutionally suspect and must be strictly scrutinized. *Shaw II,* 517 U.S., at 904, 116 S.Ct. 1894; *Miller v. Johnson,* 515 U.S. 900, 904–905, 115 S.Ct. 2475, 132 L.Ed.2d 762 (1995); *Adarand Constructors, Inc. v. Peña,* 515 U.S. 200, 227, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995). When racial classifications are explicit, no inquiry into legislative purpose is necessary. See *Shaw I,* 509 U.S., at 642, 113 S.Ct. 2816. A facially neutral law, on the other hand, warrants strict scrutiny only if it can be proved that the law was "motivated by a racial purpose or object," *Miller, supra,* at 913, 115 S.Ct. 2475, or if it is " 'unexplainable on grounds other than race,' " *Shaw I, supra,* at 644, 113 S.Ct. 2816 (quoting *Arlington Heights v. Metropolitan Housing Development Corp.,* 429 U.S. 252, 266, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977)); see also *Miller, supra,* at 905, 913, 115 S.Ct. 2475. The task of assessing a jurisdiction's motivation, however, is not a simple matter; on the contrary, it is an inherently complex endeavor, one requiring the trial court to perform a "sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Arlington Heights, supra,* at 266, 97 S.Ct. 555; see also *Miller, supra,* at 905, 914, 115 S.Ct. 2475 (citing *Arlington Heights*); *Shaw I, supra,* at 644, 113 S.Ct. 2816 (same).[2]

***547** Districting legislation ordinarily, if not always, classifies tracts of land, precincts, or census blocks, and is race neutral on its face. North Carolina's 1997 plan was not atypical; appellees, therefore, were required to prove that District 12 was drawn with an impermissible racial motive—in this context, strict scrutiny applies if race was the "predominant factor"

motivating the legislature's districting decision. To carry their burden, appellees were obliged to show—using direct or circumstantial evidence, or a combination of both, see *Shaw II, supra,* at 905, 116 S.Ct. 1894; *Miller,* 515 U.S., at 916, 115 S.Ct. 2475—that "the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, and respect for political subdivisions or communities defined by actual shared interests, to racial considerations," *ibid.*

Appellees offered only circumstantial evidence in support of their claim. Their evidence included maps of District 12, showing its size, shape,[3] and alleged lack of continuity. See Appendix, *infra.* They also submitted evidence of the district's low scores with respect to traditional measures of compactness and expert affidavit testimony explaining that this statistical evidence proved the State had ignored traditional districting criteria in crafting the new Twelfth Congressional District. See App. 221–251. Appellees further claimed that the State had disrespected political subdivisions and communities of interest. In support, they pointed out that under the 1997 plan, District 12 was the only one statewide ***548** to contain no undivided county and offered figures showing that District 12 gathered almost 75% of its population from Mecklenburg County, at the southern tip of the district, and from Forsyth and Guilford Counties at the northernmost part of the district. *Id.,* at 176, 208–209.

Appellees also presented statistical and demographic evidence with respect to the precincts that were included within District 12 and those that were placed in neighboring districts. For the six subdivided counties ****1550** included within District 12, the proportion of black residents was higher in the portion of the county within District 12 than the portion of the county in a neighboring district.[4] Other maps and supporting data submitted by appellees compared the demographics of several so-called "boundary segments."[5] This evidence tended to show that, in several instances, the State had excluded precincts that had a lower percentage of black population but were as Democratic (in terms of registered voters) as the precinct inside District 12. *Id.,* at 253–290; 3 Record, Doc. No. 61.

Viewed *in toto,* appellees' evidence tends to support an inference that the State drew its district lines with an impermissible ***549** racial motive—even though they presented no direct evidence of intent. Summary judgment, however, is appropriate only where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. See *Celotex Corp. v. Catrett,* 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). To be sure, appellants did not contest the evidence of District 12's shape (which hardly could be contested), nor did they claim that appellees' statistical and demographic evidence, most if not all of which appears to have been obtained from the State's own data banks, was untrue.

The District Court nevertheless was only partially correct in stating that the material facts before it were uncontroverted. The legislature's motivation is itself a factual question. See *Shaw II,* 517 U.S., at 905, 116 S.Ct. 1894; *Miller, supra,* at 910, 115 S.Ct. 2475. Appellants asserted that the General Assembly drew its district lines with the intent to make District 12 a strong Democratic district. In support, they presented the after-the-fact affidavit testimony of the two members of the General Assembly responsible for developing the State's 1997 plan. See App. to Juris. Statement 69a–84a. Those legislators further stated that, in crafting their districting law, they attempted to protect incumbents, to adhere to traditional districting criteria, and to preserve the existing partisan balance in the State's congressional delegation, which in 1997 was composed of six Republicans and six Democrats. *Ibid.*

More important, we think, was the affidavit of an expert, Dr. David W. Peterson. *Id.,* at 85a–100a. He reviewed racial demographics, party registration, and election result data (the number of people voting for Democratic candidates) gleaned from the State's 1998 Court of Appeals election, 1998 Lieutenant Governor election, and 1990 United States Senate election for the precincts included within District 12 and those surrounding it. Unlike appellees' evidence, which highlighted select boundary segments, appellants' expert ***550** examined the district's entire border—all 234 boundary segments. See *id.,* at 92a. He recognized "a strong correlation between racial composition and party preference" so that "in precincts with high black representation, there is a correspondingly high tendency for voters to favor the Democratic Party" but that "[i]n precincts with low black representation, there is much more variation in party preference, and the fraction of registered voters favoring Democrats is substantially lower." *Id.,* at 91a. Because of this significant correlation, the data tended to support both a political and racial hypothesis. Therefore, Peterson focused on "divergent ****1551** boundary segments," those where blacks were greater inside District 12 but Democrats were greater outside and those where blacks were greater outside the district but Democrats were greater inside. He concluded that the State included the more heavily Democratic precinct much more often than the more heavily black precinct, and therefore, that the data as a whole supported a political explanation at least as well as, and somewhat better than, a racial explanation. *Id.,* at 98a; see also *id.,* at 87a ("[T]here is at least one other

explanation that fits the data as well as or better than race, and that explanation is political identification").

Peterson's analysis of District 12's divergent boundary segments and his affidavit testimony that District 12 displays a high correlation between race and partisanship support an inference that the General Assembly did no more than create a district of strong partisan Democrats. His affidavit is also significant in that it weakens the probative value of appellees' boundary segment evidence, which the District Court appeared to give significant weight. See *id.,* at 20a–21a. Appellees' evidence was limited to a few select precincts, see App. 253–276, whereas Peterson analyzed all 234 boundary segments. Moreover, appellees' maps reported only party registration figures. Peterson again was more thorough, looking also at actual voting results. ***551** Peterson's more complete analysis was significant because it showed that in North Carolina, party registration and party preference do not always correspond.[6]

Accepting appellants' political motivation explanation as true, as the District Court was required to do in ruling on appellees' motion for summary judgment, see *Anderson,* 477 U.S., at 255, 106 S.Ct. 2505, appellees were not entitled to judgment as a matter of law. Our prior decisions have made clear that a jurisdiction may engage in constitutional political gerrymandering, even if it so happens that the most loyal Democrats happen to be black Democrats and even if the State were *conscious* of that fact. See *Bush v. Vera,* 517 U.S. 952, 968, 116 S.Ct. 1941, 135 L.Ed.2d 248 (1996); *id.,* at 1001, 116 S.Ct. 1941 (THOMAS, J., concurring in judgment); *Shaw II, supra,* at 905, 116 S.Ct. 1894; *Miller,* 515 U.S., at 916, 115 S.Ct. 2475; *Shaw I,* 509 U.S., at 646, 113 S.Ct. 2816.[7] Evidence that blacks constitute even a supermajority in one congressional district while amounting ***552** to less than a plurality in a neighboring district will not, by itself, suffice to prove that a jurisdiction was motivated by race in drawing its district lines when the evidence also shows a high correlation between race and party preference.

Of course, neither appellees nor the District Court relied exclusively on appellees' boundary segment evidence, and appellees submitted other evidence tending to show that the General Assembly was motivated by racial considerations in drawing District 12—most notably, District 12's shape and its lack of compactness. But in ruling on a motion for summary judgment, the nonmoving party's evidence "is to be believed, and all justifiable ****1552** inferences are to be drawn in [that party's] favor." *Anderson,* 477 U.S., at 255, 106 S.Ct. 2505. While appellees' evidence might *allow* the District Court to find that the State acted with an impermissible racial motivation, despite the State's explanation as supported by the Peterson affidavit, it does not *require* that the court do so. All that can be said on the record before us is that motivation was in dispute. Reasonable inferences from the undisputed facts can be drawn in favor of a racial motivation finding or in favor of a political motivation finding. The District Court nevertheless concluded that race was the "predominant factor" in the drawing of the district. In doing so, it either credited appellees' asserted inferences over those advanced and supported by appellants or did not give appellants the inference they were due. In any event, it was error in this case for the District Court to resolve the disputed fact of motivation at the summary judgment stage. Cf. *ibid.* ("Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions").[8]

***553** Outright admissions of impermissible racial motivation are infrequent and plaintiffs often must rely upon other evidence. Summary judgment in favor of the party with the burden of persuasion, however, is inappropriate when the evidence is susceptible of different interpretations or inferences by the trier of fact.[9] That is not to say that summary judgment in a plaintiff's favor will never be appropriate in a racial gerrymandering case sought to be proved exclusively by circumstantial evidence. We can imagine an instance where the uncontroverted evidence and the reasonable inferences to be drawn in the nonmoving party's favor would not be "significantly probative" so as to create a genuine issue of fact for trial. *Id.,* at 249–250, 106 S.Ct. 2505. But this is not that case. And even if the question whether appellants had created a material dispute of fact were a close one, we think that "the sensitive nature of redistricting and the presumption of good faith that must be accorded legislative enactments," *Miller,* 515 U.S., at 916, 115 S.Ct. 2475, would tip the balance in favor of the District Court making findings of fact. See also *id.,* at 916–917, 115 S.Ct. 2475 ("[C]ourts must also recognize ... the intrusive potential of judicial intervention into the legislative realm, when assessing ... the adequacy of a plaintiff's showing at the various stages of litigation and determining whether to permit discovery or trial to proceed").

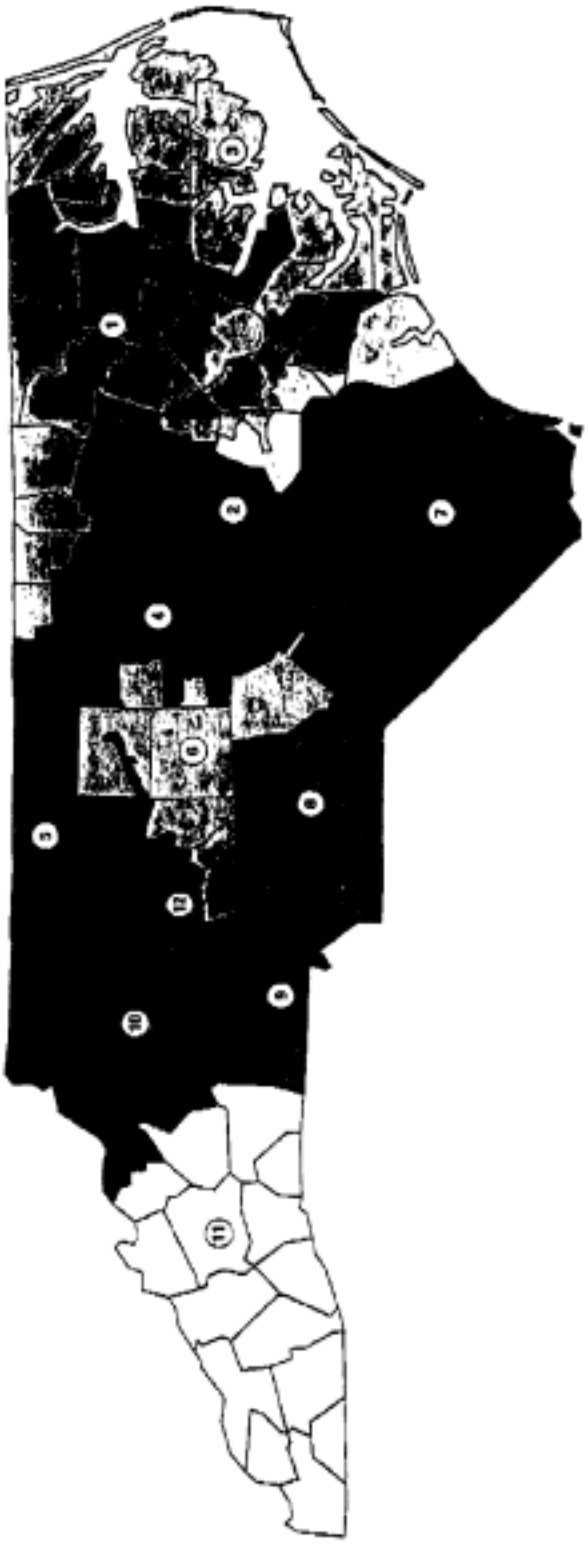
In reaching our decision, we are fully aware that the District Court is more familiar with the evidence than this Court, and is likewise better suited to assess the General ***554** Assembly's motivations. Perhaps, after trial, the evidence will support a finding that race was the State's predominant motive, but we express no position as to that question. We decide only that this case was not suited for summary disposition. The judgment of the District Court is reversed.

It is so ordered.

**1553 APPENDIX

APPENDIX

APPENDIX TO OPINION OF THE COURT



**1554 *555 Justice STEVENS, with whom Justice SOUTER, Justice GINSBURG, and Justice BREYER join, concurring in the judgment.

The disputed issue of fact in this case is whether political considerations or racial considerations provide the "primary" explanation for the seemingly irregular configuration of North Carolina's Twelfth Congressional District. The Court concludes that evidence submitted to the District Court on behalf of the State made it inappropriate for that Court to grant appellees' motion for summary judgment. I agree with that conclusion, but write separately to emphasize the importance of two undisputed matters of fact that are firmly established by the historical record and confirmed by the record in this case.

First, bizarre configuration is the traditional hallmark of the political gerrymander. This obvious proposition is supported by the work product of Elbridge Gerry, by the "swan" designed by New Jersey Republicans in 1982, see *Karcher v. Daggett,* 462 U.S. 725, 744, 762–763, 103 S.Ct. 2653, 77 L.Ed.2d 133 (1983), and by the Indiana plan reviewed in *Davis v. Bandemer,* 478 U.S. 109, 183, 185, 106 S.Ct. 2797, 92 L.Ed.2d 85 (1986). As we learned in *Gomillion v. Lightfoot,* 364 U.S. 339, 81 S.Ct. 125, 5 L.Ed.2d 110 (1960), a racial gerrymander may have an equally "uncouth" shape. See *id.,* at 340, 348, 81 S.Ct. 125. Thus, the shape of the congressional district at issue in this case provides strong evidence that either political or racial factors motivated its architects, but sheds no light on the question of which set of factors was more responsible for subordinating any of the State's "traditional" districting principles.[1]

*556 Second, as the Presidential campaigns conducted by Strom Thurmond in 1948 and by George Wallace in 1968, and the Senate campaigns conducted more recently by Jesse Helms, have demonstrated, a great many registered Democrats in the South do not always vote for Democratic candidates in federal elections. The Congressional Quarterly recently recorded the fact that in North Carolina "Democratic voter registration edges ... no longer translat[e] into success in statewide or national races. In recent years, conservative white Democrats have gravitated toward Republican candidates." See Congressional Quarterly Inc., Congressional Districts in the 1990s, p. 549 (1993).[2] This voting pattern *557 had proved to be particularly pronounced in voting districts that contain more than about one-third African–American **1555 residents. See Pildes, The Politics of Race, 108 Harv. L.Rev. 1359, 1382–1386 (1995). There was no need for expert testimony to establish the proposition that "in North Carolina, party registration and party preference do not always correspond." *Ante,* at 1551.

Indeed, for me the most remarkable feature of the District Court's erroneous decision is that it relied entirely on data concerning the location of registered Democrats and ignored the more probative evidence of how the people who live near the borders of District 12 actually voted in recent elections. That evidence not only undermines and rebuts the inferences the District Court drew from the party registration data, but also provides strong affirmative evidence that is thoroughly consistent with the sworn testimony of the two members of the state legislature who were most active in drawing the boundaries of District 12. The affidavits of those members, stating that district lines were drawn according to election results, not voter registration, are uncontradicted.[3] And almost all of the majority-Democrat registered precincts that the state legislature excluded from District 12 in favor of precincts with higher black populations produced significantly less dependable Democratic results and actually voted for one or more Republicans in recent elections.

The record supports the conclusion that the most loyal Democrats living near the borders of District 12 "happen to be black Democrats," see *ibid.,* and I have no doubt that the legislature was conscious of that fact when it enacted this apportionment plan. But everyone agrees that that fact is not sufficient to invalidate the district. Cf. *ibid.* That fact would not even be enough, under this Court's decisions, to invalidate a governmental action, that, unlike the *558 action at issue here, actually has an adverse impact on a particular racial group. See, *e.g., Personnel Administrator of Mass. v. Feeney,* 442 U.S. 256, 279, 99 S.Ct. 2282, 60 L.Ed.2d 870 (1979) (holding that the Equal Protection Clause is implicated only when "a state legislatur[e] selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group"); *Washington v. Davis,* 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976); *Hernandez v. New York,* 500 U.S. 352, 375, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991) (O'CONNOR, J., concurring in judgment) ("No matter how closely tied or significantly correlated to race the explanation for [a governmental action] may be, the [action] does not implicate the Equal Protection Clause unless it is based on race").

Accordingly, appellees' evidence may include nothing more than (i) a bizarre shape, which is equally consistent with either political or racial motivation, (ii) registration data, which are virtually irrelevant when actual voting results were available and which point in a different direction, and (iii) knowledge of the racial composition of the district. Because we do not have before us the question whether the District Court erred in denying the State's motion for summary judgment, I need not decide whether that circumstantial evidence even raises an inference of improper motive. It is sufficient at this stage of the

proceedings to join in the Court's judgment of reversal, which I do.

All Citations

526 U.S. 541, 119 S.Ct. 1545, 143 L.Ed.2d 731, 67 USLW 3682, 67 USLW 4306, 99 Cal. Daily Op. Serv. 3567, 1999 Daily Journal D.A.R. 4553, 1999 CJ C.A.R. 2712

Footnotes

[*] The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

[1] In response to the District Court's decision and order, the State enacted yet another districting plan, 1998 N.C. Sess. Laws, ch. 2 (codified at N.C. Gen.Stat. § 163–201(a) (Supp.1998)), which revised Districts 5, 6, 9, 10, and 12. Under the State's 1998 plan, no part of Guilford County is located within District 12 and all of Rowan County falls within the district's borders. The 1998 plan also modified District 12's boundaries in Forsyth, Davidson, and Iredell Counties. See *ibid.;* see also *Cromartie v. Hunt,* No. 4:96–CV–104–BO (3) (EDNC, June 22, 1998), App. to Juris. Statement 178a–179a. The State's 1998 congressional elections were conducted pursuant to the 1998 plan with the District Court's approval. Brief for Appellees 6, n. 13; App. to Juris. Statement 179a. Because the State's 1998 law provides that the State will revert to the 1997 districting plan upon a favorable decision of this Court, see 1998 N.C. Sess. Laws, ch. 2, § 1.1, this case is not moot, see *City of Mesquite v. Aladdin's Castle, Inc.,* 455 U.S. 283, 288–289, and n. 11, 102 S.Ct. 1070, 71 L.Ed.2d 152 (1982); *Zablocki v. Redhail,* 434 U.S. 374, 382, n. 9, 98 S.Ct. 673, 54 L.Ed.2d 618 (1978); *Bullock v. Carter,* 405 U.S. 134, 141–142, n. 17, 92 S.Ct. 849, 31 L.Ed.2d 92 (1972).

[2] Cf. *Reno v. Bossier Parish School Bd.,* 520 U.S. 471, 488, 117 S.Ct. 1491, 137 L.Ed.2d 730 (1997) (holding that, in cases brought under § 5 of the Voting Rights Act of 1965, the *Arlington Heights* framework should guide a court's inquiry into whether a jurisdiction had a discriminatory purpose in enacting a voting change); *Rogers v. Lodge,* 458 U.S. 613, 618, 102 S.Ct. 3272, 73 L.Ed.2d 1012 (1982) (same framework is to be used in evaluating vote dilution claims brought under the Equal Protection Clause).

[3] Justice STEVENS asserts that proof of a district's "bizarre configuration" gives rise equally to an inference that its architects were motivated by politics or race. *Post,* at 1554. We do not necessarily quarrel with the proposition that a district's unusual shape can give rise to an inference of political motivation. But we doubt that a bizarre shape *equally* supports a political inference and a racial one. Some districts, we have said, are "so highly irregular that [they] rationally cannot be understood as anything other than an effort to 'segregat[e] ... voters' on the basis of race." *Shaw I,* 509 U.S. 630, 646–647, 113 S.Ct. 2816, 125 L.Ed.2d 511 (1993) (quoting *Gomillion v. Lightfoot,* 364 U.S. 339, 341, 81 S.Ct. 125, 5 L.Ed.2d 110 (1960)).

[4] In the portion of Guilford County in District 12, black residents constituted 51.5% of the population, while in the District 6 portion, only 10.2% of the population was black. App. 179. Appellees' evidence as to the other counties showed: Forsyth District 12 was 72.9% black while Forsyth District 5 was 11.1% black; Davidson District 12 was 14.8% black while Davidson District 6 was 4.1% black; Rowan District 12 was 35.6% black and Rowan District 6 was 7.7% black; Iredell District 12 was 24.3% black while Iredell District 10 was 10.1% black; Mecklenburg District 12 was 51.9% black but Mecklenburg District 9 was only 7.2% black. *Id.,* at 179–181.

[5] Boundary segments, we are told, are those sections along the district's perimeter that separate outside precincts from inside precincts. In other words, the boundary segment is the district borderline itself; for each segment, the relevant comparison is between the inside precinct that touches the segment and the corresponding outside precinct. See App. to Juris. Statement 92a; Brief for United States as *Amicus Curiae* 20, n. 7.

[6] In addition to the evidence that appellants presented to the District Court, they have submitted with their reply brief maps showing

that in almost all of the majority-Democrat registered precincts surrounding those portions of District 12 in Guilford, Forsyth, and Mecklenburg Counties, Republican candidates were elected in at least one of the three elections considered by the state defendants' expert. Reply Brief for State Appellants 4–8; App. to Reply Brief for State Appellants 1a–10a. Appellants apparently did not put this additional evidence before the District Court prior to the court's decision on the competing motions for summary judgment. They claim excuse in that appellees filed their maps showing partisan registration at the "eleventh hour." Brief for State Appellants 10, n. 13. We are not sure why appellants believe the timing of appellees' filing to be an excuse. The District Court set an advance deadline for filings in support of the competing motions for summary judgment, so appellants could not have been caught by surprise. And given that appellants not only had to respond to appellees' evidence, but also had their own motion for summary judgment to support, one would think that the District Court would not have needed to afford them "an adequate opportunity to respond." *Ibid.*

7 This Court has recognized, however, that political gerrymandering claims are justiciable under the Equal Protection Clause although we were not in agreement as to the standards that would govern such a claim. See *Davis v. Bandemer,* 478 U.S. 109, 127, 106 S.Ct. 2797, 92 L.Ed.2d 85 (1986).

8 We note that *Bush v. Vera,* 517 U.S. 952, 116 S.Ct. 1941, 135 L.Ed.2d 248 (1996), *Shaw II,* 517 U.S. 899, 116 S.Ct. 1894, 135 L.Ed.2d 207 (1996) and *Miller v. Johnson,* 515 U.S. 900, 115 S.Ct. 2475, 132 L.Ed.2d 762 (1995), each came to us on a developed record and after the respective District Courts had made findings of fact. *Bush v. Vera, supra,* at 959, 116 S.Ct. 1941; *Vera v. Richards,* 861 F.Supp. 1304, 1311–1331, 1336–1344 (S.D.Tex.1994); *Shaw II, supra* at 903, 116 S.Ct. 1894; *Shaw v. Hunt,* 861 F.Supp. 408, 456–473 (E.D.N.C.1994); *Miller v. Johnson, supra,* at 910, 115 S.Ct. 2475; *Johnson v. Miller,* 864 F.Supp. 1354, 1360–1369 (S.D.Ga.1994).

9 Just as summary judgment is rarely granted in a plaintiff's favor in cases where the issue is a defendant's racial motivation, such as disparate treatment suits under Title VII or racial discrimination claims under 42 U.S.C. § 1981, the same holds true for racial gerrymandering claims of the sort brought here. See generally 10B Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, Federal Practice and Procedure §§ 2730, 2732.2 (1998).

1 I include the last phrase because the Court has held that a state legislature may make race-based districting decisions so long as those decisions do not subordinate (to some uncertain degree) " 'traditional ... districting principles.' " See *Shaw v. Hunt,* 517 U.S. 899, 907, 116 S.Ct. 1894, 135 L.Ed.2d 207 (1996); *Miller v. Johnson,* 515 U.S. 900, 916, 115 S.Ct. 2475, 132 L.Ed.2d 762 (1995) (holding that racial considerations are subject to strict scrutiny when they subordinate "traditional race-neutral districting principles"); *id.,* at 928, 116 S.Ct. 1894 (O'CONNOR, J., concurring) ("To invoke strict scrutiny, a plaintiff must show that the State has relied on race in substantial disregard of customary and traditional districting practices"). In this regard, I note that neither the Court's opinion nor the District Court's opinion analyzes the question whether the "traditional districting principle" of joining communities of interest is subordinated in the present Twelfth District. A district may lack compactness or contiguity—due, for example, to geographic or demographic reasons—yet still serve the traditional districting goal of joining communities of interest.

2 The Congressional Quarterly's publication, which is largely seen as the authoritative source regarding the political and demographic makeup of the congressional districts resulting from each decennial census, is even more revealing when one examines its district-by-district analysis of North Carolina's partisan voting patterns. With regard to the original First District, which was just over 50 percent black, the book remarks: "The white voters of the 1st claim the Democratic roots of their forefathers, but often support GOP candidates at the state and national level. A fair number are 'Jessecrats,' conservative Democratic supporters of GOP Sen. Jesse Helms." Congressional Quarterly, at 550. The book shows that while the Second and Third Districts have "significant Democratic voter registration edges," Republican candidates actually won substantial victories in four of five recent elections. See *id.,* at 549, 552–553. Statistics also demonstrate that a majority of voters in the Eleventh District consistently vote for Republicans "despite a wide Democratic registration advantage." *Id.,*at 565. Although the book exhaustively analyzes the statistical demographics of each congressional district, listing even the number of cable television subscribers in each district, it does not provide voter registration statistics.

[3] See App. to Juris. Statement 73a (affidavit of Sen. Roy A. Cooper III, Chairman of Senate Redistricting Committee); *id.,* at 81a–82a (affidavit of Rep. W. Edwin McMahan, Chairman of House Redistricting Committee).

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125 S.Ct. 1141
Supreme Court of the United States

Garrison S. JOHNSON, Petitioner,
v.
CALIFORNIA et al.

No. 03–636.
|
Argued Nov. 2, 2004.
|
Decided Feb. 23, 2005.

Synopsis
Background: African–American state prison inmate brought § 1981 and § 1983 equal-protection action against corrections officials, challenging unwritten policy of placing new or transferred inmates with cellmates of same race during initial evaluation. The United States District Court for the Central District of California, Kim M. Wardlaw, J., granted officials' motion to dismiss. Inmate appealed. The Ninth Circuit Court of Appeals, 207 F.3d 650, reversed in part and remanded. On remand, the District Court, Consuelo B. Marshall, C.J., granted summary judgment for officials. Inmate again appealed. The Ninth Circuit Court of Appeals, 321 F.3d 791, affirmed. Certiorari was granted.

The United States Supreme Court, Justice O'Connor, held that strict scrutiny standard of review, rather than "reasonably related to legitimate penological interest" standard, governed inmate's challenge.

Reversed and remanded.

Justice Ginsburg filed concurring opinion joined by Justices Souter and Breyer.

Justice Stevens filed dissenting opinion.

Justice Thomas filed dissenting opinion joined by Justice Scalia.

The Chief Justice took no part in the decision of the case.

****1142 *499** *Syllabus*[*]
The California Department of Corrections' (CDC) unwritten policy of racially segregating prisoners in double cells for up to 60 days each time they enter a new correctional facility is based on the asserted rationale that it prevents violence caused by racial gangs. Petitioner Johnson, an African–American inmate who has been intermittently double-celled under the policy's terms ever since his 1987 incarceration, filed this suit alleging that the policy violates his Fourteenth Amendment right to equal protection. The District Court ultimately granted defendant former CDC officials summary judgment on grounds that they were entitled to qualified immunity. The Ninth Circuit affirmed, holding that the policy's constitutionality should be reviewed under the deferential standard articulated in *Turner v. Safley,* 482 U.S. 78, 107 S.Ct. 2254, 96 L.Ed.2d 64, not under strict scrutiny, and that the policy survived *Turner* scrutiny.

Held: Strict scrutiny is the proper standard of review for an equal protection challenge to the CDC's policy. Pp. 1146–1152.

(a) Because the CDC's policy is "immediately suspect" as an express racial classification, *Shaw v. Reno,* 509 U.S. 630, 642,

113 S.Ct. 2816, 125 L.Ed.2d 511, the Ninth Circuit erred in failing to apply strict scrutiny and thereby to require the CDC to demonstrate that the policy is narrowly tailored to serve a compelling state interest, see *Adarand Constructors, Inc. v. Peña,* 515 U.S. 200, 227, 115 S.Ct. 2097, 132 L.Ed.2d 158. *"[A]ll* racial classifications [imposed by government] ... must be analyzed ... under strict scrutiny," *ibid.,* in order to " 'smoke out' illegitimate **1143 uses of race by assuring that [government] is pursuing a goal important enough to warrant [such] a highly suspect tool," *Richmond v. J.A. Croson Co.,* 488 U.S. 469, 493, 109 S.Ct. 706, 102 L.Ed.2d 854. The CDC's claim that its policy should be exempt from this categorical rule because it is "neutral"—*i.e.,* because all prisoners are "equally" segregated—ignores this Court's repeated command that "racial classifications receive close scrutiny even when they may be said to burden or benefit the races equally," *Shaw, supra,* at 651, 113 S.Ct. 2816. Indeed, the Court rejected the notion that separate can ever be equal—or "neutral"—50 years ago in *Brown v. Board of Education,* 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873, and refuses to resurrect it today. The Court has previously applied a heightened standard of review in evaluating racial segregation in prisons. *Lee v. Washington,* 390 U.S. 333, 88 S.Ct. 994, 19 L.Ed.2d 1212. The need for strict scrutiny is no less important here. By perpetuating *500 the notion that race matters most, racial segregation of inmates "may exacerbate the very patterns of [violence that it is] said to counteract." *Shaw, supra,* at 648, 113 S.Ct. 2816. Virtually all other States and the Federal Government manage their prison systems without reliance on racial segregation. In fact, the United States argues that it is possible to address prison security concerns through individualized consideration without using racial segregation, unless it is warranted as a necessary and temporary response to a serious threat of race-related violence. As to transferees, in particular, whom the CDC has already evaluated at least once, it is not clear why more individualized determinations are not possible. Pp. 1146–1148.

(b) The Court declines the CDC's invitation to make an exception to the categorical strict scrutiny rule and instead to apply *Turner's* deferential review standard on the ground that the CDC's policy applies only in the prison context. The Court has never applied the *Turner* standard—which asks whether a regulation that burdens prisoners' fundamental rights is "reasonably related" to "legitimate penological interests," 482 U.S., at 89, 107 S.Ct. 2254—to racial classifications. *Turner* itself did not involve such a classification, and it cast no doubt on *Lee.* That is unsurprising, as the Court has applied the *Turner* test *only* to rights that are "inconsistent with proper incarceration." *Overton v. Bazzetta,* 539 U.S. 126, 131, 123 S.Ct. 2162, 156 L.Ed.2d 162. The right not to be discriminated against based on one's race is not susceptible to *Turner's* logic because it is not a right that need necessarily be compromised for the sake of proper prison administration. On the contrary, compliance with the Fourteenth Amendment's ban on racial discrimination is not only consistent with proper prison administration, but also bolsters the legitimacy of the entire criminal justice system. Cf. *Batson v. Kentucky,* 476 U.S. 79, 99, 106 S.Ct. 1712, 90 L.Ed.2d 69. Deference to the particular expertise of officials managing daily prison operations does not require a more relaxed standard here. The Court did not relax the standard of review for racial classifications in prison in *Lee,* and it refuses to do so today. Rather, it explicitly reaffirms that the "necessities of prison security and discipline," *Lee, supra,* at 334, 88 S.Ct. 994, are a compelling government interest justifying only those uses of race that are narrowly tailored to address those necessities, see, *e.g., Grutter v. Bollinger,* 539 U.S. 306, 353, 123 S.Ct. 2325, 156 L.Ed.2d 304. Because *Turner's* standard would allow prison officials to use race-based policies even when there are race-neutral means to accomplish the same goal, and even when the race-based policy **1144 does not in practice advance that goal, it is too lenient a standard to ferret out invidious uses of race. Contrary to the CDC's protest, strict scrutiny will not render prison administrators unable to address legitimate problems of race-based violence in prisons. On remand, the CDC will have the burden of demonstrating that its policy is *501 narrowly tailored with regard to new inmates as well as transferees. Pp. 1148–1152.

(c) The Court does not decide whether the CDC's policy violates equal protection, but leaves it to the Ninth Circuit, or the District Court, to apply strict scrutiny in the first instance. See, *e.g., Consolidated Rail Corporation v. Gottshall,* 512 U.S. 532, 557–558, 114 S.Ct. 2396, 129 L.Ed.2d 427. P. 1152.

321 F.3d 791, reversed and remanded.

O'CONNOR, J., delivered the opinion of the Court, in which KENNEDY, SOUTER, GINSBURG, and BREYER, JJ., joined. GINSBURG, J., filed a concurring opinion, in which SOUTER and BREYER, JJ., joined, *post,* p. 1152. STEVENS, J., filed a dissenting opinion, *post,* p. 1153. THOMAS, J., filed a dissenting opinion, in which SCALIA, J., joined, *post,* p. 1157. REHNQUIST, C.J., took no part in the decision of the case.

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Opinion

Justice O'CONNOR delivered the opinion of the Court.

***502** The California Department of Corrections (CDC) has an unwritten policy of racially segregating prisoners in double cells in reception centers for up to 60 days each time they enter a new correctional facility. We consider whether strict scrutiny is the proper standard of review for an equal protection challenge to that policy.

I

A

CDC institutions house all new male inmates and all male inmates transferred from other state facilities in reception centers for up to 60 days upon their arrival. During that time, prison officials evaluate the inmates to determine their ultimate placement. Double-cell assignments in the reception centers are based on a number of factors, predominantly race. In fact, the CDC has admitted that the chances of an inmate being assigned a cellmate of another race are " '[p]retty close' " to zero percent. App. to Pet. for Cert. 3a. The CDC further subdivides prisoners within each racial group. Thus, Japanese–Americans are housed separately from Chinese–Americans, and northern California Hispanics are separated from southern California Hispanics.

The CDC's asserted rationale for this practice is that it is necessary to prevent violence caused by racial gangs. Brief for Respondents 1–6. It cites numerous incidents of racial violence in CDC facilities and identifies five major prison gangs in ****1145** the State: Mexican Mafia, Nuestra Familia, Black Guerilla Family, Aryan Brotherhood, and Nazi Low Riders. *Id.,* at 2. The CDC also notes that prison-gang culture is violent and murderous. *Id.,* at 3. An associate warden testified ***503** that if race were not considered in making initial housing assignments, she is certain there would be racial conflict in the cells and in the yard. App. 215a. Other prison officials also expressed their belief that violence and conflict would result if prisoners were not segregated. See, *e.g., id.,* at 305a–306a. The CDC claims that it must therefore segregate all inmates while it determines whether they pose a danger to others. See Brief for Respondents 29.

With the exception of the double cells in reception areas, the rest of the state prison facilities—dining areas, yards, and cells—are fully integrated. After the initial 60–day period, prisoners are allowed to choose their own cellmates. The CDC usually grants inmate requests to be housed together, unless there are security reasons for denying them.

B

Garrison Johnson is an African–American inmate in the custody of the CDC. He has been incarcerated since 1987 and, during that time, has been housed at a number of California prison facilities. Fourth Amended Complaint 3, Record, Doc. No. 78. Upon his arrival at Folsom prison in 1987, and each time he was transferred to a new facility thereafter, Johnson was double-celled with another African–American inmate. See *ibid.*

Johnson filed a complaint *pro se* in the United States District Court for the Central District of California on February 24, 1995, alleging that the CDC's reception-center housing policy violated his right to equal protection under the Fourteenth Amendment by assigning him cellmates on the basis of his race. He alleged that, from 1987 to 1991, former CDC Director James Rowland instituted and enforced an unconstitutional policy of housing inmates according to race. Second Amended Complaint 2–4, Record, Doc. No. 21. Johnson made the same allegations against former Director James Gomez for the period from 1991 until the filing of his complaint. *Ibid.* The District Court dismissed his complaint ***504** for failure to state a claim. The Court of Appeals for the Ninth Circuit reversed and remanded, holding that Johnson had stated a claim for racial discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment. *Johnson v. California,* 207 F.3d 650, 655 (2000).

On remand, Johnson was appointed counsel and granted leave to amend his complaint. On July 5, 2000, he filed his Fourth Amended Complaint. Record, Doc. No. 81. Johnson claimed that the CDC's policy of racially segregating all inmates in reception-center cells violated his rights under the Equal Protection Clause. Johnson sought damages, alleging that former CDC Directors Rowland and Gomez, in their individual capacities, violated his constitutional rights by formulating and implementing the CDC's housing policy. He also sought injunctive relief against former CDC Director Stephen Cambra.

Johnson has consistently challenged, and the CDC has consistently defended, the policy as a whole—as it relates to both new inmates and inmates transferred from other facilities. Johnson was first segregated in 1987 as a new inmate when he entered the CDC facility at Folsom. Since 1987, he has been segregated each time he has been transferred to a new facility. Thus, he has been subject to the CDC's policy both as a new inmate and as an inmate transferred from one facility to another.

After discovery, the parties moved for summary judgment. The District Court ****1146** granted summary judgment to the defendants on grounds that they were entitled to qualified immunity because their conduct was not clearly unconstitutional. The Court of Appeals for the Ninth Circuit affirmed. 321 F.3d 791 (2003). It held that the constitutionality of the CDC's policy should be reviewed under the deferential standard we articulated in *Turner v. Safley,* 482 U.S. 78, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987)—not strict scrutiny. 321 F.3d, at 798–799. Applying *Turner,* it held that Johnson had the burden of refuting the "common-sense connection" between the policy and ***505** prison violence. 321 F.3d, at 802. Though it believed this was a "close case," *id.,* at 798, the Court of Appeals concluded that the policy survived *Turner's* deferential standard, 321 F.3d, at 807.

The Court of Appeals denied Johnson's petition for rehearing en banc. Judge Ferguson, joined by three others, dissented on grounds that "[t]he panel's decision ignore[d] the Supreme Court's repeated and unequivocal command that all racial classifications imposed by the government must be analyzed by a reviewing court under strict scrutiny, and fail[ed] to recognize that [the] *Turner* analysis is inapplicable in cases, such as this one, in which the right asserted is not inconsistent with legitimate penological objectives." 336 F.3d 1117 (2003) (internal quotation marks and citations omitted). We granted certiorari to decide which standard of review applies. 540 U.S. 1217, 124 S.Ct. 1505, 158 L.Ed.2d 151 (2004).

II

A

We have held that "*all* racial classifications [imposed by government] ... must be analyzed by a reviewing court under strict scrutiny." *Adarand Constructors, Inc. v. Peña,* 515 U.S. 200, 227, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995) (emphasis added). Under strict scrutiny, the government has the burden of proving that racial classifications "are narrowly tailored measures that further compelling governmental interests." *Ibid.* We have insisted on strict scrutiny in every context, even for so-called "benign" racial classifications, such as race-conscious university admissions policies, see *Grutter v. Bollinger,* 539 U.S. 306, 326, 123 S.Ct. 2325, 156 L.Ed.2d 304 (2003), race-based preferences in government contracts, see *Adarand, supra,* at 226, 115 S.Ct. 2097, and race-based districting intended to improve minority representation, see *Shaw v. Reno,* 509 U.S. 630, 650, 113 S.Ct. 2816, 125 L.Ed.2d 511 (1993).

The reasons for strict scrutiny are familiar. Racial classifications raise special fears that they are motivated by an invidious purpose. Thus, we have admonished time and ***506** again that, "[a]bsent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining ... what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics." *Richmond v. J.A. Croson Co.,* 488 U.S. 469, 493, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989) (plurality opinion). We therefore apply strict scrutiny to *all* racial classifications to " 'smoke out' illegitimate uses of race by assuring that [government] is pursuing a goal important enough to warrant use of a highly suspect tool." *Ibid.*[1]

The CDC claims that its policy should be exempt from our categorical rule because ****1147** it is "neutral"—that is, it "neither benefits nor burdens one group or individual more than any other group or individual." Brief for Respondents 16. In other words, strict scrutiny should not apply because all prisoners are "equally" segregated. The CDC's argument ignores our repeated command that "racial classifications receive close scrutiny even when they may be said to burden or benefit the races equally." *Shaw, supra,* at 651, 113 S.Ct. 2816. Indeed, we rejected the notion that separate can ever be equal—or "neutral"—50 years ago in *Brown v. Board of Education,* 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954), and we refuse to resurrect it today. See also *Powers v. Ohio,* 499 U.S. 400, 410, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991) (rejecting the argument that race-based peremptory challenges were permissible because they applied equally to white and black jurors and holding that "[i]t is axiomatic that racial classifications do not become legitimate on the assumption that all persons suffer them in equal degree").

We have previously applied a heightened standard of review in evaluating racial segregation in prisons. In *Lee v.* ***507** *Washington,* 390 U.S. 333, 88 S.Ct. 994, 19 L.Ed.2d 1212 (1968) *(per curiam),* we upheld a three-judge court's decision striking down Alabama's policy of segregation in its prisons. *Id.,* at 333–334, 88 S.Ct. 994. Alabama had argued that desegregation would undermine prison security and discipline, *id.,* at 334, 88 S.Ct. 994, but we rejected that contention. Three Justices concurred "to make explicit something that is left to be gathered only by implication from the Court's opinion"—"that prison authorities have the right, acting in good faith and in *particularized circumstances,* to take into account racial tensions in maintaining security, discipline, and good order in prisons and jails." *Ibid.* (emphasis added). The concurring Justices emphasized that they were "unwilling to assume that state or local prison authorities might mistakenly regard such an explicit pronouncement as evincing any dilution of this Court's firm commitment to the Fourteenth Amendment's prohibition of racial discrimination." *Ibid.*

The need for strict scrutiny is no less important here, where prison officials cite racial violence as the reason for their policy. As we have recognized in the past, racial classifications "threaten to stigmatize individuals by reason of their membership in a racial group and to *incite racial hostility.*" *Shaw, supra,* at 643, 113 S.Ct. 2816 (citing *J.A. Croson Co., supra,* at 493, 109 S.Ct. 706 (plurality opinion); emphasis added). Indeed, by insisting that inmates be housed only with other inmates of the same race, it is possible that prison officials will breed further hostility among prisoners and reinforce racial and ethnic divisions. By perpetuating the notion that race matters most, racial segregation of inmates "may exacerbate the very patterns of [violence that it is] said to counteract." *Shaw, supra,* at 648, 113 S.Ct. 2816; see also Trulson & Marquart, The Caged Melting Pot: Toward an Understanding of the Consequences of Desegregation in Prisons, 36 Law & Soc. Rev. 743, 774 (2002) (in a study of prison desegregation, finding that "over [10 years] the rate of violence between inmates segregated by race in double cells surpassed the rate among those ***508** racially integrated"). See also Brief for Former State Corrections Officials as *Amici Curiae* 19 (opinion of former corrections officials from six States that "racial integration of cells tends to diffuse racial tensions and thus diminish interracial violence" and that "a blanket ****1148** policy of racial segregation of inmates is contrary to sound prison management").

The CDC's policy is unwritten. Although California claimed at oral argument that two other States follow a similar policy, see Tr. of Oral Arg. 30–31, this assertion was unsubstantiated, and we are unable to confirm or deny its accuracy.[2] Virtually

all other States and the Federal Government manage their prison systems without reliance on racial segregation. See Brief for United States as *Amicus Curiae* 24. Federal regulations governing the Federal Bureau of Prisons (BOP) expressly prohibit racial segregation. 28 CFR § 551.90 (2004) ("[BOP] staff shall not discriminate ***509** against inmates on the basis of race, religion, national origin, sex, disability, or political belief. This includes the making of administrative decisions and providing access to work, housing and programs"). The United States contends that racial integration actually "leads to less violence in BOP's institutions and better prepares inmates for re-entry into society." Brief for United States as *Amicus Curiae* 25. Indeed, the United States argues, based on its experience with the BOP, that it is possible to address "concerns of prison security through individualized consideration without the use of racial segregation, unless warranted as a necessary and temporary response to a race riot or other serious threat of race-related violence." *Id.,* at 24. As to transferees, in particular, whom the CDC has already evaluated at least once, it is not clear why more individualized determinations are not possible.

Because the CDC's policy is an express racial classification, it is "immediately suspect." *Shaw,* 509 U.S., at 642, 113 S.Ct. 2816; see also *Washington v. Seattle School Dist. No. 1,* 458 U.S. 457, 485, 102 S.Ct. 3187, 73 L.Ed.2d 896 (1982). We therefore hold that the Court of Appeals erred when it failed to apply strict scrutiny to the CDC's policy and to require the CDC to demonstrate that its policy is narrowly tailored to serve a compelling state interest.

B

The CDC invites us to make an exception to the rule that strict scrutiny applies to all racial classifications, and instead to apply the deferential standard of review articulated in *Turner v. Safley,* 482 U.S. 78, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987), because its segregation policy applies only ****1149** in the prison context. We decline the invitation. In *Turner,* we considered a claim by Missouri prisoners that regulations restricting inmate marriages and inmate-to-inmate correspondence were unconstitutional. *Id.,* at 81, 107 S.Ct. 2254. We rejected the prisoners' argument that the regulations should be subject to strict scrutiny, asking instead whether the regulation that burdened the prisoners' ***510** fundamental rights was "reasonably related" to "legitimate penological interests." *Id.,* at 89, 107 S.Ct. 2254.

We have never applied *Turner* to racial classifications. *Turner* itself did not involve any racial classification, and it cast no doubt on *Lee.* We think this unsurprising, as we have applied *Turner's* reasonable-relationship test *only* to rights that are "inconsistent with proper incarceration." *Overton v. Bazzetta,* 539 U.S. 126, 131, 123 S.Ct. 2162, 156 L.Ed.2d 162 (2003); see also *Pell v. Procunier,* 417 U.S. 817, 822, 94 S.Ct. 2800, 41 L.Ed.2d 495 (1974) ("[A] prison inmate retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system"). This is because certain privileges and rights must necessarily be limited in the prison context. See *O'Lone v. Estate of Shabazz,* 482 U.S. 342, 348, 107 S.Ct. 2400, 96 L.Ed.2d 282 (1987) (" '[L]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system' " (quoting *Price v. Johnston,* 334 U.S. 266, 285, 68 S.Ct. 1049, 92 L.Ed. 1356 (1948))). Thus, for example, we have relied on *Turner* in addressing First Amendment challenges to prison regulations, including restrictions on freedom of association, *Overton, supra;* limits on inmate correspondence, *Shaw v. Murphy,* 532 U.S. 223, 121 S.Ct. 1475, 149 L.Ed.2d 420 (2001); restrictions on inmates' access to courts, *Lewis v. Casey,* 518 U.S. 343, 116 S.Ct. 2174, 135 L.Ed.2d 606 (1996); restrictions on receipt of subscription publications, *Thornburgh v. Abbott,* 490 U.S. 401, 109 S.Ct. 1874, 104 L.Ed.2d 459 (1989); and work rules limiting prisoners' attendance at religious services, *Shabazz, supra.* We have also applied *Turner* to some due process claims, such as involuntary medication of mentally ill prisoners, *Washington v. Harper,* 494 U.S. 210, 110 S.Ct. 1028, 108 L.Ed.2d 178 (1990); and restrictions on the right to marry, *Turner, supra.*

The right not to be discriminated against based on one's race is not susceptible to the logic of *Turner.* It is not a right that need necessarily be compromised for the sake of proper prison administration. On the contrary, compliance with the Fourteenth Amendment's ban on racial discriminationis ***511** not only consistent with proper prison administration, but also bolsters the legitimacy of the entire criminal justice system. Race discrimination is "especially pernicious in the administration of justice." *Rose v. Mitchell,* 443 U.S. 545, 555, 99 S.Ct. 2993, 61 L.Ed.2d 739 (1979). And public respect for our system of justice is undermined when the system discriminates based on race. Cf. *Batson v. Kentucky,* 476 U.S. 79, 99, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986) ("[P]ublic respect for our criminal justice system and the rule of law will be

strengthened if we ensure that no citizen is disqualified from jury service because of his race"). When government officials are permitted to use race as a proxy for gang membership and violence without demonstrating a compelling government interest and proving that their means are narrowly tailored, society as a whole suffers. For similar reasons, we have not used *Turner* to evaluate Eighth Amendment claims of cruel and unusual punishment in prison. We judge violations ****1150** of that Amendment under the "deliberate indifference" standard, rather than *Turner's* "reasonably related" standard. See *Hope v. Pelzer,* 536 U.S. 730, 738, 122 S.Ct. 2508, 153 L.Ed.2d 666 (2002) (asking whether prison officials displayed " 'deliberate indifference' to the inmates' health or safety" where an inmate claimed that they violated his rights under the Eighth Amendment (quoting *Hudson v. McMillian,* 503 U.S. 1, 8, 112 S.Ct. 995, 117 L.Ed.2d 156 (1992))). This is because the integrity of the criminal justice system depends on full compliance with the Eighth Amendment. See *Spain v. Procunier,* 600 F.2d 189, 193–194 (C.A.9 1979) (Kennedy, J.) ("[T]he full protections of the eighth amendment most certainly remain in force [in prison]. The whole point of the amendment is to protect persons convicted of crimes. ... Mechanical deference to the findings of state prison officials in the context of the eighth amendment would reduce that provision to a nullity in precisely the context where it is most necessary").

In the prison context, when the government's power is at its apex, we think that searching judicial review of racial classifications is necessary to guard against invidious discrimination. ***512** Granting the CDC an exemption from the rule that strict scrutiny applies to all racial classifications would undermine our "unceasing efforts to eradicate racial prejudice from our criminal justice system." *McCleskey v. Kemp,* 481 U.S. 279, 309, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987) (internal quotation marks omitted).

The CDC argues that "[d]eference to the particular expertise of prison officials in the difficult task of managing daily prison operations" requires a more relaxed standard of review for its segregation policy. Brief for Respondents 18. But we have refused to defer to state officials' judgments on race in other areas where those officials traditionally exercise substantial discretion. For example, we have held that, despite the broad discretion given to prosecutors when they use their peremptory challenges, using those challenges to strike jurors on the basis of their race is impermissible. See *Batson, supra,* at 89–96, 106 S.Ct. 1712. Similarly, in the redistricting context, despite the traditional deference given to States when they design their electoral districts, we have subjected redistricting plans to strict scrutiny when States draw district lines based predominantly on race. Compare generally *Vieth v. Jubelirer,* 541 U.S. 267, 124 S.Ct. 1769, 158 L.Ed.2d 546 (2004) (partisan gerrymandering), with *Shaw v. Reno,* 509 U.S. 630, 113 S.Ct. 2816, 125 L.Ed.2d 511 (1993) (racial gerrymandering).

We did not relax the standard of review for racial classifications in prison in *Lee,* and we refuse to do so today. Rather, we explicitly reaffirm what we implicitly held in *Lee:* The "necessities of prison security and discipline," 390 U.S., at 334, 88 S.Ct. 994, are a compelling government interest justifying only those uses of race that are narrowly tailored to address those necessities. See *Grutter,* 539 U.S., at 353, 123 S.Ct. 2325 (THOMAS, J., concurring in part and dissenting in part) (citing *Lee* for the principle that "protecting prisoners from violence might justify narrowly tailored racial discrimination"); *J.A. Croson Co.,* 488 U.S., at 521, 109 S.Ct. 706 (SCALIA, J., concurring in judgment) (citing *Lee* for the proposition that "only a social emergency rising to the level of imminent danger to life and limb—for ***513** example, a prison race riot, requiring temporary segregation of inmates—can justify an exception to the principle embodied in the Fourteenth Amendment that '[o]ur Constitution is color-blind, and neither knows nor tolerates classes among citizens' " (quoting ****1151** *Plessy v. Ferguson,* 163 U.S. 537, 559, 16 S.Ct. 1138, 41 L.Ed. 256 (1896) (Harlan, J., dissenting))); see also *Pell,* 417 U.S., at 823, 94 S.Ct. 2800 ("[C]entral to all other corrections goals is the institutional consideration of internal security within the corrections facilities themselves").

Justice THOMAS would subject race-based policies in prisons to *Turner's* deferential standard of review because, in his view, judgments about whether race-based policies are necessary "are better left in the first instance to the officials who run our Nation's prisons." *Post,* at 1168. But *Turner* is too lenient a standard to ferret out invidious uses of race. *Turner* requires only that the policy be "reasonably related" to "legitimate penological interests." 482 U.S., at 89, 107 S.Ct. 2254. *Turner* would allow prison officials to use race-based policies even when there are race-neutral means to accomplish the same goal, and even when the race-based policy does not in practice advance that goal. See, *e.g.,* 321 F.3d, at 803 (case below) (reasoning that, under *Turner,* the Court of Appeals did "not have to agree that the policy actually advances the CDC's legitimate interest, but only [that] 'defendants might reasonably have thought that the policy would advance its interests' "). See also *Turner, supra,* at 90, 107 S.Ct. 2254 (warning that *Turner* is not a "least restrictive alternative test" (internal quotation marks omitted)).

For example, in Justice THOMAS' world, prison officials could segregate visiting areas on the ground that racial mixing

would cause unrest in the racially charged prison atmosphere. Under *Turner,* "[t]he prisoner would have to prove that there would *not* be a riot[.] [But] [i]t is certainly 'plausible' that such a riot could ensue: our society, as well as our prisons, contains enough racists that almost any interracial interaction could potentially lead to conflict." ***514** 336 F.3d, at 1120 (case below) (Ferguson, J., dissenting from denial of rehearing en banc). Indeed, under Justice THOMAS' view, there is no obvious limit to permissible segregation in prisons. It is not readily apparent why, if segregation in reception centers is justified, segregation in the dining halls, yards, and general housing areas is not also permissible. Any of these areas could be the potential site of racial violence. If Justice THOMAS' approach were to carry the day, even the blanket segregation policy struck down in *Lee* might stand a chance of survival if prison officials simply asserted that it was necessary to prison management. We therefore reject the *Turner* standard for racial classifications in prisons because it would make rank discrimination too easy to defend.

The CDC protests that strict scrutiny will handcuff prison administrators and render them unable to address legitimate problems of race-based violence in prisons. See also *post,* at 1161–1162, 1170–1171 (THOMAS, J., dissenting). Not so. Strict scrutiny is not "strict in theory, but fatal in fact." *Adarand,* 515 U.S., at 237, 115 S.Ct. 2097 (internal quotation marks omitted); *Grutter,* 539 U.S., at 326–327, 123 S.Ct. 2325 ("Although all governmental uses of race are subject to strict scrutiny, not all are invalidated by it"). Strict scrutiny does not preclude the ability of prison officials to address the compelling interest in prison safety. Prison administrators, however, will have to demonstrate that any race-based policies are narrowly tailored to that end. See *id.,* at 327, 123 S.Ct. 2325 ("When race-based action is necessary to further a compelling governmental interest, such action does not violate the constitutional guarantee of equal protection so long as the narrow-tailoring requirement is ****1152** also satisfied").[3]

***515** The fact that strict scrutiny applies "says nothing about the ultimate validity of any particular law; that determination is the job of the court applying strict scrutiny." *Adarand, supra,* at 229–230, 115 S.Ct. 2097. At this juncture, no such determination has been made. On remand, the CDC will have the burden of demonstrating that its policy is narrowly tailored with regard to new inmates as well as transferees. Prisons are dangerous places, and the special circumstances they present may justify racial classifications in some contexts. Such circumstances can be considered in applying strict scrutiny, which is designed to take relevant differences into account.

III

We do not decide whether the CDC's policy violates the Equal Protection Clause. We hold only that strict scrutiny is the proper standard of review and remand the case to allow the Court of Appeals for the Ninth Circuit, or the District Court, to apply it in the first instance. See *Consolidated Rail Corporation v. Gottshall,* 512 U.S. 532, 557–558, 114 S.Ct. 2396, 129 L.Ed.2d 427 (1994) (reversing and remanding for the lower court to apply the correct legal standard in the first instance); *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 1031–1032, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992) (same). The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

THE CHIEF JUSTICE took no part in the decision of this case.

Justice GINSBURG, with whom Justice SOUTER and Justice BREYER join, concurring.

***516** I join the Court's opinion, subject to the reservation expressed in *Grutter v. Bollinger,* 539 U.S. 306, 344–346, 123 S.Ct. 2325, 156 L.Ed.2d 304 (2003) (GINSBURG, J., concurring).

The Court today resoundingly reaffirms the principle that state-imposed racial segregation is highly suspect and cannot be justified on the ground that " 'all persons suffer [the separation] in equal degree.' " *Ante,* at 1147 (quoting *Powers v. Ohio,* 499 U.S. 400, 410, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991)). While I join that declaration without reservation, I write separately to express again my conviction that the same standard of review ought not control judicial inspection of every official race classification. As I stated most recently in *Gratz v. Bollinger,* 539 U.S. 244, 301, 123 S.Ct. 2411, 156 L.Ed.2d 257 (2003) (dissenting opinion): "Actions designed to burden groups long denied full citizenship stature are not sensibly ranked with measures ****1153** taken to hasten the day when entrenched discrimination and its aftereffects have been extirpated." See also *Grutter,* 539 U.S., at 344–346, 123 S.Ct. 2325 (GINSBURG, J., concurring); *Adarand Constructors, Inc. v. Peña,* 515 U.S. 200, 271–276, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995) (GINSBURG, J., dissenting).

There is no pretense here, however, that the California Department of Corrections (CDC) installed its segregation policy to "correct inequalities." See Wechsler, The Nationalization of Civil Liberties and Civil Rights, Supp. to 12 Tex. Q. 10, 23 (1968). Experience in other States and in federal prisons, see *ante,* at 1148; *post,* at 1154–1155 (STEVENS, J., dissenting), strongly suggests that CDC's race-based assignment of new inmates and transferees, administratively convenient as it may be, is not necessary to the safe management of a penal institution.

Disagreeing with the Court that "strict scrutiny" properly applies to any and all racial classifications, see *ante,* at 1146–1148, 1150–1151, 1151–1152, but agreeing that the stereotypical classification at hand warrants rigorous scrutiny, I join the Court's opinion.

Justice STEVENS, dissenting.

***517** In my judgment a state policy of segregating prisoners by race during the first 60 days of their incarceration, as well as the first 60 days after their transfer from one facility to another, violates the Equal Protection Clause of the Fourteenth Amendment. The California Department of Corrections (CDC) has had an ample opportunity to justify its policy during the course of this litigation, but has utterly failed to do so whether judged under strict scrutiny or the more deferential standard set out in *Turner v. Safley,* 482 U.S. 78, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987). The CDC had no incentive in the proceedings below to withhold evidence supporting its policy; nor has the CDC made any offer of proof to suggest that a remand for further factual development would serve any purpose other than to postpone the inevitable. I therefore agree with the submission of the United States as *amicus curiae* that the Court should hold the policy unconstitutional on the current record.

The CDC's segregation policy[1] is based on a conclusive presumption that housing inmates of different races together creates an unacceptable risk of racial violence. Under the policy's logic, an inmate's race is a proxy for gang membership, and gang membership is a proxy for violence. The ***518** CDC, however, has offered scant empirical evidence or expert opinion to justify this use of race under even a minimal level of constitutional scrutiny. The presumption underlying the policy is undoubtedly overbroad. The CDC has made no effort to prove what fraction of new or transferred inmates are members of race-based gangs, nor has it shown more generally that interracial violence is disproportionately ****1154** greater than intraracial violence in its prisons. Proclivity toward racial violence unquestionably varies from inmate to inmate, yet the CDC applies its blunderbuss policy to *all* new and transferred inmates housed in double cells regardless of their criminal histories or records of previous incarceration. Under the CDC's policy, for example, two car thieves of different races—neither of whom has any history of gang involvement, or of violence, for that matter—would be barred from being housed together during their first two months of prison. This result derives from the CDC's inflexible judgment that such integrated living conditions are simply too dangerous. This Court has never countenanced such racial prophylaxis.

To establish a link between integrated cells and violence, the CDC relies on the views of two state corrections officials. They attested to their belief that double-celling members of different races would lead to violence and that this violence would spill out into the prison yards. One of these officials, an associate warden, testified as follows:

> "[W]ith the Asian population, the control sergeants have to be more careful than they do with Blacks, Whites, and Hispanics because, for example, you cannot house a Japanese inmate with a Chinese inmate. You cannot. They will kill

each other. They won't even tell you about it. They will just do it. The same with Laotians, Vietnamese, Cambodians, Filipinos. You have to be very careful about housing other Asians with other Asians. It's very culturally heavy." App. 189a.

***519** Such musings inspire little confidence. Indeed, this comment supports the suspicion that the policy is based on racial stereotypes and outmoded fears about the dangers of racial integration. This Court should give no credence to such cynical, reflexive conclusions about race. See, *e.g., Palmore v. Sidoti,* 466 U.S. 429, 432, 104 S.Ct. 1879, 80 L.Ed.2d 421 (1984) ("Classifying persons according to their race is more likely to reflect racial prejudice than legitimate public concerns; the race, not the person, dictates the category"); *Watson v. Memphis,* 373 U.S. 526, 536, 83 S.Ct. 1314, 10 L.Ed.2d 529 (1963) (rejecting the city's plea for delay in desegregating public facilities when "neither the asserted fears of violence and tumult nor the asserted inability to preserve the peace was demonstrated at trial to be anything more than personal speculations or vague disquietudes of city officials").

The very real risk that prejudice (whether conscious or not) partly underlies the CDC's policy counsels in favor of relaxing the usual deference we pay to corrections officials in these matters. We should instead insist on hard evidence, especially given that California's policy is an outlier when compared to nationwide practice. The Federal Bureau of Prisons administers 104 institutions; no similar policy is applied in any of them. Countless state penal institutions are operated without such a policy. An *amici* brief filed by six former state corrections officials with an aggregate of over 120 years of experience managing prison systems in Wisconsin, Georgia, Oklahoma, Kansas, Alaska, and Washington makes clear that a blanket policy of even temporary segregation runs counter to the great weight of professional opinion on sound prison management. See Brief for Former State Corrections Officials as *Amici Curiae* 19. Tellingly, the CDC can only point to two other States, Texas and Oklahoma, that use racial status in assigning inmates in prison reception areas. It is doubtful from the record that these States' policies have the same broad and inflexible sweep as California's, and this is ultimately beside the point. What is important is that the Federal Government ****1155** and the vast ***520** majority of States address the threat of interracial violence in prisons without resorting to the expedient of segregation.

In support of its policy, the CDC offers poignant evidence that its prisons are infested with violent race-based gangs. The most striking of this evidence involves a series of riots that took place between 1998 and 2001 at Pelican Bay State Prison. That prison houses some of the State's most violent criminal offenders, including "validated" gang members who have been transferred from other prisons. The riots involved both interracial and intraracial violence. In the most serious incident, involving 250–300 inmates, "Southern Hispanic" gang members, joined by some white inmates, attacked a number of black inmates.

Our judicial role, however, requires that we scratch below the surface of this evidence, lest the sheer gravity of a threat be allowed to authorize any policy justified in its name. Upon inspection, the CDC's *post hoc,* generalized evidence of gang violence is only tenuously related to its segregation policy. Significantly, the CDC has not cited a single specific incident of interracial violence between cellmates—much less a *pattern* of such violence—that prompted the adoption of its unique policy years ago. Nor is there any indication that antagonism between cellmates played any role in the more recent riots the CDC mentions. And despite the CDC's focus on prison gangs and its suggestion that such gangs will recruit new inmates into committing racial violence during their 60–day stays in the reception centers, the CDC has cited no evidence of such recruitment, nor has it identified any instances in which new inmates committed racial violence against other new inmates in the common areas, such as the yard or the cafeteria. Perhaps the CDC's evidence might provide a basis for arguing that at Pelican Bay and other facilities that have experienced similar riots, some race-conscious measures are justified if properly tailored. See *Lee v. Washington,* 390 U.S. 333, 334, 88 S.Ct. 994, 19 L.Ed.2d 1212 (1968) (Black, J., concurring). But even if the incidents cited by the CDC, ***521** which occurred in the general prison population, were relevant to the conditions in the reception centers, they provide no support for the CDC's decision to apply its segregation policy to *all* of its reception centers, without regard for each center's security level or history of racial violence. Nor do the incidents provide any support for a policy applicable only to cellmates, while the common areas of the prison in which the disturbances occurred remain fully integrated.

Given the inherent indignity of segregation and its shameful historical connotations, one might assume that the CDC came to its policy only as a last resort. Distressingly, this is not so: There is no evidence that the CDC has ever experimented with, or even carefully considered, race-neutral methods of achieving its goals. That the policy is unwritten reflects, I think, the evident lack of deliberation that preceded its creation.

Specifically, the CDC has failed to explain why it could not, as an alternative to automatic segregation, rely on an

individualized assessment of each inmate's risk of violence when assigning him to a cell in a reception center. The Federal Bureau of Prisons and other state systems do so without any apparent difficulty. For inmates who are being transferred from one facility to another—who represent approximately 85% of those subject to the segregation policy—the CDC can simply examine their prison records to determine if they have any known gang affiliations or if they have ever engaged in or threatened ****1156** racial violence. For example, the CDC has had an opportunity to observe petitioner for almost 20 years; surely the CDC could have determined his placement without subjecting him to a period of segregation.[2] For new inmates, assignments can be based on their ***522** presentence reports, which contain information about offense conduct, criminal record, and personal history—including any available information about gang affiliations. In fact, state law requires the county probation officer to transmit a presentence report to the CDC along with an inmate's commitment papers. See Cal.Penal Code Ann. § 1203c (West 2004); Cal. Rule of Court 4.411(d) (Criminal Cases) (West Supp.2004).

Despite the rich information available in these records, the CDC considers these records only rarely in assigning inmates to cells in the reception centers. The CDC's primary explanation for this is administrative inefficiency—the records, it says, simply do not arrive in time. The CDC's counsel conceded at oral argument that presentence reports "have a fair amount of information," but she stated that, "in California, the presentence report does not always accompany the inmate and frequently does not. It follows some period of time later from the county." Tr. of Oral Arg. 33. Despite the state-law requirement to the contrary, counsel informed the Court that the counties are not preparing the presentence reports "in a timely fashion." *Ibid.* Similarly, with regard to transferees, counsel stated that their prison records do not arrive at the reception centers in time to make cell assignments. *Id.,* at 28. Even if such inefficiencies might explain a temporary expedient in some cases, they surely do not justify a systemwide policy. When the State's interest in administrative convenience is pitted against the Fourteenth Amendment's ban on racial segregation, the latter must prevail. When there has been no "serious, good faith consideration of workable race-neutral alternatives that will achieve the [desired goal]," ***523** *Grutter v. Bollinger,* 539 U.S. 306, 339, 123 S.Ct. 2325, 156 L.Ed.2d 304 (2003), and when "obvious, easy alternatives" are available, *Turner,* 482 U.S., at 90, 107 S.Ct. 2254, the conclusion that CDC's policy is unconstitutional is inescapable regardless of the standard of review that the Court chooses to apply.[3]

In fact, the CDC's failure to demand timely presentence reports and prison records undercuts the sincerity of its concern for inmate security during the reception process. Race is an unreliable and necessarily ****1157** underinclusive predictor of violence. Without the inmate-specific information found in the records, there is a risk that corrections officials will, for example, house together inmates of the same race who are nevertheless members of rival gangs, such as the Bloods and Crips.[4]

Accordingly, while I agree that a remand is appropriate for a resolution of the issue of qualified immunity, I respectfully dissent from the Court's refusal to decide, on the basis of the record before us, that the CDC's policy is unconstitutional.

Justice THOMAS, with whom Justice SCALIA joins, dissenting.

***524** The questions presented in this case require us to resolve two conflicting lines of precedent. On the one hand, as the Court stresses, this Court has said that " '*all* racial classifications reviewable under the Equal Protection Clause must be strictly scrutinized.' " *Gratz v. Bollinger,* 539 U.S. 244, 270, 123 S.Ct. 2411, 156 L.Ed.2d 257 (2003) (quoting *Adarand Constructors, Inc. v. Peña,* 515 U.S. 200, 224, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995); emphasis added). On the other, this Court has no less categorically said that "the [relaxed] standard of review we adopted in *Turner* [*v. Safley,* 482 U.S. 78, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987),] applies to *all* circumstances in which the needs of prison administration implicate constitutional rights." *Washington v. Harper,* 494 U.S. 210, 224, 110 S.Ct. 1028, 108 L.Ed.2d 178 (1990) (emphasis added).

Emphasizing the former line of cases, the majority resolves the conflict in favor of strict scrutiny. I disagree. The Constitution has always demanded less within the prison walls. Time and again, even when faced with constitutional rights no less "fundamental" than the right to be free from state-sponsored racial discrimination, we have deferred to the reasonable judgments of officials experienced in running this Nation's prisons. There is good reason for such deference in this case. California oversees roughly 160,000 inmates in prisons that have been a breeding ground for some of the most violent prison gangs in America—all of them organized along racial lines. In that atmosphere, California racially segregates a portion of its inmates, in a part of its prisons, for brief periods of up to 60 days, until the State can arrange permanent housing. The majority is concerned with sparing inmates the indignity and stigma of racial discrimination. *Ante,* at 1147–1148. California

is concerned with their safety and saving their lives. I respectfully dissent.

***525** I

To understand this case, one must understand just how limited the policy at issue is. That requires more factual background than the Court's opinion provides. Petitioner Garrison Johnson is a black inmate in the California Department of Corrections (CDC), currently serving his sentence for murder, robbery, and assault with a deadly weapon. App. 255a–256a, 259a. Johnson began serving his sentence in June 1987 at the California Institution for Men in Chino, California. ****1158** *Id.,* at 79a, 264a. Since that time he has been transferred to a number of other facilities within the CDC. *Id.,* at 79a–82a.

When an inmate like Johnson is admitted into the California prison system or transferred between the CDC's institutions, he is housed initially for a brief period—usually no more than 60 days—in one of California's prison reception centers for men. *Id.,* at 303a–305a. CDC, Department Operations Manual § 61010.3 (2004) (hereinafter CDC Operations Manual), available at http://www. corr.ca.gov/RegulationsPolicies/PDF/DOM/00_dept_ops_maunal.pdf (all Internet materials as visited Feb. 18, 2005, and available in Clerk of Court's case file). In 2003, the centers processed more than 40,000 newly admitted inmates, almost 72,000 inmates returned from parole, over 14,000 inmates admitted for other reasons, and some portion of the 254,000 inmates who were transferred from one prison to another. CDC, Movement of Prison Population 3 (2003).

At the reception center, prison officials have limited information about an inmate, "particularly if he has never been housed in any CDC facility." App. 303a. The inmate therefore is classified so that prison officials can place the inmate in appropriate permanent housing. During this process, the CDC evaluates the inmate's "physical, mental and emotional health." *Ibid.* The CDC also reviews the inmate's criminal ***526** history and record in jail to assess his security needs and classification level. *Id.,* at 304a. Finally, the CDC investigates whether the inmate has any enemies in prison. *Ibid.* This process determines the inmate's ultimate housing placement and has nothing to do with race.

While the process is underway, the CDC houses the inmate in a one-person cell, a two-person cell, or a dormitory. *Id.,* at 305a. The few single cells available at reception centers are reserved for inmates who present special security problems, including those convicted of especially heinous crimes or those in need of protective custody. See, *e.g.,* CDC Operations Manual § 61010.11.3. At the other end of the spectrum, lower risk inmates are assigned to dormitories. App. 189a–190a. Placement in either a single cell or a dormitory has nothing to do with race, except that prison officials attempt to maintain a racial balance within each dormitory. *Id.,* at 250a. Inmates placed in single cells or dormitories lead fully integrated lives: The CDC does not distinguish based on race at any of its facilities when it comes to jobs, meals, yard and recreation time, or vocational and educational assignments. *Ibid.*

Yet some prisoners, like Johnson, neither require confinement in a single cell nor may be safely housed in a dormitory. The CDC houses these prisoners in double cells during the 60–day period. In pairing cellmates, race is indisputably the predominant factor. *Id.,* at 305a, 309a. California's reason is simple: Its prisons are dominated by violent gangs. Brief for Respondents 1–5. And as the largest gangs' names indicate—the Aryan Brotherhood, the Black Guerrilla Family, the Mexican Mafia, the Nazi Low Riders, and La Nuestra Familia—they are organized along racial lines. See Part II–B, *infra.*

According to the State, housing inmates in double cells without regard to race threatens not only prison discipline, but also the physical safety of inmates and staff. App. 305a–306a, 310a–311a. That is because double cells are especially ***527** dangerous. The risk of racial violence in public areas of prisons is high, and the tightly confined, private conditions of cells hazard even more violence. Prison staff cannot ****1159** see into the cells without going up to them, and inmates can cover the windows to prevent the staff from seeing inside the cells. *Id.,* at 306a. The risk of violence caused by this privacy is grave, for inmates are confined to their cells for much of the day. *Ibid.; id.,* at 187a–188a.

Nevertheless, while race is the predominant factor in pairing cellmates, it is hardly the only one. After dividing this subset of inmates based on race, the CDC further divides them based on geographic or national origin. As an example, Hispanics from

northern and southern California are not housed together in reception centers because they often belong to rival gangs—La Nuestra Familia and the Mexican Mafia, respectively. *Id.,* at 185a. Likewise, Chinese and Japanese inmates are not housed together, nor are Cambodians, Filipinos, Laotians, or Vietnamese. *Id.,* at 189a. In addition to geographic and national origin, prison officials consider a host of other factors, including inmates' age, mental health, medical needs, criminal history, and gang affiliation. *Id.,* at 304a, 309a. For instance, when Johnson was admitted in 1987, he was a member of the Crips, a black street gang. *Id.,* at 93a. He was therefore ineligible to be housed with nonblack inmates. *Id.,* at 183a; Brief for Respondents 12, n. 9.

Moreover, while prison officials consider race in assigning inmates to double cells, the record shows that inmates are not necessarily housed with other inmates of the same race during that 60–day period. When a Hispanic inmate affiliated with the Crips asked to be housed at the reception center with a black inmate, for example, prison administrators granted his request. App. 183a–184a, 199a. Such requests are routinely granted after the 60–day period, when prison officials complete the classification process and transfer an ***528** inmate from the reception center to a permanent placement at that prison or another one.[1] *Id.,* at 311a–312a.

II

Traditionally, federal courts rarely involved themselves in the administration of state prisons, "adopt[ing] a broad hands-off attitude toward problems of prison administration."[2] *Procunier v. Martinez,* 416 U.S. 396, 404, 94 S.Ct. 1800, 40 L.Ed.2d 224 (1974). For most of this Nation's ****1160** history, only law-abiding citizens could claim the cover of the Constitution: Upon conviction and incarceration, defendants forfeited their constitutional rights and possessed instead only those rights that the State chose to extend them. See, *e.g., Shaw v. Murphy,* 532 U.S. 223, 228, 121 S.Ct. 1475, 149 L.Ed.2d 420 (2001); *Ruffin v. Commonwealth,* 62 Va. 790, 796 (1871). In recent decades, however, this Court has decided ***529** that incarceration does not divest prisoners of all constitutional protections. See, *e.g., Wolff v. McDonnell,* 418 U.S. 539, 555–556, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974) (the right to due process); *Cruz v. Beto,* 405 U.S. 319, 322, 92 S.Ct. 1079, 31 L.Ed.2d 263 (1972) (per curiam) (the right to free exercise of religion).[3]

At the same time, this Court quickly recognized that the extension of the Constitution's demands behind prison walls had to accommodate the needs of prison administration. This Court reached that accommodation in *Turner v. Safley,* 482 U.S. 78, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987), which "adopted a unitary, deferential standard for reviewing prisoners' constitutional claims," *Shaw, supra,* at 229, 113 S.Ct. 2816. That standard should govern Johnson's claims, as it has governed a host of other claims challenging conditions of confinement, even when restricting the rights at issue would otherwise have occasioned strict scrutiny. Under the *Turner* standard, the CDC's policy passes constitutional muster because it is reasonably related to legitimate penological interests.

A

Well before *Turner,* this Court recognized that experienced prison administrators, and not judges, are in the best position to supervise the daily operations of prisons across this country. See, *e.g., Jones v. North Carolina Prisoners' Labor Union, Inc.,* 433 U.S. 119, 125, 97 S.Ct. 2532, 53 L.Ed.2d 629 (1977) (courts must give "appropriate deference to the decisions of prison administrators"); *Procunier, supra,* at 405, 94 S.Ct. 1800 ("[C]ourts are ill equipped to deal with the increasingly urgent problems of prison administration ***530** and reform"). *Turner* made clear that a deferential standard of review would apply across the board to inmates' constitutional challenges to prison policies.

At issue in *Turner* was the constitutionality of a pair of Missouri prison regulations limiting inmate-to-inmate correspondence and inmate marriages. The Court's analysis proceeded in two steps. First, the Court recognized that prisoners are not entirely without constitutional rights. As proof, it listed certain constitutional rights retained by prisoners, including the right to be "protected against invidious racial discrimination ..., *Lee v. Washington,* 390 U.S. 333, 88 S.Ct. 994, 19 L.Ed.2d 1212 (1968)." *Turner,* 482 U.S., at 84, 107 S.Ct. 2254. Second, the Court concluded that for prison administrators rather than courts to " 'make the difficult judgments concerning institutional operations,' " *id.,* at 89, 107 S.Ct. 2254 (quoting *Jones, supra,* at 128, 97 S.Ct. 2532), courts should ****1161** uphold prison regulations that impinge on those constitutional rights if they reasonably relate to legitimate penological interests, 482 U.S., at 89, 107 S.Ct. 2254. Nowhere did the Court suggest that *Lee's* right to be free from racial discrimination was immune from *Turner's* deferential standard of review. To the contrary, "[w]e made quite clear that the standard of review we adopted in *Turner* applies to *all* circumstances in which the needs of prison administration implicate constitutional rights." *Harper,* 494 U.S., at 224, 110 S.Ct. 1028 (emphasis added).

Consistent with that understanding, this Court has applied *Turner's* standard to a host of constitutional claims by prisoners, regardless of the standard of review that would apply outside prison walls.[4] And this Court has adhered to ***531** *Turner* despite being urged to adopt different standards of review based on the constitutional provision at issue. See *Harper, supra,* at 224, 110 S.Ct. 1028 (*Turner's* standard of review "appl [ies] in all cases in which a prisoner asserts that a prison regulation violates the Constitution, *not just those in which the prisoner invokes the First Amendment*" (emphasis added)); *O'Lone v. Estate of Shabazz,* 482 U.S. 342, 353, 107 S.Ct. 2400, 96 L.Ed.2d 282 (1987) ("We take this opportunity to reaffirm our refusal, *even where claims are made under the First Amendment,* to substitute our judgment on ... difficult and sensitive matters of institutional administration for the determinations of those charged with the formidable task of running a prison" (internal quotation marks and citation omitted; emphasis added)). Our steadfast adherence makes sense: If *Turner* is our accommodation of the Constitution's demands to those of prison administration, see *supra,* at 1160–1161, we should apply it uniformly to prisoners' challenges to their conditions of confinement.

After all, Johnson's claims, even more than other claims to which we have applied *Turner's* test, implicate *Turner's* rationale. In fact, in a passage that bears repeating, the *Turner* Court explained precisely why deference to the judgments of California's prison officials is necessary:

> "Subjecting the day-to-day judgments of prison officials to an inflexible strict scrutiny analysis would seriously hamper their ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration. The rule would also distort the decisionmaking process, for every administrative judgment would be subject to the possibility that some court somewhere would conclude that it had a less restrictive way of solving the problem at hand. Courts inevitably would become the primary arbiters of what constitutes the best solution to every administrative ***532** problem, thereby unnecessarily perpetuating the involvement of the federal courts in affairs of prison administration." ****1162** 482 U.S., at 89, 107 S.Ct. 2254 (internal quotation marks and alteration omitted).

The majority's failure to heed that advice is inexplicable, especially since *Turner* itself recognized the "growing problem with prison gangs." *Id.,* at 91, 107 S.Ct. 2254. In fact, there is no more "intractable problem" inside America's prisons than racial violence, which is driven by race-based prison gangs. See, *e.g., Dawson v. Delaware,* 503 U.S. 159, 172–173, and n. 1, 112 S.Ct. 1093, 117 L.Ed.2d 309 (1992) (THOMAS, J., dissenting); *Stefanow v. McFadden,* 103 F.3d 1466, 1472 (C.A.9 1996) ("Anyone familiar with prisons understands the seriousness of the problems caused by prison gangs that are fueled by actively virulent racism and religious bigotry").

B

The majority decides this case without addressing the problems that racial violence poses for wardens, guards, and inmates throughout the federal and state prison systems. But that is the core of California's justification for its policy: It maintains that, if it does not racially separate new cellmates thrown together in close confines during their initial admission or transfer, violence will erupt.

The dangers California seeks to prevent are real. See Brief for National Association of Black Law Enforcement Officers, Inc., as *Amicus Curiae* 12. Controlling prison gangs is the central challenge facing correctional officers and administrators. Carlson, Prison Interventions: Evolving Strategies to Control Security Threat Groups, 5 Corrections Mgmt. Q. 10 (Winter 2001) (hereinafter Carlson). The worst gangs are highly regimented and sophisticated organizations that commit crimes ranging from drug trafficking to theft and murder. *Id.,* at 12; Cal. Dept. of Justice, Division of Law Enforcement, Organized Crime in California Annual Report to the California Legislature 2003, p. 15, available ***533** at http://caag.state.ca.us/publications/org_crime.pdf. In fact, street gangs are often just an extension of prison gangs, their " 'foot soldiers' " on the outside. *Ibid.;* Willens, Structure, Content and the Exigencies of War: American Prison Law After Twenty–Five Years 1962–1987, 37 Am. U. L.Rev. 41, 55–56 (1987). And with gang membership on the rise, the percentage of prisoners affiliated with prison gangs more than doubled in the 1990's.[5]

The problem of prison gangs is not unique to California,[6] but California has a history like no other. There are at least five major gangs in this country—the Aryan Brotherhood, the Black Guerrilla Family, the Mexican Mafia, La Nuestra Familia, and the Texas Syndicate—all of which originated in California's prisons.[7] ****1163** Unsurprisingly, then, California has the largest number of gang-related inmates of any correctional system in the country, including the Federal Government. Carlson 16.

As their very names suggest, prison gangs like the Aryan Brotherhood and the Black Guerrilla Family organize themselves along racial lines, and these gangs perpetuate hate and violence. Irwin 182, 184. Interracial murders and assaults ***534** among inmates perpetrated by these gangs are common.[8] And, again, that brutality is particularly severe in California's prisons. See, *e.g., Walker v. Gomez,* 370 F.3d 969, 971 (C.A.9 2004) (describing "history of significant racial tension and violence" at Calipatria State Prison); *id.,* at 979–980 (Rymer, J., dissenting) (same); App. 297a–299a (describing 2–year span at Pelican Bay Prison, during which there were no fewer than nine major riots that left at least one inmate dead and many more wounded).

C

It is against this backdrop of pervasive racial violence that California racially segregates inmates in the reception centers' double cells, for brief periods of up to 60 days, until such time as the State can assign permanent housing. Viewed in that context and in light of the four factors enunciated in *Turner,* California's policy is constitutional: The CDC's policy is reasonably related to a legitimate penological interest; alternative means of exercising the restricted right remain open to inmates; racially integrating double cells might negatively impact prison inmates, staff, and administrators; and there are no obvious, easy alternatives to the CDC's policy.

1

First, the policy is reasonably related to a legitimate penological interest. *Turner, supra,* at 89, 107 S.Ct. 2254. The protection of inmates and staff is undeniably a legitimate penological interest. See *Bell v. Wolfish,* 441 U.S. 520, 546–547, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979). ***535** The evidence shows, and Johnson has never contested, that the objective of California's policy is reducing violence among the inmates and against the staff. No cells are designated for, nor are special privileges afforded to, any racial group. App. 188a, 305a. Because prison administrators use race as a factor in making initial housing assignments "solely on the basis of [its] potential implications for prison security," the CDC's cell assignment practice is neutral. *Thornburgh v. Abbott,* 490 U.S. 401, 415, 109 S.Ct. 1874, 104 L.Ed.2d 459 (1989); *Turner,* 482 U.S., at 90, 107 S.Ct. 2254.

California's policy bears a valid, rational connection to this interest. The racial component to prison violence is impossible for prison administrators to ignore. Johnson himself testified that he is afraid of violence—based solely on the color of his skin.[9] In combating that violence, an inmate's ****1164** arrival or transfer into a new prison setting is a critical time for inmate and staff alike. The policy protects an inmate from other prisoners, and they from him, while prison officials gather more information, including his gang affiliation, about his compatibility with other inmates. App. 249a. This connection between racial violence and the policy makes it far from "arbitrary or irrational." *Turner, supra,* at 89–90, 107 S.Ct. 2254.

Indeed, Johnson concedes that it would be perfectly constitutional for California to take account of race "as part of an overall analysis of proclivity to violence based upon a series of facts existing in that prison." Tr. of Oral Arg. 15. But that is precisely what California does. It takes into account a host of factors in addition to race: geographic or national ***536** origin, age, physical size, mental health, medical needs, criminal history, and, of course, gang affiliation. *Supra,* at 1159. California does not simply assign inmates to double cells in the reception centers based on race—it also separates *intra*racially (for example, northern from southern Hispanics or violent from nonviolent offenders).

2

Second, alternative means of exercising the restricted right remain open to inmates like Johnson. *Turner, supra,* at 90, 107 S.Ct. 2254. The CDC submits, and Johnson does not contest, that all other facets of prison life are fully integrated: work, vocational, and educational assignments; dining halls; and exercise yards and recreational facilities. App. 250a. And after a brief detention period at the reception center, inmates may select their own cellmates regardless of race in the absence of overriding security concerns. *Id.,* at 311a–312a. Simply put, Johnson has spent, and will continue to spend, the vast bulk of his sentence free from any limitation on the race of his cellmate.

3

Third, Johnson fails to establish that the accommodation he seeks—*i.e.,* assigning inmates to double cells without regard to race—would not significantly impact prison personnel, other inmates, and the allocation of prison resources. *Harper,* 494 U.S., at 226–227, 110 S.Ct. 1028; *Turner, supra,* at 90, 107 S.Ct. 2254. Prison staff cannot see into the double cells without going up to them, and inmates can cover the windows so that staff cannot see inside the cells at all. App. 306a. Because of the limited number of staff to oversee the many cells, it "would be very difficult to assist inmates if the staff were needed in several places at one time." *Ibid.* Coordinated gang attacks against nongang cellmates could leave prison officials unable to respond effectively. In any event, diverting prison resources to monitor cells disrupts services elsewhere.

***537** Then, too, fights in the cells are likely to spill over to the exercise yards and common areas. *Ibid.;* see also *id.,* at 187a. As *Turner* made clear: "When accommodation of an asserted right will have a significant 'ripple effect' on fellow inmates or on prison staff, courts should be particularly deferential to the informed discretion of corrections officials." 482 U.S., at 90, 107 S.Ct. 2254; see also *White v. Morris,* 832 F.Supp. 1129, 1130 (S.D.Ohio 1993) (racially integrated double-celling contributed to a race riot in which 10 people were murdered). California prison officials are united in the view that racially integrating double cells in the ****1165** reception centers would lead to serious violence.[10] This is precisely the sort of testimony that the Court found persuasive in *Turner* itself. 482 U.S., at 92, 107 S.Ct. 2254.

4

Finally, Johnson has not shown that there are "obvious, easy alternatives" to the CDC's policy. *Id.,* at 90, 107 S.Ct. 2254. Johnson contends that, for newly admitted inmates, prison officials need only look to the information available in the presentence report that must accompany a convict to prison. See Cal.Penal Code Ann. § 1203(c) (West 2004); Cal. Rules of Ct., Crim., Rule 4.411(d) (West Supp.2004). But prison officials already do this to the extent that they can. Indeed, gang affiliation, not race, is the first factor in determining initial housing assignments. App. 315a. Race becomes the predominant factor only because gang affiliation is often not known, especially with regard to newly admitted inmates. As the Court of Appeals pointed out: "There is little chance ***538** that inmates will be forthcoming about their past violent episodes or criminal gang activity so as to provide an accurate and dependable picture of the inmate." 321 F.3d 791, 806 (C.A.9 2003); see also App. 185a, 189a. Even if the CDC had the manpower and resources to prescreen the more than 40,000 new inmates it receives yearly, leafing through presentence reports would not tell prison officials what they need to know. See *ante,* at 1155–1157 (STEVENS, J., dissenting).

Johnson presents a closer case with regard to the segregation of prisoners whom the CDC transfers between facilities. As I understand it, California has less need to segregate prisoners about whom it already knows a great deal (since they have undergone the initial classification process and been housed for some period of time). However, this does not inevitably mean that racially integrating transferred inmates, while obvious and easy, is a true alternative. For instance, an inmate may have affiliated with a gang since the CDC's last official assessment, or his past lack of racial violence may have been due to the absence of close confinement with members of other races. The CDC's policy does not appear to arise from laziness or neglect; California is a leader in institutional intelligence gathering. See Carlson 16 ("The CDC devotes 75 intelligence staff to gathering and verifying inmate-related information," both in prisons and on the streets). In short, applying the policy to transfers is not "arbitrary or irrational," requiring that we set aside the considered contrary judgment of prison administrators. *Turner, supra,* at 89–90, 107 S.Ct. 2254.

III

The majority claims that strict scrutiny is the applicable standard of review based on this Court's precedents and its general skepticism of racial classifications. It is wrong on both scores.

A

Only once before, in *Lee v. Washington,* 390 U.S. 333, 88 S.Ct. 994, 19 L.Ed.2d 1212 (1968) *(per curiam),* has this Court considered ****1166** the constitutionality ***539** of racial classifications in prisons. The majority claims that *Lee* applied "a heightened standard of review." *Ante,* at 1147. But *Lee* did not address the applicable standard of review. And even if it bore on the standard of review, *Lee* would support the State here.

In *Lee,* a three-judge District Court ordered Alabama to desegregate its prisons under *Brown v. Board of Education,* 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954). *Washington v. Lee,* 263 F.Supp. 327, 331–332 (M.D.Ala.1966). In so doing, the District Court rejected any notion that "consideration[s] of prison security or discipline" justified the "complete and permanent segregation of the races in all the Alabama penal facilities." *Id.,* at 331. However, the District Court noted "that in some isolated instances prison security and discipline necessitates segregation of the races for a limited period." *Ibid.* (footnote omitted). It provided only one example—"the 'tank' used in ... large municipal jails where intoxicated persons are

placed upon their initial incarceration and kept until they become sober," *id.,* at 331, n. 6—and the court left unmentioned why it would have been necessary to separate drunk whites from blacks on a Birmingham Saturday night.

This Court, in a *per curiam,* one-paragraph opinion, affirmed the District Court's order. It found "unexceptionable" not only the District Court's general rule that wholesale segregation of penal facilities was unconstitutional, but also the District Court's "allowance for the necessities of prison security and discipline." *Lee,* 390 U.S., at 334, 88 S.Ct. 994. Indeed, Justices Black, Harlan, and Stewart concurred

> "to make explicit something that is left to be gathered only by implication from the Court's opinion. This is that prison authorities have the right, acting in good faith and in particularized circumstances, to take into account racial tensions in maintaining security, discipline, and good order in prisons and jails." *Ibid.*

***540** Those Justices were "unwilling to assume" that such an "explicit pronouncement [would] evinc[e] any dilution of this Court's firm commitment to the Fourteenth Amendment's prohibition of racial discrimination." *Ibid.*

Lee said nothing about the applicable standard of review, for there was no need. Surely Alabama's wholesale segregation of its prisons was unconstitutional even under the more deferential standard of review that applies within prisons. This Court's brief, *per curiam* opinion in *Lee* simply cannot bear the weight or interpretation the majority places on it. See *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership,* 513 U.S. 18, 24, 115 S.Ct. 386, 130 L.Ed.2d 233 (1994) (noting "our customary skepticism toward *per curiam* dispositions that lack the reasoned consideration of a full opinion"); *Edelman v. Jordan,* 415 U.S. 651, 670–671, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974).

Yet even if *Lee* had announced a heightened standard of review for prison policies that pertain to race, *Lee* also carved out an exception to the standard that California's policy would certainly satisfy. As the *Lee* concurrence explained without objection, the Court's exception for "the necessities of prison security and discipline" meant that "prison authorities have the right, acting in *good faith* and in *particularized circumstances,* to take into account racial tensions in maintaining security, discipline, and good order in prisons and jails." 390 U.S., at 334, 88 S.Ct. 994 (opinion of Black, Harlan, and Stewart, JJ., concurring) (emphasis added).

California's policy—which is a far cry from the wholesale segregation at issue in ****1167** *Lee*—would fall squarely within *Lee's* exception. Johnson has never argued that California's policy is motivated by anything other than a desire to protect inmates and staff. And the "particularized" nature of the policy is evident: It applies only to new inmates and transfers, only in a handful of prisons, only to double cells, and only then for a period of no more than two months. In the name of following a test that *Lee* did not create, the majority ***541** opts for a more demanding standard of review than *Lee's* language even arguably supports.

The majority heavily relies on this Court's statement that " 'all racial classifications [imposed by government] ... must be analyzed by a reviewing court under strict scrutiny.' " *Ante,* at 1146 (emphasis deleted) (quoting *Adarand Constructors, Inc.,* 515 U.S., at 227, 115 S.Ct. 2097). *Adarand* has nothing to do with this case. *Adarand's* statement that "all racial classifications" are subject to strict scrutiny addressed the contention that classifications favoring rather than disfavoring blacks are exempt. *Id.,* at 226–227, 115 S.Ct. 2097; accord, *Grutter v. Bollinger,* 539 U.S. 306, 353, 123 S.Ct. 2325, 156 L.Ed.2d 304 (2003) (THOMAS, J., concurring in part and dissenting in part). None of these statements overruled, *sub silentio, Turner* and its progeny, especially since the Court has repeatedly held that constitutional demands are diminished in the unique context of prisons. See, *e.g., Harper,* 494 U.S., at 224, 110 S.Ct. 1028; *Abbott,* 490 U.S., at 407, 109 S.Ct. 1874; *Turner,* 482 U.S., at 85, 107 S.Ct. 2254; see also *Webster v. Fall,* 266 U.S. 507, 511, 45 S.Ct. 148, 69 L.Ed. 411 (1925) ("Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents").

B

The majority offers various other reasons for applying strict scrutiny. None is persuasive. The majority's main reason is that

"*Turner's* reasonable-relationship test [applies] *only* to rights that are 'inconsistent with proper incarceration.' " *Ante,* at 1149 (quoting *Overton v. Bazzetta,* 539 U.S. 126, 131, 123 S.Ct. 2162, 156 L.Ed.2d 162 (2003)). According to the majority, the question is thus whether a right "need necessarily be compromised for the sake of proper prison administration." *Ante,* at 1149. This inconsistency-with-proper-prison-administration test begs the question at the heart of this case. For a court to know whether any particular right is inconsistent with proper prison administration, it must have some implicit notion of what a proper prison ought to look like and how it ***542** ought to be administered. *Overton, supra,* at 139, 123 S.Ct. 2162 (THOMAS, J., concurring in judgment). But the very issue in this case is whether such second-guessing is permissible.

The majority's test eviscerates *Turner.* Inquiring whether a given right is consistent with "proper prison administration" calls for precisely the sort of judgments that *Turner* said courts were ill equipped to make. In none of the cases in which the Court deferred to the judgments of prison officials under *Turner* did it examine whether "proper" prison security and discipline permitted greater speech or associational rights *(Abbott, supra; Shaw,* 532 U.S. 223, 121 S.Ct. 1475, 149 L.Ed.2d 420; and *Overton, supra)*; expanded access to the courts (*Lewis v. Casey,* 518 U.S. 343, 116 S.Ct. 2174, 135 L.Ed.2d 606 (1996)); broader freedom from bodily restraint *(Harper, supra);* or additional free exercise rights (*O'Lone,* 482 U.S. 342, 107 S.Ct. 2400, 96 L.Ed.2d 282). The Court has steadfastly refused to undertake the threshold standard-of-review inquiry that ****1168** *Turner* settled, and that the majority today resurrects. And with good reason: As *Turner* pointed out, these judgments are better left in the first instance to the officials who run our Nation's prisons, not to the judges who run its courts.

In place of the Court's usual deference, the majority gives conclusive force to its own guesswork about "proper" prison administration. It hypothesizes that California's policy might incite, rather than diminish, racial hostility.[11] ***543** *Ante,* at 1146–1148. The majority's speculations are implausible. New arrivals have a strong interest in promptly convincing other inmates of their willingness to use violent force. See Brief for National Association of Black Law Enforcement Officers, Inc., as *Amicus Curiae* 13–14 (citing commentary and congressional findings); cf. *United States v. Santiago,* 46 F.3d 885, 888 (C.A.9 1995) (describing one Hispanic inmate's murder of another in order to join the Mexican Mafia); *United States v. Silverstein,* 732 F.2d 1338, 1341 (C.A.7 1984) (prospective members of the Aryan Brotherhood must "make bones," or commit a murder, to be eligible for membership). In any event, the majority's guesswork falls far short of the compelling showing needed to overcome the deference we owe to prison administrators.

The majority contends that the Court "[has] put the burden on state actors to demonstrate that their race-based policies are justified," *ante,* at 1147, n. 1, and "[has] refused to defer to state officials' judgments on race in other areas where those officials traditionally exercise substantial discretion," *ante,* at 1150. Yet two Terms ago, in upholding the University of Michigan Law School's affirmative-action program, this Court deferred to the judgment by the law school's faculty and administrators on their need for diversity in the student body. See *Grutter, supra,* at 328, 123 S.Ct. 2325 ("The Law School's educational judgment that ... diversity is essential to its educational mission is one to which we defer"). Deference would seem all the more warranted in the prison context, for whatever the Court knows of administering educational institutions, it knows much less about administering penal ones. The potential consequences of second-guessing the judgments of prison administrators are also much more severe. See *White v. Morris,* 832 F.Supp. 1129, 1130 (S.D.Ohio 1993) (racially integrated double-celling that resulted ***544** from federal consent decree was a factor in the worst prison riot in Ohio history). More importantly, as I have explained, the Court has recognized that the typically exacting review it applies to restrictions on fundamental rights must be relaxed in the unique context of prisons. See, *e.g., Harper,* 494 U.S., at 224, 110 S.Ct. 1028; *Abbott,* 490 U.S., at 407, 109 S.Ct. 1874; ****1169** *Turner,* 482 U.S., at 85, 107 S.Ct. 2254. The majority cannot fall back on the Constitution's usual demands, because those demands have always been lessened inside the prison walls. See *supra,* at 1160.

The majority also mentions that California's policy may be the only one of its kind, as virtually all other States and the Federal Government manage their prison systems without racially segregating inmates. *Ante,* at 1148. This is both irrelevant and doubtful. It is irrelevant because the number of States that have followed California's lead matters not to the applicable standard of review (the only issue the Court today decides), but to whether California satisfies whatever standard applies, a question the majority leaves to be addressed on remand. In other words, the uniqueness of California's policy might show whether the policy is reasonable or narrowly tailored—but deciding whether to apply *Turner* or strict scrutiny in the first instance must depend on something else, like the majority's inconsistency-with-proper-prison-administration test. The commonness of California's housing policy is further irrelevant because strict scrutiny now applies to all claims of racial discrimination in prisons, regardless of whether the policies being challenged are unusual.

The majority's assertion is doubtful, because at least two other States apply similar policies to newly admitted inmates. Both

Oklahoma and Texas, like California, assign newly admitted inmates to racially segregated cells in their prison reception centers.[12] The similarity is not surprising: ***545** States like California and Texas have historically had the most severe problems with prison gangs. However, even States with less severe problems maintain that policies like California's are necessary to deal with race-related prison violence. See Brief for States of Utah, Alabama, Alaska, Delaware, Idaho, Nevada, New Hampshire and North Dakota as *Amici Curiae* 16. Relatedly, 10.3% of all wardens at maximum security facilities in the United States report that their inmates are assigned to racially segregated cells—apparently on a *permanent* basis. Henderson, Cullen, Carroll, & Feinberg, Race, Rights, and Order in Prison: A National Survey of Wardens on the Racial Integration of Prison Cells, 80 Prison J. 295, 304 (Sept.2000). In the same survey, 4.3% of the wardens report that their States have an official policy against racially integrating male inmates in cells. *Id.,* at 302. Presumably, for the remainder of prisons in which inmates are assigned to racially segregated cells, that policy is the result of discretionary decisions by wardens rather than of official state directives. *Ibid.* In any event, the ongoing debate about the best way to reduce racial violence in prisons should not be resolved by judicial decree: It is the job "of prison administrators ... and not the courts, to make the difficult judgments concerning institutional operations." *Jones,* 433 U.S., at 128, 97 S.Ct. 2532.

****1170** The majority also observes that we have already carved out an exception to *Turner* for Eighth Amendment claims of cruel and unusual punishment in prison. See ***546** *Hope v. Pelzer,* 536 U.S. 730, 738, 122 S.Ct. 2508, 153 L.Ed.2d 666 (2002). In that context, we have held that "[a] prison official's 'deliberate indifference' to a substantial risk of serious harm to an inmate violates the Eighth Amendment." *Farmer v. Brennan,* 511 U.S. 825, 828, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994). Setting aside whether claims challenging inmates' conditions of confinement should be cognizable under the Eighth Amendment at all, see *Hudson v. McMillian,* 503 U.S. 1, 18–19, 112 S.Ct. 995, 117 L.Ed.2d 156 (1992) (THOMAS, J., dissenting), the "deliberate indifference" standard does not bolster the majority's argument. If anything, that standard is *more* deferential to the judgments of prison administrators than *Turner's* reasonable-relationship test: It subjects prison officials to liability only when they are subjectively aware of the risk to the inmate, and they fail to take reasonable measures to abate the risk. *Farmer, supra,* at 847, 114 S.Ct. 1970. It certainly does not demonstrate the wisdom of an exception that imposes a heightened standard of review on the actions of prison officials.

Moreover, the majority's decision subjects prison officials to competing and perhaps conflicting demands. In this case, California prison officials have uniformly averred that random double-celling poses a substantial risk of serious harm to the celled inmates. App. 245a–246a, 251a. If California assigned inmates to double cells without regard to race, knowing full well that violence might result, that would seem the very definition of deliberate indifference. See *Robinson v. Prunty,* 249 F.3d 862, 864–865 (C.A.9 2001) (prisoner alleged an Eighth Amendment violation because administrators had *failed* to consider race when releasing inmates into the yards); *Jensen v. Clarke,* 94 F.3d 1191, 1201, 1204 (C.A.8 1996) (court held that random double-celling by prison officials constituted deliberate indifference, and affirmed an injunction and attorney's fees awarded against the officials). Nor would a victimized inmate need to prove that prison officials had anticipated any particular attack; it would be sufficient that prison officials had ignored a dangerous condition ***547** that was chronic and ongoing—like interracial housing in closely confined quarters within prisons dominated by racial gangs. *Farmer, supra,* at 843–844, 114 S.Ct. 1970. Under *Farmer,* prison officials could have been ordered to take account of the very thing to which they may now have to turn a blind eye: inmates' race.

Finally, the majority presents a parade of horribles designed to show that applying the *Turner* standard would grant prison officials unbounded discretion to segregate inmates throughout prisons. See *ante,* at 1151. But we have never treated *Turner* as a blank check to prison officials. Quite to the contrary, this Court has long had "confidence that ... a reasonableness standard is not toothless." *Abbott,* 490 U.S., at 414, 109 S.Ct. 1874 (internal quotation marks omitted). California prison officials segregate only double cells, because only those cells are particularly difficult to monitor—unlike "dining halls, yards, and general housing areas." *Ante,* at 1151. Were California's policy not so narrow, the State might well have race-neutral means at its disposal capable of accommodating prisoners' rights without sacrificing their safety. See *Turner,* 482 U.S., at 90–91, 107 S.Ct. 2254. The majority does not say why *Turner's* standard ably polices all other constitutional infirmities, just not racial discrimination. In any event, it is not the refusal to apply—for the first time ever—a strict standard of review in the prison context that is "fundamentally at odds" ****1171** with our constitutional jurisprudence. *Ante,* at 1146–1147, n. 1. Instead, it is the majority's refusal—for the first time ever—to defer to the expert judgment of prison officials.

IV

Even under strict scrutiny analysis, "it is possible, even likely, that prison officials could show that the current policy meets the test." 336 F.3d 1117, 1121 (C.A.9 2003) (Ferguson, J., joined by Pregerson, Nelson, and Reinhardt, JJ., dissenting from denial of rehearing en banc). As Johnson concedes, all States have a compelling interest in ***548** maintaining order and internal security within their prisons. See Reply Brief for Petitioner 18; see also *Procunier,* 416 U.S., at 404, 94 S.Ct. 1800. Thus the question on remand will be whether the CDC's policy is narrowly tailored to serve California's compelling interest.[13] The other dissent notes the absence of evidence on that question, see *ante,* at 1154–1155 (opinion of STEVENS, J.), but that is hardly California's fault.

From the outset, Johnson himself has alleged, in terms taken from *Turner*, that the CDC's policy is "not related to a legitimate penological interest." *Johnson v. California,* 207 F.3d 650, 655 (C.A.9 2000) *(per curiam)* (discussing Johnson's Third Amended Complaint). In reinstating Johnson's equal protection claim following the District Court's dismissal, the Court of Appeals repeated Johnson's allegation, without indicating that strict scrutiny should apply on remand before the District Court.[14] *Ibid.* And on remand, again Johnson alleged only that the CDC's policy "is not reasonably related to the legitimate penological interests of the CDC." App. 51a (Fourth Amended Complaint ¶ 23).

After the District Court granted qualified immunity to some of the defendants, Johnson once again appealed. In his brief before the Court of Appeals, Johnson assumed that ***549** both *Lee* and *Turner* applied, without arguing that there was any tension between them; indeed, nowhere in his brief did Johnson even mention the words "strict scrutiny." Brief for Appellant in No. 01–56436(CA9), pp. 20, 26, 2001 WL 34091249. Perhaps as a result, the Court of Appeals did not discuss strict scrutiny in its second decision, the one currently before this Court. The Court of Appeals did find tension between *Lee* and *Turner;* however, it resolved this tension in *Turner's* favor. 321 F.3d, at 799. Yet the Court of Appeals accepted *Lee's* test at face value: Prison officials may only make racial classifications " 'in good faith and in particularized circumstances.' " 321 F.3d, at 797. The Court of Appeals, like Johnson, ****1172** did *not* equate *Lee's* test with strict scrutiny, and in fact it mentioned strict scrutiny only when it quoted the portion of *Turner* that *rejects* strict scrutiny as the proper standard of review in the prison context. 321 F.3d, at 798. Even Johnson did not make the leap equating *Lee* with strict scrutiny when he requested that the Court of Appeals rehear his case. Appellant's Petition for Panel Rehearing with Suggestion for Rehearing En Banc in No. 01–56436(CA9), pp. 4–5. That leap was first made by the judges who dissented from the Court of Appeals' denial of rehearing en banc. 336 F.3d, at 1118 (Ferguson, J., joined by Pregerson, Nelson, and Reinhardt, JJ., dissenting from denial of rehearing en banc).

Thus, California is now, after the close of discovery, subject to a more stringent standard than it had any reason to anticipate from Johnson's pleadings, the Court of Appeals' initial decision, or even the Court of Appeals' decision below. In such circumstances, California should be allowed to present evidence of narrow tailoring, evidence it was never obligated to present in either appearance before the District Court. See *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 1031–1032, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992) (remanding for consideration under the correct legal standard); *id.,* at 1033, 112 S.Ct. 2886 (KENNEDY, J., concurring in judgment) ("Although we establish a framework ***550** for remand, ... we do not decide the ultimate [constitutional] question [because] [t]he facts necessary to the determination have not been developed in the record").

* * *

Petitioner Garrison Johnson challenges not permanent, but temporary, segregation of only a portion of California's prisons. Of the 17 years Johnson has been incarcerated, California has assigned him a cellmate of the same race for no more than a year (and probably more like four months); Johnson has had black cellmates during the other 16 years, but by his own choice. Nothing in the record demonstrates that if Johnson (or any other prisoner) requested to be housed with a person of a different race, it would be denied (though Johnson's gang affiliation with the Crips might stand in his way). Moreover, Johnson

concedes that California's prisons are racially violent places, and that he lives in fear of being attacked because of his race. Perhaps on remand the CDC's policy will survive strict scrutiny, but in the event that it does not, Johnson may well have won a Pyrrhic victory.

All Citations

543 U.S. 499, 125 S.Ct. 1141, 160 L.Ed.2d 949, 05 Cal. Daily Op. Serv. 1568, 2005 Daily Journal D.A.R. 2118

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

1 Justice THOMAS takes a hands-off approach to racial classifications in prisons, suggesting that a "compelling showing [is] needed to overcome the deference we owe to prison administrators." *Post,* at 1168 (dissenting opinion). But such deference is fundamentally at odds with our equal protection jurisprudence. We put the burden on state actors to demonstrate that their race-based policies are justified.

2 Though, as Justice THOMAS points out, see *post,* at 1169, and n. 12, inmates in reception centers in Oklahoma and Texas " 'are not generally assigned randomly to racially integrated cells,' " it is also the case that "these inmates are not precluded from integrated cell assignments," Oklahoma Dept. of Corrections, Policies and Procedures, Operations Memorandum No. OP–030102, Inmate Housing (Sept. 16, 2004), available at http://www.doc.state.ok.us/docs/policies.htm (as visited Jan. 21, 2005, and available in Clerk of Court's case file); Texas Dept. of Criminal Justice, Security Memorandum No. SM–01.28, Assignment to General Population Two–Person Cells (June 15, 2002). See also Brief for Former State Corrections Officials as *Amici Curiae* 20, n. 10 ("To the extent that race is considered in the assignment calculus in Oklahoma, it appears to be one factor among many, and as a result, individualized consideration is given to all inmates"). We therefore have no way of knowing whether, in practice, inmates in Oklahoma and Texas, like those in California, have close to no chance, App. to Pet. for Cert. 3a, of being celled with a person of a different race. See also Brief for Former State Corrections Officials as *Amici Curiae* 19–20 ("[W]e are aware of no state other than California that assumes that every incoming prisoner is incapable of getting along with a cell mate of a different race. And we are aware of no state other than California that has acted on such an assumption by adopting an inflexible and absolute policy of racial segregation of double cells in reception centers").

3 Justice THOMAS characterizes the CDC's policy as a "limited" one, see *post,* at 1157, but the CDC's policy is in fact sweeping in its application. It applies to *all* prisoners housed in double cells in reception centers, whether newly admitted or transferred from one facility to another. Moreover, despite Justice THOMAS' suggestion that the CDC considers other nonracial factors in determining housing placements, the CDC itself has admitted that, in practice, there is a " '[p]retty close' " to zero percent chance that an inmate will be housed with a person of a different race. App. to Pet. for Cert. 3a. See also generally *post,* at 1153–1154, and n. 1 (STEVENS, J., dissenting). Thus, despite an inmate's "age, physical size, mental health, medical needs, [and] criminal history," *post,* at 1164 (THOMAS, J., dissenting), the fact that he is black categorically precludes him from being celled with a white inmate. As we explain, see *infra,* at 1152 and we do not decide whether the threat of violence in California prisons is sufficient to justify such a broad policy.

1 The CDC operates 32 prisons, 7 of which house reception centers. All new inmates and all inmates transferring between prisons are funneled through one of these reception centers before they are permanently placed. At the centers, inmates are housed either in dormitories, double cells, or single cells (of which there are few). Under the CDC's segregation policy, race is a determinative factor in placing inmates in double cells, regardless of the other factors considered in such decisions. While a corrections official with 24 years of experience testified that an exception to this policy was once granted to a Hispanic inmate who had been "raised with Crips," App. 184a, the CDC's suggestion that its policy is therefore flexible, see Brief for Respondents 9, strains credulity. There is no evidence that the CDC routinely allows inmates to opt out of segregation, much less evidence that the CDC informs inmates of their supposed right to do so.

[2] In explaining why it cannot prescreen new inmates, the CDC's brief all but concedes that segregating transferred inmates is unnecessary. See Brief for Respondents 42 ("If the officials had all of the necessary information to assess the inmates' violence potential when the inmates arrived, perhaps a different practice could be used. But unlike the federal system, where the inmates generally are in federal custody from the moment they are arrested, state inmates are in county custody until they are convicted and later transferred to the custody of the CDC").

[3] Because the *Turner* factors boil down to a tailoring test, and I conclude that the CDC's policy is, at best, an " 'exaggerated response' " to its asserted security concerns, see *Turner v. Safley,* 482 U.S. 78, 90, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987), I find it unnecessary to address specifically the other factors, such as whether new and transferred inmates have "alternative means" of exercising their right to equal protection during their period of housing segregation, *id.,* at 89, 107 S.Ct. 2254. Indeed, this case demonstrates once again that "[h]ow a court describes its standard of review when a prison regulation infringes fundamental constitutional rights often has far less consequence[s] for the inmates than the actual showing that the court demands of the State in order to uphold the regulation." *Id.,* at 100, 107 S.Ct. 2254 (STEVENS, J., concurring in part and dissenting in part).

[4] The CDC's policy may be counterproductive in other ways. For example, an official policy of segregation may initiate new arrivals into a corrosive culture of prison racial segregation, lending credence to the view that members of other races are to be feared and that racial alliances are necessary. While integrated cells encourage inmates to gain valuable cross-racial experiences, segregated cells may well facilitate the formation of race-based gangs. See Brief for Former State Corrections Officials as *Amici Curiae* 19 (citing evidence and experience suggesting that the racial integration of cells on balance decreases interracial violence).

[1] Johnson has never requested—not during his initial admittance, nor his subsequent transfers, nor his present incarceration—that he be housed with a person of a different race. App. 106a, 112a–113a, 175a. According to Johnson, he considered the policy a barrier to any such request; however, Johnson has also testified that he never filed a grievance with prison officials about the segregation policy. *Id.,* at 112a–113a, 124a–125a. Neither the parties nor the majority discusses whether Johnson has exhausted his action under Rev. Stat. § 1979, 42 U.S.C. § 1983, as required by the Prison Litigation Reform Act of 1995, 110 Stat. 1321–66, as amended, 42 U.S.C. § 1997e(a). See *Booth v. Churner,* 532 U.S. 731, 734, 121 S.Ct. 1819, 149 L.Ed.2d 958 (2001). The majority thus assumes that statutorily mandated exhaustion is not jurisdictional, and that California has waived the issue by failing to raise it. See, *e.g., Richardson v. Goord,* 347 F.3d 431, 433–434 (C.A.2 2003); *Perez v. Wisconsin Dept. of Corrections,* 182 F.3d 532, 536 (C.A.7 1999).

[2] The majority refers to my approach as a "hands-off" one because I would accord deference to the judgments of the State's prison officials. See *ante,* at 1146–1147, n. 1. Its label is historically inaccurate. The "hands-off" approach was that taken prior to the 1960's by federal courts, which generally declined to consider the merits of prisoners' claims. See, *e.g.,* J. Fliter, Prisoners' Rights: The Supreme Court and Evolving Standards of Decency 64–65 (2001); M. Feeley & E. Rubin, Judicial Policy Making and the Modern State 30–34 (2000); S. Krantz & L. Branham, Cases and Materials on the Law of Sentencing, Corrections and Prisoners' Rights 264–265 (4th ed.1991).

[3] A prisoner may not entirely surrender his constitutional rights at the prison gates, *Bell v. Wolfish,* 441 U.S. 520, 545, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979); *Jones v. North Carolina Prisoners' Labor Union, Inc.,* 433 U.S. 119, 129, 97 S.Ct. 2532, 53 L.Ed.2d 629 (1977), but certainly he leaves some of his liberties behind him. When a prisoner makes a constitutional claim, the initial question should be whether the prisoner possesses the right at issue at all, or whether instead the prisoner has been divested of the right as a condition of his conviction and confinement. See *Overton v. Bazzetta,* 539 U.S. 126, 140, 123 S.Ct. 2162, 156 L.Ed.2d 162 (2003) (THOMAS, J., concurring in judgment); *Coffin v. Reichard,* 143 F.2d 443, 445 (C.A.6 1944).

[4] See, *e.g., Overton, supra,* at 132, 123 S.Ct. 2162 (the right to association under the First and Fourteenth Amendments); *Shaw v. Murphy,* 532 U.S. 223, 228–229, 121 S.Ct. 1475, 149 L.Ed.2d 420 (2001) (the right to communicate with fellow inmates under the First Amendment); *Lewis v. Casey,* 518 U.S. 343, 361, 116 S.Ct. 2174, 135 L.Ed.2d 606 (1996) (the right of access to the courts

under the Due Process and Equal Protection Clauses); *Washington v. Harper,* 494 U.S. 210, 223–225, 110 S.Ct. 1028, 108 L.Ed.2d 178 (1990) (the right to refuse forced medication under the Due Process Clause); *Thornburgh v. Abbott,* 490 U.S. 401, 413–414, 109 S.Ct. 1874, 104 L.Ed.2d 459 (1989) (the right to receive correspondence under the First Amendment); *O'Lone v. Estate of Shabazz,* 482 U.S. 342, 349–350, 107 S.Ct. 2400, 96 L.Ed.2d 282 (1987) (the right to free exercise of religion under the First Amendment).

5 See National Gang Crime Research Center, A National Assessment of Gangs and Security Threat Groups (STGs) in Adult Correctional Institutions: Results of the 1999 Adult Corrections Survey, p. 5, http:// www.ngcrc.com/ngcrc/page7.htm.

6 See, *e.g., Fraise v. Terhune,* 283 F.3d 506, 512–513 (C.A.3 2002) (describing violence caused by a single black prison gang, the Five Percent Nation, in various New Jersey correctional facilities); *Conroy v. Dingle,* No. Civ. 01–1626 (RHK/RLE), 2002 WL 31357055, *1–*2 (D.Minn., Oct. 11, 2002) (describing rival racial gangs at Minnesota's Moose Lake facility, a medium security prison).

7 See D. Orlando–Morningstar, Prison Gangs, Special Needs Offenders Bulletin, Federal Judicial Center 4 (Oct.1997); see also J. Irwin, Prisons in Turmoil 189 (1980) (hereinafter Irwin) (describing the establishment and rise of gangs inside the California prison system, first the Mexican Mafia, followed by La Nuestra Familia, the Aryan Brotherhood, and the Black Guerrilla Family); *United States v. Shryock,* 342 F.3d 948, 961 (C.A.9 2003) (detailing rise of Mexican Mafia inside the California prison system).

8 See, *e.g., id.,* at 962–969 (describing a host of murders and attempted murders by a handful of Mexican Mafia members); *United States v. Silverstein,* 732 F.2d 1338, 1341–1342 (C.A.7 1984) (describing murder of a black inmate by members of the Aryan Brotherhood); *State v. Kell,* 61 P.3d 1019, 1024–1025 (Utah 2002) (describing fatal stabbing of a black inmate by two white supremacists); *State v. Farmer,* 126 Ariz. 569, 570–571, 617 P.2d 521, 522–523 (1980) (en banc) (describing murder of a black inmate by members and recruits of the Aryan Brotherhood).

9 Specifically, Johnson testified:

"I was incarcerated at Calipatria before the major riot broke out there with Mexican and black inmates. ... If I would have stayed there, I would have been involved in that because you have four facilities there and *each facility went on a major riot and a lot of people got hurt and injured just based on your skin color.* I'm black, and if I was there I would have been hurt." App. 102a (emphasis added).

10 See *id.,* at 245a–246a (Cambra declaration) ("If race were to be disregarded entirely, however, I am certain, based upon my experience with CDC prisoners, that ... there will be fights in the cells and the problems will emanate onto the prison yards"); *id.,* at 250a–251a (Schulteis declaration) ("At CSP–Lancaster, if we were to disregard the initial housing placement [according to race], then I am certain there would be serious violence among inmates. I have worked in five different CDC institutions and this would be true for all of them").

11 The majority's sole empirical support for its speculation is a study of Texas prison desegregation that found the rate of violence higher in racially segregated double cells. *Ante,* at 1147–1148 (citing Trulson & Marquart, The Caged Melting Pot: Toward an Understanding of the Consequences of Desegregation in Prisons, 36 Law & Soc. Rev. 743, 774 (2002)). However, the study's authors specifically note that Texas—like California—does not integrate its "initial diagnostic facilities" or its "transfer facilities." See *id.,* at 753, n. 13. Thus the study says nothing about the violence likely to result from integrating cells when inmates are thrown together for brief periods during admittance or transfer. What the study does say is that, once Texas has had the time to gather inmate-related information and make more permanent housing assignments, racially integrated cells may be the preferred option. But California leaves open that door: Inmates are generally free to room with whomever they like on a permanent basis.

[12] See Oklahoma Dept. of Corrections, Policies and Procedures, Operations Memorandum No. OP–030102, Inmate Housing (Sept. 16, 2004) ("Upon arrival at the assessment and reception center ... [f]or reasons of safety and security, newly received inmates are not generally assigned randomly to racially integrated cells") (available at http:// www.doc.state.ok.us/docs/policies.htm); Texas Dept. of Criminal Justice, Security Memorandum No. SM–01.28, Assignment to General Population Two–Person Cells (June 15, 2002) ("Upon arrival at a reception and diagnostic center ... [f]or reasons of safety and security, newly-received offenders are not generally assigned randomly to racially integrated cells due to the fact that the specific information needed to assess an offender's criminal and victimization history is not available until after diagnostic processing has been completed").

[13] On the majority's account, deference to the judgments of prison officials in the application of strict scrutiny is presumably warranted to account for "the special circumstances [that prisons] present," *ante,* at 1152. See *Grutter v. Bollinger,* 539 U.S. 306, 328, 123 S.Ct. 2325, 156 L.Ed.2d 304 (2003). Although I disagree that deference is normally appropriate when scrutinizing racial classifications, there is some logic to the majority's qualification in this case because the Constitution's demands have always been diminished in the prison context. See, *e.g., Harper,* 494 U.S., at 224, 110 S.Ct. 1028; *Abbott,* 490 U.S., at 407, 109 S.Ct. 1874; *Turner v. Safley,* 482 U.S. 78, 85, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987).

[14] The Court of Appeals cited both *Turner* and *Lee v. Washington,* 390 U.S. at 333, 88 S.Ct. 994 (1968) *(per curiam),* for the proposition that certain constitutional protections, among them the protection against state-sponsored racial discrimination, extend to the prison setting. However, the Court of Appeals did not discuss the applicable standard of review, nor did it attempt to resolve the tension between *Turner* and *Lee* that the majority finds.

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126 S.Ct. 2594
Supreme Court of the United States

LEAGUE OF UNITED LATIN AMERICAN CITIZENS et al., Appellants,
v.
Rick PERRY, Governor of Texas, et al.
Travis County, Texas, et al., Appellants,
v.
Rick Perry, Governor of Texas, et al.
Eddie Jackson, et al., Appellants,
v.
Rick Perry, Governor of Texas, et al.
Gi Forum of Texas, et al., Appellants,
v.
Rick Perry, Governor of Texas, et al.

Nos. 05–204, 05–254, 05–276, 05–439
|
Argued March 1, 2006.
|
Decided June 28, 2006.

Synopsis
Background: City, voters, and interest groups challenged state legislature's mid-decade congressional redistricting plan, which had been implemented to replace judicially created plan, asserting violations of equal protection and the Voting Rights Act. A three-judge panel of the District Court, 298 F.Supp.2d 451, Higginbotham, Circuit Judge, and Rosenthal, J., entered judgment for defendants. While appeal was pending, the United States Supreme Court remanded, 543 U.S. 941, 125 S.Ct. 351, 160 L.Ed.2d 252. On remand, the three judge panel of the District Court, Higginbotham, Circuit Judge, 399 F.Supp.2d 756, again rejected plaintiffs' claims, and they appealed.

Holdings: The Supreme Court, Justice Kennedy, held that:

state legislature's decision to override a valid, court-drawn redistricting plan mid-decade was not sufficiently suspect to give shape to a reliable standard for identifying unconstitutional political gerrymanders;

evidence was sufficient to demonstrate minority cohesion and majority bloc voting among Latino voters in redrawn congressional district;

newly-drawn congressional district in which Latinos were majority did not offset loss of potential Latino opportunity district as result of redistricting; and

under totality of the circumstances, redistricting plan violated Voting Rights Act's vote dilution provision.

Affirmed in part, reversed in part, vacated in part, and remanded.

Justice Stevens filed an opinion concurring in part and dissenting in part, in which Justice Breyer joined in part.

Justice Souter filed an opinion concurring in part and dissenting in part, in which Justice Ginsburg joined.

Justice Breyer filed an opinion concurring in part and dissenting in part.

Chief Justice Roberts filed an opinion concurring in part, concurring in the judgment in part, and dissenting in part, in which Justice Alito joined.

Justice Scalia filed an opinion concurring in the judgment in part and dissenting in part, in which Justice Thomas joined, and in which Chief Justice Roberts and Justice Alito joined in part.

****2597 *399** *Syllabus*[*]

The 1990 census resulted in a 3–seat increase over the 27 seats previously allotted the Texas congressional delegation. Although the Democratic Party then controlled 19 of those 27 seats, as well as both state legislative houses and the governorship, change was in the air: The Republican Party had received 47% of the 1990 statewide vote, while the Democrats had received only 51%. Faced with a possible Republican ascent to majority status, the legislature drew a congressional redistricting plan that favored Democratic candidates. The Republicans challenged the 1991 plan as an unconstitutional partisan gerrymander, but to no avail.

****2598** The 2000 census authorized two additional seats for the Texas delegation. The Republicans then controlled the governorship and the State Senate, but did not yet control the State House of Representatives. So constituted, the legislature was unable to pass a redistricting scheme, resulting in litigation and the necessity of a court-ordered plan to comply with the U.S. Constitution's one-person, one-vote requirement. Conscious that the primary responsibility for drawing congressional districts lies with the political branches of government, and hesitant to undo the work of one political party for the benefit of another, the three-judge Federal District Court sought to apply only "neutral" redistricting standards when drawing Plan 1151C, including placing the two new seats in high-growth areas, following county and voting precinct lines, and avoiding the pairing of incumbents. Under Plan 1151C, the 2002 congressional elections resulted in a 17–to–15 Democratic majority in the Texas delegation, compared to a 59% to 40% Republican majority in votes for statewide office in 2000, thus leaving the 1991 Democratic gerrymander largely in place.

In 2003, however, Texas Republicans gained control of both houses of the legislature and set out to increase Republican representation in the congressional delegation. After a protracted partisan struggle, the legislature ***400** enacted a new congressional districting map, Plan 1374C. In the 2004 congressional elections, Republicans won 21 seats to the Democrats' 11, while also obtaining 58% of the vote in statewide races against the Democrats' 41%. Soon after Plan 1374C was enacted, appellants challenged it in court, alleging a host of constitutional and statutory violations. In 2004 the District Court entered judgment for appellees, but this Court vacated the decision and remanded for consideration in light of *Vieth v. Jubelirer,* 541 U.S. 267, 124 S.Ct. 1769, 158 L.Ed.2d 546. On remand, the District Court, believing the scope of its mandate was limited to questions of political gerrymandering, again rejected appellants' claims.

Held: The judgment is affirmed in part, reversed in part, and vacated in part, and the cases are remanded.

399 F.Supp.2d 756, affirmed in part, reversed in part, vacated in part, and remanded.

Justice KENNEDY delivered the opinion of the Court with respect to Parts II–A and III, concluding:

1. This Court held, in *Davis v. Bandemer,* 478 U.S. 109, 118–127, 106 S.Ct. 2797, 92 L.Ed.2d 85, that an equal protection challenge to a political gerrymander presents a justiciable case or controversy, although it could not agree on what substantive standard to apply, compare *id.,* at 127–137, 106 S.Ct. 2797, with *id.,* at 161–162, 106 S.Ct. 2797. That disagreement persists. The *Vieth* plurality would have held such challenges nonjusticiable political questions, but a majority declined to do so, see 541 U.S., at 306, 317, 343, 355, 124 S.Ct. 1769. Justiciability is not revisited here. At issue is whether appellants offer a manageable, reliable measure of fairness for determining whether a partisan gerrymander is

unconstitutional. P. 2607.

2. Texas' redrawing of District 23's lines amounts to vote dilution violative of § 2 of the Voting Rights Act of 1965. Pp. 2612 – 2623.

(a) Plan 1374C's changes to District 23 served the dual goals of increasing Republican seats and protecting the incumbent Republican against an increasingly powerful Latino population that threatened to oust him, with the additional political nuance that he would be reelected in a district that had a Latino majority as to voting-age population, though not a Latino ****2599** majority as to citizen voting-age population or an effective Latino voting majority. The District 23 changes required adjustments elsewhere, so the State created new District 25 to avoid retrogression under § 5 of the Act. Pp. 2612 – 2613.

(b) A State violates § 2 "if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election ... are not [as] equally open to ... members of [a racial group as they are to] other members of the electorate." 42 U.S.C. § 1973(b). *Thornburg v. Gingles,* 478 U.S. 30, 50–51, 106 S.Ct. 2752, 92 L.Ed.2d 25, identified three threshold conditions ***401** for establishing a § 2 violation: (1) the racial group must be "sufficiently large and geographically compact to constitute a majority in a single-member district"; (2) the group must be "politically cohesive"; and (3) the white majority must "vot[e] sufficiently as a bloc to enable it ... usually to defeat the minority's preferred candidate." The legislative history identifies factors that courts can use, once all three threshold requirements are met, in interpreting § 2's "totality of circumstances" standard, including the State's history of voting-related discrimination, the extent to which voting is racially polarized, and the extent to which the State has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group. See *id.,* at 44–45, 106 S.Ct. 2752. Another relevant consideration is whether the number of districts in which the minority group forms an effective majority is roughly proportional to its share of the population in the relevant area. *Johnson v. De Grandy,* 512 U.S. 997, 1000, 114 S.Ct. 2647, 129 L.Ed.2d 775. The district court's determination whether the § 2 requirements are satisfied must be upheld unless clearly erroneous. See *Gingles, supra,* at 78–79, 106 S.Ct. 2752. Where "the ultimate finding of dilution" is based on "a misreading of the governing law," however, there is reversible error. *De Grandy, supra,* at 1022, 114 S.Ct. 2647. Pp. 2613 – 2614.

(c) Appellants have satisfied all three *Gingles* requirements as to District 23, and the creation of new District 25 does not remedy the problem.

The second and third *Gingles* factors—Latino cohesion, majority bloc voting—are present, given the District Court's finding of racially polarized voting in District 23 and throughout the State. As to the first *Gingles* precondition—that the minority group be large and compact enough to constitute a majority in a single-member district, 478 U.S., at 50, 106 S.Ct. 2752—appellants have established that Latinos could have had an opportunity district in District 23 had its lines not been altered and that they do not have one now. They constituted a majority of the citizen voting-age population in District 23 under Plan 1151C. The District Court suggested incorrectly that the district was not a Latino opportunity district in 2002 simply because the incumbent prevailed. The fact that a group does not win elections does not resolve the vote dilution issue. *De Grandy,* 512 U.S., at 1014, n. 11, 114 S.Ct. 2647. In old District 23 the increase in Latino voter registration and overall population, the concomitant rise in Latino voting power in each successive election, the near victory of the Latino candidate of choice in 2002, and the resulting threat to the incumbent's continued election were the very reasons the State redrew the district lines. Since the redistricting prevented the immediate success of the emergent Latino majority in District 23, there was a denial of opportunity in the real sense of that term. Plan 1374C's ***402** version of District 23, by contrast, is unquestionably not a Latino opportunity district. That Latinos are now a bare majority of the district's voting-age population ****2600** is not dispositive, since the relevant numbers must account for citizenship in order to determine the group's opportunity to elect candidates, and Latinos do not now have a citizen voting-age majority in the district.

The State's argument that it met its § 2 obligations by creating new District 25 as an offsetting opportunity district is rejected. In a district line-drawing challenge, "the first *Gingles* condition requires the possibility of creating more than the existing number of reasonably compact districts with a sufficiently large minority population to elect candidates of its choice." *Id.,* at 1008, 114 S.Ct. 2647. The District Court's finding that the current plan contains six Latino opportunity districts and that seven reasonably compact districts, as proposed by appellant GI Forum, could not be drawn was not clearly erroneous. However, the court failed to perform the required compactness inquiry between the number of Latino opportunity districts under the challenger's proposal of reinstating Plan 1151C and the "existing number of reasonably compact districts." *Ibid.* Section 2 does not forbid the creation of a noncompact majority-minority district, *Bush v. Vera,* 517 U.S. 952, 999, 116 S.Ct. 1941, 135 L.Ed.2d 248, but such a district cannot remedy a violation elsewhere in the State, see *Shaw v. Hunt,* 517 U.S. 899,

916, 116 S.Ct. 1894, 135 L.Ed.2d 207. The lower court recognized there was a 300–mile gap between the two Latino communities in District 25, and a similarly large gap between the needs and interests of the two groups. The court's conclusion that the relative smoothness of the district lines made the district compact, despite this combining of discrete communities of interest, is inapposite because the court analyzed the issue only in the equal protection context, where compactness focuses on the contours of district lines to determine whether race was the predominant factor in drawing those lines. See *Miller v. Johnson,* 515 U.S. 900, 916–917, 115 S.Ct. 2475, 132 L.Ed.2d 762. Under § 2, by contrast, the injury is vote dilution, so the compactness inquiry considers "the compactness of the minority population, not ... the compactness of the contested district." *Vera,* 517 U.S., at 997, 116 S.Ct. 1941. A district that "reaches out to grab small and apparently isolated minority communities" is not reasonably compact. *Id.,* at 979, 116 S.Ct. 1941. The lower court's findings regarding the different characteristics, needs, and interests of the two widely scattered Latino communities in District 23 are well supported and uncontested. The enormous geographical distances separating the two communities, coupled with the disparate needs and interests of these populations—not either factor alone—renders District 25 noncompact for § 2 purposes. Therefore, Plan 1374C contains only five reasonably compact Latino opportunity districts, one fewer than Plan 1151C. Pp. 2614 – 2619.

***403** d) The totality of the circumstances demonstrates a § 2 violation. The relevant proportionality inquiry, see *De Grandy,* 512 U.S., at 1000, 114 S.Ct. 2647, compares the percentage of total districts that are Latino opportunity districts with the Latino share of the citizen voting-age population. The State's contention that proportionality should be decided on a regional basis is rejected in favor of appellants' assertion that their claim requires a statewide analysis because they have alleged statewide vote dilution based on a statewide plan. Looking statewide, there are 32 congressional districts. The five reasonably compact Latino opportunity districts amount to roughly 16% of the total, while Latinos make up 22% of Texas' citizen voting-age population. Latinos are, therefore, two districts shy of proportional representation. Even deeming this disproportionality insubstantial would not ****2601** overcome the other evidence of vote dilution for Latinos in District 23. The changes there undermined the progress of a racial group that has been subject to significant voting-related discrimination and that was becoming increasingly politically active and cohesive. Cf., *e.g., id.,* at 1014, 114 S.Ct. 2647. Against this background, the Latinos' diminishing electoral support for the incumbent indicates their belief he was unresponsive to their particularized needs. In essence, the State took away their opportunity because they were about to exercise it. Even accepting the District Court's finding that the State's action was taken primarily for political, not racial, reasons, the redrawing of District 23's lines was damaging to its Latino voters. The State not only made fruitless the Latinos' mobilization efforts but also acted against those Latinos who were becoming most politically active. Although incumbency protection can be a legitimate factor in districting, see *Karcher v. Daggett,* 462 U.S. 725, 740, 103 S.Ct. 2653, 77 L.Ed.2d 133, not all of its forms are in the interests of the constituents. If, as here, such protection means excluding some voters from the district simply because they are likely to vote against the officeholder, the change is to benefit the officeholder, not the voters. This policy, whatever its validity in the political realm, cannot justify the effect on Latino voters. See *Gingles, supra,* at 45, 106 S.Ct. 2752. Pp. 2619 – 2623.

(e) Because Plan 1374C violates § 2 in its redrawing of District 23, appellants' First Amendment and equal protection claims with respect to that district need not be addressed. Their equal protection claim as to the drawing of District 25 need not be confronted because that district will have to be redrawn to remedy the District 23 violation. P. 2623.

Justice KENNEDY concluded in Part II that because appellants have established no legally impermissible use of political classifications, they state no claim on which relief may be granted as to their contention that Texas' statewide redistricting is an unconstitutional political gerrymander. ***404** Justice SOUTER and Justice GINSBURG joined Part II–D. Pp. 2607 – 2612.

(a) Article I of the Constitution, §§ 2 and 4, gives "the States primary responsibility for apportionment of their ... congressional ... districts," *Growe v. Emison,* 507 U.S. 25, 34, 113 S.Ct. 1075, 122 L.Ed.2d 388, but § 4 also permits Congress to set further requirements. Neither the Constitution nor Congress has stated any explicit prohibition of mid-decade redistricting to change districts drawn earlier in conformance with a decennial census. Although the legislative branch plays the primary role in congressional redistricting, courts have an important role when a districting plan violates the Constitution. See, *e.g., Wesberry v. Sanders,* 376 U.S. 1, 84 S.Ct. 526, 11 L.Ed.2d 481. That the federal courts sometimes must order legislative redistricting, however, does not shift the primary responsibility away from legislative bodies, see, *e.g., Wise v. Lipscomb,* 437 U.S. 535, 540, 98 S.Ct. 2493, 57 L.Ed.2d 411, who are free to replace court-mandated remedial plans by enacting redistricting plans of their own, see, *e.g., Upham v. Seamon,* 456 U.S. 37, 44, 102 S.Ct. 1518, 71 L.Ed.2d 725. Judicial respect for legislative plans, however, cannot justify legislative reliance on improper criteria for districting determinations. Pp. 2607 – 2609.

(b) Appellants claim unpersuasively that a decision to effect mid-decennial redistricting, when solely motivated by partisan objectives, presumptively violates equal protection and the First Amendment because it serves no legitimate public purpose and burdens one group because of its political opinions and affiliation. For a ****2602** number of reasons, that test is unconvincing. There is some merit to the State's assertion that partisan gain was not the sole motivation for replacing Plan 1151C: The contours of some contested district lines seem to have been drawn based on more mundane and local interests, and a number of line-drawing requests by Democratic state legislators were honored. Moreover, a successful test for identifying unconstitutional partisan gerrymandering must do what appellants' sole-motivation theory explicitly disavows: show a burden, as measured by a reliable standard, on the complainants' representational rights. See *Vieth,* 541 U.S., at 292–295, 307–308, 124 S.Ct. 1769. Appellants' sole-intent standard is no more compelling when it is linked to the circumstance that Plan 1374C is mid-decennial legislation. The Constitution's text and structure and this Court's cases indicate there is nothing inherently suspect about a legislature's decision to replace mid-decade a court-ordered plan with one of its own. Even if there were, the fact of mid-decade redistricting alone is no sure indication of unlawful political gerrymanders. Appellants' test would leave untouched the 1991 Texas redistricting, which entrenched a party on the verge of minority status, while striking down the 2003 redistricting plan, which resulted in the majority Republican Party capturing a larger share of the seats. A test that treats these two similarly effective ***405** power plays in such different ways does not have the reliability appellants ascribe to it. Pp. 2609 – 2611.

(c) Appellants' political gerrymandering theory that mid-decade redistricting for exclusively partisan purposes violates the one-person, one-vote requirement is rejected. Although conceding that States operate under the legal fiction that their plans are constitutionally apportioned throughout a decade, see, *e.g., Georgia v. Ashcroft,* 539 U.S. 461, 488, n. 2, 123 S.Ct. 2498, 156 L.Ed.2d 428, appellants contend that this fiction should not provide a safe harbor for a legislature that enacts a voluntary, mid-decade plan overriding a legal court-drawn plan. This argument mirrors appellants' attack on mid-decennial redistricting solely motivated by partisan considerations and is unsatisfactory for the same reasons. Their further contention that the legislature intentionally sought to manipulate population variances when it enacted Plan 1374C is unconvincing because there is no District Court finding to that effect, and they present no specific evidence to support this serious allegation of bad faith. Because they have not demonstrated that the legislature's decision to enact Plan 1374C constitutes a violation of the equal-population requirement, their subsidiary reliance on *Larios v. Cox,* 300 F.Supp.2d 1320, summarily aff'd, 542 U.S. 947, 124 S.Ct. 2806, 159 L.Ed.2d 831, is unavailing. Pp. 2611 – 2612.

Justice KENNEDY, joined by THE CHIEF JUSTICE and Justice ALITO, concluded in Part IV that the Dallas area redistricting does not violate § 2 of the Voting Rights Act. Appellants allege that the Dallas changes dilute African–American voting strength because an African–American minority effectively controlled District 24 under Plan 1151C. However, before Plan 1374C, District 24 had elected an Anglo Democrat to Congress in every election since 1978. Since then, moreover, the incumbent has had no opposition in any of his primary elections, and African–Americans have consistently voted for him. African–Americans were the second-largest racial group in the district after Anglos, but had only 25.7% of the citizen voting-age population. Even assuming that the first *Gingles* prong can accommodate appellants' assertion that a § 2 claim may be stated for a racial group that makes up less than 50% of the population, see, *e.g.,* ****2603** *De Grandy, supra,* at 1009, 114 S.Ct. 2647, they must show they constitute "a sufficiently large minority to elect their candidate of choice with the assistance of cross-over votes," *Voinovich v. Quilter,* 507 U.S. 146, 158, 113 S.Ct. 1149, 122 L.Ed.2d 500. The District Court committed no clear error in rejecting questionable evidence that African–Americans have the ability to elect their candidate of choice in favor of other evidence that an African–American candidate of choice would not prevail. See *Anderson v. Bessemer City,* 470 U.S. 564, 574, 105 S.Ct. 1504, 84 L.Ed.2d 518. That African–Americans had influence in the district does not suffice to state a § 2 claim. If it did, it would unnecessarily infuse race into virtually every redistricting, raising serious constitutional questions. See ***406** *Georgia v. Ashcroft,* 539 U.S. 461, 491, 123 S.Ct. 2498, 156 L.Ed.2d 428. *Id.,* at 480, 482, 123 S.Ct. 2498, distinguished. Appellants do not raise a district-specific political gerrymandering claim against District 24. Pp. 2624 – 2626.

THE CHIEF JUSTICE, joined by Justice ALITO, agreed that appellants have not provided a reliable standard for identifying unconstitutional political gerrymanders, but noted that the question whether any such standard exists—*i.e.,* whether a challenge to such a gerrymander presents a justiciable case or controversy—has not been argued in these cases. THE CHIEF JUSTICE and Justice ALITO therefore take no position on that question, which has divided the Court, see *Vieth v. Jubelirer,* 541 U.S. 267, 124 S.Ct. 1769, 158 L.Ed.2d 546, and join the plurality's Part II disposition without specifying whether appellants have failed to state a claim on which relief can be granted or failed to present a justiciable controversy. Pp. 2652 – 2653.

Justice SCALIA, joined by Justice THOMAS, concluded that appellants' claims of unconstitutional political gerrymandering do not present a justiciable case or controversy, see *Vieth v. Jubelirer,* 541 U.S. 267, 271–306, 124 S.Ct. 1769, 158 L.Ed.2d 546 (plurality opinion), and that their vote-dilution claims premised on § 2 of the Voting Rights Act of 1965 lack merit for the reasons set forth in Justice THOMAS's opinion concurring in the judgment in *Holder v. Hall,* 512 U.S. 874, 891–946, 114 S.Ct. 2581, 129 L.Ed.2d 687. Reviewing appellants' race-based equal protection claims, Justice SCALIA, joined by THE CHIEF JUSTICE, Justice THOMAS, and Justice ALITO, concluded that the District Court did not commit clear error in rejecting appellant GI Forum's assertion that the removal of Latino residents from District 23 constituted intentional vote dilution. Justice SCALIA, joined by THE CHIEF JUSTICE, Justice THOMAS, and Justice ALITO, subjected the intentional creation of District 25 as a majority-minority district to strict scrutiny and held that standard satisfied because appellants conceded that the creation of this district was reasonably necessary to comply with § 5 of the Voting Rights Act of 1965, which is a compelling state interest, and did not argue that Texas did more than that provision required it to do. Pp. 2663 – 2669.

KENNEDY, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts II–A and III, in which STEVENS, SOUTER, GINSBURG, and BREYER, JJ., joined, an opinion with respect to Parts I and IV, in which ROBERTS, C. J., and ALITO, J., joined, an opinion with respect to Parts II–B and II–C, and an opinion with respect to Part II–D, in which SOUTER and GINSBURG, JJ., joined. STEVENS, J., filed an opinion concurring in part and dissenting in part, in which BREYER, J., joined as to Parts I and II, *post,* p. 2626. SOUTER, J., filed an opinion ****2604** concurring in part and dissenting in part, in which GINSBURG, J., joined, *post,* p. 2647. BREYER, J., filed an opinion concurring in part ***407** and dissenting in part, *post,* p. 2651. ROBERTS, C. J., filed an opinion concurring in part, concurring in the judgment in part, and dissenting in part, in which ALITO, J., joined, *post,* p. 2652. SCALIA, J., filed an opinion concurring in the judgment in part and dissenting in part, in which THOMAS, J., joined, and in which ROBERTS, C. J., and ALITO, J., joined as to Part III, *post,* p. 2663.

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Opinion

Justice KENNEDY announced the judgment of the Court and delivered the opinion of the Court with respect to Parts II–A and III, an opinion with respect to Parts I and IV, in which THE CHIEF JUSTICE and Justice ALITO join, an opinion with respect to Parts II–B and II–C, and an opinion with respect to Part II–D, in which Justice SOUTER and Justice GINSBURG join.

***409** These four consolidated cases are appeals from a judgment entered by the United States District Court for the Eastern District of Texas. Convened as a three-judge court under 28 U.S.C. § 2284, the court heard appellants' constitutional and statutory challenges to a 2003 enactment of the Texas State Legislature that drew new district lines for the 32 seats Texas holds in the United States House of Representatives. (Though appellants do not join each other as to all claims, for the sake of convenience we refer to appellants collectively.) In 2004 the court entered judgment for appellees and issued detailed findings of fact and conclusions of law. *Session v. Perry,* 298 F.Supp.2d 451 *(per curiam).* This Court vacated that decision and remanded for consideration in light of *Vieth v. Jubelirer,* 541 U.S. 267, 124 S.Ct. 1769, 158 L.Ed.2d 546 (2004). 543 U.S. 941, 125 S.Ct. 351, 352, 160 L.Ed.2d 252 (2004). The District Court reexamined appellants' political gerrymandering claims and, in a second careful opinion, again held for the defendants. *Henderson v. Perry,* 399 F.Supp.2d 756 (2005). These appeals followed, and we noted probable jurisdiction. 546 U.S. 1074, 126 S.Ct. 827, 829, 163 L.Ed.2d 705 (2005).

****2605** Appellants contend the new plan is an unconstitutional partisan gerrymander and that the redistricting statewide violates § 2 of the Voting Rights Act of 1965, 79 Stat. 437, as amended, 42 U.S.C. § 1973. Appellants also contend that the use of race and politics in drawing lines of specific districts violates the First Amendment and the Equal Protection Clause of the Fourteenth Amendment. The three-judge panel, consisting of Circuit Judge Higginbotham and District Judges Ward and Rosenthal, brought considerable experience and expertise to the instant action, based on their knowledge of the State's people, history, and geography. Judges Higginbotham and Ward, moreover, had served on the three-judge court that drew the plan the Texas Legislature ***410** replaced in 2003, so they were intimately familiar with the history and intricacies of the cases.

We affirm the District Court's dispositions on the statewide political gerrymandering claims and the Voting Rights Act claim against District 24. We reverse and remand on the Voting Rights Act claim with respect to District 23. Because we do not reach appellants' race-based equal protection claim or the political gerrymandering claim as to District 23, we vacate the judgment of the District Court on these claims.

I

To set out a proper framework for the cases, we first recount the history of the litigation and recent districting in Texas. An appropriate starting point is not the reapportionment in 2000 but the one from the census in 1990.

The 1990 census resulted in a 30–seat congressional delegation for Texas, an increase of 3 seats over the 27 representatives allotted to the State in the decade before. See *Bush v. Vera,* 517 U.S. 952, 956–957, 116 S.Ct. 1941, 135 L.Ed.2d 248 (1996). In 1991 the Texas Legislature drew new district lines. At the time, the Democratic Party controlled both houses in the state legislature, the governorship, and 19 of the State's 27 seats in Congress. Yet change appeared to be on the horizon. In the previous 30 years the Democratic Party's post-Reconstruction dominance over the Republican Party had eroded, and by 1990 the Republicans received 47% of the statewide vote, while the Democrats received 51%. *Henderson, supra,* at 763; Brief for Appellee Perry et al. in No. 05–204 etc., p. 2 (hereinafter Brief for State Appellees).

Faced with a Republican opposition that could be moving toward majority status, the state legislature drew a congressional redistricting plan designed to favor Democratic candidates. Using then-emerging computer technology to draw district lines with artful precision, the legislature enacted a plan later described as the "shrewdest gerrymander of the 1990s." M. Barone, R. Cohen, & C. Cook, Almanac of American ***411** Politics 2002, p. 1448 (2001). See *Henderson, supra,* at 767, and n. 47. Although the 1991 plan was enacted by the state legislature, Democratic Congressman Martin Frost was acknowledged as its architect. *Session, supra,* at 482. The 1991 plan "carefully constructs democratic districts 'with incredibly convoluted lines' and packs 'heavily Republican' suburban areas into just a few districts." *Henderson, supra,* at 767, n. 47 (quoting M. Barone & R. Cohen, Almanac of American Politics 2004, p. 1510 (2003) (hereinafter 2004 Almanac)).

Voters who considered this unfair and unlawful treatment sought to invalidate the 1991 plan as an unconstitutional partisan gerrymander, but to no avail. See *Terrazas v. Slagle,* 789 F.Supp. 828, 833 (W.D.Tex.1992); *Terrazas v. Slagle,* 821 F.Supp. 1162, 1175 (W.D.Tex.1993) *(per curiam)*. The 1991 plan realized the ****2606** hopes of Democrats and the fears of Republicans with respect to the composition of the Texas congressional delegation. The 1990's were years of continued

growth for the Texas Republican Party, and by the end of the decade it was sweeping elections for statewide office. Nevertheless, despite carrying 59% of the vote in statewide elections in 2000, the Republicans only won 13 congressional seats to the Democrats' 17. *Henderson, supra,* at 763.

These events likely were not forgotten by either party when it came time to draw congressional districts in conformance with the 2000 census and to incorporate two additional seats for the Texas delegation. The Republican Party controlled the governorship and the State Senate; it did not yet control the State House of Representatives, however. As so constituted, the legislature was unable to pass a redistricting scheme, resulting in litigation and the necessity of a court-ordered plan to comply with the Constitution's one-person, one-vote requirement. See *Balderas v. Texas,* Civ. Action No. 6:01CV158, 2001 WL 35673968 (ED Tex., Nov. 14, 2001) *(per curiam),* summarily aff'd, 536 U.S. 919, 122 S.Ct. 2583, 153 L.Ed.2d 773 (2002), App. E to Juris. Statement in No. 05–276, p. 202a (hereinafter *Balderas,* App. E to ***412** Juris. Statement). The congressional districting map resulting from the *Balderas* litigation is known as Plan 1151C.

As we have said, two members of the three-judge court that drew Plan 1151C later served on the three-judge court that issued the judgment now under review. Thus we have the benefit of their candid comments concerning the redistricting approach taken in the *Balderas* litigation. Conscious that the primary responsibility for drawing congressional districts is given to political branches of government, and hesitant to "und[o] the work of one political party for the benefit of another," the three-judge*Balderas* court sought to apply "only 'neutral' redistricting standards" when drawing Plan 1151C. *Henderson,* 399 F.Supp.2d, at 768. Once the District Court applied these principles—such as placing the two new seats in high-growth areas, following county and voting precinct lines, and avoiding the pairing of incumbents—"the drawing ceased, leaving the map free of further change except to conform it to one-person, one-vote." *Ibid.* Under Plan 1151C, the 2002 congressional elections resulted in a 17–to–15 Democratic majority in the Texas delegation, compared to a 59% to 40% Republican majority in votes for statewide office in 2000. *Id.,* at 763–764. Reflecting on the *Balderas* plan, the District Court in *Henderson* was candid to acknowledge "[t]he practical effect of this effort was to leave the 1991 Democratic Party gerrymander largely in place as a 'legal' plan." 399 F.Supp.2d, at 768.

The continuing influence of a court-drawn map that "perpetuated much of [the 1991] gerrymander," *ibid.,* was not lost on Texas Republicans when, in 2003, they gained control of the State House of Representatives and, thus, both houses of the legislature. The Republicans in the legislature "set out to increase their representation in the congressional delegation." *Session,* 298 F.Supp.2d, at 471. See also *id*., at 470 ("There is little question but that the single-minded purpose of the Texas Legislature in enacting [a new plan] was to gain partisan advantage"). After a protracted partisan ***413** struggle, during which Democratic legislators left the State for a time to frustrate quorum requirements, the legislature enacted a new congressional districting map in October 2003. It is called Plan 1374C. The 2004 congressional elections did not disappoint the plan's drafters. Republicans won 21 seats to the Democrats' 11, while also obtaining 58% of the vote in statewide races against the Democrats' 41%. *Henderson, supra,* at 764.

****2607** Soon after Texas enacted Plan 1374C, appellants challenged it in court, alleging a host of constitutional and statutory violations. Initially, the District Court entered judgment against appellants on all their claims. See *Session,* 298 F.Supp.2d, at 457; *id.,* at 515 (Ward, J., concurring in part and dissenting in part). Appellants sought relief here and, after their jurisdictional statements were filed, this Court issued *Vieth v. Jubelirer*. Our order vacating the District Court judgment and remanding for consideration in light of *Vieth* was issued just weeks before the 2004 elections. See 543 U.S. 941, 125 S.Ct. 351, 352, 160 L.Ed.2d 252 (Oct. 18, 2004). On remand, the District Court, believing the scope of its mandate was limited to questions of political gerrymandering, again rejected appellants' claims. *Henderson,* 399 F.Supp.2d, at 777–778. Judge Ward would have granted relief under the theory—presented to the court for the first time on remand—that mid-decennial redistricting violates the one-person, one-vote requirement, but he concluded such an argument was not within the scope of the remand mandate. *Id.,* at 779, 784–785 (specially concurring).

II

A

Based on two similar theories that address the mid-decade character of the 2003 redistricting, appellants now argue that Plan 1374C should be invalidated as an unconstitutional partisan gerrymander. In *Davis v. Bandemer,* 478 U.S. 109, 106 S.Ct. 2797, 92 L.Ed.2d 85 (1986), the Court held that an equal protection challenge to a political gerrymander presents a justiciable case or controversy, ***414** *id.,* at 118–127, 106 S.Ct. 2797, but there was disagreement over what substantive standard to apply. Compare *id.,* at 127–137, 106 S.Ct. 2797 (plurality opinion), with *id.,* at 161–162, 106 S.Ct. 2797 (Powell, J., concurring in part and dissenting in part). That disagreement persists. A plurality of the Court in *Vieth* would have held such challenges to be nonjusticiable political questions, but a majority declined to do so. See 541 U.S., at 306, 124 S.Ct. 1769 (KENNEDY, J., concurring in judgment); *id.,* at 317, 124 S.Ct. 1769 (STEVENS, J., dissenting); *id.,* at 343, 124 S.Ct. 1769 (SOUTER, J., dissenting); *id.,* at 355, 124 S.Ct. 1769 (BREYER, J., dissenting). We do not revisit the justiciability holding but do proceed to examine whether appellants' claims offer the Court a manageable, reliable measure of fairness for determining whether a partisan gerrymander violates the Constitution.

B

Before addressing appellants' arguments on mid-decade redistricting, it is appropriate to note some basic principles on the roles the States, Congress, and the courts play in determining how congressional districts are to be drawn. Article I of the Constitution provides:

> "Section 2. The House of Representatives shall be composed of Members chosen every second Year by the People of the several States....
>
> .....
>
> "Section 4. The Times, Places and Manner of holding Elections for ... Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations...."

This text, we have explained, "leaves with the States primary responsibility for apportionment of their federal congressional ... districts." *Growe v. Emison,* 507 U.S. 25, 34, 113 S.Ct. 1075, 122 L.Ed.2d 388 (1993); see also ****2608** *Chapman v. Meier,* 420 U.S. 1, 27, 95 S.Ct. 751, 42 L.Ed.2d 766 (1975) ("[R]eapportionment is primarily the duty and responsibility of the State through its legislature or other body"); ***415** *Smiley v. Holm,* 285 U.S. 355, 366–367, 52 S.Ct. 397, 76 L.Ed. 795 (1932) (reapportionment implicated State's powers under Art. I, § 4). Congress, as the text of the Constitution also provides, may set further requirements, and with respect to districting it has generally required single-member districts. See U.S. Const., Art. I, § 4; Pub. L. 90–196, 81 Stat. 581, 2 U.S.C. § 2c; *Branch v. Smith,* 538 U.S. 254, 266–267, 123 S.Ct. 1429, 155 L.Ed.2d 407 (2003). But see *id.,* at 275, 123 S.Ct. 1429 (plurality opinion) (multimember districts permitted by 55 Stat. 762, 2 U.S.C. § 2a(c) in limited circumstances). With respect to a mid-decade redistricting to change districts drawn earlier in conformance with a decennial census, the Constitution and Congress state no explicit prohibition.

Although the legislative branch plays the primary role in congressional redistricting, our precedents recognize an important role for the courts when a districting plan violates the Constitution. See, *e.g., Wesberry v. Sanders,* 376 U.S. 1, 84 S.Ct. 526, 11 L.Ed.2d 481 (1964). This litigation is an example, as we have discussed. When Texas did not enact a plan to comply with the one-person, one-vote requirement under the 2000 census, the District Court found it necessary to draw a redistricting map on its own. That the federal courts sometimes are required to order legislative redistricting, however, does not shift the primary locus of responsibility.

> "Legislative bodies should not leave their reapportionment tasks to the federal courts; but when those with legislative responsibilities do not respond, or the imminence of a state election makes it impractical for them to do so, it becomes the 'unwelcome obligation' of the federal court to devise and impose a reapportionment plan pending later legislative action." *Wise v. Lipscomb,* 437 U.S. 535, 540, 98 S.Ct. 2493, 57 L.Ed.2d 411 (1978) (principal opinion) (quoting *Connor v. Finch,* 431 U.S. 407, 415, 97 S.Ct. 1828, 52 L.Ed.2d 465 (1977)).

Quite apart from the risk of acting without a legislature's expertise, and quite apart from the difficulties a court faces in drawing a map that is fair and rational, see *id.,* at 414–415, 97 S.Ct. 1828, ***416** the obligation placed upon the Federal Judiciary is unwelcome because drawing lines for congressional districts is one of the most significant acts a State can perform to ensure citizen participation in republican self-governance. That Congress is the federal body explicitly given

constitutional power over elections is also a noteworthy statement of preference for the democratic process. As the Constitution vests redistricting responsibilities foremost in the legislatures of the States and in Congress, a lawful, legislatively enacted plan should be preferable to one drawn by the courts.

It should follow, too, that if a legislature acts to replace a court-drawn plan with one of its own design, no presumption of impropriety should attach to the legislative decision to act. As the District Court noted here, *Session,* 298 F.Supp.2d, at 460–461, our decisions have assumed that state legislatures are free to replace court-mandated remedial plans by enacting redistricting plans of their own. See, *e.g., Upham v. Seamon,* 456 U.S. 37, 44, 102 S.Ct. 1518, 71 L.Ed.2d 725 (1982) *(per curiam); Wise, supra,* at 540, 98 S.Ct. 2493 (principal opinion) (quoting *Connor, supra,* at 415, 97 S.Ct. 1828); *Burns v. Richardson,* 384 U.S. 73, 85, 86 S.Ct. 1286, 16 L.Ed.2d 376 (1966); *Reynolds v. Sims,* 377 U.S. 533, 587, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964). Underlying this principle is the assumption that to prefer a ****2609** court-drawn plan to a legislature's replacement would be contrary to the ordinary and proper operation of the political process. Judicial respect for legislative plans, however, cannot justify legislative reliance on improper criteria for districting determinations. With these considerations in mind, I now turn to consider appellants' challenges to the new redistricting plan.

C

Appellants claim that Plan 1374C, enacted by the Texas Legislature in 2003, is an unconstitutional political gerrymander. A decision, they claim, to effect mid-decennial redistricting, when solely motivated by partisan objectives, violates equal protection and the First Amendment because it ***417** serves no legitimate public purpose and burdens one group because of its political opinions and affiliation. The mid-decennial nature of the redistricting, appellants say, reveals the legislature's sole motivation. Unlike *Vieth,* where the legislature acted in the context of a required decennial redistricting, the Texas Legislature voluntarily replaced a plan that itself was designed to comply with new census data. Because Texas had "no constitutional obligation to act at all" in 2003, Brief for Appellant Jackson et al. in No. 05–276, p. 26, it is hardly surprising, according to appellants, that the District Court found "[t]here is little question but that the single-minded purpose of the Texas Legislature in enacting Plan 1374C was to gain partisan advantage" for the Republican majority over the Democratic minority, *Session, supra,* at 470.

A rule, or perhaps a presumption, of invalidity when a mid-decade redistricting plan is adopted solely for partisan motivations is a salutary one, in appellants' view, for then courts need not inquire about, nor parties prove, the discriminatory effects of partisan gerrymandering—a matter that has proved elusive since *Bandemer*. See *Vieth,* 541 U.S., at 281, 124 S.Ct. 1769 (plurality opinion); *Bandemer,* 478 U.S., at 127, 106 S.Ct. 2797 (plurality opinion). Adding to the test's simplicity is that it does not quibble with the drawing of individual district lines but challenges the decision to redistrict at all.

For a number of reasons, appellants' case for adopting their test is not convincing. To begin with, the state appellees dispute the assertion that partisan gain was the "sole" motivation for the decision to replace Plan 1151C. There is some merit to that criticism, for the pejorative label overlooks indications that partisan motives did not dictate the plan in its entirety. The legislature does seem to have decided to redistrict with the sole purpose of achieving a Republican congressional majority, but partisan aims did not guide every line it drew. As the District Court found, the contours of some contested district lines were drawn based ***418** on more mundane and local interests. *Session, supra,* at 472–473. The state appellees also contend, and appellants do not contest, that a number of line-drawing requests by Democratic state legislators were honored. Brief for State Appellees 34.

Evaluating the legality of acts arising out of mixed motives can be complex, and affixing a single label to those acts can be hazardous, even when the actor is an individual performing a discrete act. See, *e.g., Hartman v. Moore,* 547 U.S. 250, 259–260, 126 S.Ct. 1695, 1703–1704, 164 L.Ed.2d 441 (2006). When the actor is a legislature and the act is a composite of manifold choices, the task can be even more daunting. Appellants' attempt to separate the legislature's sole motive for discarding Plan 1151C from the complex of choices it made while drawing the lines of Plan 1374C seeks to avoid that difficulty. We should be skeptical, however, of a claim ****2610** that seeks to invalidate a statute based on a legislature's unlawful motive but does so without reference to the content of the legislation enacted.

Even setting this skepticism aside, a successful claim attempting to identify unconstitutional acts of partisan gerrymandering

must do what appellants' sole-motivation theory explicitly disavows: show a burden, as measured by a reliable standard, on the complainants' representational rights. For this reason, a majority of the Court rejected a test proposed in *Vieth* that is markedly similar to the one appellants present today. Compare 541 U.S., at 336, 124 S.Ct. 1769 (STEVENS, J., dissenting) ("Just as race can be a factor in, but cannot dictate the outcome of, the districting process, so too can partisanship be a permissible consideration in drawing district lines, so long as it does not predominate"), and *id.,* at 338, 124 S.Ct. 1769 ("[A]n acceptable rational basis can be neither purely personal nor purely partisan"), with *id.,* at 292–295, 124 S.Ct. 1769 (plurality opinion), and *id.,* at 307–308, 124 S.Ct. 1769 (KENNEDY, J., concurring in judgment).

The sole-intent standard offered here is no more compelling when it is linked to the circumstance that Plan 1374C is mid-decennial legislation. The text and structure of the ***419** Constitution and our case law indicate there is nothing inherently suspect about a legislature's decision to replace mid-decade a court-ordered plan with one of its own. And even if there were, the fact of mid-decade redistricting alone is no sure indication of unlawful political gerrymanders. Under appellants' theory, a highly effective partisan gerrymander that coincided with decennial redistricting would receive less scrutiny than a bumbling, yet solely partisan, mid-decade redistricting. More concretely, the test would leave untouched the 1991 Texas redistricting, which entrenched a party on the verge of minority status, while striking down the 2003 redistricting plan, which resulted in the majority Republican Party capturing a larger share of the seats. A test that treats these two similarly effective power plays in such different ways does not have the reliability appellants ascribe to it.

Furthermore, compared to the map challenged in *Vieth,* which led to a Republican majority in the congressional delegation despite a Democratic majority in the statewide vote, Plan 1374C can be seen as making the party balance more congruent to statewide party power. To be sure, there is no constitutional requirement of proportional representation, and equating a party's statewide share of the vote with its portion of the congressional delegation is a rough measure at best. Nevertheless, a congressional plan that more closely reflects the distribution of state party power seems a less likely vehicle for partisan discrimination than one that entrenches an electoral minority. See *Gaffney v. Cummings,* 412 U.S. 735, 754, 93 S.Ct. 2321, 37 L.Ed.2d 298 (1973). By this measure, Plan 1374C can be seen as fairer than the plan that survived in *Vieth* and the two previous Texas plans—all three of which would pass the modified sole-intent test that Plan 1374C would fail.

A brief for one of the *amici* proposes a symmetry standard that would measure partisan bias by "compar[ing] how both parties would fare hypothetically if they each (in turn) had received a given percentage of the vote." Brief for Gary ***420** King et al. 5. Under that standard the measure of a map's bias is the extent to which a majority party would fare better than the minority party, should their respective shares of the vote reverse. *Amici* 's proposed standard does not compensate ****2611** for appellants' failure to provide a reliable measure of fairness. The existence or degree of asymmetry may in large part depend on conjecture about where possible vote-switchers will reside. Even assuming a court could choose reliably among different models of shifting voter preferences, we are wary of adopting a constitutional standard that invalidates a map based on unfair results that would occur in a hypothetical state of affairs. Presumably such a challenge could be litigated if and when the feared inequity arose. Cf. *Abbott Laboratories v. Gardner,* 387 U.S. 136, 148, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967). More fundamentally, the counterfactual plaintiff would face the same problem as the present, actual appellants: providing a standard for deciding how much partisan dominance is too much. Without altogether discounting its utility in redistricting planning and litigation, I would conclude asymmetry alone is not a reliable measure of unconstitutional partisanship.

In the absence of any other workable test for judging partisan gerrymanders, one effect of appellants' focus on mid-decade redistricting could be to encourage partisan excess at the outset of the decade, when a legislature redistricts pursuant to its decennial constitutional duty and is then immune from the charge of sole motivation. If mid-decade redistricting were barred or at least subject to close judicial oversight, opposition legislators would also have every incentive to prevent passage of a legislative plan and try their luck with a court that might give them a better deal than negotiation with their political rivals. See *Henderson,* 399 F.Supp.2d, at 776–777.

D

Appellants' second political gerrymandering theory is that mid-decade redistricting for exclusively partisan purposes ***421** violates the one-person, one-vote requirement. They observe that population variances in legislative districts are tolerated

only if they "are unavoidable despite a good-faith effort to achieve absolute equality, or for which justification is shown." *Karcher v. Daggett,* 462 U.S. 725, 730, 103 S.Ct. 2653, 77 L.Ed.2d 133 (1983) (quoting *Kirkpatrick v. Preisler,* 394 U.S. 526, 531, 89 S.Ct. 1225, 22 L.Ed.2d 519 (1969); internal quotation marks omitted). Working from this unchallenged premise, appellants contend that, because the population of Texas has shifted since the 2000 census, the 2003 redistricting, which relied on that census, created unlawful interdistrict population variances.

To distinguish the variances in Plan 1374C from those of ordinary, 3–year–old districting plans or belatedly drawn court-ordered plans, appellants again rely on the voluntary, mid-decade nature of the redistricting and its partisan motivation. Appellants do not contend that a decennial redistricting plan would violate equal representation three or five years into the decade if the State's population had shifted substantially. As they must, they concede that States operate under the legal fiction that their plans are constitutionally apportioned throughout the decade, a presumption that is necessary to avoid constant redistricting, with accompanying costs and instability. See *Georgia v. Ashcroft,* 539 U.S. 461, 488, n. 2, 123 S.Ct. 2498, 156 L.Ed.2d 428 (2003); *Reynolds,* 377 U.S., at 583, 84 S.Ct. 1362. Appellants agree that a plan implemented by a court in 2001 using 2000 population data also enjoys the benefit of the so-called legal fiction, presumably because belated court-drawn plans promote other important interests, such as ensuring a plan complies with the Constitution and voting rights legislation.

In appellants' view, however, this fiction should not provide a safe harbor for a legislature that enacts a voluntary, mid-decade ****2612** plan overriding a legal court-drawn plan, thus " 'unnecessarily' " creating population variance "when there was no legal compulsion" to do so. Brief for Appellant Travis County et al. in No. 05–254, p. 18. This is particularly so, appellants say, when a legislature acts because of an ***422** exclusively partisan motivation. Under appellants' theory this improper motive at the outset seems enough to condemn the map for violating the equal-population principle. For this reason, appellants believe that the State cannot justify under *Karcher v. Daggett* the population variances in Plan 1374C because they are the product of partisan bias and the desire to eliminate all competitive districts.

As the District Court noted, this is a test that turns not on whether a redistricting furthers equal-population principles but rather on the justification for redrawing a plan in the first place. *Henderson, supra,* at 776. In that respect appellants' approach merely restates the question whether it was permissible for the Texas Legislature to redraw the districting map. Appellants' answer, which mirrors their attack on mid-decennial redistricting solely motivated by partisan considerations, is unsatisfactory for reasons we have already discussed.

Appellants also contend that the legislature intentionally sought to manipulate population variances when it enacted Plan 1374C. There is, however, no District Court finding to that effect, and appellants present no specific evidence to support this serious allegation of bad faith. Because appellants have not demonstrated that the legislature's decision to enact Plan 1374C constitutes a violation of the equal-population requirement, we find unavailing their subsidiary reliance on *Larios v. Cox,* 300 F.Supp.2d 1320 (N.D.Ga.) *(per curiam),* summarily aff'd, 542 U.S. 947, 124 S.Ct. 2806, 159 L.Ed.2d 831 (2004). In *Larios,* the District Court reviewed the Georgia Legislature's decennial redistricting of its State Senate and House of Representatives districts and found deviations from the equal-population requirement. The District Court then held the objectives of the drafters, which included partisan interests along with regionalist bias and inconsistent incumbent protection, did not justify those deviations. 300 F.Supp.2d, at 1351–1352. The *Larios* holding and its examination of the legislature's motivations were relevant only in response to ***423** an equal-population violation, something appellants have not established here. Even in addressing political motivation as a justification for an equal-population violation, moreover, *Larios* does not give clear guidance. The panel explained it "need not resolve the issue of whether or when partisan advantage alone may justify deviations in population" because the plans were "plainly unlawful" and any partisan motivations were "bound up inextricably" with other clearly rejected objectives. *Id.,* at 1352.

In sum, we disagree with appellants' view that a legislature's decision to override a valid, court-drawn plan mid-decade is sufficiently suspect to give shape to a reliable standard for identifying unconstitutional political gerrymanders. We conclude that appellants have established no legally impermissible use of political classifications. For this reason, they state no claim on which relief may be granted for their statewide challenge.

III

Plan 1374C made changes to district lines in south and west Texas that appellants challenge as violations of § 2 of the Voting Rights Act and the Equal Protection Clause of the Fourteenth Amendment. The most significant changes occurred to District 23, which—both before and after ****2613** the redistricting—covers a large land area in west Texas, and to District 25, which earlier included Houston but now includes a different area, a north-south strip from Austin to the Rio Grande Valley.

After the 2002 election, it became apparent that District 23 as then drawn had an increasingly powerful Latino population that threatened to oust the incumbent Republican, Henry Bonilla. Before the 2003 redistricting, the Latino share of the citizen voting-age population was 57.5%, and Bonilla's support among Latinos had dropped with each successive election since 1996. *Session,* 298 F.Supp.2d, at 488–489. In 2002, Bonilla captured only 8% of the Latino vote, ***424** *ibid.,* and 51.5% of the overall vote. Faced with this loss of voter support, the legislature acted to protect Bonilla's incumbency by changing the lines—and hence the population mix—of the district. To begin with, the new plan divided Webb County and the city of Laredo, on the Mexican border, that formed the county's population base. Webb County, which is 94% Latino, had previously rested entirely within District 23; under the new plan, nearly 100,000 people were shifted into neighboring District 28. *Id.,* at 489. The rest of the county, approximately 93,000 people, remained in District 23. To replace the numbers District 23 lost, the State added voters in counties comprising a largely Anglo, Republican area in central Texas. *Id.,* at 488. In the newly drawn district, the Latino share of the citizen voting-age population dropped to 46%, though the Latino share of the total voting-age population remained just over 50%. *Id.,* at 489.

These changes required adjustments elsewhere, of course, so the State inserted a third district between the two districts to the east of District 23, and extended all three of them farther north. New District 25 is a long, narrow strip that winds its way from McAllen and the Mexican-border towns in the south to Austin, in the center of the State and 300 miles away. *Id.,* at 502. In between it includes seven full counties, but 77% of its population resides in split counties at the northern and southern ends. Of this 77%, roughly half reside in Hidalgo County, which includes McAllen, and half are in Travis County, which includes parts of Austin. *Ibid.* The Latinos in District 25, comprising 55% of the district's citizen voting-age population, are also mostly divided between the two distant areas, north and south. *Id.,* at 499. The Latino communities at the opposite ends of District 25 have divergent "needs and interests," *id.,* at 502, owing to "differences in socio-economic status, education, employment, health, and other characteristics," *id.,* at 512.

The District Court summed up the purposes underlying the redistricting in south and west Texas: "The change to ***425** Congressional District 23 served the dual goal of increasing Republican seats in general and protecting Bonilla's incumbency in particular, with the additional political nuance that Bonilla would be reelected in a district that had a majority of Latino voting age population—although clearly not a majority of citizen voting age population and certainly not an effective voting majority." *Id.,* at 497. The goal in creating District 25 was just as clear: "[t]o avoid retrogression under § 5" of the Voting Rights Act given the reduced Latino voting strength in District 23. *Id.,* at 489.

A

The question we address is whether Plan 1374C violates § 2 of the Voting Rights Act. A State violates § 2

> "if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision ****2614** are not equally open to participation by members of [a racial group] in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b).

The Court has identified three threshold conditions for establishing a § 2 violation: (1) the racial group is " ' "sufficiently large and geographically compact to constitute a majority in a single-member district" ' "; (2) the racial group is " ' "politically cohesive" ' "; and (3) the majority " ' "vot[es] sufficiently as a bloc to enable it ... usually to defeat the minority's preferred candidate." ' " *Johnson v. De Grandy,* 512 U.S. 997, 1006–1007, 114 S.Ct. 2647, 129 L.Ed.2d 775 (1994) (quoting *Growe,* 507 U.S., at 40, 113 S.Ct. 1075 (in turn quoting *Thornburg v. Gingles,* 478 U.S. 30, 50–51, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986))). These are the so-called *Gingles* requirements.

If all three *Gingles* requirements are established, the statutory text directs us to consider the "totality of circumstances" to

determine whether members of a racial group ***426** have less opportunity than do other members of the electorate. *De Grandy, supra,* at 1011–1012, 114 S.Ct. 2647; see also *Abrams v. Johnson,* 521 U.S. 74, 91, 117 S.Ct. 1925, 138 L.Ed.2d 285 (1997). The general terms of the statutory standard "totality of circumstances" require judicial interpretation. For this purpose, the Court has referred to the Senate Report on the 1982 amendments to the Voting Rights Act, which identifies factors typically relevant to a § 2 claim, including:

> "the history of voting-related discrimination in the State or political subdivision; the extent to which voting in the elections of the State or political subdivision is racially polarized; the extent to which the State or political subdivision has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group ...; the extent to which minority group members bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process; the use of overt or subtle racial appeals in political campaigns; and the extent to which members of the minority group have been elected to public office in the jurisdiction. The Report notes also that evidence demonstrating that elected officials are unresponsive to the particularized needs of the members of the minority group and that the policy underlying the State's or the political subdivision's use of the contested practice or structure is tenuous may have probative value." *Gingles, supra,* at 44–45, 106 S.Ct. 2752 (citing S.Rep. No. 97–417 (1982), U.S.Code Cong. & Admin.News 1982, pp. 177, 206 (hereinafter Senate Report); pinpoint citations omitted).

Another relevant consideration is whether the number of districts in which the minority group forms an effective majority is roughly proportional to its share of the population in the relevant area. *De Grandy, supra,* at 1000, 114 S.Ct. 2647.

***427** The District Court's determination whether the § 2 requirements are satisfied must be upheld unless clearly erroneous. See *Gingles, supra,* at 78–79, 106 S.Ct. 2752. Where "the ultimate finding of dilution" is based on "a misreading of the governing law," however, there is reversible error. *De Grandy, supra,* at 1022, 114 S.Ct. 2647.

B

Appellants argue that the changes to District 23 diluted the voting rights of ****2615** Latinos who remain in the district. Specifically, the redrawing of lines in District 23 caused the Latino share of the citizen voting-age population to drop from 57.5% to 46%. The District Court recognized that "Latino voting strength in Congressional District 23 is, unquestionably, weakened under Plan 1374C." *Session,* 298 F.Supp.2d, at 497. The question is whether this weakening amounts to vote dilution.

To begin the *Gingles* analysis, it is evident that the second and third *Gingles* preconditions—cohesion among the minority group and bloc voting among the majority population—are present in District 23. The District Court found "racially polarized voting" in south and west Texas, and indeed "throughout the State." *Session, supra,* at 492–493. The polarization in District 23 was especially severe: 92% of Latinos voted against Bonilla in 2002, while 88% of non-Latinos voted for him. App. 134, Table 20 (expert Report of Allan J. Lichtman on Voting–Rights Issues in Texas Congressional Redistricting (Nov. 14, 2003) (hereinafter Lichtman Report)). Furthermore, the projected results in new District 23 show that the Anglo citizen voting-age majority will often, if not always, prevent Latinos from electing the candidate of their choice in the district. *Session, supra,* at 496–497. For all these reasons, appellants demonstrated sufficient minority cohesion and majority bloc voting to meet the second and third *Gingles* requirements.

The first *Gingles* factor requires that a group be "sufficiently large and geographically compact to constitute a majority ***428** in a single-member district." 478 U.S., at 50, 106 S.Ct. 2752. Latinos in District 23 could have constituted a majority of the citizen voting-age population in the district, and in fact did so under Plan 1151C. Though it may be possible for a citizen voting-age majority to lack real electoral opportunity, the Latino majority in old District 23 did possess electoral opportunity protected by § 2.

While the District Court stated that District 23 had not been an effective opportunity district under Plan 1151C, it recognized the district was "moving in that direction." *Session,* 298 F.Supp.2d, at 489. Indeed, by 2002 the Latino candidate of choice in

District 23 won the majority of the district's votes in 13 out of 15 elections for statewide officeholders. *Id.,* at 518 (Ward, J., concurring in part and dissenting in part). And in the congressional race, Bonilla could not have prevailed without some Latino support, limited though it was. State legislators changed District 23 specifically because they worried that Latinos would vote Bonilla out of office. *Id.,* at 488.

Furthermore, to the extent the District Court suggested that District 23 was not a Latino opportunity district in 2002 simply because Bonilla prevailed, see *id.,* at 488, 495, it was incorrect. The circumstance that a group does not win elections does not resolve the issue of vote dilution. We have said that "the ultimate right of § 2 is equality of opportunity, not a guarantee of electoral success for minority-preferred candidates of whatever race." *De Grandy,* 512 U.S., at 1014, n. 11, 114 S.Ct. 2647. In old District 23 the increase in Latino voter registration and overall population, *Session,* 298 F.Supp.2d, at 523 (Ward, J., concurring in part and dissenting in part), the concomitant rise in Latino voting power in each successive election, the near-victory of the Latino candidate of choice in 2002, and the resulting threat to the Bonilla incumbency, were the very reasons that led the State to redraw the district lines. Since the redistricting prevented the immediate success of the emergent Latino majority in District ***429** 23, there was ****2616** a denial of opportunity in the real sense of that term.

Plan 1374C's version of District 23, by contrast, "is unquestionably not a Latino opportunity district." *Id.,* at 496. Latinos, to be sure, are a bare majority of the voting-age population in new District 23, but only in a hollow sense, for the parties agree that the relevant numbers must include citizenship. This approach fits the language of § 2 because only eligible voters affect a group's opportunity to elect candidates. In sum, appellants have established that Latinos could have had an opportunity district in District 23 had its lines not been altered and that they do not have one now.

Considering the district in isolation, the three *Gingles* requirements are satisfied. The State argues, nonetheless, that it met its § 2 obligations by creating new District 25 as an offsetting opportunity district. It is true, of course, that "States retain broad discretion in drawing districts to comply with the mandate of § 2." *Shaw v. Hunt,* 517 U.S. 899, 917, n. 9, 116 S.Ct. 1894, 135 L.Ed.2d 207 (1996) *(Shaw II)*. This principle has limits, though. The Court has rejected the premise that a State can always make up for the less-than-equal opportunity of some individuals by providing greater opportunity to others. See *id.,* at 917, 116 S.Ct. 1894 ("The vote-dilution injuries suffered by these persons are not remedied by creating a safe majority-black district somewhere else in the State"). As set out below, these conflicting concerns are resolved by allowing the State to use one majority-minority district to compensate for the absence of another only when the racial group in each area had a § 2 right and both could not be accommodated.

As to the first *Gingles* requirement, it is not enough that appellants show the possibility of creating a majority-minority district that would include the Latinos in District 23. See *Shaw II, supra,* at 917, n. 9, 116 S.Ct. 1894 (rejecting the idea that "a § 2 plaintiff has the right to be placed in a majority-minority district once a violation of the statute is shown"). If the inclusion of the plaintiffs would necessitate the exclusion ***430** of others, then the State cannot be faulted for its choice. That is why, in the context of a challenge to the drawing of district lines, "the first *Gingles* condition requires the possibility of creating more than the existing number of reasonably compact districts with a sufficiently large minority population to elect candidates of its choice." *De Grandy, supra,* at 1008, 114 S.Ct. 2647.

The District Court found that the current plan contains six Latino opportunity districts and that seven reasonably compact districts could not be drawn. Appellant GI Forum presented a plan with seven majority-Latino districts, but the District Court found these districts were not reasonably compact, in part because they took in "disparate and distant communities." *Session, supra,* at 491–492, and n. 125. While there was some evidence to the contrary, the court's resolution of the conflicting evidence was not clearly erroneous.

A problem remains, though, for the District Court failed to perform a comparable compactness inquiry for Plan 1374C as drawn. *De Grandy* requires a comparison between a challenger's proposal and the "existing number of reasonably compact districts." 512 U.S., at 1008, 114 S.Ct. 2647. To be sure, § 2 does not forbid the creation of a noncompact majority-minority district. *Bush v. Vera,* 517 U.S., at 999, 116 S.Ct. 1941 (KENNEDY, J., concurring). The noncompact district cannot, however, remedy a violation elsewhere in the State. See *Shaw II, supra,* at 916, 116 S.Ct. 1894 (unless "the district ****2617** contains a 'geographically compact' population" of the racial group, "where that district sits, 'there neither has been a wrong nor can be a remedy' " (quoting *Growe,* 507 U.S., at 41, 113 S.Ct. 1075)). Simply put, the State's creation of an opportunity district for those without a § 2 right offers no excuse for its failure to provide an opportunity district for those with a § 2 right. And since there is no § 2 right to a district that is not reasonably compact, see *Abrams,* 521 U.S., at 91–92, 117 S.Ct. 1925, the creation of a noncompact ***431** district does not compensate for the dismantling of a compact opportunity district.

THE CHIEF JUSTICE claims compactness should be only a factor in the analysis, see *post,* at 2660–2661 (opinion concurring in part, concurring in judgment in part, and dissenting in part), but his approach comports neither with our precedents nor with the nature of the right established by § 2. *De Grandy* expressly stated that the first *Gingles* prong looks only to the number of "reasonably compact districts." 512 U.S., at 1008, 114 S.Ct. 2647. *Shaw II,* moreover, refused to consider a noncompact district as a possible remedy for a § 2 violation. 517 U.S., at 916, 116 S.Ct. 1894. It is true *Shaw II* applied this analysis in the context of a State's using compliance with § 2 as a defense to an equal protection challenge, but the holding was clear: A State cannot remedy a § 2 violation through the creation of a noncompact district. *Ibid. Shaw II* also cannot be distinguished based on the relative location of the remedial district as compared to the district of the alleged violation. The remedial district in *Shaw II* had a 20% overlap with the district the plaintiffs sought, but the Court stated "[w]e do not think this degree of incorporation could mean [the remedial district] substantially addresses the § 2 violation." *Id.,* at 918, 116 S.Ct. 1894; see also *De Grandy, supra,* at 1019, 114 S.Ct. 2647 (expressing doubt about the idea that even within the same county, vote dilution in half the county could be compensated for in the other half). The overlap here is not substantially different, as the majority of Latinos who were in the old District 23 are still in the new District 23, but no longer have the opportunity to elect their candidate of choice.

Apart from its conflict with *De Grandy* and *Shaw II,* THE CHIEF JUSTICE's approach has the deficiency of creating a one-way rule whereby plaintiffs must show compactness but States need not (except, it seems, when using § 2 as a defense to an equal protection challenge). THE CHIEF JUSTICE appears to accept that a plaintiff, to make out a § 2 violation, ***432** must show he or she is part of a racial group that could form a majority in a reasonably compact district. *Post,* at 2659–2660. If, however, a noncompact district cannot make up for the lack of a compact district, then this is equally true whether the plaintiff or the State proposes the noncompact district.

The District Court stated that Plan 1374C created "six *Gingles* Latino" districts, *Session,* 298 F.Supp.2d, at 498, but it failed to decide whether District 25 was reasonably compact for § 2 purposes. It recognized there was a 300–mile gap between the Latino communities in District 25, and a similarly large gap between the needs and interests of the two groups. *Id.,* at 502. After making these observations, however, it did not make any finding about compactness. *Id.,* at 502–504. It ruled instead that, despite these concerns, District 25 would be an effective Latino opportunity district because the combined voting strength of both Latino groups would allow a Latino-preferred candidate to prevail in elections. *Ibid.* The District Court's general finding of effectiveness cannot substitute for the lack of a finding ****2618** on compactness, particularly because the District Court measured effectiveness simply by aggregating the voting strength of the two groups of Latinos. *Id.,* at 503–504. Under the District Court's approach, a district would satisfy § 2 no matter how noncompact it was, so long as all the members of a racial group, added together, could control election outcomes.

The District Court did evaluate compactness for the purpose of deciding whether race predominated in the drawing of district lines. The Latinos in the Rio Grande Valley and those in Central Texas, it found, are "disparate communities of interest," with "differences in socio-economic status, education, employment, health, and other characteristics." *Id.,* at 512. The court's conclusion that the relative smoothness of the district lines made the district compact, despite this combining of discrete communities of interest, is inapposite ***433** because the court analyzed the issue only for equal protection purposes. In the equal protection context, compactness focuses on the contours of district lines to determine whether race was the predominant factor in drawing those lines. See *Miller v. Johnson,* 515 U.S. 900, 916–917, 115 S.Ct. 2475, 132 L.Ed.2d 762 (1995). Under § 2, by contrast, the injury is vote dilution, so the compactness inquiry embraces different considerations. "The first *Gingles* condition refers to the compactness of the minority population, not to the compactness of the contested district." *Vera,* 517 U.S., at 997, 116 S.Ct. 1941 (KENNEDY, J., concurring); see also *Abrams,* 521 U.S., at 111, 117 S.Ct. 1925 (BREYER, J., dissenting) (compactness to show a violation of equal protection, "which concerns the shape or boundaries of a district, differs from § 2 compactness, which concerns a minority group's compactness"); *Shaw II, supra,* at 916, 116 S.Ct. 1894 (the inquiry under § 2 is whether "the minority group is geographically compact" (internal quotation marks omitted)).

While no precise rule has emerged governing § 2 compactness, the "inquiry should take into account 'traditional districting principles such as maintaining communities of interest and traditional boundaries.' " *Abrams, supra,* at 92, 117 S.Ct. 1925 (quoting *Vera,* 517 U.S., at 977, 116 S.Ct. 1941 (plurality opinion)); see also *id.,* at 979, 116 S.Ct. 1941 (A district that "reaches out to grab small and apparently isolated minority communities" is not reasonably compact). The recognition of nonracial communities of interest reflects the principle that a State may not "assum[e] from a group of voters' race that they 'think alike, share the same political interests, and will prefer the same candidates at the polls.' " *Miller, supra,* at 920, 115 S.Ct. 2475 (quoting *Shaw v. Reno,* 509 U.S. 630, 647, 113 S.Ct. 2816, 125 L.Ed.2d 511 (1993)). In the absence of this

prohibited assumption, there is no basis to believe a district that combines two farflung segments of a racial group with disparate interests provides the opportunity that § 2 requires or that the first *Gingles* condition contemplates. "The purpose of the Voting Rights Act is to prevent discrimination in ***434** the exercise of the electoral franchise and to foster our transformation to a society that is no longer fixated on race." *Georgia v. Ashcroft,* 539 U.S., at 490, 123 S.Ct. 2498, 156 L.Ed.2d 428; cf. *post,* at 2663 (opinion of ROBERTS, C. J.). We do a disservice to these important goals by failing to account for the differences between people of the same race.

While the District Court recognized the relevant differences, by not performing the compactness inquiry, it failed to account for the significance of these differences under § 2. In these cases the District Court's findings regarding the different characteristics, needs, and interests ****2619** of the Latino community near the Mexican border and the one in and around Austin are well supported and uncontested. Legitimate yet differing communities of interest should not be disregarded in the interest of race. The practical consequence of drawing a district to cover two distant, disparate communities is that one or both groups will be unable to achieve their political goals. Compactness is, therefore, about more than "style points," *post,* at 2653 (opinion of ROBERTS, C. J.); it is critical to advancing the ultimate purposes of § 2, ensuring minority groups equal "opportunity ... to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b). (And if it were just about style points, it is difficult to understand why a plaintiff would have to propose a compact district to make out a § 2 claim.) As witnesses who know the south and west Texas culture and politics testified, the districting in Plan 1374C "could make it more difficult for thinly financed Latino-preferred candidates to achieve electoral success and to provide adequate and responsive representation once elected." *Session,* 298 F.Supp.2d, at 502; see also *id.,* at 503 (Elected officials from the region "testified that the size and diversity of the newly-configured districts could make it more difficult for the constituents in the Rio Grande Valley to control election outcomes"). We do not question the District Court's finding that the groups' combined voting strength would enable ***435** them to elect a candidate each prefers to the Anglos' candidate of choice. We also accept that in some cases members of a racial group in different areas—for example, rural and urban communities—could share similar interests and therefore form a compact district if the areas are in reasonably close proximity. See *Abrams, supra,* at 111–112, 117 S.Ct. 1925 (BREYER, J., dissenting). When, however, the only common index is race and the result will be to cause internal friction, the State cannot make this a remedy for a § 2 violation elsewhere. We emphasize it is the enormous geographical distance separating the Austin and Mexican-border communities, coupled with the disparate needs and interests of these populations—not either factor alone—that renders District 25 noncompact for § 2 purposes. The mathematical possibility of a racial bloc does not make a district compact.

Since District 25 is not reasonably compact, Plan 1374C contains only five reasonably compact Latino opportunity districts. Plan 1151C, by contrast, created six such districts. The District Court did not find, and the State does not contend, that any of the Latino opportunity districts in Plan 1151C are noncompact. Contrary to THE CHIEF JUSTICE's suggestion, *post,* at 2657, moreover, the Latino population in old District 23 is, for the most part, in closer geographic proximity than is the Latino population in new District 25. More importantly, there has been no contention that different pockets of the Latino population in old District 23 have divergent needs and interests, and it is clear that, as set out below, the Latino population of District 23 was split apart particularly because it was becoming so cohesive. The Latinos in District 23 had found an efficacious political identity, while this would be an entirely new and difficult undertaking for the Latinos in District 25, given their geographic and other differences.

Appellants have thus satisfied all three *Gingles* requirements as to District 23, and the creation of new District 25 does not remedy the problem.

***436** C

We proceed now to the totality of the circumstances, and first to the proportionality ****2620** inquiry, comparing the percentage of total districts that are Latino opportunity districts with the Latino share of the citizen voting-age population. As explained in *De Grandy,* proportionality is "a relevant fact in the totality of circumstances." 512 U.S., at 1000, 114 S.Ct. 2647. It does not, however, act as a "safe harbor" for States in complying with § 2. *Id.,* at 1017–1018, 114 S.Ct. 2647; see also *id.,* at 1025, 114 S.Ct. 2647 (O'CONNOR, J., concurring) (proportionality "is *always* relevant evidence in determining vote dilution, but is *never* itself dispositive"); *id.,* at 1027–1028, 114 S.Ct. 2647 (KENNEDY, J., concurring in part and concurring in judgment) (proportionality has "some relevance," though "placing undue emphasis upon proportionality risks

defeating the goals underlying the Voting Rights Act"). If proportionality could act as a safe harbor, it would ratify "an unexplored premise of highly suspect validity: that in any given voting jurisdiction ..., the rights of some minority voters under § 2 may be traded off against the rights of other members of the same minority class." *Id.,* at 1019, 114 S.Ct. 2647; see also *Shaw II,* 517 U.S., at 916–918, 116 S.Ct. 1894.

The State contends that proportionality should be decided on a regional basis, while appellants say their claim requires the Court to conduct a statewide analysis. In *De Grandy,* the plaintiffs "passed up the opportunity to frame their dilution claim in statewide terms." 512 U.S., at 1022, 114 S.Ct. 2647. Based on the parties' apparent agreement that the proper frame of reference was the Dade County area, the Court used that area to decide proportionality. *Id.,* at 1022–1023, 114 S.Ct. 2647. In these cases, on the other hand, appellants allege an "injury to African American and Hispanic voters throughout the State." Complaint in Civ. Action No. 03C–356 (ED Tex.), pp. 1–2; see also First Amended Complaint in Civ. Action No. 2:03–354 (ED Tex.), pp. 1, 5, 7; Plaintiff's First Amended Complaint in Civ. Action No. 2:03cv354 etc. (ED Tex.), pp. 4–5. The District Court, moreover, expressly considered the statewide ***437** proportionality argument. As a result, the question of the proper geographic scope for assessing proportionality now presents itself.

We conclude the answer in these cases is to look at proportionality statewide. The State contends that the seven districts in south and west Texas correctly delimit the boundaries for proportionality because that is the only area of the State where reasonably compact Latino opportunity districts can be drawn. This argument, however, misunderstands the role of proportionality. We have already determined, under the first *Gingles* factor, that another reasonably compact Latino district can be drawn. The question now is whether the absence of that additional district constitutes impermissible vote dilution. This inquiry requires an " 'intensely local appraisal' " of the challenged district. *Gingles,* 478 U.S., at 79, 106 S.Ct. 2752 (quoting *Rogers v. Lodge,* 458 U.S. 613, 622, 102 S.Ct. 3272, 73 L.Ed.2d 1012 (1982)); see also *Gingles, supra,* at 101, 106 S.Ct. 2752 (O'CONNOR, J., concurring in judgment). A local appraisal is necessary because the right to an undiluted vote does not belong to the "minority as a group," but rather to "its individual members." *Shaw II, supra,* at 917, 116 S.Ct. 1894. And a State may not trade off the rights of some members of a racial group against the rights of other members of that group. See *De Grandy, supra,* at 1019, 114 S.Ct. 2647; *Shaw II, supra,* at 916–918, 116 S.Ct. 1894. The question is therefore not "whether line-drawing in the challenged area as a whole dilutes minority voting strength," *post,* at 2659 (opinion of ****2621** ROBERTS, C. J.), but whether line-drawing dilutes the voting strength of the Latinos in District 23.

The role of proportionality is not to displace this local appraisal or to allow the State to trade off the rights of some against the rights of others. Instead, it provides some evidence of whether "the political processes leading to nomination or election in the State or political subdivision are not equally open to participation." 42 U.S.C. § 1973(b). For this purpose, the State's seven-district area is arbitrary. It just as easily could have included six or eight districts. Appellants ***438** have alleged statewide vote dilution based on a statewide plan, so the electoral opportunities of Latinos across the State can bear on whether the lack of electoral opportunity for Latinos in District 23 is a consequence of Plan 1374C's redrawing of lines or simply a consequence of the inevitable "win some, lose some" in a State with racial bloc voting. Indeed, several of the other factors in the totality of circumstances have been characterized with reference to the State as a whole. *Gingles, supra,* at 44–45, 106 S.Ct. 2752 (listing Senate Report factors). Particularly given the presence of racially polarized voting—and the possible submergence of minority votes—throughout Texas, it makes sense to use the entire State in assessing proportionality.

Looking statewide, there are 32 congressional districts. The five reasonably compact Latino opportunity districts amount to roughly 16% of the total, while Latinos make up 22% of Texas' citizen voting-age population. (Appellant GI Forum claims, based on data from the 2004 American Community Survey of the U.S. Census Bureau, that Latinos constitute 24.5% of the statewide citizen voting-age population, but as this figure was neither available at the time of the redistricting, nor presented to the District Court, we accept the District Court's finding of 22%.) Latinos are, therefore, two districts shy of proportional representation. There is, of course, no "magic parameter," *De Grandy,* 512 U.S., at 1017, n. 14, 114 S.Ct. 2647, and "rough proportionality," *id.,* at 1023, 114 S.Ct. 2647, must allow for some deviations. We need not decide whether the two-district deficit in these cases weighs in favor of a § 2 violation. Even if Plan 1374C's disproportionality were deemed insubstantial, that consideration would not overcome the other evidence of vote dilution for Latinos in District 23. "[T]he degree of probative value assigned to proportionality may vary with other facts," *id.,* at 1020, 114 S.Ct. 2647, and the other facts in these cases convince us that there is a § 2 violation.

District 23's Latino voters were poised to elect their candidate of choice. They were becoming more politically active, ***439** with a marked and continuous rise in Spanish-surnamed voter registration. See Lichtman Report, App. 142–143. In

successive elections Latinos were voting against Bonilla in greater numbers, and in 2002 they almost ousted him. Webb County in particular, with a 94% Latino population, spurred the incumbent's near defeat with dramatically increased turnout in 2002. See 2004 Almanac 1579. In response to the growing participation that threatened Bonilla's incumbency, the State divided the cohesive Latino community in Webb County, moving about 100,000 Latinos to District 28, which was already a Latino opportunity district, and leaving the rest in a district where they now have little hope of electing their candidate of choice.

The changes to District 23 undermined the progress of a racial group that has been subject to significant voting-related discrimination and that was becoming increasingly politically active and cohesive. Cf. ****2622** *De Grandy, supra,* at 1014, 114 S.Ct. 2647 (finding no § 2 violation where "the State's scheme would thwart the historical tendency to exclude Hispanics, not encourage or perpetuate it"); *White v. Regester,* 412 U.S. 755, 769, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973) (looking in the totality of the circumstances to whether the proposed districting would "remedy the effects of past and present discrimination against Mexican–Americans, and to bring the community into the full stream of political life of the county and State by encouraging their further registration, voting, and other political activities" (citation and internal quotation marks omitted)). The District Court recognized "the long history of discrimination against Latinos and Blacks in Texas," *Session,* 298 F.Supp.2d, at 473, and other courts have elaborated on this history with respect to electoral processes:

> "Texas has a long, well-documented history of discrimination that has touched upon the rights of African–Americans and Hispanics to register, to vote, or to participate otherwise in the electoral process. Devices such as the poll tax, an all-white primary system, and ***440** restrictive voter registration time periods are an unfortunate part of this State's minority voting rights history. The history of official discrimination in the Texas election process—stretching back to Reconstruction—led to the inclusion of the State as a covered jurisdiction under Section 5 in the 1975 amendments to the Voting Rights Act. Since Texas became a covered jurisdiction, the Department of Justice has frequently interposed objections against the State and its subdivisions." *Vera v. Richards,* 861 F.Supp. 1304, 1317 (S.D.Tex.1994) (citations omitted).

See also *Vera,* 517 U.S., at 981–982, 116 S.Ct. 1941 (plurality opinion); *Regester, supra,* at 767–769, 93 S.Ct. 2332. In addition, the "political, social, and economic legacy of past discrimination" for Latinos in Texas, *Session, supra,* at 492, may well "hinder their ability to participate effectively in the political process," *Gingles,* 478 U.S., at 45, 106 S.Ct. 2752 (citing Senate Report factors).

Against this background, the Latinos' diminishing electoral support for Bonilla indicates their belief he was "unresponsive to the particularized needs of the members of the minority group." *Ibid.* (same). In essence the State took away the Latinos' opportunity because Latinos were about to exercise it. This bears the mark of intentional discrimination that could give rise to an equal protection violation. Even if we accept the District Court's finding that the State's action was taken primarily for political, not racial, reasons, *Session, supra,* at 508, the redrawing of the district lines was damaging to the Latinos in District 23. The State not only made fruitless the Latinos' mobilization efforts but also acted against those Latinos who were becoming most politically active, dividing them with a district line through the middle of Laredo.

Furthermore, the reason for taking Latinos out of District 23, according to the District Court, was to protect Congressman Bonilla from a constituency that was increasingly voting against him. The Court has noted that incumbency protection ***441** can be a legitimate factor in districting, see *Karcher v. Daggett,* 462 U.S., at 740, 103 S.Ct. 2653, but experience teaches that incumbency protection can take various forms, not all of them in the interests of the constituents. If the justification for incumbency protection is to keep the constituency intact so the officeholder is accountable for promises made or broken, then the protection seems to accord with concern for the voters. If, on the other hand, incumbency protection means excluding some voters from the district simply because they are likely to vote ****2623** against the officeholder, the change is to benefit the officeholder, not the voters. By purposely redrawing lines around those who opposed Bonilla, the state legislature took the latter course. This policy, whatever its validity in the realm of politics, cannot justify the effect on Latino voters. See *Gingles, supra,* at 45, 106 S.Ct. 2752 (citing Senate Report factor of whether "the policy underlying" the State's action "is tenuous"). The policy becomes even more suspect when considered in light of evidence suggesting that the State intentionally drew District 23 to have a nominal Latino voting-age majority (without a citizen voting-age majority) for political reasons. *Session, supra,* at 497. This use of race to create the facade of a Latino district also weighs in favor of appellants' claim.

Contrary to THE CHIEF JUSTICE's suggestion that we are reducing the State's needed flexibility in complying with § 2, see *post,* at 2660, the problem here is entirely of the State's own making. The State chose to break apart a Latino opportunity district to protect the incumbent congressman from the growing dissatisfaction of the cohesive and politically active Latino community in the district. The State then purported to compensate for this harm by creating an entirely new district that

combined two groups of Latinos, hundreds of miles apart, that represent different communities of interest. Under § 2, the State must be held accountable for the effect of these choices in denying equal opportunity ***442** to Latino voters. Notwithstanding these facts, THE CHIEF JUSTICE places great emphasis on the District Court's statement that "new District 25 is 'a more effective Latino opportunity district than Congressional District 23 had been.' " *Post,* at 2653 (quoting *Session,* 298 F.Supp.2d, at 503). Even assuming this statement, expressed in the context of summarizing witnesses' testimony, qualifies as a finding of the District Court, two points make it of minimal relevance. First, as previously noted, the District Court measured the effectiveness of District 25 without accounting for the detrimental consequences of its compactness problems. Second, the District Court referred only to how effective District 23 "had been," not to how it would operate today, a significant distinction given the growing Latino political power in the district.

Based on the foregoing, the totality of the circumstances demonstrates a § 2 violation. Even assuming Plan 1374C provides something close to proportional representation for Latinos, its troubling blend of politics and race—and the resulting vote dilution of a group that was beginning to achieve § 2's goal of overcoming prior electoral discrimination—cannot be sustained.

D

Because we hold Plan 1374C violates § 2 in its redrawing of District 23, we do not address appellants' claims that the use of race and politics in drawing that district violates the First Amendment and equal protection. We also need not confront appellants' claim of an equal protection violation in the drawing of District 25. The districts in south and west Texas will have to be redrawn to remedy the violation in District 23, and we have no cause to pass on the legitimacy of a district that must be changed. See *Session,* 298 F.Supp.2d, at 528 (Ward, J., concurring in part and dissenting in part). District 25, in particular, was formed to compensate for the loss of District 23 as a Latino opportunity district, and there is no reason to believe District 25 will remain ***443** in its current form once District 23 is brought into compliance with § 2. We therefore vacate the District Court's judgment as to these claims.

****2624** IV

Appellants also challenge the changes to district lines in the Dallas area, alleging they dilute African–American voting strength in violation of § 2 of the Voting Rights Act. Specifically, appellants contend that an African–American minority effectively controlled District 24 under Plan 1151C, and that § 2 entitles them to this district.

Before Plan 1374C was enacted, District 24 had elected Anglo Democrat Martin Frost to Congress in every election since 1978. *Id.,* at 481–482. Anglos were the largest racial group in the district, with 49.8% of the citizen voting-age population, and third largest were Latinos, with 20.8%. State's Exh. 57, App. 339. African–Americans were the second-largest group, with 25.7% of the citizen voting-age population, *ibid.,* and they voted consistently for Frost. The new plan broke apart this racially diverse district, assigning its pieces into several other districts.

Accepting that African–Americans would not be a majority of the single-member district they seek, and that African–Americans do not vote cohesively with Hispanics, *Session, supra,* at 484, appellants nonetheless contend African–Americans had effective control of District 24. As the Court has done several times before, we assume for purposes of this litigation that it is possible to state a § 2 claim for a racial group that makes up less than 50% of the population. See *De Grandy,* 512 U.S., at 1009, 114 S.Ct. 2647; *Voinovich v. Quilter,* 507 U.S. 146, 154, 113 S.Ct. 1149, 122 L.Ed.2d 500 (1993); *Gingles,* 478 U.S., at 46–47, n. 12, 106 S.Ct. 2752. Even on the assumption that the first *Gingles* prong can accommodate this claim, however, appellants must show they constitute "a sufficiently large minority to elect their candidate of choice with the assistance of cross-over votes." *Voinovich, supra,* at 158, 113 S.Ct. 1149 (emphasis deleted).

***444** The relatively small African–American population can meet this standard, according to appellants, because its members constituted 64% of the voters in the Democratic primary. Since a significant number of Anglos and Latinos voted for the

Democrat in the general election, the argument goes, African–American control of the primary translated into effective control of the entire election.

The District Court found, however, that African–Americans could not elect their candidate of choice in the primary. In support of this finding, it relied on testimony that the district was drawn for an Anglo Democrat, the fact that Frost had no opposition in any of his primary elections since his incumbency began, and District 24's demographic similarity to another district where an African–American candidate failed when he ran against an Anglo. *Session,* 298 F.Supp.2d, at 483–484. "In short, that Anglo Democrats control this district is," according to the District Court, "the most rational conclusion." *Id.,* at 484.

Appellants fail to demonstrate clear error in this finding. In the absence of any contested Democratic primary in District 24 over the last 20 years, no obvious benchmark exists for deciding whether African–Americans could elect their candidate of choice. The fact that African–Americans voted for Frost—in the primary and general elections—could signify he is their candidate of choice. Without a contested primary, however, it could also be interpreted to show (assuming racial bloc voting) that Anglos and Latinos would vote in the Democratic primary in greater numbers if an African–American candidate of choice were to run, especially given Texas' open primary system. The District Court heard trial testimony that would support both explanations, and we cannot ****2625** say that it erred in crediting the testimony that endorsed the latter interpretation. Compare App. 242–243 (testimony of Tarrant County Precinct Administrator that Frost is the "favored candidate of the African–American community" and that he has gone unopposed in primary challenges ***445** because he "serves [the African–American community's] interests") with *id.,* at 262–264 (testimony of Congresswoman Eddie Bernice Johnson that District 24 was drawn for an Anglo Democrat (Martin Frost, in particular) in 1991 by splitting a minority community), and *id.,* at 277–280 (testimony of State Representative Ron Wilson that African–Americans did not have the ability to elect their preferred candidate, particularly an African–American candidate, in District 24 and that Anglo Democrats in such "influence [d]istricts" were not fully responsive to the needs of the African–American community).

The analysis submitted by appellants' own expert was also inconsistent. Of the three elections for statewide office he examined, in District 24 the African–American candidate of choice would have won one, lost one, and in the third the African–American vote was split. See Lichtman Report, *id.,* at 75–76, 92–96; State's Exh. 20 in Civ. Action No. 2:03–CV–354 (ED Tex.), p. 138; State's Exh. 21 in Civ. Action No. 2:03–CV–354 (ED Tex.). The District Court committed no clear error in rejecting this questionable showing that African–Americans have the ability to elect their candidate of choice in favor of other evidence that an African–American candidate of choice would not prevail. See *Anderson v. Bessemer City,* 470 U.S. 564, 574, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985) ("Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous").

That African–Americans had influence in the district, *Session, supra,* at 485, does not suffice to state a § 2 claim in these cases. The opportunity "to elect representatives of their choice," 42 U.S.C. § 1973(b), requires more than the ability to influence the outcome between some candidates, none of whom is their candidate of choice. There is no doubt African–Americans preferred Martin Frost to the Republicans who opposed him. The fact that African–Americans preferred Frost to some others does not, however, make him ***446** their candidate of choice. Accordingly, the ability to aid in Frost's election does not make the old District 24 an African–American opportunity district for purposes of § 2. If § 2 were interpreted to protect this kind of influence, it would unnecessarily infuse race into virtually every redistricting, raising serious constitutional questions. See *Georgia v. Ashcroft,* 539 U.S., at 491, 123 S.Ct. 2498 (KENNEDY, J., concurring).

Appellants respond by pointing to *Georgia v. Ashcroft,* where the Court held that the presence of influence districts is a relevant consideration under § 5 of the Voting Rights Act. The inquiry under § 2, however, concerns the opportunity "to elect representatives of their choice," 42 U.S.C. § 1973(b), not whether a change has the purpose or effect of "denying or abridging the right to vote," § 1973c. *Ashcroft* recognized the differences between these tests, 539 U.S., at 478, 123 S.Ct. 2498, and concluded that the ability of racial groups to elect candidates of their choice is only one factor under § 5, *id.,* at 480, 123 S.Ct. 2498. So while the presence of districts "where minority voters may not be able to elect a candidate of choice but can play a substantial, if not decisive, role in the electoral process" is relevant to the § 5 analysis, *id.,* at 482, 123 S.Ct. 2498, the lack of such districts cannot establish a § 2 violation. The failure to create an influence ****2626** district in these cases thus does not run afoul of § 2 of the Voting Rights Act.

Appellants do not raise a district-specific political gerrymandering claim against District 24. Even if the claim were cognizable as part of appellants' statewide challenge, it would be unpersuasive. Just as for the statewide claim, appellants

would lack any reliable measure of partisan fairness. Justice STEVENS suggests the burden on representational rights can be measured by comparing the success of Democrats in old District 24 with their success in the new districts they now occupy. *Post,* at 2642 – 2643 (opinion concurring in part and dissenting in part). There is no reason, however, why the old district has any special claim to fairness. In fact, old District 24, no less than the old redistricting plan as ***447** a whole, was formed for partisan reasons. See *Session,* 298 F.Supp.2d, at 484; see also *Balderas,* App. E to Juris. Statement 208a. Furthermore, Justice STEVENS' conclusion that the State has not complied with § 5 of the Voting Rights Act, *post,* at 2644 – 2646—effectively overruling the Attorney General without briefing, argument, or a lower court opinion on the issue—does not solve the problem of determining a reliable measure of impermissible partisan effect.

* * *

We reject the statewide challenge to Texas' redistricting as an unconstitutional political gerrymander and the challenge to the redistricting in the Dallas area as a violation of § 2 of the Voting Rights Act. We do hold that the redrawing of lines in District 23 violates § 2 of the Voting Rights Act. The judgment of the District Court is affirmed in part, reversed in part, and vacated in part, and the cases are remanded for further proceedings.

It is so ordered.

Justice STEVENS, with whom Justice BREYER joins as to Parts I and II, concurring in part and dissenting in part.

This is a suit in which it is perfectly clear that judicially manageable standards enable us to decide the merits of a statewide challenge to a political gerrymander. Applying such standards, I shall explain why the wholly unnecessary replacement of the neutral plan fashioned by the three-judge court in *Balderas v. Texas,* Civ. Action No. 6:01CV158, 2001 WL 35673966 (ED Tex., Nov. 14, 2001) *(per curiam)* (Plan 1151C or *Balderas* Plan) with Plan 1374C, which creates districts with less compact shapes, violates the Voting Rights Act of 1965, and fragments communities of interest—all for purely partisan purposes—violated the State's constitutional duty to govern impartially. Prior misconduct by the Texas Legislature neither excuses nor justifies that violation. Accordingly, while I join the Court's decision to invalidate District 23, I ***448** would hold that Plan 1374C is entirely invalid and direct the District Court to reinstate Plan 1151C. Moreover, as I shall explain, even if the remainder of the plan were valid, the cracking of *Balderas* District 24 would still be unconstitutional.

I

The maintenance of existing district boundaries is advantageous to both voters and candidates. Changes, of course, must be made after every census to equalize the population of each district or to accommodate changes in the size of a State's congressional delegation. Similarly, changes must be made in response to a finding that a districting plan violates § 2 or § 5 of the Voting Rights Act, 42 U.S.C. §§ 1973, ****2627** 1973c. But the interests in orderly campaigning and voting, as well as in maintaining communication between representatives and their constituents, underscore the importance of requiring that any decision to redraw district boundaries—like any other state action that affects the electoral process—must, at the very least, serve some legitimate governmental purpose. See, *e.g., Burdick v. Takushi,* 504 U.S. 428, 434, 440, 112 S.Ct. 2059, 119 L.Ed.2d 245 (1992); *id.,* at 448–450, 112 S.Ct. 2059 (KENNEDY, J., joined by Blackmun and STEVENS, JJ., dissenting). A purely partisan desire "to minimize or cancel out the voting strength of racial or political elements of the voting population," *Fortson v. Dorsey,* 379 U.S. 433, 439, 85 S.Ct. 498, 13 L.Ed.2d 401 (1965), is not such a purpose. Because a desire to minimize the strength of Texas Democrats was the sole motivation for the adoption of Plan 1374C, see *Session v. Perry,* 298 F.Supp.2d 451, 470, 472 (E.D.Tex.2004) *(per curiam),* the plan cannot withstand constitutional

scrutiny.

The districting map that Plan 1374C replaced, Plan 1151C, was not only manifestly fair and neutral, it may legitimately be described as a milestone in Texas' political history because it put an end to a long history of Democratic misuse of power in that State. For decades after the Civil War, the political party associated with the former Commander in ***449** Chief of the Union Army attracted the support of former slaves and a handful of "carpetbaggers," but had no significant political influence in Texas. The Democrats maintained their political power by excluding black voters from participating in primary elections, see, *e.g., Smith v. Allwright,* 321 U.S. 649, 656–661, 64 S.Ct. 757, 88 L.Ed. 987 (1944), by the artful management of multimember electoral schemes, see, *e.g., White v. Regester,* 412 U.S. 755, 765–770, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973), and, most recently, by outrageously partisan gerrymandering, see *ante,* at 2605 – 2606 (opinion of KENNEDY, J.); *Bush v. Vera,* 517 U.S. 952, 987–990, 116 S.Ct. 1941, 135 L.Ed.2d 248 (1996) (appendixes in plurality opinion), *id.,* at 1005–1007, 1042–1045, 116 S.Ct. 1941 (STEVENS, J., dissenting). Unfortunately, some of these tactics are not unique to Texas Democrats; the apportionment scheme they devised in the 1990's is only one example of the excessively gerrymandered districting plans that parties with control of their States' governing bodies have implemented in recent years. See, *e.g., Cox v. Larios,* 542 U.S. 947, 947–950, 124 S.Ct. 2806, 159 L.Ed.2d 831 (2004) (STEVENS, J., joined by BREYER, J., concurring) (Democratic gerrymander in Georgia); *Vieth v. Jubelirer,* 541 U.S. 267, 272, 124 S.Ct. 1769, 158 L.Ed.2d 546 (2004) (plurality opinion); *id.,* at 342, 124 S.Ct. 1769 (STEVENS, J., dissenting) (Republican gerrymander in Pennsylvania); *Karcher v. Daggett,* 462 U.S. 725, 744, 103 S.Ct. 2653, 77 L.Ed.2d 133 (1983) (Democratic gerrymander in New Jersey); *Badham v. Eu,* 694 F.Supp. 664, 666 (N.D.Cal.1988), summarily aff'd, 488 U.S. 1024, 109 S.Ct. 829, 102 L.Ed.2d 962 (1989) (Democratic gerrymander in California).

Despite the Texas Democratic Party's sordid history of manipulating the electoral process to perpetuate its stranglehold on political power, the Texas Republican Party managed to become the State's majority party by 2002. If, after finally achieving political strength in Texas, the Republicans had adopted a new plan in order to remove the excessively partisan Democratic gerrymander of the 1990's, the decision to do so would unquestionably have been supported by a neutral justification. But that is not what happened. Instead, as the following discussion of the relevant events that ***450** transpired in Texas ****2628** following the release of the 2000 census data demonstrates, Texas Republicans abandoned a neutral apportionment map for the sole purpose of manipulating district boundaries to maximize their electoral advantage and thus create their own impermissible stranglehold on political power.

By 2001, Texas Republicans had overcome many of the aforementioned tactics designed to freeze the Democrats' status as the State's dominant party, and Republicans controlled the governorship and the State Senate. Democrats, however, continued to constitute a majority of the State House of Representatives. In March of that year, the results of the 2000 decennial census revealed that, as a result of its population growth, Texas was entitled to two additional seats in the United States House of Representatives, bringing the size of the Texas congressional delegation to 32. Texas, therefore, was required to draw 32 equipopulous districts to account for its additional representation and to comply with the one-person, one-vote mandate of Article I, § 2, see, *e.g., Karcher,* 462 U.S. 725, 103 S.Ct. 2653, 77 L.Ed.2d 133. Under Texas law, the Texas Legislature was required to draw these new districts. See *Session,* 298 F.Supp.2d, at 457–458.

The Texas Legislature, divided between a Republican Senate and a Democratic House, did not reach agreement on a new congressional map in the regular legislative session, and Governor Rick Perry declined to call a special session. Litigation in the Texas state courts also failed to result in a plan, as the Texas Supreme Court vacated the map created by a state trial judge. See *Perry v. Del Rio,* 67 S.W.3d 85 (2001). This left a three-judge Federal District Court in the Eastern District of Texas with " 'the unwelcome obligation of performing in the legislature's stead.' " *Balderas v. Texas,* Civ. Action No. 6:01CV158, 2001 WL 35673966 (Nov. 14, 2001) *(per curiam),* App. E to Juris. Statement in No. 05–276, p. 202a (hereinafter App. to Juris. Statement) (quoting *Connor v. Finch,* 431 U.S. 407, 415, 97 S.Ct. 1828, 52 L.Ed.2d 465 (1977)).

***451** After protracted proceedings, which included the testimony of an impartial expert as well as representatives of interested groups supporting different plans, the court prepared its own plan. "Conscious that the primary responsibility for drawing congressional districts is given to political branches of government, and hesitant to 'und[o] the work of one political party for the benefit of another,' the three-judge *Balderas* court sought to apply 'only "neutral" redistricting standards' when drawing Plan 1151C." *Ante,* at 2606 (opinion of KENNEDY, J.) (quoting *Henderson v. Perry,* 399 F.Supp.2d 756, 768 (E.D.Tex.2005)). As the court explained, it started with a blank map of Texas, drew in the existing districts protected by the Voting Rights Act, located the new Districts 31 and 32 where the population growth that produced them had occurred, and then applied the neutral criteria of "compactness, contiguity, and respecting county and municipal boundaries." App. to Juris.

Statement 205a. See *id.,* at 206a–209a. The District Court purposely "eschewed an effort to treat old lines as an independent locator," and concluded that its plan had done much "to end most of the below-the-surface 'ripples' of the 1991 plan and the myriad of submissions before us. For example, the patently irrational shapes of Districts 5 and 6 under the 1991 plan, widely cited as the most extreme but successful gerrymandering in the country, are no more." *Id.,* at 207a–208a.

At the conclusion of this process, the court believed that it had fashioned a map that was "likely to produce a congressional ****2629** delegation roughly proportional to the party voting breakdown across the state." *Id.,* at 209a. Indeed, reflecting the growing strength of the Republican Party, the District Court's plan, Plan 1151C, offered that party an advantage in 20 of the 32 congressional seats. See *Session,* 298 F.Supp.2d, at 471 (describing Plan 1151C). The State's expert in this litigation testified that the *Balderas* Plan was not biased in favor of Democrats and that it was "[m]aybe slightly" biased in favor of Republicans. App. 224 (deposition ***452** of Ronald Keith Gaddie, Ph.D.). Although groups of Latino voters challenged Plan 1151C on appeal, neither major political party did so, and the State of Texas filed a motion asking this Court to affirm the District Court's judgment, which we did, *Balderas v. Texas,* 536 U.S. 919, 122 S.Ct. 2583, 153 L.Ed.2d 773 (2002).

In the 2002 congressional elections, however, Republicans were not able to capitalize on the advantage that the *Balderas* Plan had provided them. A number of Democratic incumbents were able to attract the votes of ticket-splitters (individuals who voted for candidates from one party in statewide elections and for a candidate from a different party in congressional elections), and thus won elections in some districts that favored Republicans. As a result, Republicans carried only 15 of the districts drawn by the *Balderas* court.[1]

While the Republicans did not do as well as they had hoped in elections for the United States House of Representatives, they made gains in the Texas House of Representatives and won a majority of seats in that body. This gave Texas Republicans control over both bodies of the state legislature, as well as the Governor's mansion, for the first time since Reconstruction.

With full control of the State's legislative and executive branches, the Republicans "decided to redraw the state's ***453** congressional districts solely for the purpose of seizing between five and seven seats from Democratic incumbents." *Session,* 298 F.Supp.2d, at 472 (internal quotation marks omitted). According to former Lieutenant Governor Bill Ratliff, a highly regarded Republican member of the State Senate, "political gain for the Republicans was 110% of the motivation for the Plan, ... it was 'the entire motivation.' " *Id.,* at 473 (quoting trial transcript). Or, as the District Court stated in the first of its two decisions in this litigation, "[t]here is little question but that the single-minded purpose of the Texas Legislature in enacting Plan 1374C was to gain partisan advantage." *Id.,* at 470. See also *ante,* at 2606 (opinion of KENNEDY, J.) (quoting District Court's conclusion). Indeed, as the State itself argued before the District Court: "The overwhelming evidence demonstrated that partisan gain was the motivating force behind the decision to redistrict in 2003." State Defendants' Post–Trial ****2630** Brief in No. 2:03–CV–354 (ED Tex.), p. 51 (hereinafter State Post–Trial Brief).

This desire for political gain led to a series of dramatic confrontations between Republicans and Democrats, and ultimately resulted in the adoption of a plan that violated the Voting Rights Act. The legislature did not pass a new map in the regular 2003 session, in part because Democratic House members absented themselves and thus denied the body a quorum. Governor Perry then called a special session to take up congressional redistricting—the same step he had declined to take in 2001 after the release of the decennial census figures, when Republicans lacked a majority in the House. During the first special session, the House approved a new congressional map, but the Senate's longstanding tradition requiring two-thirds of that body to support a measure before the full Senate will consider it allowed Democrats to block the plan.

Lieutenant Governor Dewhurst then announced that he would suspend operation of the two-thirds rule in any future ***454** special session considering congressional redistricting. Nonetheless, in a second special session, Senate Democrats again prevented the passage of a new districting map by leaving the State and depriving the Senate of a quorum. When a lone Senate Democrat returned to Texas, Governor Perry called a third special session to consider congressional redistricting.

During that third special session, the State Senate and the State House passed maps that would have apparently avoided any violation of the Voting Rights Act because they would have, *inter alia,* essentially preserved *Balderas* District 23, a majority-Latino district in southwest Texas, and *Balderas* District 24, a majority-minority district in the Dallas–Fort Worth area, where black voters constituted a significant majority of voters in the Democratic primary and usually elected their candidate of choice in the general election. Representative Phil King, the redistricting legislation's chief sponsor in the Texas House, had previously proposed fragmenting District 24, but, after lawyers reviewed the map, King expressed concern that redrawing District 24 might violate the Voting Rights Act, and he drafted a new map that left District 24 largely unchanged.

Nonetheless, the conferees seeking to reconcile the House and Senate plans produced a map that, as part of its goal of maximizing Republican political advantage, significantly altered both Districts 23 and 24 as they had existed in the *Balderas* Plan. *Balderas* District 23 was extended north to take in roughly 100,000 new people who were predominately Anglo and Republican, and was also moved west, thus splitting Webb County and the city of Laredo, and pushing roughly 100,000 people who were predominately Latino and Democratic into an adjacent district. *Session,* 298 F.Supp.2d, at 488–489. Black voters who previously resided in *Balderas* District 24 were fragmented into five new districts, each of which is predominately Anglo and Republican. See App. 104–106. Representative King testified at trial that ***455** District 24 was cracked even though cracking the district was not " 'the path of least resistance' " in terms of avoiding Voting Rights Act liability because leaving *Balderas* District 24 intact would not "accomplish our political objectives." State Post–Trial Brief 51–52 (quoting transcript). This map was ultimately enacted into law as Plan 1374C.

The overall effect of Plan 1374C was to shift more than *eight million* Texans into new districts, and to split more counties into more pieces than the *Balderas* Plan. Moreover, the 32 districts in Plan 1374C are, on average, much less compact under either of two standard measures than their counterparts had been under the *Balderas* ****2631** Plan. See App. 177–178 (expert report of Professor Gaddie).[2]

Numerous parties filed suit in federal court challenging Plan 1374C on the grounds that it violated § 2 of the Voting Rights Act and that it constituted an unconstitutional partisan gerrymander. A three-judge panel—two of whom also were members of the *Balderas* court—rejected these challenges, over Judge Ward's partial dissent on the § 2 claims. See *Session,* 298 F.Supp.2d 451. Responding to plaintiffs' appeals, we remanded for reconsideration in light of *Vieth,* 541 U.S. 267, 124 S.Ct. 1769, 158 L.Ed.2d 546. See 543 U.S. 941, 125 S.Ct. 351, 352, 160 L.Ed.2d 252 (2004).

In a characteristically thoughtful opinion written by Judge Higginbotham, the District Court again rejected all challenges to the constitutionality of Plan 1374C. See *Henderson,* 399 F.Supp.2d 756. It correctly found that the Constitution does not prohibit a state legislature from redrawing congressional districts in the middle of a census cycle, see *id.,* at 766, and it also correctly recognized that this Court has not yet endorsed clear standards for judging the validity of partisan gerrymanders, see *id.,* at 760–762. Because the ***456** District Court's original decision, and its reconsideration of the case in the light of the several opinions in *Vieth,* are successive chapters in the saga that began with *Balderas,* it is appropriate to quote this final comment from that opinion before addressing the principal question that is now presented. The *Balderas* court concluded:

> "Finally, to state directly what is implicit in all that we have said: political gerrymandering, a purely partisan exercise, is inappropriate for a federal court drawing a congressional redistricting map. Even at the hands of a legislative body, political gerrymandering is much a bloodfeud, in which revenge is exacted by the majority against its rival. We have left it to the political arena, as we must and wisely should. We do so because our role is limited and not because we see gerrymandering as other than what it is: an abuse of power that, at its core, evinces a fundamental distrust of voters, serving the self-interest of the political parties at the expense of the public good." App. to Juris. Statement 209a–210a (footnote omitted).

II

The unique question of law that is raised in this appeal is one that the Court has not previously addressed. That narrow question is whether it was unconstitutional for Texas to replace a lawful districting plan "in the middle of a decade, for the sole purpose of maximizing partisan advantage." Juris. Statement in No. 05–276, p. i. This question is both different from, and simpler than, the principal question presented in *Vieth,* in which the " 'lack of judicially discoverable and manageable standards' " prevented the plurality from deciding the merits of a statewide challenge to a political gerrymander. 541 U.S., at 277–278, 124 S.Ct. 1769.

As the State points out, "in every political-gerrymandering claim the Court has considered, the focus has been on the *map*

itself, not on the decision to create the map in the first ***457** place." Brief for State Appellees 33. In defense of the map itself, rather than the basic decision whether to draw the map in the first place, the State ****2632** notes that Plan 1374C's district borders frequently follow county lines and other neutral criteria. At what the State describes as the relevant "level of granularity," the State correctly points out that appellants have not even attempted to argue that every district line was motivated solely for partisan gain. *Ibid.* See also *ante,* at 2609 (opinion of KENNEDY, J.) (noting that "partisan aims did not guide every line" in Plan 1374C). Indeed, the multitude of "granular" decisions that are made during redistricting was part of why the *Vieth* plurality concluded, in the context of a statewide challenge to a redistricting plan promulgated in response to a legal obligation to redistrict, that there are no manageable standards to govern whether the predominant motivation underlying the entire redistricting map was partisan. See 541 U.S., at 285, 124 S.Ct. 1769. But see *id.,* at 355, 124 S.Ct. 1769 (BREYER, J., dissenting) (arguing that there are judicially manageable standards to assess statewide districting challenges even when a plan is enacted in response to a legal obligation to redistrict).

Unlike *Vieth,* the narrow question presented by the statewide challenge in this litigation is whether the State's decision to draw the map in the first place, when it was under no legal obligation to do so, was permissible. It is undeniable that identifying the motive for making that basic decision is a readily manageable judicial task. See *Gomillion v. Lightfoot,* 364 U.S. 339, 341, 81 S.Ct. 125, 5 L.Ed.2d 110 (1960) (noting that plaintiffs' allegations, if true, would establish by circumstantial evidence "tantamount for all practical purposes to a mathematical demonstration," that redistricting legislation had been enacted "solely" to segregate voters along racial lines); cf. *Personnel Administrator of Mass. v. Feeney,* 442 U.S. 256, 276–280, 99 S.Ct. 2282, 60 L.Ed.2d 870 (1979) (analyzing whether the purpose of a law was to discriminate against women). Indeed, although the Constitution places no *per se* ban on midcycle redistricting, ***458** a legislature's decision to redistrict in the middle of the census cycle, when the legislature is under no legal obligation to do so, makes the judicial task of identifying the legislature's motive simpler than it would otherwise be. As Justice BREYER has pointed out, "the presence of midcycle redistricting, for any reason, raises a fair inference that partisan machinations played a major role in the map-drawing process." *Vieth,* 541 U.S., at 367, 124 S.Ct. 1769 (dissenting opinion).

The conclusion that courts can easily identify the motive for redistricting when the legislature is under no legal obligation to act is reinforced by the record in this very case. The District Court unambiguously identified the sole purpose behind the decision to promulgate Plan 1374C: a desire to maximize partisan advantage. See *Session,* 298 F.Supp.2d, at 472 ("It was clear from the evidence" that Republicans " 'decided to redraw the state's congressional districts solely for the purpose of seizing between five and seven seats from Democratic incumbents' " (quoting *amicus* brief filed in *Vieth*)); 298 F.Supp.2d, at 470 ("There is little question but that the single-minded purpose of the Texas Legislature in enacting Plan 1374C was to gain partisan advantage"). It does not matter whether the District Court's description of that purpose qualifies as a specific finding of fact because it is perfectly clear that there is more than ample evidence in the record to support such a finding. This evidence includes: (1) testimony from state legislators; (2) the procedural irregularities described above that accompanied the adoption of Plan 1374C, including the targeted abolition of the longstanding two-thirds rule, designed to protect the rights of the minority party, in ****2633** the Texas Senate; (3) Plan 1374C's significant departures from the neutral districting criteria of compactness and respect for county lines; (4) the plan's excessive deviations from prior districts, which interfere with the development of strong relationships between Members of Congress and their constituents; and (5) the plan's failure to comply with the Voting Rights Act. Indeed, ***459** the State itself conceded that "[t]he overwhelming evidence demonstrated that partisan gain was the motivating force behind the decision to redistrict in 2003." State Post–Trial Brief 51. In my judgment, there is not even a colorable basis for contending that the relevant intent—in this case a purely partisan intent[3]—cannot be identified on the basis of admissible evidence in the record.[4]

Of course, the conclusions that courts are fully capable of analyzing the intent behind a decision to redistrict, and that desire for partisan gain was the sole factor motivating the decision to redistrict at issue here, do not resolve the question whether proof of a single-minded partisan intent is sufficient to establish a constitutional violation.

On the merits of that question, the State seems to assume that our decision in *Upham v. Seamon,* 456 U.S. 37, 102 S.Ct. 1518, 71 L.Ed.2d 725 (1982) *(per curiam),* has already established the legislature's right to replace a court-ordered plan with a plan drawn for purely ***460** partisan purposes. Justice KENNEDY ultimately indulges in a similar assumption, relying on *Upham* for the proposition that "our decisions have assumed that state legislatures are free to replace court-mandated remedial plans by enacting redistricting plans of their own." *Ante,* at 2608. Justice KENNEDY recognizes that "[j]udicial respect for legislative plans, however, cannot justify legislative reliance on improper criteria for districting determinations." *Ante,* at 2609. But Justice KENNEDY then incorrectly concludes that the singular intent to maximize partisan advantage is not, in itself, such an improper criterion. *Ante,* at 2609–2610.

This reliance on *Upham* overlooks critical distinctions between the redistricting plan the District Court drew in *Upham* and the redistricting plan the District Court drew in *Balderas*. The judicial plan in *Upham* was created to provide an interim response to an objection by the Attorney General that two contiguous districts in a plan originally drafted by the Texas Legislature violated § 5 of the Voting ****2634** Rights Act. We concluded that, in fashioning its interim remedy, the District Court had erroneously "substituted its own reapportionment preferences for those of the state legislature." 456 U.S., at 40, 102 S.Ct. 1518. We held that when judicial relief was necessary because a state legislature had failed " 'to reapportion according to federal constitutional [or statutory] requisites in a timely fashion after having had an adequate opportunity to do so,' " the federal court should, as much as possible " 'follow the policies and preferences of the State,' " in creating a new map. *Id.,* at 41, 102 S.Ct. 1518 (quoting *White v. Weiser,* 412 U.S. 783, 794–795, 93 S.Ct. 2348, 37 L.Ed.2d 335 (1973)). We did not suggest that federal courts should honor partisan concerns, but rather identified the relevant state policies as those " 'expressed in statutory and constitutional provisions or in the reapportionment plans proposed by the state legislature, whenever adherence to state policy does not detract from the requirements of the Federal Constitution.' " *Upham,* 456 U.S., at 41, 102 S.Ct. 1518 (quoting *White,* 412 U.S., at 794–795, 93 S.Ct. 2348). Because the District Court in ***461** *Upham* had exceeded its authority in drawing a new districting map, we made clear that the legislature was authorized to remedy the § 5 violation with a map of its own choosing. See 456 U.S., at 44, 102 S.Ct. 1518. *Upham,* then, stands only for the proposition that a state legislature is authorized to redraw a court-drawn congressional districting map when a district court has exceeded its remedial authority. *Upham* does not stand for the proposition that, after a State embraces a valid, neutral court-drawn plan by asking this Court to affirm the opinion creating that plan, the State may then redistrict for the sole purpose of disadvantaging a minority political party.

Indeed, to conclude otherwise would reflect a fundamental misunderstanding of the reason why we have held that state legislatures, rather than federal courts, should have the primary task of creating apportionment plans that comport with federal law. We have so held because "a state legislature is the institution that is by far the best situated to identify and then reconcile traditional state policies" with the requirements of federal law, *Finch,* 431 U.S., at 414–415, 97 S.Ct. 1828, not because we wish to supply a dominant party with an opportunity to disadvantage its political opponents. Indeed, a straightforward application of settled constitutional law leads to the inescapable conclusion that the State may not decide to redistrict if its sole motivation is "to minimize or cancel out the voting strength of racial *or political* elements of the voting population," *Fortson,* 379 U.S., at 439, 85 S.Ct. 498 (emphasis added).

The requirements of the Federal Constitution that limit the State's power to rely exclusively on partisan preferences in drawing district lines are the Fourteenth Amendment's prohibition against invidious discrimination, and the First Amendment's protection of citizens from official retaliation based on their political affiliation. The equal protection component of the Fourteenth Amendment requires actions taken by the sovereign to be supported by some legitimate interest, and further establishes that a bare desire to harm ***462** a politically disfavored group is not a legitimate interest. See, *e.g., Cleburne v. Cleburne Living Center, Inc.,* 473 U.S. 432, 447, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985). Similarly, the freedom of political belief and association guaranteed by the First Amendment prevents the State, absent a compelling interest, from "penalizing citizens because of their participation in the electoral process, ... their association with a political party, or their expression of political views." ****2635** *Vieth,* 541 U.S., at 314, 124 S.Ct. 1769 (KENNEDY, J., concurring in judgment) (citing *Elrod v. Burns,* 427 U.S. 347, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976) (plurality opinion)). These protections embodied in the First and Fourteenth Amendments reflect the fundamental duty of the sovereign to govern impartially. *E.g., Lehr v. Robertson,* 463 U.S. 248, 265, 103 S.Ct. 2985, 77 L.Ed.2d 614 (1983); *New York City Transit Authority v. Beazer,* 440 U.S. 568, 99 S.Ct. 1355, 59 L.Ed.2d 587 (1979).

The legislature's decision to redistrict at issue in this litigation was entirely inconsistent with these principles. By taking an action for the sole purpose of advantaging Republicans and disadvantaging Democrats, the State of Texas violated its constitutional obligation to govern impartially. "If a State passed an enactment that declared 'All future apportionment shall be drawn so as most to burden Party X's rights to fair and effective representation, though still in accord with one-person, one-vote principles,' we would surely conclude the Constitution had been violated." *Vieth,* 541 U.S., at 312, 124 S.Ct. 1769 (KENNEDY, J., concurring in judgment).

III

Relying solely on *Vieth,* Justice KENNEDY maintains that even if legislation is enacted based solely on a desire to harm a politically unpopular minority, this fact is insufficient to establish unconstitutional partisan gerrymandering absent proof that the legislation did in fact burden "the complainants' representative rights." *Ante,* at 2610. This conclusion—which clearly goes to the merits, rather than the manageability, of a partisan gerrymandering claim—is not only inconsistent with the constitutional requirement that ***463** state action must be supported by a legitimate interest, but also provides an insufficient response to appellants' claim on the merits.

Justice KENNEDY argues that adopting "the modified sole-intent test" could "encourage partisan excess at the outset of the decade, when a legislature redistricts pursuant to its decennial constitutional duty and is then immune from the charge of sole motivation." *Ante,* at 2610, 2611. But this would be a problem of the Court's own making. As the decision in *Cox v. Larios,* 542 U.S. 947, 124 S.Ct. 2806, 159 L.Ed.2d 831, demonstrates, there are, in fact, readily manageable judicial standards that would allow injured parties to challenge excessive (and unconstitutional) partisan gerrymandering undertaken in response to the release of the decennial census data.[5] See also *Vieth,* 541 U.S., at 328–339, 124 S.Ct. 1769 (STEVENS, J., dissenting); *id.,* at 347–353, 124 S.Ct. 1769 (SOUTER, J., joined by GINSBURG, J., dissenting); ****2636** *id.,* at 365–367, 124 S.Ct. 1769 (BREYER, J., dissenting). Justice KENNEDY's concern about a heightened incentive to engage in such excessive partisan gerrymandering would be avoided if the Court were willing to enforce those standards.

***464** In any event, Justice KENNEDY's additional requirement that there be proof that the gerrymander did in fact burden the complainants' representative rights is clearly satisfied by the record in this litigation. Indeed, the Court's accurate exposition of the reasons why the changes to District 23 diluted the voting rights of Latinos who remain in that district simultaneously explains why those changes also disadvantaged Democratic voters and thus demonstrates that the effects of a political gerrymander can be evaluated pursuant to judicially manageable standards.

In my judgment the record amply supports the conclusion that Plan 1374C not only burdens the minority party in District 23, but also imposes a severe statewide burden on the ability of Democratic voters and politicians to influence the political process.[6]

In arguing that Plan 1374C does not impose an unconstitutional burden on Democratic voters and candidates, the State takes the position that the plan has resulted in an equitable distribution of political power between the State's two principal political parties. The State emphasizes that in the 2004 elections—held pursuant to Plan 1374C—Republicans won 21 of 32, or 66%, of the congressional seats. That same year, Republicans carried 58% of the vote in statewide elections. Admittedly, these numbers do suggest that the State's congressional delegation was "roughly proportional" to the parties' share of the statewide vote, Brief for State Appellees 44, particularly in light of the fact that our electoral system tends to produce a "seat bonus" in which a party that wins a majority of the vote generally wins an even larger majority of the seats, see Brief for Alan Heslop et al. as *Amici Curiae* (describing the seat bonus phenomenon). ***465** Cf. *ante,* at 2610 (opinion of KENNEDY, J.) (arguing that, compared to the redistricting plan challenged in *Vieth,* "Plan 1374C can be seen as making the party balance more congruent to statewide party power").

That Plan 1374C produced a "roughly proportional" congressional delegation in 2004 does not, however, answer the question whether the plan has a discriminatory effect against Democrats. As appellants point out, whether a districting map is biased against a political party depends upon the bias in the map itself—in other words, it depends upon the opportunities that the map offers each party, regardless of how candidates perform in a given year. And, as the State's expert found in this litigation, Plan 1374C clearly has a discriminatory effect in terms of the opportunities it offers the two principal political parties in Texas. Indeed, that discriminatory effect is severe.

According to Professor Gaddie, the State's expert, Plan 1374C gives Republicans an advantage in 22 of 32 congressional seats. The plaintiffs' expert, Professor Alford, who had been cited favorably by the *Balderas* Court as having applied a "neutral approach" to redistricting in that litigation, App. to Juris. Statement 207a, agreed. He added that, in his view, the only surprise from the 2004 elections was "how far things moved" toward achieving a ****2637** 22–to–10 pro-Republican split "in a single election year," *id.,* at 226a (declaration of John R. Alford, Ph.D.).[7] But this 22–to–10 advantage does not depend on Republicans winning the 58% share of the statewide vote that they received in 2004. Instead, ***466** according to Professor Gaddie, Republicans would be likely to carry 22 of 32 congressional seats if they won only 52% of the statewide vote. App.

216, 229. Put differently, Plan 1374C ensures that, even if the Democratic Party succeeds in convincing 10% of the people who voted for Republicans in the last statewide elections to vote for Democratic congressional candidates,[8] which would constitute a major electoral shift, there is unlikely to be *any* change in the number of congressional seats that Democrats win. Moreover, Republicans would still have an overwhelming advantage if Democrats achieved full electoral parity. According to Professor Gaddie's analysis, Republicans would be likely to carry 20 of the 32 congressional seats even if they only won 50% (or, for that matter, 49%) of the statewide vote. *Id.,* at 216, 229–230. This demonstrates that Plan 1374C is inconsistent with the symmetry standard, a measure social scientists use to assess partisan bias, which is undoubtedly "a reliable standard" for measuring a "burden ... on the complainants' representative rights," *ante,* at 2610 (opinion of KENNEDY, J.).

The symmetry standard "requires that the electoral system treat similarly-situated parties equally, so that each receives the same fraction of legislative seats for a particular vote percentage as the other party would receive if it had received the same percentage." Brief for Gary King et al. as *Amici Curiae* 4–5. This standard is widely accepted by scholars as providing a measure of partisan fairness in electoral systems. See, *e.g.,* Tufte, The Relationship Between Seats and Votes in Two–Party Systems, 67 Am. Pol. Sci. Rev. 540, 542–543 (1973); Gelman & King, Enhancing Democracy Through Legislative Redistricting, 88 Am. Pol. Sci. Rev. 541, 545 (1994); Thompson, Election Time: Normative Implications of Temporal Properties of the Electoral Process in the ***467** United States, 98 Am. Pol. Sci. Rev. 51, 53, and n. 7 (2004); Engstrom & Kernell, Manufactured Responsiveness: The Impact of State Electoral Laws on Unified Party Control of the Presidency and House of Representatives, 1840–1940, 49 Am. J. Pol. Sci. 531, 541 (2005). Like other models that experts use in analyzing vote dilution claims, compliance with the symmetry standard is measured by extrapolating from a sample of known data, see, *e.g., Thornburg v. Gingles,* 478 U.S. 30, 53, and n. 20, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986) (discussing extreme case analysis and bivariate ecological regression analysis). In this litigation, the symmetry standard was not simply proposed by an *amicus* to this Court, it was also used by the expert for plaintiffs and the expert for the State in assessing the degree of partisan bias in Plans 1151C and 1374C. See App. 34–42 ****2638** (report of Professor Alford); *id.,* at 189–193, 216 (report of Professor Gaddie).

Because, as noted above, Republicans would have an advantage in a significant majority of seats even if the statewide vote were equally distributed between Republicans and Democrats, Plan 1374C constitutes a significant departure from the symmetry standard. By contrast, based on Professor Gaddie's evaluation, the *Balderas* Plan, though slightly biased in favor of Republicans, provided markedly more equitable opportunities to Republicans and Democrats. For example, consistent with the symmetry standard, under Plan 1151C the parties were likely to each take 16 congressional seats if they won 50% of the statewide vote. See App. 216.

Plan 1374C then, clearly has a discriminatory impact on the opportunities that Democratic citizens have to elect candidates of their choice. Moreover, this discriminatory effect cannot be dismissed as *de minimis*. According to the State's expert, if each party receives half the statewide vote, under Plan 1374C the Republicans would carry 62.5% (20) of the congressional seats, whereas the Democrats would win 37.5% (12) of those seats. In other words, at the vote distribution point where a politically neutral map would result in zero ***468** differential in the percentage of seats captured by each party, Plan 1374C is structured to create a 25% differential. When a redistricting map imposes such a significant disadvantage on a politically salient group of voters, the State should shoulder the burden of defending the map. Cf. *Brown v. Thomson,* 462 U.S. 835, 842–843, 103 S.Ct. 2690, 77 L.Ed.2d 214 (1983) (holding that the implementation of a redistricting plan for state legislative districts with population deviations over 10% creates a prima facie case of discrimination under the Equal Protection Clause, thus shifting the burden to the State to defend the plan); *Larios v. Cox,* 300 F.Supp.2d 1320, 1339–1340 (N.D.Ga.) *(per curiam),* summarily aff'd, 542 U.S. 947, 124 S.Ct. 2806, 159 L.Ed.2d 831 (2004) (same, but further pointing out that the " 'ten percent rule' " is not a safe harbor, and concluding that, under the circumstances of the case before it, a state legislative districting plan was unconstitutional even though population deviations were under 10%). At the very least, once plaintiffs have established that the legislature's sole purpose in adopting a plan was partisan—as plaintiffs have established in this action, see Part II, *supra*—such a severe discriminatory effect should be sufficient to meet any additional burden they have to demonstrate that the redistricting map accomplishes its discriminatory purpose.[9]

***469** The bias in Plan 1374C is most striking with regard to its effect on the ability ****2639** of Democratic voters to elect candidates of their choice, but its discriminatory effect does not end there. Plan 1374C also lessens the influence Democratic voters are likely to be able to exert over Republican lawmakers, thus further minimizing Democrats' capacity to play a meaningful role in the political process.

Even though it "defies political reality to suppose that members of a losing party have as much political influence over ...

government as do members of the victorious party," *Davis v. Bandemer,* 478 U.S. 109, 170, 106 S.Ct. 2797, 92 L.Ed.2d 85 (1986) (Powell, J., concurring in part and dissenting in part), the Court has recognized that "the power to influence the political process is not limited to winning elections," *id.,* at 132, 106 S.Ct. 2797 (plurality opinion); see also *Georgia v. Ashcroft,* 539 U.S. 461, 482, 123 S.Ct. 2498, 156 L.Ed.2d 428 (2003). In assessing whether members of a group whose candidate is defeated at the polls can nonetheless influence the elected representative, it is "important to consider 'the likelihood that candidates elected without decisive minority support would be willing to take the minority's interests into account.' " *Ibid.* (quoting *Gingles,* 478 U.S., at 100, 106 S.Ct. 2752 (O'Connor, J., concurring in judgment)). One justification for majority rule is that elected officials *will* generally "take the minority's interests into account," in part because the majority recognizes that preferences shift and today's minority could be tomorrow's majority. See, *e.g.,* L. Guinier, Tyranny of the Majority 77 (1994); J. Ely, Democracy and Distrust 84 (1980); cf. Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), reprinted in 1 Republic of Letters 502 (J. Smith ed.1995) (arguing that "[t]he great desideratum in Government is ... to modify the sovereignty as that it may be sufficiently neutral between different parts of the Society" and thus prevent a fixed majority from oppressing the minority). Indeed, this Court has concluded that our ***470** system of representative democracy is premised on the assumption that elected officials will seek to represent their constituency as a whole, rather than any dominant faction within that constituency. See *Shaw v. Reno,* 509 U.S. 630, 648, 113 S.Ct. 2816, 125 L.Ed.2d 511 (1993).

Plan 1374C undermines this crucial assumption that congressional representatives from the majority party (in this case Republicans) will seek to represent their entire constituency. "When a district obviously is created solely to effectuate the perceived common interests of one racial group, elected officials are more likely to believe that their primary obligation is to represent only the members of that group, rather than their constituency as a whole." *Ibid*. *Shaw's* analysis of representational harms in the racial gerrymandering context applies with at least as much force in the partisan gerrymandering context because, in addition to the possibility that a representative may believe her job is only to represent the interests of a dominant constituency, a representative may feel more beholden to the cartographers who drew her district than to the constituents who live there. See *Vieth,* 541 U.S., at 329–331, 124 S.Ct. 1769 (STEVENS, J., dissenting). In short, Plan 1374C reduces the likelihood that Republican representatives elected from gerrymandered districts will act as vigorous advocates for the needs and interests of Democrats who reside within their districts.

In addition, Plan 1374C further weakens the incentives for members of the majority party to take the interests of the minority party into account because it locks in a Republican congressional majority of 20–22 seats, so long as Republicans achieve at least 49% of the vote. The result of this lock-in is that, according to the State's ****2640** expert, between 19 and 22 of these Republican seats are safe seats, meaning seats where one party has at least a 10% advantage over the other. See App. 227–228 (expert report of Professor Gaddie). Members of Congress elected from such safe districts need not worry ***471** much about the possibility of shifting majorities, so they have little reason to be responsive to political minorities within their district.[10]

In sum, I think it is clear that Plan 1374C has a severe burden on the capacity of Texas Democrats to influence the political process. Far from representing an example of "one of the most significant acts a State can perform to ensure citizen participation in republican self-governance," *ante,* at 2608 (opinion of KENNEDY, J.), the plan guarantees that the ***472** Republican-dominated membership of the Texas congressional delegation will remain constant notwithstanding significant pro-Democratic shifts in public opinion. Moreover, the harms Plan 1374C imposes on Democrats are not "hypothetical" or "counterfactual," *ante,* at 2611, simply because, in the 2004 elections, Republicans won a share of seats roughly proportional to their statewide voting strength. By creating 19–22 safe Republican seats, Plan 1374C has already harmed Democrats because, as explained above, it significantly undermines the likelihood that Republican lawmakers from those districts will be responsive to the interests of their Democratic constituents. In addition, Democrats will surely have a more difficult time recruiting strong candidates, and mobilizing voters and resources, in these safe Republican districts. Thus, appellants have satisfied any requisite obligation to demonstrate that they have been harmed by the adoption of Plan 1374C.

Furthermore, as discussed in Part II, *supra,* the sole intent motivating the Texas Legislature's decision to replace Plan 1151C with Plan 1374C was to benefit Republicans and burden Democrats. Accordingly, in terms of both its intent and effect, Plan 1374C violates the sovereign's duty to govern impartially.

> ****2641** "When a State adopts rules governing its election machinery or defining electoral boundaries, those rules must serve the interests of the entire community. If they serve no purpose other than to favor one segment—whether racial, ethnic, religious, economic, or political—that may occupy a position of strength at a particular point in time, or to

disadvantage a politically weak segment of the community, they violate the constitutional guarantee of equal protection." *Karcher,* 462 U.S., at 748, 103 S.Ct. 2653 (STEVENS, J., concurring) (citation omitted).

Accordingly, even accepting the Court's view that a gerrymander is tolerable unless it in fact burdens the minority's ***473** representative rights, I would hold that Plan 1374C is unconstitutional.[11]

IV

Even if I thought that Plan 1374C were not unconstitutional in its entirety, I would hold that the cracking of District 24—which, under the *Balderas* Plan, was a majority-minority district that consistently elected Democratic Congressman Martin Frost—was unconstitutional. Readily manageable standards enable us to analyze both the purpose and the effect of the "granular" decisions that produced the replacements for District 24. Applying these standards, which I set forth below, I believe it is clear that the manipulation of this district for purely partisan gain violated the First and Fourteenth Amendments.

The same constitutional principles discussed above concerning the sovereign's duty to govern impartially inform the proper analysis for claims that a particular district is an unconstitutional partisan gerrymander. We have on several occasions recognized that a multimember district is subject to challenge under the Fourteenth Amendment if it operates " 'to minimize or cancel out the voting strength of racial *or* ***474** *political* elements of the voting population.' " *E.g., Gaffney v. Cummings,* 412 U.S. 735, 751, 93 S.Ct. 2321, 37 L.Ed.2d 298 (1973) (emphasis added); *Burns v. Richardson,* 384 U.S. 73, 88, 86 S.Ct. 1286, 16 L.Ed.2d 376 (1966). There is no constitutionally relevant distinction between the harms inflicted by single-member district gerrymanders that minimize or cancel out the voting strength of a political element of the population and the same harms inflicted by multimember districts. In both situations, the State has interfered with the voter's constitutional right to "engage in association for the advancement of beliefs and ideas," *NAACP v. Alabama ex rel. Patterson,* 357 U.S. 449, 460, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958).

I recognize that legislatures will always be aware of politics and that we must tolerate some consideration of political goals in the redistricting process. See ****2642** *Cousins v. City Council of Chicago,* 466 F.2d 830, 847 (C.A.7 1972) (STEVENS, J., dissenting). However, I think it is equally clear that, when a plaintiff can prove that a legislature's predominant motive in drawing a particular district was to disadvantage a politically salient group, and that the decision has the intended effect, the plaintiff's constitutional rights have been violated. See *id.,* at 859–860. Indeed, in *Vieth,* five Members of this Court explicitly recognized that extreme partisan gerrymandering violates the Constitution. See 541 U.S., at 307, 312–316, 124 S.Ct. 1769 (KENNEDY, J., concurring in judgment); *id.,* at 317–318, 124 S.Ct. 1769 (STEVENS, J., dissenting); *id.,* at 343, 347–352, 124 S.Ct. 1769 (SOUTER, J., joined by GINSBURG, J., dissenting); *id.,* at 356–357, 366–367, 124 S.Ct. 1769 (BREYER, J., dissenting). The other four Justices in *Vieth* stated that they did not disagree with that conclusion. See *id.,* at 292, 124 S.Ct. 1769 (plurality opinion). The *Vieth* plurality nonetheless determined that there were no judicially manageable standards to assess partisan gerrymandering claims. *Id.,* at 305–306, 124 S.Ct. 1769. However, the following test, which shares some features of the burden-shifting standard for assessing unconstitutional partisan gerrymandering proposed by Justice SOUTER's opinion in *Vieth,* see *id.,* at 348–351, 124 S.Ct. 1769, would provide a remedy for at least the most blatant ***475** unconstitutional partisan gerrymanders and would also be eminently manageable.

First, to have standing to challenge a district as an unconstitutional partisan gerrymander, a plaintiff would have to prove that he is either a candidate or a voter who resided in a district that was changed by a new districting plan. See *id.,* at 327–328, 124 S.Ct. 1769 (STEVENS, J., dissenting) (discussing *United States v. Hays,* 515 U.S. 737, 115 S.Ct. 2431, 132 L.Ed.2d 635 (1995)). See also 541 U.S., at 347–348, 124 S.Ct. 1769 (SOUTER, J., joined by GINSBURG, J., dissenting) (citing *Hays*). A plaintiff with standing would then be required to prove both improper purpose and effect.

With respect to the "purpose" portion of the inquiry, I would apply the standard fashioned by the Court in its racial gerrymandering cases. Under the Court's racial gerrymandering jurisprudence, judges must analyze whether plaintiffs have proved that race was the predominant factor motivating a districting decision such that other, race-neutral districting principles were subordinated to racial considerations. If so, strict scrutiny applies, see, *e.g., Vera,* 517 U.S., at 958–959, 116

S.Ct. 1941 (plurality opinion), and the State must justify its districting decision by establishing that it was narrowly tailored to serve a compelling state interest, such as compliance with § 2 of the Voting Rights Act, see *King v. Illinois Bd. of Elections,* 979 F.Supp. 619 (N.D.Ill.1997), summarily aff'd, 522 U.S. 1087, 118 S.Ct. 877, 139 L.Ed.2d 866 (1998); *Vera,* 517 U.S., at 994, 116 S.Ct. 1941 (O'Connor, J., concurring).[12] However, strict scrutiny does not apply merely because race was one motivating factor behind the drawing of a majority-minority district. *Id.,* at 958–959, 116 S.Ct. 1941 (plurality opinion); see also *Easley v. Cromartie,* 532 U.S. 234, 241, 121 S.Ct. 1452, 149 L.Ed.2d 430 (2001). Applying these standards to the political gerrymandering context, I would hold that, if a plaintiff carried ***476** her burden of demonstrating that redistricters subordinated neutral districting principles to political considerations and that their predominant ****2643** motive was to maximize one party's power, she would satisfy the intent prong of the constitutional inquiry.[13] Cf. *Vieth,* 541 U.S., at 349–350, 124 S.Ct. 1769 (SOUTER, J., joined by GINSBURG, J., dissenting) (discussing the importance of a district's departures from traditional districting principles in determining whether the district is an unconstitutional gerrymander).

With respect to the effects inquiry, a plaintiff would be required to demonstrate the following three facts: (1) her candidate of choice won election under the old plan; (2) her residence is now in a district that is a safe seat for the opposite party; and (3) her new district is less compact than the old district. The first two prongs of this effects inquiry would be designed to measure whether or not the plaintiff has been harmed, whereas the third prong would be relevant because the shape of the gerrymander has always provided crucial evidence of its character, see *Karcher,* 462 U.S., at 754–758, 762–763, 103 S.Ct. 2653 (STEVENS, J., concurring); see also *Vieth,* 541 U.S., at 348, 124 S.Ct. 1769 (SOUTER, J., joined by GINSBURG, J., dissenting) (noting that compactness is a traditional districting principle, which "can be measured quantitatively"). Moreover, a safe harbor for more compact districts would allow a newly elected majority to eliminate a prior partisan gerrymander without fear of liability or even the need to devote resources to litigating whether or not the legislature had acted with an impermissible intent.

***477** If a plaintiff with standing could meet the intent and effects prong of the test outlined above, that plaintiff would clearly have demonstrated a violation of her constitutional rights. Moreover, I do not think there can be any colorable claim that this test would not be judicially manageable.

Applying this test to the facts of these cases, I think plaintiffs in new Districts 6, 24, 26, and 32—four of the districts in Plan 1374C that replaced parts of *Balderas* District 24—can demonstrate that their constitutional rights were violated by the cracking of *Balderas* District 24. First, I assume that there are plaintiffs who reside in Districts 6, 24, 26, and 32, and whose homes were previously located in *Balderas* District 24.[14] Accordingly, I assume that there are plaintiffs who have standing to challenge the creation of these districts.

Second, plaintiffs could easily satisfy their burden of proving predominant partisan purpose. Indeed, in this litigation, the State has acknowledged that its predominant motivation for cracking District 24 was to achieve partisan gain. See State Post–Trial Brief 51–52 (noting that, in spite of concerns that the cracking of District 24 could lead to Voting Rights Act liability, "[t]he Legislature ... chose to ****2644** pursue a political goal of unseating Congressman Frost instead of following a course that might have lowered risks [of such liability]").

The District Court agreed with the State's analysis on this issue. In the District Court, plaintiffs claimed that the creation of District 26 violated the Equal Protection Clause because the decision to create District 26 was motivated by unconstitutional racial discrimination against black voters. ***478** The District Court rejected this argument, concluding that the State's decision to crack *Balderas* District 24 was driven not by racial prejudice, but rather by the political desire to maximize Republican advantage and to "remove Congressman Frost," which required that Frost "lose a large portion of his Democratic constituency, many of whom lived in a predominately Black area of Tarrant County." *Session,* 298 F.Supp.2d, at 471.

That an impermissible, predominantly partisan, purpose motivated the cracking of former District 24 is further demonstrated by the fact that, in my judgment, this cracking caused Plan 1374C to violate § 5 of the Voting Rights Act, 42 U.S.C. § 1973c. The State's willingness to adopt a plan that violated its legal obligations under the Voting Rights Act, combined with the other indicia of partisan intent in this litigation, is compelling evidence that politics was not simply one factor in the cracking of District 24, but rather that it was an impermissible, predominant factor.

Section 5 of the Voting Rights Act "was intended 'to insure that [the gains thus far achieved in minority political participation] shall not be destroyed through new [discriminatory] procedures and techniques.' " *Beer v. United States,* 425 U.S. 130, 140–141, 96 S.Ct. 1357, 47 L.Ed.2d 629 (1976) (quoting S.Rep. No. 94–295, p. 19 (1975), U.S.Code Cong. &

Admin.News 1975, pp. 774, 785; alteration in *Beer*). To effectuate this goal, § 5 prevents covered jurisdictions, such as Texas, from making changes to their voting procedures "that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Georgia,* 539 U.S., at 477, 123 S.Ct. 2498 (internal quotation marks omitted). In other words, during the redistricting process, covered jurisdictions may not "leave minority voters with less chance to be effective in electing preferred candidates than they were" under the prior districting plan. See *id.,* at 494, 123 S.Ct. 2498 (SOUTER, J., dissenting). By cracking *Balderas* District 24, and by not offsetting the loss in black voters' ability to elect preferred ***479** candidates elsewhere, Plan 1374C resulted in impermissible retrogression.

Under the *Balderas* Plan, black Americans constituted a majority of Democratic primary voters in District 24. According to the unanimous report authored by staff attorneys in the Voting Section of the Department of Justice, black voters in District 24 generally voted cohesively, and thus had the ability to elect their candidate of choice in the Democratic primary. Section 5 Recommendation Memorandum 33 (Dec. 12, 2003), available at http:// www.washingtonpost. com/wp-srv/nation/documents/ texasDOJmemo.pdf (as visited June 21, 2006, and available in Clerk of Court's case file). Moreover, the black community's candidates of choice could consistently attract sufficient crossover voting from nonblacks to win the general election, even though blacks did not constitute a majority of voters in the general election. *Id.,* at 33–34. Representative Frost, who is white, was clearly the candidate of choice of the black community in District 24, based on election returns, testimony of community leaders, and " 'scorecards' " he ****2645** received from groups dedicated to advancing the interests of African–Americans. See *id.,* at 35.

As noted above, in Plan 1374C, "the minority community in [*Balderas* District] 24[was] splintered and submerged into majority Anglo districts in the Dallas–Fort Worth area." *Id.,* at 67. By dismantling one district where blacks had the ability to elect candidates of their choice,[15] and by not offsetting ***480** this loss of a district with another district where black voters had a similar opportunity, Plan 1374C was retrogressive, in violation of § 5 of the Voting Rights Act. See *id.,* at 31, 67–69.

Notwithstanding the unanimous opinion of the staff attorneys in the Voting Section of the Justice Department that Plan 1374C was retrogressive and that the Attorney General should have interposed an objection, the Attorney General elected to preclear the map, thus allowing it to take effect. We have held that, under the statutory scheme, voters may not directly challenge the Attorney General's decision to preclear a redistricting plan, see *Morris v. Gressette,* 432 U.S. 491, 97 S.Ct. 2411, 53 L.Ed.2d 506 (1977), which means that the Attorney General's vigilant enforcement of the Act is critical, and which also means that plaintiffs could not bring a § 5 challenge as part of this litigation.[16] However, judges are frequently called upon to consider whether a redistricting plan violates § 5, because a covered jurisdiction has the option of seeking to achieve preclearance by either submitting its plan to the Attorney General or filing a declaratory judgment action in the District Court for the District of Columbia, whose judgment is ***481** subject to review by this Court, see, *e.g., Georgia,* 539 U.S. 461, 123 S.Ct. 2498, 156 L.Ed.2d 428. Accordingly, we have the tools to analyze whether a redistricting plan is retrogressive.

Even though the § 5 issue is not directly before this Court, for the reasons stated above, I believe that the cracking of District 24 caused Plan 1374C to be retrogressive. And the fact that the legislature promulgated a retrogressive plan is relevant because it provides additional evidence that the legislature acted with a predominantly partisan purpose. Complying ****2646** with § 5 is a neutral districting principle, and the legislature's promulgation of a retrogressive redistricting plan buttresses my conclusion that the "legislature subordinated traditional [politically] neutral districting principles ... to [political] considerations." *Miller v. Johnson,* 515 U.S. 900, 916, 115 S.Ct. 2475, 132 L.Ed.2d 762 (1995). This evidence is particularly compelling in light of the State's acknowledgment that "[t]he Legislature ... chose to pursue a political goal of unseating Congressman Frost instead of following a course that might have lowered risks in the preclearance process." State Post–Trial Brief 52 (citing, *inter alia,* trial testimony of state legislators).

In sum, the record in this litigation makes clear that the predominant motive underlying the fragmentation of *Balderas* District 24 was to maximize Republicans' electoral opportunities and ensure that Congressman Frost was defeated.

Turning now to the effects test I have proposed, plaintiffs in new Districts 6, 24, 26, and 32 could easily meet the three parts of that test because: (1) under the *Balderas* Plan, they lived in District 24 and their candidate of choice (Frost) was the winning candidate; (2) under Plan 1374C, they have been placed in districts that are safe seats for the Republican party, see App. 106 (showing that the Democratic share of the two-party vote in statewide elections from 1996 to 2002 was 40% or less in Districts 6, 24, 26, and 32); and (3) their ***482** new districts are less compact than *Balderas* District 24, see App. 319–320 (compactness scores for districts under the *Balderas* Plan and Plan 1374C).[17]

Justice KENNEDY rejects my proposed effects test, as applied in these cases, because in his view *Balderas* District 24 lacks "any special claim to fairness," *ante,* at 2626. But my analysis in no way depends on the proposition that *Balderas* District 24 was fair. The district *was* more compact than four of the districts that replaced it, and, as explained above, compactness serves important values in the districting process. This is why, in my view, a State that creates more compact districts should enjoy a safe harbor from partisan gerrymandering claims. However, the mere fact that a prior district was unfair should surely not provide a safe harbor for the creation of an even more unfair district. Conversely, a State may of course create less compact districts without violating the Constitution so long as its purpose is not to disadvantage a politically disfavored group. See *supra,* at 2643–2644, and n. 13. The reason I focus on*Balderas* District 24 is not because the district was fair, but because the prior district provides a clear benchmark in analyzing whether plaintiffs have been harmed.

In sum, applying the judicially manageable test set forth in this Part of my opinion reveals that the cracking of *Balderas* District 24 created several unconstitutional partisan gerrymanders. Even if I believed that Plan 1374C were not invalid in its entirety, I would reverse the judgment below with regard to Districts 6, 24, 26, and 32.

* * *

***483** For the foregoing reasons, although I concur with the majority's decision to invalidate ****2647** District 23 under § 2 of the Voting Rights Act, I respectfully dissent from the Court's decision to affirm the judgment below with respect to plaintiffs' partisan gerrymandering claim. I would reverse with respect to the plan as a whole, and also, more specifically, with respect to Districts 6, 24, 26, and 32.

Justice SOUTER, with whom Justice GINSBURG joins, concurring in part and dissenting in part.

I join Part II–D of the principal opinion, rejecting the one-person, one-vote challenge to Plan 1374C based simply on its mid-decade timing, and I also join Part II–A, in which the Court preserves the principle that partisan gerrymandering can be recognized as a violation of equal protection, see *Vieth v. Jubelirer,* 541 U.S. 267, 306, 124 S.Ct. 1769, 158 L.Ed.2d 546 (2004) (KENNEDY, J., concurring in judgment); *id.,* at 317, 124 S.Ct. 1769 (STEVENS, J., dissenting); *id.,* at 346, 124 S.Ct. 1769 (SOUTER, J., dissenting); *id.,* at 355, 124 S.Ct. 1769 (BREYER, J., dissenting). I see nothing to be gained by working through these cases on the standard I would have applied in *Vieth, supra,* at 346–355, 124 S.Ct. 1769 (dissenting opinion), because here as in *Vieth* we have no majority for any single criterion of impermissible gerrymander (and none for a conclusion that Plan 1374C is unconstitutional across the board). I therefore treat the broad issue of gerrymander much as the subject of an improvident grant of certiorari, and add only two thoughts for the future: that I do not share Justice KENNEDY's seemingly flat rejection of any test of gerrymander turning on the process followed in redistricting, see *ante,* at 2609 – 2611 (principal opinion), nor do I rule out the utility of a criterion of symmetry as a test, see, *e.g.,* King & Browning, Democratic Representation and Partisan Bias in Congressional Elections, 81 Am. Pol. Sci. Rev. 1251 (1987). Interest in exploring this notion is evident, see *ante,* at 2610–2611 ***484** principal opinion); *ante,* at 2636 – 2638 (STEVENS, J., concurring in part and dissenting in part); *post,* at 2651–2652 (BREYER, J., concurring in part and dissenting in part). Perhaps further attention could be devoted to the administrability of such a criterion at all levels of redistricting and its review.

I join Part III of the principal opinion, in which the Court holds that Plan 1374C's Districts 23 and 25 violate § 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973, in diluting minority voting strength. But I respectfully dissent from Part IV, in which a plurality upholds the District Court's rejection of the claim that Plan 1374C violated § 2 in cracking the black population in the prior District 24 and submerging its fragments in new Districts 6, 12, 24, 26, and 32. On the contrary, I would vacate the judgment and remand for further consideration.

The District Court made a threshold determination resting reasonably on precedent of this Court and on a clear rule laid down by the Fifth Circuit, see *Valdespino v. Alamo Heights Independent School Dist.,* 168 F.3d 848, 852–853 (1999), cert. denied,

528 U.S. 1114, 120 S.Ct. 931, 145 L.Ed.2d 811 (2000): the first condition for making out a § 2 violation, as set out in *Thornburg v. Gingles,* 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986), requires "the minority group ... to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district," *id.,* at 50, 106 S.Ct. 2752, (here, the old District 24) before a dilution claim can be recognized under § 2.[1] Although both the plurality ****2648** today and our own prior cases have sidestepped the question whether a statutory dilution claim can prevail without the possibility of a district percentage of minority voters above 50%, see *ante,* at 2624; ***485** *Johnson v. De Grandy,* 512 U.S. 997, 1008–1009, 114 S.Ct. 2647, 129 L.Ed.2d 775 (1994); *Voinovich v. Quilter,* 507 U.S. 146, 154, 113 S.Ct. 1149, 122 L.Ed.2d 500 (1993); *Growe v. Emison,* 507 U.S. 25, 41, n. 5, 113 S.Ct. 1075, 122 L.Ed.2d 388 (1993); *Gingles, supra,* at 46, n. 12, 106 S.Ct. 2752, the day has come to answer it.

Chief among the reasons that the time has come is the holding in *Georgia v. Ashcroft,* 539 U.S. 461, 123 S.Ct. 2498, 156 L.Ed.2d 428 (2003), that replacement of a majority-minority district by a coalition district with minority voters making up fewer than half can survive the prohibition of retrogression under § 5 of the Voting Rights Act, 42 U.S.C. § 1973c, enforced through the preclearance requirement, *Georgia,* 539 U.S., at 482–483, 123 S.Ct. 2498. At least under § 5, a coalition district can take on the significance previously accorded to one with a majority-minority voting population. Thus, despite the independence of §§ 2 and 5, *id.,* at 477–479, 123 S.Ct. 2498, there is reason to think that the integrity of the minority voting population in a coalition district should be protected much as a majority-minority bloc would be. While protection should begin through the preclearance process,[2] in jurisdictions where that is required, if that process fails a minority voter has no remedy under § 5 because the State and the Attorney General (or the District Court for the District of Columbia) are the only participants in preclearance, see 42 U.S.C. § 1973c. And, of course, vast areas of the country are not covered by § 5. Unless a minority voter is to be left with no recourse whatsoever, then, relief under § 2 must be possible, as by definition it would not be if a numerical majority of minority voters in a reconstituted or putative district is a necessary condition. I would therefore hold that a minority of 50% or less of the voting population might suffice at the *Gingles* gatekeeping stage. To have a clear-edged rule, I would hold it sufficient satisfaction of the first gatekeeping condition to show that minority voters in a reconstituted or putative district constitute a majority ***486** of those voting in the primary of the dominant party, that is, the party tending to win in the general election.[3]

This rule makes sense in light of the explanation we gave in *Gingles* for the first condition for entertaining a claim for breach of the § 2 guarantee of racially equal opportunity "to elect representatives ****2649** of ... choice," 42 U.S.C. § 1973: "The reason that a minority group making such a challenge must show, as a threshold matter, that it is sufficiently large ... is this: Unless minority voters possess the potential to elect representatives in the absence of the challenged structure or practice, they cannot claim to have been injured by that structure or practice." 478 U.S., at 50, n. 17, 106 S.Ct. 2752 (emphasis deleted); see also *id.,* at 90, n. 1, 106 S.Ct. 2752 (O'Connor, J., concurring in judgment) ("[I]f a minority group that is not large enough to constitute a voting majority in a single-member district can show that white support would probably be forthcoming in some such district to an extent that would enable the election of the candidates its members prefer, that minority group would appear to have demonstrated that, at least under this measure of its voting strength, it would be able to elect some candidates of its choice"). Hence, we emphasized that an analysis under § 2 of the political process should be " 'functional.' " *Id.,* at 48, n. 15, 106 S.Ct. 2752 (majority opinion); see also *Voinovich, supra,* at 158, 113 S.Ct. 1149 ("[T]he *Gingles* factors cannot be applied mechanically and without regard to the nature of the claim"). So it is not surprising that we have looked to political-primary data in considering the second and third *Gingles* conditions, to see whether there is racial bloc voting. ***487** See, *e.g., Abrams v. Johnson,* 521 U.S. 74, 91–92, 117 S.Ct. 1925, 138 L.Ed.2d 285 (1997); *Gingles, supra,* at 52–54, 59–60, 106 S.Ct. 2752.

The pertinence of minority voters' role in a primary is obvious: a dominant party's primary can determine the representative ultimately elected, as we recognized years ago in evaluating the constitutional importance of primary elections. See *United States v. Classic,* 313 U.S. 299, 318–319, 61 S.Ct. 1031, 85 L.Ed. 1368 (1941) ("Where the state law has made the primary an integral part of the procedure of choice, or where in fact the primary effectively controls the choice, the right of the elector to have his ballot counted at the primary is likewise included in the right protected by Article I, § 2.... Here, ... the right to choose a representative is in fact controlled by the primary because, as is alleged in the indictment, the choice of candidates at the Democratic primary determines the choice of the elected representative"); *id.,* at 320, 61 S.Ct. 1031 ("[A] primary election which involves a necessary step in the choice of candidates for election as representatives in Congress, and which in the circumstances of this case controls that choice, is an election within the meaning of the constitutional provision"); *Smith v. Allwright,* 321 U.S. 649, 660, 64 S.Ct. 757, 88 L.Ed. 987 (1944) (noting "[t]he fusing by the *Classic* case of the primary and general elections into a single instrumentality for choice of officers"); *id.,* at 661–662, 64 S.Ct. 757 ("It may now be taken as a postulate that the right to vote in such a primary for the nomination of candidates without discrimination by the

State, like the right to vote in a general election, is a right secured by the Constitution.... Under our Constitution the great privilege of the ballot may not be denied a man by the State because of his color").[4] These conclusions of our predecessors ***488** fit with recent scholarship showing that electoral success by minorities ****2650** is adequately predictable by taking account of primaries as well as elections, among other things. See Grofman, Handley, & Lublin, Drawing Effective Minority Districts: A Conceptual Framework and Some Empirical Evidence, 79 N.C.L.Rev. 1383 (2000–2001).[5]

I would accordingly not reject this § 2 claim at step one of *Gingles,* nor on this record would I dismiss it by jumping to the ultimate § 2 issue to be decided on a totality of the circumstances, see *De Grandy,* 512 U.S., at 1009–1022, 114 S.Ct. 2647, and determine that the black plaintiffs cannot show that submerging them in the five new districts violated their right to equal opportunity to participate in the political process and elect candidates of their choice. The plurality, on the contrary, is willing to accept the conclusion that the minority voters lost nothing cognizable under § 2 because they could not show the degree of control that guaranteed a candidate of their choice in the old District 24. See *ante,* at 2624 – 2626. The plurality accepts this conclusion by placing great weight on the fact that Martin Frost, the perennially successful congressional candidate in District 24, was white. See, *e.g., ante,* at 2624 – 2625 (no clear error in District Court's findings that "no Black candidate has ever filed in a Democratic primary against Frost," *Session v. Perry,* 298 F.Supp.2d 451, 484 (E.D.Tex.2004) *(per curiam),* and "[w]e have no measure of what Anglo turnout would be in a Democratic primary if Frost were opposed by a Black candidate," *ibid.*); *ante,* at 2625 (no clear error in District Court's reliance on testimony of Congresswoman Eddie Bernice Johnson that "District 24 ***489** was drawn for an Anglo Democrat (Martin Frost, in particular) in 1991").

There are at least two responses. First, "[u]nder § 2, it is the status of the candidate as the chosen representative of a particular racial group, not the race of the candidate, that is important." *Gingles, supra,* at 68, 106 S.Ct. 2752 (emphasis deleted). Second, Frost was convincingly shown to have been the "chosen representative" of black voters in old District 24. In the absence of a black-white primary contest, the unchallenged evidence is that black voters dominated a primary that consistently nominated the same and ultimately successful candidate; it takes more than speculation to rebut the demonstration that Frost was the candidate of choice of the black voters.[6] There is no indication that party rules or any other device rigged the primary ballot so as to bar any aspirants the minority voters would have preferred, see n. 5, *supra,* and the uncontroverted and overwhelming evidence is that Frost was strongly supported by minority voters after more than two decades of sedulously considering minority interests, App. 107 (Frost's rating of 94% on his voting record from the National Association for the Advancement of Colored People exceeded the scores of all other members of the Texas congressional delegation, including black and Hispanic members of both major parties); *id.,* at 218–219 (testimony by State's political-science expert that Frost is the African–Americans' candidate ****2651** of choice); *id.,* at 239 (testimony by Ron Kirk, an African–American former mayor of Dallas and U.S. Senate candidate, that Frost "has gained a very strong base of support among African–American ... voters because of his strong voting records [in numerous areas]" and has "an incredible following and amount of respect among the African–American community"); *id.,* at 240–241 (Kirk's testimonythat ***490** Frost has never had a contested primary because he is beloved by the African–American community, and that a black candidate, possibly including himself, could not better Frost in a primary because of his strong rapport with the black community); *id.,* at 242–243 (testimony by county precinct administrator that Frost has been the favored candidate of the African–American community and there have been no primary challenges to him because he "serves [African–American] interests").[7]

It is not that I would or could decide at this point whether the elimination of the prior district and composition of the new one violates § 2. The other *Gingles* gatekeeping rules have to be considered, with particular attention to the third, majority bloc voting, see 478 U.S., at 51, 106 S.Ct. 2752, since a claim to a coalition district is involved.[8] And after that would come the ultimate analysis of the totality of circumstances. See *De Grandy, supra,* at 1009–1022, 114 S.Ct. 2647.

I would go no further here than to hold that the enquiry should not be truncated by or conducted in light of the Fifth ***491** Circuit's 50% rule,[9] or by the candidate-of-choice analysis just rejected. I would return the § 2 claim on old District 24 to the District Court, which has already labored so mightily on these cases. All the members of the three-judge court would be free to look again untethered by the 50% barrier, and Judge Ward, in particular, would have the opportunity to develop his reasons unconstrained by the Circuit's 50% rule, which he rightly took to limit his consideration of the claim, see *Session,* 298 F.Supp.2d, at 528–531 (opinion concurring in part and dissenting in part).

Justice BREYER, concurring in part and dissenting in part.

I join Parts II–A and III of the Court's opinion. I also join Parts I and II of ****2652** Justice STEVENS' opinion concurring in part and dissenting in part.

For one thing, the timing of the redistricting (between census periods), the radical departure from traditional boundary-drawing criteria, and the other evidence to which Justice STEVENS refers in Parts I and II of his opinion make clear that a "desire to maximize partisan advantage" was the "sole purpose behind the decision to promulgate Plan 1374C." *Ante,* at 2632. Compare, *e.g.,* App. 176–178; *ante,* at 2629 – 2630, 2632 – 2633 (opinion of STEVENS, J.), with *Vieth v. Jubelirer,* 541 U.S. 267, 366–367, 124 S.Ct. 1769, 158 L.Ed.2d 546 (2004) (BREYER, J., dissenting).

For another thing, the evidence to which Justice STEVENS refers in Part III of his opinion demonstrates that the ***492** plan's effort "to maximize partisan advantage," *ante,* at 2632, encompasses an effort not only to exaggerate the favored party's electoral majority but also to produce a majority of congressional representatives even if the favored party receives only a *minority* of popular votes. Compare *ante,* at 2636 – 2638 (opinion of STEVENS, J.), App. 55 (plaintiffs' expert), and *id*., at 216 (State's expert), with *Vieth, supra,* at 360, 124 S.Ct. 1769 (BREYER, J., dissenting).

Finally, because the plan entrenches the Republican Party, the State cannot successfully defend it as an effort simply to *neutralize* the Democratic Party's previous political gerrymander. Nor has the State tried to justify the plan on nonpartisan grounds, either as an effort to achieve legislative stability by avoiding legislative exaggeration of small shifts in party preferences, see *Vieth,* 541 U.S., at 359, 124 S.Ct. 1769 (same), or in any other way.

In sum, "the risk of entrenchment is demonstrated," "partisan considerations [have] render[ed] the traditional district-drawing compromises irrelevant," and "no justification other than party advantage can be found." *Id.,* at 367, 124 S.Ct. 1769 (same). The record reveals a plan that overwhelmingly relies upon the unjustified use of purely partisan line-drawing considerations and which will likely have seriously harmful electoral consequences. *Ibid*. For these reasons, I believe the plan in its entirety violates the Equal Protection Clause.

Chief Justice ROBERTS, with whom Justice ALITO joins, concurring in part, concurring in the judgment in part, and dissenting in part.

I join Parts I and IV of the plurality opinion. With regard to Part II, I agree with the determination that appellants have not provided "a reliable standard for identifying unconstitutional political gerrymanders." *Ante,* at 2612. The question whether any such standard exists—that is, whether a challenge to a political gerrymander presents a justiciable case or controversy—has not been argued in these cases. I therefore take no position on that question, which ***493** has divided the Court, see *Vieth v. Jubelirer,* 541 U.S. 267, 124 S.Ct. 1769, 158 L.Ed.2d 546 (2004), and I join the Court's disposition in Part II without specifying whether appellants have failed to state a claim on which relief can be granted, or have failed to present a justiciable controversy.

I must, however, dissent from Part III of the Court's opinion. According to the District Court's factual findings, the State's drawing of district lines in south and west Texas caused the area to move from five out of seven effective Latino opportunity congressional districts, with an additional district "moving" in that direction, to *six* out of seven effective Latino opportunity districts. See ****2653** *Session v. Perry,* 298 F.Supp.2d 451, 489, 503–504 (E.D.Tex.2004) *(per curiam)*. The end result is that while Latinos make up 58% of the citizen voting-age population in the area, they control 85% (six of seven) of the districts under the State's plan.

In the face of these findings, the majority nonetheless concludes that the State's plan somehow dilutes the voting strength of Latinos in violation of § 2 of the Voting Rights Act of 1965. The majority reaches its surprising result because it finds that Latino voters in one of the State's Latino opportunity districts—District 25—are insufficiently compact, in that they consist of two different groups, one from around the Rio Grande and another from around Austin. According to the majority, this may make it more difficult for certain Latino-preferred candidates to be elected from that district—*even though Latino voters make up 55% of the citizen voting-age population in the district and vote as a bloc*. *Id.,* at 492, n. 126, 503. The majority prefers old District 23, despite the District Court determination that new District 25 is "a more effective Latino opportunity district than Congressional District 23 had been." *Id.,* at 503; see *id.,* at 489, 498–499. The District Court based that determination on a careful examination of regression analysis showing that "the Hispanic-preferred candidate [would win] *every* primary and general election examined in District 25," *id.,* at 503 (emphasis added), compared to the only partial

success ***494** such candidates enjoyed in former District 23, *id.,* at 488, 489, 496.

The majority dismisses the District Court's careful factfinding on the ground that the experienced judges did not properly consider whether District 25 was "compact" for purposes of § 2. *Ante,* at 2616 – 2617. But the District Court opinion itself clearly demonstrates that the court carefully considered the compactness of the minority group in District 25, just as the majority says it should have. The District Court recognized the very features of District 25 highlighted by the majority and unambiguously concluded, under the totality of the circumstances, that the district was an effective Latino opportunity district, and that no violation of § 2 in the area had been shown.

Unable to escape the District Court's factfinding, the majority is left in the awkward position of maintaining that its *theory* about compactness is more important under § 2 than the actual prospects of electoral success for Latino-preferred candidates under a State's apportionment plan. And that theory is a novel one to boot. Never before has this or any other court struck down a State's redistricting plan under § 2, on the ground that the plan achieves the maximum number of possible majority-minority districts, but loses on style points, in that the minority voters in one of those districts are not as "compact" as the minority voters would be in another district were the lines drawn differently. Such a basis for liability pushes voting rights litigation into a whole new area—an area far removed from the concern of the Voting Rights Act to ensure minority voters an equal opportunity "to elect representatives of their choice." 42 U.S.C. § 1973(b).

I

Under § 2, a plaintiff alleging "a denial or abridgement of the right of [a] citizen of the United States to vote on account of race or color," § 1973(a), must show, "based on the totality of circumstances,"

> ***495** "that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) ... in that its members have less opportunity ****2654** than other members of the electorate to participate in the political process and to elect representatives of their choice." § 1973(b).

In *Thornburg v. Gingles,* 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986), we found that a plaintiff challenging the State's use of multimember districts could meet this standard by showing that replacement of the multimember district with several single-member districts would likely provide minority voters in at least some of those single-member districts "the ability ... to elect representatives of their choice." *Id.,* at 48, 106 S.Ct. 2752. The basis for this requirement was simple: If no districts were possible in which minority voters had prospects of electoral success, then the use of multimember districts could hardly be said to thwart minority voting power under § 2. See *ibid.* ("Minority voters who contend that the multimember form of districting violates § 2 must prove that the use of a multimember electoral structure operates to minimize or cancel out their ability to elect their preferred candidates").

The next generation of voting rights litigation confirmed that "manipulation of [single-member] district lines" could also dilute minority voting power if it packed minority voters in a few districts when they might control more, or dispersed them among districts when they might control some. *Voinovich v. Quilter,* 507 U.S. 146, 153–154, 113 S.Ct. 1149, 122 L.Ed.2d 500 (1993). Again the basis for this application of *Gingles* was clear: A configuration of district lines could only dilute minority voting strength if under another configuration minority voters had better electoral prospects. Thus in cases involving single-member districts, the question was whether an *additional* majority-minority district should be created, see *Abrams v. Johnson,* 521 U.S. 74, 91–92, 117 S.Ct. 1925, 138 L.Ed.2d 285 (1997); *Growe v. Emison,* 507 U.S. 25, 38, 113 S.Ct. 1075, 122 L.Ed.2d 388 (1993), or whether *additional* influence districts ***496** should be created to supplement existing majority-minority districts, see *Voinovich, supra,* at 154, 113 S.Ct. 1149.

We have thus emphasized, since *Gingles* itself, that a § 2 plaintiff must at least show an apportionment that is likely to perform *better* for minority voters, compared to the existing one. See 478 U.S., at 99, 106 S.Ct. 2752 (O'Connor, J., concurring in judgment) ("[T]he relative lack of minority electoral success under a challenged plan, when compared with the

success that would be predicted under the measure of undiluted minority voting strength the court is employing, can constitute powerful evidence of vote dilution"). And unsurprisingly, in the context of single-member districting schemes, we have invariably understood this to require the possibility of *additional* single-member districts that minority voters might control.

Johnson v. De Grandy, 512 U.S. 997, 114 S.Ct. 2647, 129 L.Ed.2d 775 (1994), reaffirmed this understanding. The plaintiffs in *De Grandy* claimed that, by reducing the size of the Hispanic majority in some districts, *additional* Hispanic-majority districts could be created. *Id.,* at 1008, 114 S.Ct. 2647. The State defended a plan that did not do so on the ground that the proposed additional districts, while containing nominal Hispanic majorities, would "lack enough Hispanic voters to elect candidates of their choice without cross-over votes from other ethnic groups," and thus could not bolster Hispanic voting strength under § 2. *Ibid.*

In keeping with the requirement that a § 2 plaintiff must show that an alternative apportionment would present *better* prospects for minority-preferred candidates, ****2655** the Court set out the condition that a challenge to an existing set of single-member districts must show the possibility of "creating more than the existing number of reasonably compact districts with a sufficiently large minority population to elect candidates of its choice." *Ibid. De Grandy* confirmed that simply proposing a set of districts that divides up a minority population in a different manner than the State has chosen, ***497** without a gain in minority opportunity districts, does not show vote dilution, but "only that lines could have been drawn elsewhere." *Id.,* at 1015, 114 S.Ct. 2647.

Here the District Court found that six Latino-majority districts were all that south and west Texas could support. Plan 1374C provides six such districts, just as its predecessor did. This fact, combined with our precedent making clear that § 2 plaintiffs must show an alternative with *better* prospects for minority success, should have resulted in affirmance of the District Court decision on vote dilution in south and west Texas. See *Gingles, supra,* at 79, 106 S.Ct. 2752 ("[T]he clearly-erroneous test of [Federal Rule of Civil Procedure] 52(a) is the appropriate standard for appellate review of a finding of vote dilution ... .[W]hether the political process is equally open to minority voters ... is peculiarly dependent upon the facts" (internal quotation marks omitted)); *Rogers v. Lodge,* 458 U.S. 613, 622, 627, 102 S.Ct. 3272, 73 L.Ed.2d 1012 (1982).

The majority avoids this result by finding fault with the District Court's analysis of one of the Latino-majority districts in the State's plan. That district—District 25—is like other districts in the State's plan, like districts in the predecessor plan, and like districts in the *plaintiffs* ' proposed seven-district plan, in that it joins population concentrations around the border area with others closer to the center of the State. The District Court explained that such " 'bacon-strip' " districts are inevitable, given the geography and demography of that area of the State. *Session,* 298 F.Supp.2d, at 486–487, 490, 491, n. 125, 502.

The majority, however, criticizes the District Court because its consideration of the compactness of District 25 under § 2 was deficient. According to the majority,

> "the court analyzed the issue only for equal protection purposes. In the equal protection context, compactness focuses on the contours of district lines to determine whether race was the predominant factor in drawing ***498** those lines. Under § 2, by contrast, the injury is vote dilution, so the compactness inquiry embraces different considerations." *Ante,* at 2618 (citation omitted).

This is simply an inaccurate description of the District Court's opinion. The District Court expressly considered compactness in the § 2 context. That is clear enough from the fact that the majority *quotes* the District Court's opinion in elaborating on the standard of compactness it believes the District Court *should* have applied. See *ante,* at 2613 (quoting *Session, supra,* at 502); *ante,* at 2619 (quoting *Session, supra,* at 502). The very passage quoted by the majority about the different " 'needs and interests' " of the communities in District 25, *ante,* at 2613, appeared in the District Court opinion precisely because the District Court recognized that those concerns "bear on the extent to which the new districts"—including District 25—"are functionally effective Latino opportunity districts, important to understanding whether *dilution* results from Plan 1374C," *Session,* 298 F.Supp.2d, at 502 (emphasis added); see also *ibid.* (noting different "needs and interests of Latino communities" in the " 'bacon-strip' " districts and concluding that "[t]he issue is ****2656** whether these features mean that the newly-configured districts *dilute the voting strength* of Latinos" (emphasis added)).

Indeed, the District Court addressed compactness in two different sections of its opinion: in Part VI–C with respect to vote dilution under § 2, and in Part VI–D with respect to whether race predominated in drawing district lines, for purposes of

equal protection analysis. The District Court even explained, in considering in Part VI–C the differences between the Latino communities in the bacon-strip districts (including District 25) for purposes of vote dilution under § 2, how the same concerns bear on the plaintiffs' equal protection claim, discussed in Part VI–D. *Id.,* at 502, n. 168. The majority faults the District Court for discussing "the relative smoothness of the district lines," because that is only pertinent ***499** in the equal protection context, *ante,* at 2618, but it was only in the equal protection context that the District Court mentioned the relative smoothness of district lines. See 298 F.Supp.2d, at 506–508. In discussing compactness in Part VI–C, with respect to vote dilution under § 2, the District Court considered precisely what the majority says it should have: the diverse needs and interests of the different Latino communities in the district. Unlike the majority, however, the District Court properly recognized that the question under § 2 was "whether these features mean that the newly-configured districts dilute the voting strength of Latinos." *Id.,* at 502.

The District Court's answer to that question was unambiguous:

> "Witnesses testified that Congressional Districts 15 and 25 would span *colonias* in Hidalgo County and suburban areas in Central Texas, but the witnesses testified, and the regression data show, that both districts are effective Latino opportunity districts, with the Hispanic-preferred candidate winning every primary and general election examined in District 25." *Id.,* at 503.

The District Court emphasized this point again later on:

> "The newly-configured Districts 15, 25, 27, and 28 cover more territory and travel farther north than did the corresponding districts in Plan 1151C. The districts combine more voters from the central part of the State with voters from the border cities than was the case in Plan 1151C. The population data, regression analyses, and the testimony of both expert witnesses and witnesses knowledgeable about how politics actually works in the area lead to the finding that in Congressional Districts 25 and 28, Latino voters will likely control every primary and general election outcome." *Id.,* at 503–504.

I find it inexplicable how the majority can read these passages and state that the District Court reached its finding ***500** on the effectiveness of District 25 "without accounting for the detrimental consequences of its compactness problems." *Ante,* at 2623. The majority does "not question" the District Court's parsing of the statistical evidence to reach the finding that District 25 was an effective Latino opportunity district. *Ante,* at 2619. But the majority nonetheless rejects that finding, based on its own theory that "[t]he practical consequence of drawing a district to cover two distant, disparate communities is that one or both groups will be unable to achieve their political goals," *ibid.,* and because the finding rests on the "prohibited assumption" that voters of the same race will "think alike, share the same political interests, and will prefer the same candidates at the polls," *ante,* at 2618 (internal quotation marks omitted). It is important to be perfectly clear about the ****2657** following, out of fairness to the District Court if for no other reason: No one has made any "assumptions" about how voters in District 25 will vote based on their ethnic background. Not the District Court; not this dissent. There was a trial. At trials, assumptions and assertions give way to facts. In voting rights cases, that is typically done through regression analyses of past voting records. Here, those analyses showed that the Latino candidate of choice prevailed in every primary and general election examined for District 25. See *Session,* 298 F.Supp.2d, at 499–500. Indeed, a plaintiffs' expert conceded that Latino voters in District 25 "have an effective opportunity to control outcomes in both primary and general elections." *Id.,* at 500. The District Court, far from "assum[ing]" that Latino voters in District 25 would "prefer the same candidate at the polls," concluded that they were likely to do so based on statistical evidence of historic voting patterns.

Contrary to the erroneous statements in the majority opinion, the District Court judges did *not* simply "aggregat[e]" minority voters to measure effectiveness. *Ante,* at 2618. They did *not* simply rely on the "mathematical possibility" of minority voters voting for the same preferred ***501** candidate, *ante,* at 2619, and it is a disservice to them to state otherwise. It is the majority that is indulging in unwarranted "assumption[s]" about voting, contrary to the facts found at trial based on carefully considered evidence.

What is blushingly ironic is that the district preferred by the majority—former District 23—suffers from the same "flaw" the majority ascribes to District 25, except to a greater degree. While the majority decries District 25 because the Latino communities there are separated by "enormous geographical distance," *ibid.,* and are "hundreds of miles apart," *ante,* at 2623, Latino communities joined to form the voting majority in old District 23 are nearly twice as far apart. Old District 23 runs "from El Paso, over 500 miles, into San Antonio and down into Laredo. It covers a much longer distance than ... the 300 miles from Travis to McAllen [in District 25]." App. 292 (testimony of T. Giberson); see *id.,* at 314 (expert report of T.

Giberson) ("[D]istrict 23 in any recent Congressional plan extends from the outskirts of El Paso down to Laredo, dipping into San Antonio and spanning 540 miles"). So much for the significance of "enormous geographical distance." Or perhaps the majority is willing to "assume" that Latinos around San Antonio have common interests with those on the Rio Grande rather than those around Austin, even though San Antonio and Austin are a good bit closer to each other (less than 80 miles apart) than either is to the Rio Grande.*

**2658 *502 The District Court considered expert evidence on projected election returns and concluded that District 25 would likely perform impeccably for Latino voters, better indeed than former District 23. See *Session,* 298 F.Supp.2d, at 503–504, 488, 489, 496. The District Court also concluded that the other districts in Plan 1374C would give Latino voters a favorable opportunity to elect their preferred candidates. See *id.,* at 499 (observing the parties' agreement that Districts 16 and 20 in Plan 1374C "do clearly provide effective Latino citizen voting age population majorities"); *id.,* at 504 ("Latino voters will likely control every primary and general election outcome" in District 28, and "every primary outcome and almost every general election outcome" in Districts 15 and 27, under Plan 1374C). In light of these findings, the District Court concluded that "compared to Plan 1151C ... Plaintiffs have not shown an impermissible reduction in effective opportunities for Latino electoral control or in opportunities for Latino participation in the political process." *Ibid.*

Viewed against this backdrop, the majority's holding that Plan 1374C violates § 2 amounts to this: A State has denied minority voters equal opportunity to "participate in the political process and to elect representatives of their choice," 42 U.S.C. § 1973(b), when the districts in the plan a State has created have *better* prospects for the success of *503 minority-preferred candidates than an alternative plan, simply because one of the State's districts combines different minority communities, which, in any event, are likely to vote as a controlling bloc. It baffles me how this could be vote dilution, let alone how the District Court's contrary conclusion could be clearly erroneous.

II

The majority arrives at the wrong resolution because it begins its analysis in the wrong place. The majority declares that a *Gingles* violation is made out "[c]onsidering" former District 23 "in isolation," and chides the State for suggesting that it can remedy this violation "by creating new District 25 as an offsetting opportunity district." *Ante,* at 2616. According to the majority, " § 2 does not forbid the creation of a noncompact majority-minority district," but "[t]he noncompact district cannot ... remedy a violation elsewhere in the State." *Ibid.*

The issue, however, is not whether a § 2 violation in District 23, viewed "in isolation," can be remedied by the creation of a Latino opportunity district in District 25. When the question is where a fixed number of majority-minority districts should be located, the analysis should never begin by asking whether a *Gingles* violation can be made out in any one district "in isolation." In these circumstances, it is always possible to look at one area of minority population "in isolation" and see a "violation" of § 2 under *Gingles*. For example, if a State drew three districts in a group, with 60% minority voting-age population in the first two, and 40% in the third, the 40% can readily claim that their opportunities are being thwarted because *they* were not grouped with an additional **2659 20% of minority voters from one of the other districts. But the remaining minority voters in the other districts would have precisely the same claim if minority voters were shifted from their districts to join the 40%. See *De Grandy,* 512 U.S., at 1015–1016, 114 S.Ct. 2647 ("[S]ome dividing by district *504 lines and combining within them is virtually inevitable and befalls any population group of substantial size"). That is why the Court has explained that no individual minority voter has a right to be included in a majority-minority district. See *Shaw v. Hunt,* 517 U.S. 899, 917, and n. 9, 116 S.Ct. 1894, 135 L.Ed.2d 207 (1996) *(Shaw II); id.,* at 947, 116 S.Ct. 1894 (STEVENS, J., dissenting). Any other approach would leave the State caught between incompatible claims by different groups of minority voters. See *Session, supra,* at 499 ("[T]here is neither sufficiently dense and compact population in general nor Hispanic population in particular to support" retaining former District 23 *and* adding District 25).

The correct inquiry under § 2 is not whether a *Gingles* violation can be made out with respect to one district "in isolation," but instead whether line-drawing in the challenged area as a whole dilutes minority voting strength. A proper focus on the

district lines in the area as a whole also demonstrates why the majority's reliance on *Bush v. Vera,* 517 U.S. 952, 116 S.Ct. 1941, 135 L.Ed.2d 248 (1996), and *Shaw II* is misplaced.

In those cases, we rejected on the basis of lack of compactness districts that a State defended against equal protection strict scrutiny on the grounds that they were necessary to avoid a § 2 violation. See *Vera, supra,* at 977–981, 116 S.Ct. 1941 (plurality opinion); *Shaw II, supra,* at 911, 916–918, 116 S.Ct. 1894. But those cases never suggested that a plaintiff proceeding under § 2 could rely on lack of compactness to prove liability. And the districts in those cases were nothing like District 25 here. To begin with, they incorporated multiple, small, farflung pockets of minority population, and did so by ignoring the boundaries of political subdivisions. *Vera, supra,* at 987–989, 116 S.Ct. 1941 (Appendices A–C to plurality opinion) (depicting districts); *Shaw II, supra,* at 902–903, 116 S.Ct. 1894 (describing districts). Here the District Court found that the long and narrow but more normal shape of District 25 was shared by other districts both in the state plan and the predecessor plan—not to mention the plaintiffs' own proposed plan—and resulted from the demography ***505** and geography of south and west Texas. See *Session,* 298 F.Supp.2d, at 487–488, 491, and n. 125. And *none* of the minority voters in the *Vera* and *Shaw II* districts could have formed part of a *Gingles*-compliant district, see *Vera, supra,* at 979, 116 S.Ct. 1941 (plurality opinion) (remarking of one of the districts at issue that it "reaches out to grab small and apparently isolated minority communities which, based on the evidence presented, could not possibly form part of a compact majority-minority district"); *Shaw II,* 517 U.S., at 916–917, 116 S.Ct. 1894 (describing the challenged district as "in no way coincident with the compact *Gingles* district"); while here no one disputes that at least the Latino voters in the border area of District 25—the larger concentration—*must* be part of a Latino-majority district if six are to be placed in south and west Texas.

This is not, therefore, a case of the State drawing a majority-minority district "anywhere," once a § 2 violation has been established elsewhere in the State. *Id.,* at 917, 116 S.Ct. 1894. The question is instead whether the State has some latitude in deciding where to place the maximum possible number of majority-minority districts, when one of those districts contains ****2660** a substantial proportion of minority voters who *must* be in a majority-minority district if the maximum number is to be created at all.

Until today, no court has ever suggested that lack of compactness under § 2 might invalidate a district that a State has chosen to create in the first instance. The "geographica[l] compact[ness]" of a minority population has previously been only an element of the *plaintiff's* case. See *Gingles,* 478 U.S., at 49–50, 106 S.Ct. 2752. That is to say, the § 2 plaintiff bears the burden of demonstrating that "the minority group ... is sufficiently large and geographically compact to constitute a majority in a single-member district." *Id.,* at 50, 106 S.Ct. 2752. Thus compactness, when it has been invoked by lower courts to defeat § 2 claims, has been applied to a remedial district a *plaintiff* proposes. See, *e.g.,* ***506** *Sensley v. Albritton,* 385 F.3d 591, 596–597 (C.A.5 2004); *Mallory v. Ohio,* 173 F.3d 377, 382–383 (C.A.6 1999); *Stabler v. County of Thurston,* 129 F.3d 1015, 1025 (C.A.8 1997). Indeed, the most we have had to say about the compactness aspect of the *Gingles* inquiry is to profess doubt whether it was met when the district a § 2 plaintiff proposed was "oddly shaped." *Growe v. Emison,* 507 U.S., at 38, 41, 113 S.Ct. 1075. And even then, we rejected § 2 liability not because of the odd shape, but because no evidence of majority bloc voting had been submitted. *Id.,* at 41–42, 113 S.Ct. 1075.

Far from imposing a freestanding compactness obligation on the States, we have repeatedly emphasized that "States retain broad discretion in drawing districts to comply with the mandate of § 2," *Shaw II, supra,* at 917, n. 9, 116 S.Ct. 1894, and that § 2 itself imposes "no *per se* prohibitions against particular types of districts," *Voinovich v. Quilter,* 507 U.S., at 155, 113 S.Ct. 1149. We have said that the States retain "flexibility" in complying with voting rights obligations that "federal courts enforcing § 2 lack." *Vera, supra,* at 978, 116 S.Ct. 1941. The majority's intrusion into line-drawing, under the authority of § 2, when the lines already achieve the maximum possible number of majority-minority opportunity districts, suggests that all this is just so much hollow rhetoric.

The majority finds fault in a "one-way rule whereby plaintiffs must show compactness but States need not," *ante,* at 2617, without bothering to explain how its contrary rule of equivalence between plaintiffs litigating and the elected representatives of the people legislating comports with our repeated assurances concerning the discretion and flexibility left to the States. Section 2 is, after all, part of the Voting Rights Act, not the Compactness Rights Act. The word "compactness" appears nowhere in § 2, nor even in the agreed-upon legislative history. See *Gingles, supra,* at 36–37, 106 S.Ct. 2752. To bestow on compactness such precedence in the § 2 inquiry is the antithesis of the totality test that the statute contemplates. *De Grandy,* 512 U.S., at 1011, 114 S.Ct. 2647 ("[T]he ultimate conclusions about equality or inequality of opportunity ***507** were intended by Congress to be judgments resting on comprehensive, not limited, canvassing of relevant facts"). Suggesting that determinative weight should have been given this one factor contravenes our understanding of how § 2 analysis proceeds, see

Gingles, 478 U.S., at 45, 106 S.Ct. 2752 (quoting statement from the legislative history of § 2 that " 'there is no requirement that any particular number of factors be proved, or that a majority of them point one way or the other' "), particularly when the proper standard of review for the District Court's ultimate judgment under § 2 is clear error, see *id.,* at 78–79, 106 S.Ct. 2752.

**2661 A § 2 plaintiff has no legally protected interest in compactness, apart from how deviations from it dilute the equal opportunity of minority voters "to elect representatives of their choice." § 1973(b). And the District Court found that any effect on this opportunity caused by the different "needs and interests" of the Latino voters within District 25 was at least offset by the fact that, despite these differences, they were likely to prefer the same candidates at the polls. This finding was based on the evidence, not assumptions.

Whatever the competing merits of old District 23 and new District 25 at the margins, judging between those two majority-minority districts is surely the responsibility of the legislature, not the courts. See *Georgia v. Ashcroft,* 539 U.S. 461, 480, 123 S.Ct. 2498, 156 L.Ed.2d 428 (2003). The majority's squeamishness about the supposed challenge facing a Latino-preferred candidate in District 25—having to appeal to Latino voters near the Rio Grande and those near Austin—is not unlike challenges candidates face around the country all the time, as part of a healthy political process. It is in particular not unlike the challenge faced by a Latino-preferred candidate in the district favored by the majority, former District 23, who must appeal to Latino voters both in San Antonio and in El Paso, 540 miles away. "[M]inority voters are not immune from the obligation to pull, haul, and trade to find common political ground, the virtue of which is not to be slighted in applying *508 a statute meant to hasten the waning of racism in American politics." *De Grandy,* 512 U.S., at 1020, 114 S.Ct. 2647. As the Court has explained, "the ultimate right of § 2 is equality of opportunity, not a guarantee of electoral success for minority-preferred candidates of whatever race." *Id.,* at 1014, n. 11, 114 S.Ct. 2647. Holding that such *opportunity* is denied because a State draws a district with 55% minority citizen voting-age population, rather than keeping one with a similar percentage (but lower turnout) that did not in any event consistently elect minority-preferred candidates, gives an unfamiliar meaning to the word "opportunity."

III

Even if a plaintiff satisfies the *Gingles* factors, a finding of vote dilution under § 2 does not automatically follow. In *De Grandy,* we identified another important aspect of the totality inquiry under § 2: whether "minority voters form effective voting majorities in a number of districts roughly proportional to the minority voters' respective shares in the voting-age population." 512 U.S., at 1000, 114 S.Ct. 2647. A finding of proportionality under this standard can defeat § 2 liability even if a clear *Gingles* violation has been made out. In *De Grandy* itself, we found that "substantial proportionality" defeated a claim that the district lines at issue "diluted the votes cast by Hispanic voters," 512 U.S., at 1014–1015, 114 S.Ct. 2647, even assuming that the plaintiffs had shown "the possibility of creating *more* than the existing number of reasonably compact districts with a sufficiently large minority population to elect candidates of its choice," *id.,* at 1008–1009, 114 S.Ct. 2647 (emphasis added).

The District Court determined that south and west Texas was the appropriate geographic frame of reference for analyzing proportionality: "If South and West Texas is the only area in which *Gingles* is applied and can be met, as Plaintiffs argue, it is also the relevant area for measuring proportionality." *Session,* 298 F.Supp.2d, at 494. As the court explained, *509 "[l]ower courts that have analyzed 'proportionality' in the *De Grandy* sense have been consistent in using the same frame of reference for that factor and for the factors set forth **2662 in *Gingles*." *Id.,* at 493–494, and n. 131 (citing cases).

In south and west Texas, Latinos constitute 58% of the relevant population and control 85% (six out of seven) of the congressional seats in that region. That includes District 25, because the District Court found, without clear error, that Latino voters in that district "will likely control every primary and general election outcome." *Id.,* at 504. But even not counting that district as a Latino opportunity district, because of the majority's misplaced compactness concerns, Latinos in south and west Texas still control congressional seats in a markedly greater proportion—71% (five out of seven)—than their share of the

population there. In other words, in the only area in which the *Gingles* factors can be satisfied, Latino voters enjoy effective political power 46% above their numerical strength, or, even disregarding District 25 as an opportunity district, 24% above their numerical strength. See *De Grandy,* 512 U.S., at 1017, n. 13, 114 S.Ct. 2647. Surely these figures do not suggest a denial of equal *opportunity* to *participate* in the political process.

The majority's only answer is to shift the focus to statewide proportionality. In *De Grandy* itself, the Court rejected an argument that proportionality should be analyzed on a statewide basis as "flaw[ed]," because "the argument would recast these cases as they come to us, in order to bar consideration of proportionality except on statewide scope, whereas up until now the dilution claims have been litigated on a smaller geographical scale." *Id.,* at 1021–1022, 114 S.Ct. 2647. The same is true here: The plaintiffs' § 2 claims concern "the impact of the legislative plan on Latino voting strength *in South and West Texas,*" *Session, supra,* at 486 (emphasis added), and that is the only area of the State in which they can satisfy the *Gingles* factors. That is accordingly the proper frame of reference in analyzing proportionality.

***510** In any event, at a statewide level, 6 Latino opportunity districts out of 32, or 19% of the seats, would certainly seem to be "roughly proportional" to the Latino 22% share of the population. See *De Grandy, supra,* at 1000, 114 S.Ct. 2647. The District Court accordingly determined that proportionality suggested the lack of vote dilution, even considered on a statewide basis. *Session, supra,* at 494. The majority avoids that suggestion by disregarding the District Court's factual finding that District 25 is an effective Latino opportunity district. That is not only improper, for the reasons given, but the majority's rejection of District 25 as a Latino opportunity district is also flatly inconsistent with its statewide approach to analyzing proportionality. Under the majority's view, the Latino voters in the northern end of District 25 cannot "count" along with the Latino voters at the southern end to form an effective majority, because they belong to different communities. But Latino voters from everywhere around the State of Texas—even those from areas where the *Gingles* factors are not satisfied—can "count" for purposes of calculating the proportion against which effective Latino electoral power should be measured. Heads the plaintiffs win; tails the State loses.

* * *

The State has drawn a redistricting plan that provides six of seven congressional districts with an effective majority of Latino voting-age citizens in south and west Texas, and it is not possible to provide more. The majority nonetheless faults the state plan because of the *particular mix* of Latino voters forming the majority in one of the six districts—a combination of voters ****2663** from around the Rio Grande and from around Austin, as opposed to what the majority uncritically views as the more monolithic majority assembled (from more farflung communities) in old District 23. This despite the express factual findings, from judges far more familiar with Texas than we are, that the State's new district would be a ***511** more effective Latino-majority district than old District 23 ever was, and despite the fact that *any* plan would necessarily leave *some* Latino voters outside a Latino-majority district.

Whatever the majority believes it is fighting with its holding, it is not vote dilution on the basis of race or ethnicity. I do not believe it is our role to make judgments about which *mixes* of minority voters should count for purposes of forming a majority in an electoral district, in the face of factual findings that the district is an effective majority-minority district. It is a sordid business, this divvying us up by race. When a State's plan already provides the maximum possible number of majority-minority effective opportunity districts, and the minority enjoys effective political power in the area well in *excess* of its proportion of the population, I would conclude that the courts have no further role to play in rejiggering the district lines under § 2.

I respectfully dissent from Part III of the Court's opinion.

Justice SCALIA, with whom Justice THOMAS joins, and with whom THE CHIEF JUSTICE and Justice ALITO join as to Part III, concurring in the judgment in part and dissenting in part.

I

As I have previously expressed, claims of unconstitutional partisan gerrymandering do not present a justiciable case or controversy. See *Vieth v. Jubelirer,* 541 U.S. 267, 271–306, 124 S.Ct. 1769, 158 L.Ed.2d 546 (2004) (plurality opinion). Justice KENNEDY's discussion of appellants' political-gerrymandering claims ably demonstrates that, yet again, no party or judge has put forth a judicially discernible standard by which to evaluate them. See *ante,* at 2607 – 2612. Unfortunately, the opinion then concludes that appellants have failed to state a claim as to political gerrymandering, without ever articulating what the elements of such a claim consist of. That is not an available disposition of this appeal. We must either conclude ***512** that the claim is nonjusticiable and dismiss it, or else set forth a standard and measure appellants' claim against it. *Vieth, supra,* at 301, 124 S.Ct. 1769. Instead, we again dispose of this claim in a way that provides no guidance to lower court judges and perpetuates a cause of action with no discernible content. We should simply dismiss appellants' claims as nonjusticiable.

II

I would dismiss appellants' vote-dilution claims premised on § 2 of the Voting Rights Act of 1965 for failure to state a claim, for the reasons set forth in Justice THOMAS's opinion, which I joined, in *Holder v. Hall,* 512 U.S. 874, 891–946, 114 S.Ct. 2581, 129 L.Ed.2d 687 (1994) (opinion concurring in judgment). As THE CHIEF JUSTICE makes clear, see *ante,* p. 2652 (opinion concurring in part, concurring in judgment in part, and dissenting in part), the Court's § 2 jurisprudence continues to drift ever further from the Act's purpose of ensuring minority voters equal electoral opportunities.

III

Because I find no merit in either of the claims addressed by the Court, I must consider appellants' race-based equal protection ****2664** claims. The GI Forum appellants focus on the removal of 100,000 residents, most of whom are Latino, from District 23. They assert that this action constituted intentional vote dilution in violation of the Equal Protection Clause. The Jackson appellants contend that the intentional creation of District 25 as a majority-minority district was an impermissible racial gerrymander. The District Court rejected the equal protection challenges to both districts.

A

The GI Forum appellants contend that the Texas Legislature removed a large number of Latino voters living in Webb County from District 23 with the purpose of diminishing Latino electoral power in that district. Congressional redistricting is

primarily a responsibility of state legislatures, and legislative motives are often difficult to discern. We presume,moreover, ***513** that legislatures fulfill this responsibility in a constitutional manner. Although a State will almost always be aware of racial demographics when it redistricts, it does not follow from this awareness that the State redistricted on the basis of race. See *Miller v. Johnson,* 515 U.S. 900, 915–916, 115 S.Ct. 2475, 132 L.Ed.2d 762 (1995). Thus, courts must "exercise extraordinary caution" in concluding that a State has intentionally used race when redistricting. *Id.,* at 916, 115 S.Ct. 2475. Nevertheless, when considerations of race predominate, we do not hesitate to apply the strict scrutiny that the Equal Protection Clause requires. See, *e.g., Shaw v. Hunt,* 517 U.S. 899, 908, 116 S.Ct. 1894, 135 L.Ed.2d 207 (1996) *(Shaw II); Miller, supra,* at 920, 115 S.Ct. 2475.

At the time the legislature redrew Texas's congressional districts, District 23 was represented by Congressman Henry Bonilla, whose margin of victory and support among Latinos had been steadily eroding. See *Session v. Perry,* 298 F.Supp.2d 451, 488–489 (E.D.Tex.2004) *(per curiam)*. In the 2002 election, he won with less than 52 percent of the vote, *ante,* at 2613 (opinion of the Court), and received only 8 percent of the Latino vote, *Session,* 298 F.Supp.2d, at 488. The District Court found that the goal of the map drawers was to adjust the lines of that district to protect the imperiled incumbent: "The record presents undisputed evidence that the Legislature desired to increase the number of Republican votes cast in Congressional District 23 to shore up Bonilla's base and assist in his reelection." *Ibid.* To achieve this goal, the legislature extended the district north to include counties in the central part of the State with residents who voted Republican, adding 100,000 people to the district. Then, to comply with the one-person, one-vote requirement, the legislature took one-half of heavily Democratic Webb County, in the southern part of the district, and included it in the neighboring district. *Id.,* at 488–489.

Appellants acknowledge that the State redrew District 23 at least in part to protect Bonilla. They argue, however, that they assert an intentional vote-dilution claim that is analytically distinct from the racial-gerrymandering claim of ***514** the sort at issue in *Shaw v. Reno,* 509 U.S. 630, 642–649, 113 S.Ct. 2816, 125 L.Ed.2d 511 (1993) *(Shaw I)*. A vote-dilution claim focuses on the majority's intent to harm a minority's voting power; a *Shaw I* claim focuses instead on the State's purposeful classification of individuals by their race, regardless of whether they are helped or hurt. *Id.,* at 651–652, 113 S.Ct. 2816 (distinguishing the vote-dilution claim in *United Jewish Organizations of Williamsburgh, Inc. v. Carey,* 430 U.S. 144, 97 S.Ct. 996, 51 L.Ed.2d 229 (1977)). In contrast to a *Shaw I* claim, appellants contend, in a vote-dilution claim the plaintiff need not ****2665** show that the racially discriminatory motivation *predominated,* but only that the invidious purpose was *a* motivating factor. Appellants contrast *Easley v. Cromartie,* 532 U.S. 234, 241, 121 S.Ct. 1452, 149 L.Ed.2d 430 (2001) (in a racial-gerrymandering claim, "[r]ace must not simply have been *a* motivation for the drawing of a majority-minority district, but the *predominant* factor motivating the legislature's districting decision" (citation and internal quotation marks omitted)), with *Arlington Heights v. Metropolitan Housing Development Corp.,* 429 U.S. 252, 265–266, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977), and *Rogers v. Lodge,* 458 U.S. 613, 617, 102 S.Ct. 3272, 73 L.Ed.2d 1012 (1982). Whatever the validity of this distinction, on the facts of these cases it is irrelevant. The District Court's conclusion that the legislature was not racially motivated when it drew the plan as a whole, *Session,* 298 F.Supp.2d, at 473, and when it split Webb County, *id.,* at 509, dooms appellants' intentional-vote-dilution claim.

We review a district court's factual finding of a legislature's motivation for clear error. See *Easley, supra,* at 242, 121 S.Ct. 1452. We will not overturn that conclusion unless we are " 'left with the definite and firm conviction that a mistake has been committed.' " *Anderson v. Bessemer City,* 470 U.S. 564, 573, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985) (quoting *United States v. United States Gypsum Co.,* 333 U.S. 364, 395, 68 S.Ct. 525, 92 L.Ed. 746 (1948)). I cannot say that the District Court clearly erred when it found that "[t]he legislative motivation for the division of Webb County between Congressional District 23 and Congressional District 28 in Plan 1374C was political." *Session, supra,* at 509.

***515** Appellants contend that the District Court had evidence of the State's intent to minimize Latino voting power. They note, for instance, that the percentage of Latinos in District 23's citizen voting-age population decreased significantly as a result of redistricting and that only 8 percent of Latinos had voted for Bonilla in the last election. They also point to testimony indicating that the legislature was conscious that protecting Bonilla would result in the removal of Latinos from the district and was pleased that, even after redistricting, he would represent a district in which a slight majority of voting-age residents was Latino. Of the individuals removed from District 23, 90 percent of those of voting age were Latinos, and 87 percent voted for Democrats in 2002. *Id.,* at 489. The District Court concluded that these individuals were removed because they voted for Democrats and against Bonilla, not because they were Latino. *Id.,* at 473, 508–510. This finding is entirely in accord with our case law, which has recognized that "a jurisdiction may engage in constitutional political gerrymandering, even if it so happens that the most loyal Democrats happen to be black Democrats and even if the State were *conscious* of that fact." *Hunt v. Cromartie,* 526 U.S. 541, 551, 119 S.Ct. 1545, 143 L.Ed.2d 731 (1999). See also *Bush v. Vera,* 517 U.S.

952, 968, 116 S.Ct. 1941, 135 L.Ed.2d 248 (1996) (plurality opinion) ("If district lines merely correlate with race because they are drawn on the basis of political affiliation, which correlates with race, there is no racial classification to justify").[1] Appellants argue that in **2666 evaluating the State's stated motivation, the District *516 Court improperly conflated race and political affiliation by failing to recognize that the individuals moved were not Democrats, they just voted against Bonilla. But the District Court found that the State's purpose was to protect Bonilla, and not just to create a safe Republican district. The fact that the redistricted residents voted against Bonilla (regardless of how they voted in other races) is entirely consistent with the legislature's political and nonracial objective.

I cannot find, under the clear error standard, that the District Court was required to reach a different conclusion. See *Hunt, supra,* at 551, 119 S.Ct. 1545. "Discriminatory purpose ... implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker ... selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Personnel Administrator of Mass. v. Feeney,* 442 U.S. 256, 279, 99 S.Ct. 2282, 60 L.Ed.2d 870 (1979) (citation, some internal quotation marks, and footnote omitted). The District Court cited ample evidence supporting its finding that the State did not remove Latinos from the district because they were Latinos: The new District 23 is more compact than it was under the old plan, see *Session,* 298 F.Supp.2d, at 506, the division of Webb County simply followed the interstate highway, *id.,* at 509–510, and the district's "lines did not make twists, turns, or jumps that can be explained only as efforts to include Hispanics or exclude Anglos, or vice-versa," *id.,* at 511. Although appellants put forth alternative redistricting scenarios that would have protected Bonilla, the District Court noted that these alternatives would not have furthered the legislature's goal of increasing the number of Republicans elected statewide. *Id.,* at 497. See *Miller,* 515 U.S., at 915, 115 S.Ct. 2475 ("Electoral districting is a most difficult subject for legislatures, and so the States must have discretion to exercise the political judgment necessary to balance competing interests"). Nor is the District Court's finding at all impugned by the fact that certain legislators *517 were pleased that Bonilla would continue to represent a nominally Latino-majority district.

The ultimate inquiry, as in all cases under the Equal Protection Clause, goes to the State's purpose, not simply to the effect of state action. See *Washington v. Davis,* 426 U.S. 229, 238–241, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976). Although it is true that the effect of an action can support an inference of intent, see *id.,* at 242, 96 S.Ct. 2040, there is ample evidence here to overcome any such inference and to support the State's political explanation. The District Court did not commit clear error by accepting it.

B

The District Court's finding with respect to District 25 is another matter. There, too, the District Court applied the approach set forth in *Easley,* in which the Court held that race may be a motivation in redistricting as long as it is not the predominant one. 532 U.S., at 241, 121 S.Ct. 1452. See also *Bush,* 517 U.S., at 993, 116 S.Ct. 1941 (O'Connor, J., concurring) ("[S]o long as they do not subordinate traditional districting criteria to the use of race for its own sake or as a proxy, States may intentionally create majority-minority districts, and may otherwise take race into consideration, without coming under strict scrutiny"). In my view, however, **2667 when a legislature intentionally creates a majority-minority district, race is necessarily its predominant motivation and strict scrutiny is therefore triggered. See *id.,* at 999–1003, 116 S.Ct. 1941 (THOMAS, J., joined by SCALIA, J., concurring in judgment). As in *Bush, id.,* at 1002, 116 S.Ct. 1941, the State's concession here sufficiently establishes that the legislature classified individuals on the basis of their race when it drew District 25: "[T]o avoid retrogression and achieve compliance with § 5 of the Voting Rights Act ..., the Legislature chose to create a new Hispanic-opportunity district—new CD 25—which would allow Hispanics to actually elect its candidate of choice." Brief for State Appellees 106. The District Court similarly found that "the Legislature clearly intended to create a majority Latino citizen voting *518 age population district in Congressional District 25." *Session, supra,* at 511. Unquestionably, in my view, the drawing of District 25 triggers strict scrutiny.

Texas must therefore show that its use of race was narrowly tailored to further a compelling state interest. See *Shaw II,* 517 U.S., at 908, 116 S.Ct. 1894. Texas asserts that it created District 25 to comply with its obligations under § 5 of the Voting

Rights Act. Brief for State Appellees 105–106. That provision forbids a covered jurisdiction to promulgate any "standard, practice, or procedure" unless it "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race." 42 U.S.C. § 1973c. The purpose of § 5 is to prevent "retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Beer v. United States,* 425 U.S. 130, 141, 96 S.Ct. 1357, 47 L.Ed.2d 629 (1976). Since its changes to District 23 had reduced Latino voting power in that district, Texas asserts that it needed to create District 25 as a Latino-opportunity district in order to avoid § 5 liability.

We have in the past left undecided whether compliance with federal antidiscrimination laws can be a compelling state interest. See *Miller, supra,* at 921, 115 S.Ct. 2475; *Shaw II, supra,* at 911, 116 S.Ct. 1894. I would hold that compliance with § 5 of the Voting Rights Act can be such an interest. We long ago upheld the constitutionality of § 5 as a proper exercise of Congress's authority under § 2 of the Fifteenth Amendment to enforce that Amendment's prohibition on the denial or abridgment of the right to vote. See *South Carolina v. Katzenbach,* 383 U.S. 301, 86 S.Ct. 803, 15 L.Ed.2d 769 (1966). If compliance with § 5 were not a compelling state interest, then a State could be placed in the impossible position of having to choose between compliance with § 5 and compliance with the Equal Protection Clause. Moreover, the compelling nature of the State's interest in § 5 compliance is supported by our recognition in previous cases that race may be used where necessary to remedy identified past discrimination. See, *e.g., Shaw II, supra,* at 909, 116 S.Ct. 1894 (citing ***519** *Richmond v. J.A. Croson Co.,* 488 U.S. 469, 498–506, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989)). Congress enacted § 5 for just that purpose, see *Katzenbach, supra,* at 309, 86 S.Ct. 803; *Beer, supra,* at 140–141, 96 S.Ct. 1357, and that provision applies only to jurisdictions with a history of official discrimination, see 42 U.S.C. §§ 1973b(b), 1973c; *Vera v. Richards,* 861 F.Supp. 1304, 1317 (S.D.Tex.1994) (recounting that, because of its history of racial discrimination, Texas became a jurisdiction covered by § 5 in 1975). In the proper case, therefore, a covered jurisdiction may have a compelling interest in complying with § 5.

To support its use of § 5 compliance as a compelling interest with respect to a ****2668** particular redistricting decision, the State must demonstrate that such compliance was its " 'actual purpose' " and that it had " 'a strong basis in evidence' for believing," *Shaw II, supra,* at 908–909, n. 4, 116 S.Ct. 1894 (citations omitted), that the redistricting decision at issue was "reasonably necessary under a constitutional reading and application of" the Act, *Miller,* 515 U.S., at 921, 115 S.Ct. 2475.[2] Moreover, in order to tailor the use of race narrowly to its purpose of complying with the Act, a State cannot use racial considerations to achieve results beyond those that are required to comply with the statute. See *id.,* at 926, 115 S.Ct. 2475 (rejecting the Department of Justice's policy that maximization of minority districts was required by § 5 and thus that this policy could serve as a compelling state interest). Section 5 forbids a State to take action that would worsen minorities' electoral opportunities; it does not require action that would improve them.

In determining whether a redistricting decision was reasonably necessary, a court must bear in mind that a State is permitted great flexibility in deciding how to comply with § 5's mandate. See *Georgia v. Ashcroft,* 539 U.S. 461, 479–483, 123 S.Ct. 2498, 156 L.Ed.2d 428 (2003). For instance, we have recognized that § 5 does not constrain a State's choice between creating majority-minority districts or minority-influence districts. ***520** *Id.,* at 480–483, 123 S.Ct. 2498. And we have emphasized that, in determining whether a State has impaired a minority's "effective exercise of the electoral franchise," a court should look to the totality of the circumstances statewide. These circumstances include the ability of a minority group "to elect a candidate of its choice" or "to participate in the political process," the positions of legislative leadership held by individuals representing minority districts, and support for the new plan by the representatives previously elected from these districts. *Id.,* at 479–485, 123 S.Ct. 2498.

In light of these many factors bearing upon the question whether the State had a strong evidentiary basis for believing that the creation of District 25 was reasonably necessary to comply with § 5, I would normally remand for the District Court to undertake that "fact-intensive" inquiry. See *id.,* at 484, 490, 123 S.Ct. 2498. Appellants concede, however, that the changes made to District 23 "necessitated creating an additional effective Latino district elsewhere, in an attempt to avoid Voting Rights Act liability." Brief for Appellant Jackson et al. in No. 05–276, p. 44. This is, of course, precisely the State's position. Brief for State Appellees 105–106. Nor do appellants charge that in creating District 25 the State did more than what was required by § 5.[3] In light of these concessions, I do not believe a remand is necessary, ****2669** and I would affirm the judgment of the District Court.

All Citations

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8281, 19 Fla. L. Weekly Fed. S 425

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

1 It was apparently these electoral results that later caused the District Court to state that "the practical effect" of Plan 1151C "was to leave the 1991 Democratic Party gerrymander largely in place as a 'legal' plan." *Henderson v. Perry,* 399 F.Supp.2d 756, 768 (E.D.Tex.2005); see *id.,* at 768, n. 52. But the existence of ticket-splitting voters hardly demonstrates that Plan 1151C was biased in favor of Democrats. Instead, as noted above, even the State's expert in this litigation concluded that Plan 1151C was, if anything, biased in favor of Republicans. Nor do the circumstances surrounding the replacement of Plan 1151C suggest that the legislature was motivated by a misimpression that Plan 1151C was unfair to Republicans, and accordingly should be replaced with a more equitable map. Rather, as discussed in detail below, it is clear that the sole motivation for enacting a new districting map was to maximize Republican advantage.

2 These two standard measures of compactness are the perimeter-to-area score, which compares the relative length of the perimeter of a district to its area, and the smallest circle score, which compares the ratio of space in the district to the space in the smallest circle that could encompass the district. App. 178.

3 The State suggests that in the process of drawing districts the architects of Plan 1374C frequently followed county lines, made an effort to keep certain entire communities within a given district, and otherwise followed certain neutral principles. But these facts are not relevant to the narrow question presented by these cases: Neutral motivations in the implementation of particular features of the redistricting do not qualify the solely partisan motivation behind the basic decision to adopt an entirely unnecessary plan in the first place.

4 As noted above, rather than identifying any arguably neutral reasons for adopting Plan 1374C, the record establishes a purely partisan single-minded motivation with unmistakable clarity. Therefore, there is no need at this point to discuss standards that would guide judges in enforcing a rule allowing legislatures to be motivated in part by partisan considerations, but which would impose an "obligation not to apply *too much* partisanship in districting." *Vieth v. Jubelirer,* 541 U.S. 267, 286, 124 S.Ct. 1769, 158 L.Ed.2d 546 (2004) (plurality opinion). Deciding that 100% is "too much" is not only a manageable decision, but, as explained below, it is also an obviously correct one. Nonetheless, it is worth emphasizing that courts do, in fact, possess the tools to employ standards that permit legislatures to consider partisanship in the redistricting process, but which do not allow legislatures to use partisanship as the predominant motivation for their actions. See Part IV, *infra*.

5 See *Larios v. Cox,* 300 F.Supp.2d 1320, 1342–1353 (N.D.Ga.2004) *(per curiam).* In *Cox,* the three-judge District Court undertook a searching review of the entire record in concluding that the population deviations in the state legislative districts created for the Georgia House and Senate after the release of the 2000 census data were not driven by any traditional redistricting criteria, such as compactness or preserving county lines, but were instead driven by the impermissible factors of regional favoritism and the discriminatory protection of Democratic incumbents. If there were no judicially manageable standards to assess whether a State's adoption of a redistricting map was based on valid governmental objectives, we would not have summarily affirmed the decision in *Cox* over the dissent of only one Justice. See 542 U.S. 947, 124 S.Ct. 2806, 159 L.Ed.2d 831; *id.,* at 951, 124 S.Ct. 2806 (SCALIA, J., dissenting). In addition, as Part III of the Court's opinion and this Part of my opinion demonstrate, assessing whether a redistricting map has a discriminatory impact on the opportunities for voters and candidates of a particular party to influence the political process is a manageable judicial task.

6 Although the burdened group at issue in this litigation consists of Democratic voters and candidates, the partisan gerrymandering analysis throughout this opinion would be equally applicable to any "politically coherent group whose members engaged in bloc

voting." *Vieth,* 541 U.S., at 347, 124 S.Ct. 1769 (SOUTER, J., joined by GINSBURG, J., dissenting).

7 In the 2004 congressional elections, Republicans won 21 of the 22 seats that had been designed to favor Republicans in Plan 1374C. One Democratic incumbent, Representative Chet Edwards, narrowly defeated (with 51% of the vote) his nonincumbent Republican challenger in a Republican-leaning district; Edwards outspent his challenger, who lacked strong ties to the principal communities in the district. Republicans are likely to spend more money and find a stronger challenger in 2006, which will create a "very significant chance" of a Republican defeating Edwards. App. to Juris. Statement 224a, 226a.

8 If 10% of Republican voters decided to vote for Democratic candidates, and if there were no other changes in voter turnout or preferences, the Republicans' share of the statewide vote would be reduced from 58% to 52%.

9 Justice KENNEDY faults proponents of the symmetry standard for not "providing a standard for deciding how much partisan dominance is too much," *ante,* at 2611. But it is this Court, not proponents of the symmetry standard, that has the judicial obligation to answer the question of how much unfairness is too much. It would, of course, be an eminently manageable standard for the Court to conclude that deviations of over 10% from symmetry create a prima facie case of an unconstitutional gerrymander, just as population deviations among districts of more than 10% create such a prima facie case. Or, the Court could conclude that a significant departure from symmetry is one relevant factor in analyzing whether, under the totality of the circumstances, a districting plan is an unconstitutional partisan gerrymander. See n. 11, *infra*. At any rate, proponents of the symmetry standard have provided a helpful (though certainly not talismanic) tool in this type of litigation. While I appreciate Justice KENNEDY's leaving the door open to the use of the standard in future cases, see *ante,* at 2610–2611, I believe it is the role of this Court, not social scientists, to determine how much partisan dominance is too much.

10 Safe seats may harm the democratic process in other ways as well. According to one recent article coauthored by a former Chairman of the Federal Election Commission, electoral competition "plainly has a positive effect on the interest and participation of voters in the electoral process." Potter & Viray, Election Reform: Barriers to Participation, 36 U. Mich. J.L. Reform 547, 575 (2003) (hereinafter Potter & Viray); see also L. Guinier, Tyranny of the Majority 85 (1994). The impact of noncompetitive elections in depressing voter turnout is especially troubling in light of the fact that voter participation in the United States lags behind, often well behind, participation rates in other democratic nations. Potter & Viray 575–576, and n. 200. In addition, the creation of safe seats tends to polarize decisionmaking bodies. See, *e.g., Clingman v. Beaver,* 544 U.S. 581, 620, 125 S.Ct. 2029, 161 L.Ed.2d 920 (2005) (STEVENS, J., joined by GINSBURG, J., dissenting) (noting that safe districts can "increase the bitter partisanship that has already poisoned some of those [legislative] bodies that once provided inspiring examples of courteous adversary debate and deliberation"); Cox, Partisan Gerrymandering and Disaggregated Redistricting, 2004 S.Ct. Rev. 409, 430 (arguing that "safe seats produce more polarized representatives because, by definition, the median voter in a district that is closely divided between the two major parties is more centrist than the median voter in a district dominated by one party"); Raviv, Unsafe Harbors: One Person, One Vote and Partisan Redistricting, 7 U. Pa. J. Const. L. 1001, 1068 (2005) (arguing that safe districts encourage polarization in decisionmaking bodies because representatives from those districts have to cater only to voters from one party). See generally Issacharoff & Karlan, Where to Draw the Line?: Judicial Review of Political Gerrymanders, 153 U. Pa. L.Rev. 541, 574 (2004) (providing data about the large percentage of safe seats in recent congressional and state legislative elections, and concluding that "[n]oncompetitive elections threaten both the legitimacy and the vitality of democratic governance").

11 In this litigation expert testimony provided the principal evidence about the effects of the plan that satisfy the test Justice KENNEDY would impose. In my judgment, however, most statewide challenges to an alleged gerrymander should be evaluated primarily by examining these objective factors: (1) the number of people who have been moved from one district to another, (2) the number of districts that are less compact than their predecessors, (3) the degree to which the new plan departs from other neutral districting criteria, including respect for communities of interest and compliance with the Voting Rights Act, (4) the number of districts that have been cracked in a manner that weakens an opposition party incumbent, (5) the number of districts that include two incumbents from the opposite party, (6) whether the adoption of the plan gave the opposition party, and other groups, a fair opportunity to have input in the redistricting process, (7) the number of seats that are likely to be safe seats for the dominant party, and (8) the size of the departure in the new plan from the symmetry standard.

12 Justice BREYER has authorized me to state that he agrees with Justice SCALIA that compliance with § 5 of the Voting Rights Act is also a compelling state interest. See *post,* at 2667 (opinion concurring in judgment in part and dissenting in part). I, too, agree with Justice SCALIA on this point.

13 If, on the other hand, the State could demonstrate, for example, that the new district was part of a statewide scheme designed to apportion power fairly among politically salient groups, or to enhance the political power of an underrepresented community of interest (such as residents of an economically distressed region), the State would avoid liability even if the results of such statewide districting had predictably partisan effects. See generally *Vieth,* 541 U.S., at 351–352, 124 S.Ct. 1769 (SOUTER, J., joined by GINSBURG, J., dissenting) (discussing legitimate interests that a State could posit as a defense to a prima facie case of partisan gerrymandering).

14 This assumption is justified based on counsel's undisputed representations at oral argument. See Tr. of Oral Arg. 35. However, if there were any genuine dispute about whether there are plaintiffs whose residences were previously located in *Balderas* District 24, but which are now incorporated into Districts 6, 24, 26, and 32, a remand would be appropriate to allow the District Court to address this issue.

15 In the decision below, the District Court concluded that black voters did not in fact "control" electoral outcomes in District 24. See *Session v. Perry,* 298 F.Supp.2d 451, 498 (2004). Even assuming, as Justice KENNEDY concludes, see *ante,* at 2624–2626, that the District Court did not commit reversible error in its analysis of this issue, the lack of "control" might be relevant in analyzing plaintiffs' vote dilution claim under § 2, but it is not relevant in evaluating whether Plan 1374C is retrogressive under § 5. It is indisputable that, at the very least, *Balderas* District 24 was a strong influence district for black voters, that is, a district where voters of color can "play a substantial, if not decisive, role in the electoral process." *Georgia v. Ashcroft,* 539 U.S. 461, 482, 123 S.Ct. 2498, 156 L.Ed.2d 428 (2003). Accordingly, by dismantling *Balderas* District 24, and by failing to create a strong influence district elsewhere, Plan 1374C was retrogressive. See 539 U.S., at 482, 123 S.Ct. 2498 (explaining that, in deciding whether a plan is retrogressive, "a court must examine whether a new plan adds or subtracts 'influence districts' ").

16 As Justice KENNEDY explains, see *ante,* at 2624 – 2626, plaintiffs did, however, challenge District 24 under § 2. I am in substantial agreement with Justice SOUTER's discussion of this issue. See *post,* at 2648 – 2651 (opinion concurring in part and dissenting in part). Specifically, I agree with Justice SOUTER that the "50% rule," which finds no support in the text, history, or purposes of § 2, is not a proper part of the statutory vote dilution inquiry. For the reasons stated in my analysis of the "unique question of law ... raised in this appeal," *supra,* at 2631, and in this part of my opinion, however, it is so clear that the cracking of District 24 created an unconstitutional gerrymander that I find it unnecessary to address the statutory issue separately.

17 Because new District 12, another district that covers portions of former District 24, is more compact than *Balderas* District 24, voters in new District 12 who previously resided in *Balderas* District 24 would not be able to bring a successful partisan gerrymandering claim under my proposed test, even though new District 12 is also a safe Republican district. See App. 106, 319–320.

1 In a subsequent case, however, we did not state the first *Gingles* condition in terms of an absolute majority. See *Johnson v. De Grandy,* 512 U.S. 997, 1008, 114 S.Ct. 2647, 129 L.Ed.2d 775 (1994) ("[T]he first *Gingles* condition requires the possibility of creating more than the existing number of reasonably compact districts with a sufficiently large minority population to elect candidates of its choice").

2 Like Justice STEVENS, I agree with Justice SCALIA that compliance with § 5 is a compelling state interest. See *ante,* at 2642, n. 12 (STEVENS, J., concurring in part and dissenting in part); *post,* at 2667–2668 (SCALIA, J., concurring in judgment in part and

dissenting in part).

[3] I recognize that a minority group might satisfy the § 2 "ability to elect" requirement in other ways, and I do not mean to rule out other circumstances in which a coalition district might be required by § 2. A minority group slightly less than 50% of the electorate in nonpartisan elections for a local school board might, for example, show that it can elect its preferred candidates owing to consistent crossover support from members of other groups. Cf. *Valdespino v. Alamo Heights Independent School Dist.,* 168 F.3d 848, 850–851 (C.A.5 1999), cert. denied, 528 U.S. 1114, 120 S.Ct. 931, 145 L.Ed.2d 811 (2000).

[4] Cf. *California Democratic Party v. Jones,* 530 U.S. 567, 575, 120 S.Ct. 2402, 147 L.Ed.2d 502 (2000) ("In no area is the political association's right to exclude more important than in the process of selecting its nominee. That process often determines the party's positions on the most significant public policy issues of the day, and even when those positions are predetermined it is the nominee who becomes the party's ambassador to the general electorate in winning it over to the party's views").

[5] One must be careful about what such electoral success ostensibly shows; if the primary choices are constrained, say, by party rules, the minority voters' choice in the primary may not be truly their candidate of choice, see Note, *Gingles* In Limbo: Coalitional Districts, Party Primaries and Manageable Vote Dilution Claims, 80 N.Y.U.L.Rev. 312 (2005).

[6] Judge Ward properly noted that the fact that Frost has gone unchallenged may "reflect favorably on his record" of responding to the concerns of minorities in the district. See *Session v. Perry,* 298 F.Supp.2d 451, 530 (E.D.Tex.2004) (opinion concurring in part and dissenting in part).

[7] In any event, although a history or prophecy of success in electing candidates of choice is a powerful touchstone of § 2 liability when minority populations are cracked or packed, electoral success is not the only manifestation of equal opportunity to participate in the political process, see *De Grandy,* 512 U.S., at 1014, n. 11, 114 S.Ct. 2647. The diminution of that opportunity by taking minority voters who previously dominated the dominant party's primary and submerging them in a new district is not readily discounted by speculating on the effects of a black-white primary contest in the old district.

[8] The way this third condition is understood when a claim of a putative coalition district is made will have implications for the identification of candidate of choice under the first *Gingles* condition. Suffice it to say here that the criteria may not be the same when dealing with coalition districts as in cases of districts with majority-minority populations. All aspects of our established analysis for majority-minority districts in *Gingles* and its progeny may have to be rethought in analyzing ostensible coalition districts.

[9] Notably, under the Texas Legislature's Plan 1374C, there are three undisputed districts where African–Americans tend to elect their candidates of choice. African–Americans compose at most a citizen voting-age majority (50.6%) in one of the three, District 30, see *Session, supra,* at 515; even there, the State's expert pegged the percentage at 48.6%, App. 185–186. In any event, the others, Districts 9 and 18, are coalition districts, with African–American citizen voting-age populations of 46.9% and 48.6% respectively. *Id.,* at 184–185.

[*] The majority's fig leaf after stressing the distances involved in District 25—while ignoring the greater ones in former District 23—is to note that "it is the enormous geographical distance separating the Austin and Mexican-border communities, coupled with the disparate needs and interests of these populations—not either factor alone—that renders District 25 noncompact for § 2 purposes." *Ante,* at 2619. Of course no single factor is determinative because the ultimate question is whether the district is an effective majority-minority opportunity district. There was a trial on that; the District Court found that District 25 was, while former District 23 "did not perform as an effective opportunity district." *Session v. Perry,* 298 F.Supp.2d 451, 496 (E.D.Tex.2004)

(per curiam). The majority notes that there was no challenge to or finding on the compactness of old District 23, *ante,* at 2619—certainly not compared to District 25—but presumably that was because, as the majority does not dispute, "[u]ntil today, no court has ever suggested that lack of compactness under § 2 might invalidate a district that a State has chosen to create in the first instance," *infra,* at 2660. The majority asserts that Latino voters in old District 23 had found an "efficacious political identity," while doing so would be a challenge for such voters in District 25, *ante,* at 2619, but the latter group has a distinct advantage over the former in this regard: They actually *vote* to a significantly greater extent. See App. 187 (expert report of R. Gaddie) (for Governor and Senate races in 2002, estimated Latino turnout for District 25 was 46% to 51%, compared to 41.3% and 44% for District 23).

1 The District Court did not find that the legislature had two motivations in dividing Webb County, one invidious and the other political, and that the political one predominated. Rather, it accepted the State's explanation that although the individuals moved were largely Latino, they were moved because they voted for Democrats and against Bonilla. For this reason, appellants' argument that incumbent protection cannot be a compelling state interest is off the mark. The District Court found that incumbent protection, not race, lay behind the redistricting of District 23. Strict scrutiny therefore does not apply, and the existence *vel non* of a compelling state interest is irrelevant.

2 No party here raises a constitutional challenge to § 5 as applied in these cases, and I assume its application is consistent with the Constitution.

3 Appellants argue that in *Bush v. Vera,* 517 U.S. 952, 116 S.Ct. 1941, 135 L.Ed.2d 248 (1996), we did not allow the purpose of incumbency protection in one district to justify the use of race in a neighboring district. That is not so. What we held in *Bush* was that the District Court had not clearly erred in concluding that, although the State had political incumbent-protection purposes as well, its use of race predominated. See *id.,* at 969, 116 S.Ct. 1941 (plurality opinion). We then applied strict scrutiny, as I do here. But we said nothing more about incumbency protection as part of that analysis. Rather, we rejected the State's argument that compliance with § 5 was a compelling interest because the State had gone beyond mere nonretrogression. *Id.,* at 983, 116 S.Ct. 1941; *id.,* at 1003, 116 S.Ct. 1941 (THOMAS, J., joined by SCALIA, J., concurring in judgment).

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34 N.Y.3d 250
Court of Appeals of New York.

Gregg LUBONTY, Appellant,
v.
U.S. BANK NATIONAL ASSOCIATION, as Indenture Trustee for American Home Mortgage Investment Trust 2005-4A, et al., Respondent.

No. 85
|
November 25, 2019

Synopsis

Background: Mortgagor filed action against assignee of mortgage, seeking cancellation and discharge of mortgage, following dismissal of assignee's foreclosure action for lack of personal jurisdiction. The Supreme Court, Suffolk County, Joseph Farneti, J., 2015 WL 5253337, entered order granting assignee's motion to dismiss. The Supreme Court, Appellate Division, 74 N.Y.S.3d 279, 159 A.D.3d 962, affirmed and mortgagor appealed.

The Court of Appeals, Garcia, J., held that as matter of first impression, limitations period on assignee's foreclosure action began to run on acceleration of mortgage, but was tolled during pendency of mortgagor's bankruptcy proceedings, during which assignee was prohibited from commencing any action concerning the property.

Affirmed.

Stein, J., dissented.

Attorneys and Law Firms

Lester & Associates, P.C., Garden City (Peter K. Kamran of counsel), for appellant.

Hinshaw & Culbertson LLP, New York City (Schuyler B. Kraus, Joseph Silver and Han Sheng Beh of counsel), for respondent.

OPINION OF THE COURT

GARCIA, J.

*****643 **1223 *252** New York law tolls the statute of limitations where "the commencement of an action has been stayed by a court or by statutory prohibition" (CPLR 204[a]). Federal bankruptcy law automatically stays the commencement or continuation of any judicial proceedings against a debtor upon the filing of a bankruptcy petition (*see* 11 USC § 362[a]). We

must determine whether the bankruptcy stay qualifies as a "statutory prohibition" ***253** under CPLR 204(a), and, if so, whether a party may later avail itself of the toll where, at the time the stay was imposed, that party had a pending action asserting the same claim. For the reasons set forth below, we answer yes to both questions, and affirm the order of the Appellate Division.

I.

The relevant procedural history spans two foreclosure actions, two bankruptcy petitions, and the instant action to cancel and discharge the mortgage. In 2005, plaintiff Gregg Lubonty took out a $2.5 million mortgage on a property in Southampton, New York. Less than two years later, he defaulted on his mortgage payments. On June 11, 2007, defendant U.S. Bank National Association's predecessor in interest, American Home Mortgage Acceptance, Inc. (AHMA), accelerated plaintiff's mortgage and commenced a foreclosure action. For purposes of this appeal, we assume that at this point the six-year statute of limitations on the foreclosure claim was triggered (*see* CPLR 213[4]). Just two weeks later, before his answer in the first foreclosure action was due, plaintiff filed a bankruptcy petition in federal court invoking the automatic stay and barring continuation of the first foreclosure action. On November 24, 2009, approximately 882 days after initially filing, plaintiff voluntarily dismissed the first bankruptcy action and the stay was lifted. On January 14, 2010, AHMA filed for default judgment in the first foreclosure action. On September 27, 2010, the trial court granted plaintiff's ex parte application to dismiss the action as abandoned.[1]

Subsequently, AHMA assigned plaintiff's mortgage to defendant and in June 2011 defendant commenced a foreclosure action. On September 30, 2011, plaintiff moved to dismiss the second foreclosure action for improper service. Before the return date on that motion, however, plaintiff once again filed for bankruptcy, and an automatic bankruptcy stay was again imposed, prohibiting continuation of the second foreclosure action for 769 days.

***254** On November 26, 2013, the bankruptcy court ordered the property and three other properties, with a combined market value of approximately $11 million, released to plaintiff from the bankruptcy *****644 **1224** estate in return for two payments totaling $25,000. On April 8, 2014, the bankruptcy trustee notified the court in the second foreclosure action that the stay was no longer in effect. The stay of the second foreclosure action was lifted.[2] Plaintiff's motion to dismiss for improper service was still pending and defendant filed its opposition on June 2, 2014, the day after plaintiff made the final payment releasing the property from his bankruptcy estate. Plaintiff replied on June 12, 2014. On October 21, 2014, the court dismissed the second foreclosure action for improper service of process.[3]

Two weeks later, plaintiff filed the instant action under Real Property Actions and Proceedings Law (RPAPL) § 1501(4) to discharge the mortgage, asserting that the statute of limitations on defendant's foreclosure claim had expired.[4] Defendant moved to dismiss the action arguing that the statute of limitations on its foreclosure claim had not, in fact, expired because it was tolled while the bankruptcy stay was in effect.

Supreme Court dismissed, agreeing with defendant that "[u]nder [the provisions of CPLR 204(a) and 11 USC § 362(a)(1)], the applicable statute of limitations is tolled for the period of time during which a stay or prohibition is in effect." The Appellate Division unanimously affirmed, concluding that "plaintiff's contention that CPLR 204(a) does not apply here because the earlier foreclosure actions had already been commenced when the petitions in bankruptcy were filed is without merit" (*Lubonty*, 159 A.D.3d at 964, 74 N.Y.S.3d 279). Applying CPLR 204(a), the ***255** Appellate Division determined that the statute of limitations for defendant's foreclosure claim was extended until December 2017 (*id.*). This Court granted plaintiff leave to appeal.[5]

II.

Whether the automatic bankruptcy stay constitutes a "statutory prohibition" under CPLR 204(a) is an issue of first impression for this Court. The issue need not detain us long. The bankruptcy stay provision expressly prohibits the "commencement or

continuation" of any covered action (11 USC § 362[a][1])—it is a blanket ban on filing or continuing lawsuits against the debtor (*see infra* at 258, 116 N.Y.S.3d at 646–47, 139 N.E.3d at 1226–27). It is true that an aggrieved party may seek relief from the automatic stay by application to the bankruptcy court (*see* 11 USC § 362[d]). But the need to seek ***645** judicial relief from the automatic stay **1225** means the creditor is otherwise prohibited from proceeding, and there is no guarantee that the bankruptcy court will favorably exercise its discretion (*see id.* § 362[d][1]). It is therefore clear that section 362(a) is a "statutory prohibition" within the plain meaning of CPLR 204(a).

III.

The issue then becomes whether the toll provided in CPLR 204(a) is available to a claimant who, when the bankruptcy stay was imposed, had already commenced an action against the debtor—later dismissed—on the claim now reasserted. In interpreting this statute, our goal is to give force to the intent of the Legislature and we therefore begin with the plain text—"the clearest indicator of legislative intent" (*Majewski v. Broadalbin–Perth Cent. Sch. Dist.*, 91 N.Y.2d 577, 583, 673 N.Y.S.2d 966, 696 N.E.2d 978 [1998]). In a manner consistent with the text, we may look to the purpose of the enactment and the objectives of the Legislature (*see Albano v. Kirby*, 36 N.Y.2d 526, 530–531, 369 N.Y.S.2d 655, 330 N.E.2d 615 [1975]). We must also "interpret a statute so as to avoid an unreasonable or absurd application of the law" (*People v. Garson*, 6 N.Y.3d 604, 614, 815 N.Y.S.2d 887, 848 N.E.2d 1264 [2006] [internal quotation marks omitted], citing *People v. Santi*, 3 N.Y.3d 234, 244, 785 N.Y.S.2d 405, 818 N.E.2d 1146 [2004]). Applying those principles here, plaintiff's cramped reading of CPLR 204(a), one that produces inequitable and potentially absurd results, must be rejected.

***256** A.

CPLR 204(a) provides, "[w]here the commencement of an action has been stayed by a court or by statutory prohibition, the duration of the stay is not a part of the time within which the action must be commenced." The result here depends on our reading of the term "commencement."

Plaintiff argues that it is impossible for defendant to have been prohibited from "commencing" an action because a foreclosure action had been commenced prior to plaintiff's bankruptcy filing. Application of plaintiff's rule would be as follows: Because defendant filed the first foreclosure claim and defendant responded by filing a bankruptcy petition, invoking the automatic stay, commencement of that first action was not "stayed" under the statute and the toll is inapplicable. And when defendant filed a second foreclosure action, and plaintiff again responded by again filing a bankruptcy petition that invoked the automatic stay, "commencement" of that second action was not stayed, once again making the toll inapplicable (*see* dissenting op. at 263, 116 N.Y.S.3d at 650–51, 139 N.E.3d at 1230–31). As a result, the six-year statute of limitations would have expired on June 11, 2013—a time when the bankruptcy stay was in effect prohibiting any action against plaintiff. Plaintiff's brand of literalism quickly loses sight of the forest for the trees, producing an outcome antagonistic to the purpose and design of the tolling provision (*see New York Trust Co. v. Commr. of Internal Revenue*, 68 F.2d 19, 20 [2d Cir. 1933] [Hand, J.]). That interpretation must be rejected.

Neither this Court nor the Legislature has restricted the term "commencement" to the first time a party files a complaint asserting a cause of action; instead the term may also include the commencement of subsequent actions asserting the same claim (*cf. Carrick v. Cent. Gen. Hosp.*, 51 N.Y.2d 242, 246, 434 N.Y.S.2d 130, 414 N.E.2d 632 [1980] ["plaintiff *commenced* a second action by serving defendants with a summons and complaint" (emphasis added)]; CPLR 205[a] [permitting a plaintiff, ***646 **1226** in certain circumstances, to "commence a new action" after termination of a prior action]). Likewise, a toll operates to compensate a claimant for the shortening of the statutory period in which it must commence—or recommence—an action, irrespective of whether the stay has actually deprived the claimant of *any* opportunity to do so (*see Matter of Hickman*, 75 N.Y.2d 975, 977, 556 N.Y.S.2d 506, 555 N.E.2d 903 [1990] [holding that the limitations period **257** was extended even though the stay ended ten months before the original limitations period would have expired]).

Here, in ruling on plaintiff's claim that the mortgage should be discharged, the court must look to whether the "applicable statute of limitation for the commencement of an action to foreclose" had expired (RPAPL § 1501[4]). Because the two bankruptcy stays prevented defendant from commencing a foreclosure action for at least 1651 days, that time is not part of the time within which such an action must be commenced. Put another way, in determining whether the statute of limitations on a foreclosure action had expired when plaintiff filed this RPAPL action, the duration of any bankruptcy stay must be excluded, regardless of whether an earlier action on the same claim had been initiated or was pending when the stay was imposed.[6]

This interpretation of "commencement" promotes the purpose of CPLR 204(a) and, unlike plaintiff's proposed rule, is reconcilable with both the bankruptcy stay's effect, and the policies underlying the enforcement of limitations periods.

B.

The New York tolling statute is an old one, reaching back into the days of equity (3 Report of the Commissioners Appointed to Revise the Statute Laws of This State, ch 4, at 16 [1828] ["Whenever the commencement of any suit shall be stayed by an injunction of any court of equity, the time during which such injunction shall be in force, shall not be deemed any portion of the time in this Chapter limited, for the commencement of such suit"]), modified first to reflect the merger of law and equity with the enactment of the Field Code in 1848 (Nathan Howard, Code of Procedure of the State of New York, Unabridged 440 [1867] ["When the commencement of an action shall be stayed by injunction, the time of the continuance of the injunction shall not be part of the time limited for the commencement of the action"]), and later to include statutes having ***258** the same effect (*id.* [noting that the statute was amended to include the "statutory prohibition" language in 1849]). Having remained practically unchanged for almost two centuries, this rule has strong roots in the equitable principle that plaintiffs should not be penalized for failing to assert their rights when a court or statute prevents them from doing so (*cf. Matter of Feinberg*, 18 N.Y.2d 499, 507, 277 N.Y.S.2d 249, 223 N.E.2d 780 [1966] ["The purpose of a Statute of Limitations is to penalize claimants for sleeping on their rights"]).

We have concluded that the bankruptcy stay is a "statutory prohibition" within the ambit of this equitable tolling provision, and we must therefore look to the effect of the bankruptcy stay on the *****647 **1227** course of the litigation. The federal statutory restraint is indeed broad in application. "Nothing is more basic to bankruptcy law than the automatic stay and nothing is more important to fair case administration than enforcing stay violations" (*In re Lehman Bros. Holdings, Inc.*, 433 B.R. 101, 112 [Bankr S.D.N.Y.2010]). The effects of that stay are wide-ranging and limit virtually all judicial action against the debtor and any co-debtors: "The automatic stay is designed to provide blanket relief from creditor action" (*In re Newberry*, 604 B.R. 37, 40 [Bankr E.D. Mich.2019]), and any exceptions from the stay are narrowly written and "strictly construed" (*In re Montgomery*, 525 B.R. 682, 693 [Bankr W.D. Tenn. 2015]). Courts have also held that the bankruptcy stay not only prevents an action from being continued, but also from being discontinued and recommenced (*see U.S. Bank N.A. v. Joseph*, 159 A.D.3d 968, 970–971, 73 N.Y.S.3d 238 [2d Dept. 2018]). Moreover, the effective date of any stay is controlled by the debtor: the stay is automatic and "springs into being upon the filing of the bankruptcy petition" and "operates without the necessity for judicial intervention" (*In re Soares*, 107 F.3d 969, 976 [1st Cir. 2014] [internal quotation marks and citation omitted]). In short, the stay brings any potential and ongoing litigation to a standstill at a debtor's behest.

Plaintiff's use of the automatic stay, and his control over the timing of its application and revocation, had the effect of halting the pending litigation and staying the commencement of subsequent foreclosure actions for more than four years. In both foreclosure actions, plaintiff filed for bankruptcy and obtained an automatic stay at critical stages of the litigation: in the first case, pre-answer, and in the second before defendant could respond to the motion to dismiss for lack of personal ***259** jurisdiction. In both cases, plaintiff acted to lift the stay—either by dismissing the bankruptcy case or "purchasing" the property from the bankruptcy estate—and shortly thereafter obtained dismissal of the relevant foreclosure action. Defendant was clearly prevented from asserting its rights as a direct result of the actions of the plaintiff.

In addition to the inequity and gamesmanship it would encourage, application of a "pending action" rule urged by plaintiff would raise a host of practical issues. For example, given the federal rules regarding stays of an action against codebtors, if one debtor declares bankruptcy, a plaintiff cannot proceed independently against a codebtor even if the codebtor has not filed for bankruptcy (*see Deutsche Bank Natl. Trust Co. v. DeGiorgio*, 171 A.D.3d 1267, 1268, n. 2, 97 N.Y.S.3d 769 [3d Dept.

2019], citing 11 USC § 1301[a]). Application of a "pending action" rule could produce absurd results in such a situation: If a codebtor is not named in the original suit, or the action against the codebtor is dismissed for some reason prior to the application of the bankruptcy stay, the "pending action" rule would make suit untimely against the bankrupt debtor but not against the codebtor. Application of the rule adopted here would make both subject to the toll as both were subject to the stay.

In another scenario, under the "pending action" rule, an unasserted claim the creditor "slept on," arising out of the same transaction or series of transactions as the claim interposed, would get the benefit of the toll, while the claim that was previously asserted would not. Yet another absurd result. The rule adopted here would apply the toll equally to claims arising from same transaction.

It is not surprising therefore that courts in the Second and Third Departments, as well as a federal court applying New York ***648 **1228** law, under circumstances where a prior action was pending when the bankruptcy stay began, have each interpreted CPLR 204(a) as excluding the time the stay was in effect from the statute of limitations (*see DeGiorgio*, 171 A.D.3d at 1268, 97 N.Y.S.3d 769; *Joseph*, 159 A.D.3d at 968, 73 N.Y.S.3d 238; *In re Strawbridge*, 2012 WL 701031, *9–10 [S.D.N.Y. Mar. 6, 2012]).[7] No court has adopted plaintiff's interpretation.

***260** C.

The dissent adopts as a refrain plaintiff's argument that the "statutory scheme" of the CPLR requires a different result. Specifically, plaintiff contends that CPLR 205(a) demonstrates the Legislature's intent for the toll to apply only in cases where no action on the claim was commenced before the bankruptcy stay became effective. CPLR 205(a) provides a six-month grace period to "*commence* a new action upon the same transaction or occurrence or series of transactions or occurrences" where the previous action has been dismissed for any "other manner than by a voluntary discontinuance, a failure to obtain personal jurisdiction over the defendant, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits" (CPLR 205[a] [emphasis added]). Plaintiff asserts that the Legislature's enactment of this savings provision shows that it contemplated specific circumstances where plaintiffs should be allowed to extend the statute of limitations for their claims, and that a failure to obtain personal jurisdiction over the defendant was not one of them. This argument begs the question of whether CPLR 204(a) applies to toll the statute of limitations under these circumstances. Because it does, the Legislature's contemplation of which grounds for dismissal earn the protections of the grace period is irrelevant—the statute of limitations has not expired, and the grace period in this case is unnecessary. There may well be other provisions within the CPLR that could provide relief to other litigants in other circumstances. CPLR 204(a), however, provides defendant with relief in this case.

Plaintiff also argues that the bankruptcy statute itself provides the primary mechanism by which a defendant may refile a claim—namely, the 30–day grace period provided in 11 USC § 108(c). This argument is also unavailing: if another statute tolls the action longer than 30 days section 108(c) applies the longer toll, rather than the 30–day grace period (*see Pettibone Corp. v. Easley*, 935 F.2d 120, 121 [7th Cir. 1991] ["Federal Law assured the plaintiffs 30 days in which to pick up the baton; if states want to give plaintiffs additional time, that is their business"]; *see also HSBC Bank USA, N.A. v. Crum*, 907 F.3d 199, 206 [5th Cir. 2018]; Siegel, N.Y. Prac § 51 [6th ed]).

***261** IV.

Applying the above rule to the instant action, defendant's claims were not time-barred when Supreme Court granted defendant's motion to dismiss.[8] The statute **1229 ***649 of limitations for a foreclosure claim is six years (CPLR 213[4]). Here, the limitations period began to run on June 11, 2007, upon AHMA's acceleration of plaintiff's mortgage. The property was subject to bankruptcy stays for at least 1651 days, during which defendant was statutorily prohibited from commencing any action concerning the property. Adding the duration of the stay to the six-year statute of limitations period, defendant had until on or about December 18, 2017 to commence the foreclosure action. Dismissal of plaintiff's action to discharge the mortgage was thus proper. Accordingly, the order of the Appellate Division should be affirmed, with costs.

STEIN, J. (dissenting).

The express language of CPLR 204(a) is unambiguous: "[w]here the *commencement* of an action has been stayed by a court or by statutory prohibition, the duration of the stay is not a part of the time within which the action must be *commenced*" (emphasis added). Consequently, where a stay is instituted *after* an action is commenced—that is, where "the commencement of [the] action [is not] stayed"—section 204(a) is inapplicable. In my view, the majority reads the word "commencement" out of section 204(a), thereby impermissibly extending the statute of limitations by judicial fiat. Therefore, I respectfully dissent.

A brief restatement of the complicated procedural posture of this case—which includes two foreclosure actions, two bankruptcy proceedings, and the present action to cancel and discharge the mortgage—is necessary. In 2005, plaintiff executed a note with nonparty American Home Mortgage Acceptance, Inc. (AHMA), secured with a mortgage on residential real property (the subject property). In 2007, AHMA commenced the first foreclosure action, alleging that plaintiff had defaulted on the mortgage and requesting payment in full. Approximately ***262** two weeks later, plaintiff commenced a bankruptcy proceeding, automatically staying continuation of the first foreclosure action (*see* 11 USC § 362). This stay was lifted in November 2009, after plaintiff's bankruptcy petition was dismissed. The first foreclosure action was subsequently dismissed as abandoned in September 2010.[1]

In June 2011, after being assigned the mortgage, defendant U.S. Bank National Association (U.S.Bank) commenced a second foreclosure action, based upon the same default alleged in the first foreclosure action. Plaintiff moved to dismiss the complaint based upon improper service and, shortly thereafter, commenced a second bankruptcy proceeding, which stayed the second foreclosure action before U.S. Bank had an opportunity to respond to plaintiff's motion to dismiss. The subject property was thereafter released from the bankruptcy estate, and the stay was lifted. In October 2014, Supreme Court granted plaintiff's motion to dismiss the second foreclosure action, concluding, on the evidence presented, that U.S. Bank had failed to properly serve plaintiff under CPLR 308(2).

Plaintiff subsequently commenced this action against U.S. Bank pursuant to RPAPL 1501(4), seeking to cancel and discharge the mortgage on the subject property ****1230 ***650** because the six-year statute of limitations applicable to commencement of a foreclosure action had expired (*see* CPLR 213[4]). U.S. Bank moved to dismiss the complaint pursuant to CPLR 3211(a)(7), asserting, as relevant here, that the two bankruptcy stays tolled the statute of limitations pursuant to CPLR 204(a) such that it was still possible to timely commence a third foreclosure action. Plaintiff opposed the motion to dismiss, arguing that CPLR 204(a) was inapplicable because each bankruptcy stay became effective *after* each mortgage foreclosure action was *commenced*, and each stay was terminated before each foreclosure action was dismissed; therefore, plaintiff contended that, pursuant to the express language of CPLR 204(a), the statute of limitations was not tolled insofar as "the commencement of an action" was never stayed. Plaintiff advances the same arguments on this appeal.

Because this case presents a question of statutory interpretation regarding CPLR 204(a), we must "attempt to effectuate ***263** the intent of the [l]egislature, and where the statutory language is clear and unambiguous," we must interpret the statute "so as to give effect to the plain meaning of the words used" (*Patrolmen's Benevolent Assn. of City of N.Y. v. City of New York*, 41 N.Y.2d 205, 208, 391 N.Y.S.2d 544, 359 N.E.2d 1338 [1976] [internal citations omitted]; *see Majewski v. Broadalbin–Perth Cent. School Dist.*, 91 N.Y.2d 577, 583, 673 N.Y.S.2d 966, 696 N.E.2d 978 [1998]). It is also well established that " 'resort must be had to the natural significance of the words employed, and if they have a definite meaning, which involves no absurdity or contradiction ... courts have no right to add or take away from that meaning' " (*Majewski*, 91 N.Y.2d at 583, 673 N.Y.S.2d 966, 696 N.E.2d 978, quoting *Tompkins v. Hunter*, 149 N.Y. 117, 122–123, 43 N.E. 532 [1896]).

CPLR 204(a) is entitled, in pertinent part, "[s]tay of *commencement* of action" and, as previously noted, provides that, "[w]here the *commencement* of an action has been stayed by a court or by statutory prohibition, the duration of the stay is not a part of the time within which the action must be *commenced*" (CPLR 204[a] [emphasis added]). Although the majority correctly states that the outcome of this case is dependent upon our reading of the term "commencement," the majority neglects the critical point that "commencement" is defined in CPLR 304. In that regard, the legislature has provided that

"[a]n action is commenced by *filing* a summons and complaint or summons with notice in accordance with [CPLR 2102]" (CPLR 304[a]). In light of that definition, CPLR 204(a) could not be clearer: a toll of the statute of limitations is available only where a would-be plaintiff is precluded from duly filing the applicable papers—thereby commencing an action—as the result of a stay or statutory prohibition.

Here, it is undisputed that the first foreclosure action was commenced under CPLR 304(a) before any bankruptcy stay took effect, and the second foreclosure action was commenced in the time period between the first and second bankruptcy stays, i.e. when no stay was in effect. Accordingly, because the bankruptcy stays did not prevent the commencement of a foreclosure action regarding the subject property, the toll codified in CPLR 204(a) does not apply.

Nevertheless, the majority holds that "the duration of any bankruptcy stay must be excluded, regardless of whether an earlier action on the same claim has been initiated or was pending when the stay was imposed" (majority op. at 257, 116 N.Y.S.3d at 646, 139 N.E.3d at 1226). Stated differently, according to the majority, whenever a stay is interposed, the statute ****1231 ***651** of limitations is extended for the length ***264** of that stay, even if the action was already commenced and is subsequently terminated. However, if the legislature intended to enact such a rule, it easily could have made CPLR 204(a) applicable whenever a stay prevents a party from "commencing or *continuing* a civil action"—the phrase used in the Federal Bankruptcy Code (11 USC § 108[c]; *see* 11 USC § 362[a][1]). Instead, the legislature chose to enact a statute that links application of the toll to "commencement," a term defined by the CPLR. Therefore, the rule adopted by the majority today disregards two fundamental principles of law. First, it renders the phrase "the commencement of" superfluous, in contravention of our rules of statutory interpretation (*see Majewski*, 91 N.Y.2d at 587, 673 N.Y.S.2d 966, 696 N.E.2d 978; *Jensen v. General Elec. Co.*, 82 N.Y.2d 77, 86, 603 N.Y.S.2d 420, 623 N.E.2d 547 [1993]). Second, the majority's rule extends the statute of limitations without regard to the plain language of the tolling provision, thereby ignoring the legislature's express direction that "[n]o court shall extend the time limited by law for the commencement of an action" (*see* CPLR 201).

The majority reaches its result by relying on amorphous notions of equity, positing that application of the express statutory language would produce absurd results and encourage gamesmanship. To be sure, "courts should construe [statutes] to avoid objectionable, unreasonable[,] or absurd consequences" (*Long v. State of New York*, 7 N.Y.3d 269, 273, 819 N.Y.S.2d 679, 852 N.E.2d 1150 [2006]; *see New York State Bankers Assn. v. Albright*, 38 N.Y.2d 430, 437, 381 N.Y.S.2d 17, 343 N.E.2d 735 [1975]). However, the majority struggles to identify any such consequences that result from applying the unambiguous text of CPLR 204. First, the majority states that an absurd result would occur where an action is commenced against one codebtor before imposition of a bankruptcy stay and against a second codebtor after the same stay is lifted. The majority asserts that, in this scenario, the literal effect of the plain language of CPLR 204(a) is that the causes of action against each codebtor would become untimely at different times (*see* majority op. at 259, 116 N.Y.S.3d at 647-48, 1227 N.E.3d at 1227–28). Of course, it might be the case that the relation-back doctrine would apply in this scenario, avoiding the consequence the majority presumes (*see* CPLR 203[c]; *Buran v. Coupal*, 87 N.Y.2d 173, 178, 638 N.Y.S.2d 405, 661 N.E.2d 978 [1995]). In any event, even if the majority were correct, it is wholly unclear why we should rewrite CPLR 204(a) to avoid such an outcome. That the application of the statute of limitations may vary between different parties or claims is a reality of complex civil litigation.

The majority further posits, more generally, that enforcing the statute as written would reward parties that delay commencement ***265** of an action, because a party that commences an action closer in time to the expiration of the statute of limitations is more likely to benefit from a CPLR 204(a) toll if a stay goes into effect, whereas a party that commences an action before any stays are imposed, will receive no toll. The majority overlooks that a party who commences an action within the statute of limitations has not engaged in dilatory conduct. In other words, enforcing the statute as written does not encourage delay beyond the limitations period that the legislature has deemed appropriate. Thus, the majority's attempt to grasp for scenarios under which the express language of the statute could create a questionable outcome is unpersuasive.

Furthermore, the statutory scheme belies the majority's conclusion that CPLR 204(a), as written, creates undesirable results. ****1232 ***652** To ascertain whether the express language of CPLR 204(a) creates absurd results, we must examine how that toll operates within the larger statutory scheme of the CPLR as a whole (*see e.g. Matter of Mestecky v. City of New York*, 30 N.Y.3d 239, 243, 66 N.Y.S.3d 207, 88 N.E.3d 365 [2017]; *Matter of Wallach v. Town of Dryden*, 23 N.Y.3d 728, 744, 992 N.Y.S.2d 710, 16 N.E.3d 1188 [2014]). Generally, under the CPLR, the limitations period runs from the date a claim accrues until it is interposed by filing—that is, until the action is commenced (*see* CPLR 203[a], [c]). In other words, once an action is commenced, it either is or is not time-barred by the applicable statute of limitations.[2] However, U.S. Bank seeks to invoke

a toll despite its timely interposition—i.e., commencement—of the second foreclosure action because that action was dismissed after the expiration of the applicable limitations period as a result of U.S. Bank's failure to properly serve the summons and complaint on plaintiff. Conveniently, the CPLR contains a provision addressing this precise predicament—namely, where an action is timely commenced, but subsequently terminated after the statute of limitations period expires. Specifically, CPLR 205(a) provides, in relevant part:

> ***266** "If an action is timely commenced and is terminated in any other manner than by a voluntary discontinuance, a failure to obtain personal jurisdiction over the defendant, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits, the plaintiff ... may commence a new action upon the same transaction or occurrence or series of transactions or occurrences within six months after the termination."

Therefore, without assistance from the judiciary, the legislature has provided a remedy for the situation faced by U.S. Bank where an action is terminated after the limitations period has expired. Read in the context of the broader statutory scheme—specifically, CPLR 203 and 205(a)—it was perfectly reasonable that the legislature chose to limit the application of CPLR 204(a) to situations arising *before* commencement.[3]

Here, of course, the second foreclosure action was dismissed for U.S. Bank's failure to effectuate proper service, a personal jurisdiction defect expressly excluded from the benefit of CPLR 205(a) (*see* CPLR 205[a]; *****653 **1233** *Keane v. Kamin*, 94 N.Y.2d 263, 265, 701 N.Y.S.2d 698, 723 N.E.2d 553 [1999]; *Dobkin v. Chapman*, 21 N.Y.2d 490, 500–501, 289 N.Y.S.2d 161, 236 N.E.2d 451 [1968]). That a party in U.S. Bank's position is without a remedy under CPLR 205(a) is the legislature's intended consequence of CPLR article 2; to that end, the legislature amended CPLR 205(a) in 1992 to add the personal jurisdiction exception (*see* L 1992, ch 216).[4] If U.S. Bank's action had been dismissed outside the statute of limitations for any reason other than the four exceptions ***267** to CPLR 205(a), it would have had six months to recommence the action. In other words, that U.S. bank was unable to timely commence a third foreclosure action did not result from an absurd reading of CPLR 204(a). Rather, it was the legislature's intended result.

The majority disregards the legislative scheme of the CPLR in one additional respect that is noteworthy. CPLR 306–b requires that service be completed within 120 days of the commencement of an action, but provides that, "[i]f service is not made upon a defendant within [that] time" the court may, "upon good cause shown or in the interest of justice, extend the time for service." Rather than move to extend its time to complete proper service under this provision, U.S. Bank unsuccessfully chose to litigate the propriety of its original service.[5] Additionally, U.S. Bank could have moved for relief from the stay in the bankruptcy proceeding in order to effectuate proper service (*see* 11 USC 362[d][4]; [f]).[6] Given U.S. Bank's failure to even attempt to utilize these existing statutory remedies, I disagree with the majority's conclusion that interpreting the statute as written and as advanced by plaintiff would be inherently unreasonable. We should not lose sight, as the majority has, of the relevant statutory scheme when interpreting the express language of the statute.

Finally, although the majority proclaims that lower courts have unanimously read CPLR 204(a) to disregard the term "commencement," it is notable that, of the three cases cited in support of this proposition, one relies upon the Appellate Division order being reviewed on this appeal (*see Deutsche Bank Natl. Trust Co. v. DeGiorgio*, 171 A.D.3d 1267, 1268, 97 N.Y.S.3d 769 [3d Dept. 2019]) and none include any meaningful analysis of the statutory language or scheme, or of the legislative intent underlying CPLR 204(a).

***268** In sum, the express language of CPLR 204(a) evinces the legislature's unmistakable ****1234 ***654** intent to provide a statute of limitations toll only "where [the] commencement of an action has been stayed." I would hold that "commencement" should be read as defined in the CPLR, itself. Contrary to the majority's view, there is nothing inherently absurd about applying the words chosen by the legislature under the facts of this case, in light of U.S. Bank's failure to avail itself of other statutory devices that likely would have prevented a dismissal of the second foreclosure action based upon improper service. Nor, considering the broader statutory scheme, can it be said that the plain language of CPLR 204(a) encourages gamesmanship or creates absurd results. Therefore, I would reverse the order of the Appellate Division.

Chief Judge DiFiore and Judges Wilson and Feinman concur; Judge Stein dissents in an opinion in which Judges Rivera and Fahey concur.

Order affirmed, with costs.

All Citations

34 N.Y.3d 250, 139 N.E.3d 1222, 116 N.Y.S.3d 642, 2019 N.Y. Slip Op. 08520

Footnotes

1 In dismissing, the trial court in the first foreclosure action reasoned that "Plaintiff did not seek a default judgment as against Defendant mortgagor ... until January 14, 2010, approximately thirty months after the action was commenced." No mention is made of the first bankruptcy action; the court only notes that AHMA "has failed to offer any explanation for the extensive delay." Excluding the time the action was stayed by the first bankruptcy action, less than a month had elapsed from the time plaintiff's answer was due to when defendant filed for default judgment (*see* CPLR 3215[c]).

2 Although the exact date on which the stay was lifted is uncertain (November 26, 2013, April 8, 2014, or June 1, 2014), the choice among the dates does not change the result, and therefore for purposes of this opinion the earliest date will be used to calculate the limitations period (*accord Lubonty v. U.S. Bank N.A.*, 159 A.D.3d 962, 964, 74 N.Y.S.3d 279 [2d Dept. 2018]).

3 In dismissing the action, the trial court noted the "apparently inconsistent positions taken by [plaintiff] in the Bankruptcy proceeding, claiming that the property was of inconsequential value due to the pending foreclosure action and the position taken in the instant case." In fact, this representation by plaintiff to the trustee was used to justify the bankruptcy estate's sale to plaintiff of four properties valued at $11 million for a total price of $25,000.

4 RPAPL § 1501(4) provides that where the statute of limitations for commencement of a foreclosure action on a mortgage has expired, a person with an interest in real property subject to the mortgage may maintain an action "to secure the cancellation and discharge of record of such encumbrance."

5 The parties notified this Court that defendant filed a third foreclosure action concerning the subject property on December 14, 2017.

6 Commentators similarly use broad terms to describe the effects of the tolling provision (*see* Patrick M. Connors, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C2201:6 at 10 ["If a federal statute, such as the (bankruptcy stay) bars an action against the debtor, the statute of limitations period is tolled during the period of the stay"]; Weinstein–Korn–Miller, N.Y. Civ Prac ¶ 204.00 [2d ed] ["In general, the period of the stay or statutory prohibition is added to the period of limitation"]).

7 The Third Department, in adopting the rule we apply here, found the Second Department's reasoning in this case persuasive (*see DeGiorgio*, 171 A.D.3d at 1268, 97 N.Y.S.3d 769, citing *Lubonty*, 159 A.D.3d at 963–964, 74 N.Y.S.3d 279).

8 The accusation that the Court, in interpreting and applying the CPLR 204(a) tolling provision, is somehow "ignoring" or "disregarding" the law is unwarranted (dissenting op. at 263–64, 116 N.Y.S.3d at 650–51, 139 N.E.3d at 1230–31 ; *see* CPLR 201 [an action must be commenced within the time specified in CPLR article 2 and "no court shall extend the time limited by law for the commencement of an action"]). "[A]lthough [the statute of limitations] is subject to a variety of tolls and extensions ... [it] is not subject to a *discretionary* judicial extension" (Siegel, N.Y. Prac § 33 at 51 [6th ed] [emphasis added]).

1 Whether AHMA could have avoided dismissal by arguing that the bankruptcy stay prevented it from prosecuting the action, and whether the first foreclosure action was properly dismissed as abandoned, are not questions before the Court on this appeal.

2 The majority suggests that "[n]either this Court nor the Legislature has restricted the term 'commencement' to the first time a party files a complaint asserting a cause of action" (majority op. at 256, 116 N.Y.S.3d at 645–46, 139 N.E.3d at 1225–26). But the CPLR directs that the limitation periods be calculated from accrual until commencement (CPLR 203[c]) and, once a party commences an action, there generally would be no occasion to recommence the same action while the first action is pending. Indeed, if a party were to recommence the same action, the court could dismiss that action (*see* CPLR 3211[a][4]). Moreover, under RPAPL 1301(3), U.S. Bank could not have commenced a third foreclosure action while the second foreclosure action was pending "without leave of the court."

3 I agree with the majority that, if CPLR 204(a) applied, then U.S. Bank would have had no need to resort to CPLR 205(a) because it would have had more than six months remaining on the statute of limitations to recommence a third foreclosure action after termination of the second foreclosure action. However, this misses the point of looking to CPLR 205(a) in this case. As noted, before proclaiming that the unambiguous language of a statute creates absurd results, it is prudent to see how that statute fits within the broader legislative scheme. The majority reads CPLR 204(a) in a vacuum, despite its obvious relation to other provisions of CPLR articles 2 and 3.

4 Before 1992, the personal jurisdiction exception to CPLR 205(a) existed in case law only (*see Markoff v. South Nassau Community Hosp.*, 61 N.Y.2d 283, 286, 473 N.Y.S.2d 766, 461 N.E.2d 1253 [1984]). In *Markoff*, this Court held that CPLR 205(a)—which applies, by its plain terms, only where an action is "timely *commenced*," was not triggered in the absence of proper service because, under the then-existing statutory regime, an action was commenced by service, not filing. Notably, the *Markoff* Court recognized that "commence[ment]" could not be read out of CPLR 205(a)—a statute related to limitation periods. When the legislature revised the CPLR to adopt commencement by filing, it expressly codified the *Markoff* rule in CPLR 205(a), even though the Court's rationale no longer applied under the new statutory scheme. This history reinforces that the inapplicability of CPLR 205(a) to the facts of this case was intentional.

5 Here, only 132 days had passed between the commencement of the second foreclosure action and the institution of the bankruptcy stay. When the bankruptcy stay was lifted, U.S. Bank likely had a strong argument that the court should afford it additional time to correct its defective service considering that stay.

6 Alternatively, U.S. Bank could have moved to reopen the bankruptcy proceeding (*see* 11 USC § 350[b]) or attempted to take advantage of the 30–day window provided by 11 USC § 108(c)(2) for recommencing an action where the applicable limitations period has expired.

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41 N.Y.2d 283
Court of Appeals of New York.

In the Matter of Charles JETER et al., Respondents,
v.
ELLENVILLE CENTRAL SCHOOL DISTRICT et al., Respondents,
Board of Education of the City of Yonkers et al., Appellants-Respondents,
and
Board of Education, City School District of the City of New Rochelle, Respondent-Appellant.

Feb. 15, 1977.

Synopsis
Article 78 proceeding was filed in respect to refusal of receiving school district to admit foster children to public schools until tuition was paid by sending district or by responsible welfare agency. The Supreme Court, Special Term, John L. Larkin, J., 81 Misc.2d 511, 366 N.Y.S.2d 783, granted declaratory relief and boards of education appealed. The Supreme Court, Appellate Division, 50 A.D.2d 366, 377 N.Y.S.2d 685, modified and affirmed and appeals were taken. The Court of Appeals, Jones, J., held that section of Education Law pertaining to cost of instruction of pupils placed in family homes at board by social services districts and state agencies is to be interpreted as imposing the cost of instruction on the district in which the pupil resided at the time the social services district or state agency assumed responsibility for his support and maintenance, provided that the cost of instruction shall continue to be borne by any district, department or agency which had assumed responsibility for tuition costs as distinguished from support and maintenance prior to January 1, 1974.

Affirmed.

Attorneys and Law Firms

***285 ***404 **1087** W. Bernard Richland, Corp. Counsel, New York City (Alfred Weinstein, L. Kevin Sheridan and Joseph F. Bruno, New York City, of counsel), for New York City Board of Education and another, appellants.

Eugene J. Fox, Corp. Counsel, Yonkers (Howard G. Most, Yonkers, of counsel), for Board of Education of City of Yonkers, appellant-respondent.

Peter M. Fishbein and Robert S. Ellenport, New York City, for Board of Education, City School District of City of New Rochelle, respondent-appellant.

Gerald Harris, County Atty., White Plains (Jonathan Lovett, New York City, of counsel), for Westchester County Department of Social Services, respondent.

Opinion

JONES, Judge.

We hold that paragraph a of subdivision 5 of section 3202 of the Education Law is to be interpreted as imposing the cost of instruction of pupils placed in family homes at board by social services districts and State departments and agencies on the school district in which the pupil resided at the time the district, department or agency assumed responsibility for his support and maintenance, provided that the cost of instruction shall continue to be borne by any district, department or agency which had assumed responsibility for tuition costs (as distinguished from support and maintenance) prior to January 1, 1974. The

attacks aimed by appellants at paragraph a as so interpreted must be rejected.

The statutory provision with which we deal is a portion of the section of the Education Law that establishes the right to free public education for resident pupils and sets forth details of making education available to nonresident pupils, including allocation of the cost of such education. Paragraph a was added to subdivision 5 of section 3202 by chapter 867 of the Laws of 1973 with a view to relieving school districts of the financial burden of educating pupils who are placed in family homes within the district at board from other school districts, a burden to which the districts furnishing the educational services had been subjected under prior law. Paragraph a, as amended by chapter 919 of the Laws of 1974, now provides in relevant part: 'The cost of instruction of pupils placed in ***286** family homes at board by a social services district or a state department or agency shall be borne by the school district in which each such pupil resided at the time the social services district or state department or agency assumed responsibility for the support and maintenance *****405** of such pupil; provided, however, that such cost of instruction shall continue to be borne while such pupil remains under the age of twenty-one years, by any social services district or state department or agency which assumed responsibility for tuition costs for any such pupil prior to January one, nineteen hundred seventy-four.'

This litigation, instituted to compel provision of public education for particular children residing in foster homes in Ellenville Central School District, was subsequently expanded and parties added to permit a broad determination of responsibility for the cost of such instruction under the quoted statutory subdivision. The courts below have given a literal meaning to the language of paragraph a of Education Law, section 3202, subdivision 5, and have upheld its constitutionality.
We first address the issue of statutory interpretation pressed by the City School District of the City of New Rochelle. This appellant would have us read the defining phrase in the proviso at the end of the quoted statutory sentence—'which assumed responsibility for tuition costs for any such pupil'—as referable not to tuition costs but to the assumption of responsibility for support and maintenance of the pupil. The result of such an interpretation would be to relieve all school districts of educational costs of pupils who had become public charges prior to January 1, 1974, rather ****1088** than to limit such relief only to those public charges for whom a social welfare district or State department or agency had assumed responsibility for tuition costs (as distinguished from support and maintenance) prior to that date. We reject this suggestion. In our view the language of the subdivision facially and literally draws an unmistakable distinction between responsibility of a social services district or a State department or agency for 'support and maintenance' and for 'tuition costs'. Use of the different terms in such close proximity within the same sentence gives strong support to the conclusion that the references were to assumptions of different responsibilities. We find nothing in the legislative history to which our attention is drawn which would suggest, let alone compel, a contrary ***287** legislative meaning, intention or purpose (cf. New York State Bankers Assn. v. Albright, 38 N.Y.2d 430, 435—438, 381 N.Y.S.2d 17, 19—21, 343 N.E.2d 735, 737—739, and cases cited). Accordingly, we agree that the proviso at the end of the first sentence of paragraph a of Education Law, section 3202, subdivision 5, must be held to refer only to social services districts and State departments and agencies that, prior to January 1, 1974, assumed responsibility for the tuition costs of welfare beneficiaries in addition to or as distinguished from responsibility for their general support and maintenance.

As to challenges to the validity of the paragraph in general, we first observe that very much of the extensive arguments advanced by the parties is addressed to the economic and political wisdom of the cost allocation scheme set out in the statute, a realm of disputation which is quite outside the scope of judicial review (Montgomery v. Daniels, 38 N.Y.2d 41, 53, 378 N.Y.S.2d 1, 10, 340 N.E.2d 444, 450; cf. People v. Broadie, 37 N.Y.2d 100, 118, 371 N.Y.S.2d 471, 481, 332 N.E.2d 338, 346). The New York City Board of Education and Department of Social Services and the Board of Education of the City of Yonkers seek also to mount attacks of varying degrees of plausibility and relevance under the due process and equal protection clauses of our State and Federal Constitutions. While these units of municipal government have procedural standing to participate in the present litigation (and thus to be heard, for instance, on questions of statutory interpretation), they do not have the substantive right to raise these constitutional challenges. (Williams v. Mayor, 289 U.S. 36, 53 S.Ct. 431, 77 L.Ed. 1015; Trenton v. New Jersey, 262 U.S. 182, 43 S.Ct. 534, 67 L.Ed. 937; City of New York v. Richardson, 2 Cir., 473 F.2d 923, 929, cert. den. Sub nom. Lavine v. Lindsay, 412 U.S. 950, 93 S.Ct. 3012, 37 L.Ed.2d 1002; *****406** Lindsay v. Wyman, D.C., 372 F.Supp. 1360, 1366; Triplett v. Tiemann, D.C., 302 F.Supp. 1239, 1242; Matter of County of Cayuga v. McHugh, 4 N.Y.2d 609, 616, 176 N.Y.S.2d 643, 648, 152 N.E.2d 73, 76; Black Riv. Regulating Dist. v. Adirondack League Club, 307 N.Y. 475, 488, 121 N.E.2d 428, 433, app. dsmd. 351 U.S. 922, 76 S.Ct. 780, 100 L.Ed. 1453; Robertson v. Zimmermann, 268 N.Y. 52, 64, 196 N.E. 740, 744; see Right of municipality to invoke constitutional provisions against acts of State Legislature, Ann., 116 A.L.R. 1037.) This is not an instance in which the municipal challengers assert that if they are obliged to comply with the State statute they will by that very compliance be forced to violate a constitutional proscription

(cf. Board of Educ. v. Allen, 20 N.Y.2d 109, 281 N.Y.S.2d 799, 228 N.E.2d 791, affd. 392 U.S. 236, 88 S.Ct. 1923, 20 L.Ed.2d 1060).

Finally, we agree with the Appellate Division that, whatever may be the practical problems of administration engendered by the present statutory formulation, and understandable ***288** as is the temptation to offer judicial assistance in their minimization, there is no warrant in this statute nor in its legislative history for the erection of the presumption fashioned by Supreme Court that the school district in which the pupil resided immediately before his transfer to the receiving school district is the municipal entity responsible for payment of the cost of instruction to the receiving district. Again, if relief be needed or desired, address must be to the Legislature and the Appellate Division properly excised the provision ****1089** of the judgment that implemented the novel presumption.

Accordingly, the order of the Appellate Division should be affirmed.

BREITEL, C.J., and JASEN, GABRIELLI, WACHTLER, FUCHSBERG and COOKE, JJ., concur.

Order affirmed, without costs.

All Citations

41 N.Y.2d 283, 360 N.E.2d 1086, 392 N.Y.S.2d 403

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30 N.Y.3d 377
Court of Appeals of New York.

In the Matter of WORLD TRADE CENTER LOWER MANHATTAN DISASTER SITE LITIGATION.

Stanislaw Faltynowicz et al., Appellants,
and
State of New York, Intervenor–Appellant,
v.
Battery Park City Authority et al., Respondents.
Santiago Alvear, Appellant,
and
State of New York, Intervenor–Appellant,
v.
Battery Park City Authority, Respondent.
Peter Curley et al., Appellants,
and
State of New York, Intervenor–Appellant,
v.
Battery Park City Authority, Respondent.

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Nov. 21, 2017.

Synopsis
Background: Workers brought action against public benefit corporation charged with eliminating urban blight, seeking to recover damages for injuries they sustained during cleanup operations following terrorist attacks of September 11, 2001. The United States District Court for the Southern District of New York, Alvin K. Hellerstein, J., 66 F.Supp.3d 466, granted corporation's motion for summary judgment. Workers appealed. The United States Court of Appeals for the Second Circuit, Droney, Circuit Judge, 846 F.3d 58, certified questions.

Holdings: The Court of Appeals, Feinman, J., held that:

in determining whether corporation had capacity to mount due process challenge to statute that revived workers' claims, particularized inquiry into nature of corporation and reviving statute was not required, and

a claim-revival statute satisfies the due process clause of the State Constitution if it was enacted as a reasonable response in order to remedy an injustice.

Questions answered.

Rivera, J., filed concurring opinion.

Wilson, J., filed concurring opinion.

Attorneys and Law Firms

*****548** Gregory J. Cannata & Associates, LLP, New York City (Gregory J. Cannata of counsel), and Robert A. Grochow, P.C., for Stanislaw Faltynowicz and others, appellants.

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Boies Schiller Flexner LLP, New York City (Luke Nikas and Nathan A. Holcomb of counsel), and Napoli Shkolnik PLLC, New York City (Paul J. Napoli and Christopher R. LoPalo of counsel), for Santiago Alvear and others, appellants.

Daniel S. Connolly, New York City, and Wilson Elser Moskowitz Edelman & Dicker, LLP, White Plains (John M. Flannery *****549** and Eliza M. Scheibel of counsel), for respondents.

OPINION OF THE COURT

FEINMAN, J.

****1229 *381** This matter comes to us from an order of the United States Court of Appeals for the Second Circuit certifying the following questions pursuant to rule 500.27 of this Court (Rules of Ct. of Appeals [22 NYCRR] § 500.27):

> "(1) Before New York State's capacity-to-sue doctrine may be applied to determine whether a State-created public benefit corporation has the capacity to challenge a State statute, must it first be determined whether the public benefit corporation 'should be treated like the State,' [(*Clark–Fitzpatrick, Inc. v. Long Is. R.R. Co.,* 70 N.Y.2d 382, 387, 521 N.Y.S.2d 653, 516 N.E.2d 190 [1987])], based on a 'particularized inquiry into the nature of the instrumentality and the statute claimed to be applicable to it,' [(*John Grace & Co. v. State Univ. Constr. Fund,* 44 N.Y.2d 84, 88, 404 N.Y.S.2d 316, 375 N.E.2d 377 [1978])], and if so, what considerations are relevant to that inquiry?; and
>
> "(2) Does the 'serious injustice' standard articulated in [*Gallewski v. Hentz & Co.,* 301 N.Y. 164, 174, 93 N.E.2d 620 (1950)], or the less stringent 'reasonableness' standard articulated in [*Robinson v. Robins Dry Dock & Repair Co.,* 238 N.Y. 271, 144 N.E. 579 (1924)], govern the merits of a due process challenge under the New York State Constitution to a claim-revival statute?" (****1230** *In re World Trade Ctr. Lower Manhattan Disaster Site Litig.,* 846 F.3d 58, 70 [2d Cir.2017].)

We accepted the certified questions on February 9, 2017 (*see* 28 N.Y.3d 1159, 49 N.Y.S.3d 89, 71 N.E.3d 581 [2017]).

***382** I.

Plaintiffs in the consolidated appeal before the Second Circuit are workers who participated in cleanup operations in New York City following the September 11, 2001 terrorist attacks. The defendant is Battery Park City Authority (BPCA). BPCA was established by the State Legislature as a public benefit corporation to redevelop blighted areas in lower Manhattan and to expand the supply of safe and sanitary housing for low-income families (*see* Public Authorities Law §§ 1971, 1973[1]). Plaintiffs initially brought claims between 2006 and 2009 alleging that they developed a host of illnesses as a result of their exposure to harmful toxins at BPCA-owned properties in the course of their cleanup duties.[1] However, in July 2009, the District Court dismissed plaintiffs' claims, together with hundreds of other similar claims against BPCA, on the grounds that

the plaintiffs did not serve BPCA with timely notices of claim (*see* General Municipal Law § 50–e; Public Authorities Law § 1984).

The legislature responded to these dismissals by enacting Jimmy Nolan's Law, which became effective September 16, 2009 (*see* L. 2009, ch. 440). The law amended the General Municipal Law to provide, in relevant part:

> "Notwithstanding any other provision of law to the contrary, including ... section fifty-e of this article ... any cause of action against a public corporation for personal injuries suffered by a participant ***550** in World Trade Center rescue, recovery or cleanup operations as a result of such participation which is barred as of the effective date of this subdivision because the applicable period of limitation has expired is hereby revived, and a claim thereon may be filed and served and prosecuted provided such claim is filed and served within one year of the effective date of this subdivision" (General Municipal Law § 50–i[4][a], as added by L. 2009, ch. 440, § 2).

The effect of the law was to revive the plaintiffs' time-barred causes of action for one year after its enactment.

***383** Many of the 9/11 cleanup workers whose claims had previously been dismissed, including plaintiffs, served new notices of claim on BPCA within the one-year revival period prescribed by Jimmy Nolan's Law. BPCA moved for summary judgment on the grounds that Jimmy Nolan's Law was unconstitutional under the Due Process Clause of the State Constitution (*see* N.Y. Const., art. I, § 6). Upon due notice, the Attorney General intervened to defend the constitutionality of the law.

The District Court granted summary judgment in favor of BPCA and held that Jimmy Nolan's Law was unconstitutional as applied (*see In re World Trade Ctr. Lower Manhattan Disaster Site Litig.,* 66 F.Supp.3d 466 [S.D.N.Y.2014]). As a threshold matter, the court recognized our "traditional rule that 'municipalities and other local governmental corporate entities and their officers lack capacity to mount constitutional challenges to acts of the State and State legislation' " (*id.* at 471, quoting ****1231** *City of New York v. State of New York,* 86 N.Y.2d 286, 289, 631 N.Y.S.2d 553, 655 N.E.2d 649 [1995]). Nevertheless, the court cited a line of cases stating that "a 'particularized inquiry is necessary to determine whether—for the specific purpose at issue—the public benefit corporation should be treated like the State' " (*id.,* quoting *Clark–Fitzpatrick, Inc. v. Long Is. R.R. Co.,* 70 N.Y.2d 382, 387, 521 N.Y.S.2d 653, 516 N.E.2d 190 [1987]) and concluded that "BPCA is an entity independent of the State and has capacity to challenge the constitutionality of the Legislature's acts" (*id.* at 473). On the merits, the court found the law unconstitutional on the grounds that it was not passed in response to "exceptional" circumstances or a "serious injustice" (*id.* at 476, citing*Gallewski v. Hentz & Co.,* 301 N.Y. 164, 93 N.E.2d 620 [1950]).

Plaintiffs appealed to the Second Circuit. After discerning an "absence of authoritative guidance" on both the capacity issue and the proper standard of review in evaluating the constitutionality of claim-revival statutes (846 F.3d at 69), the Second Circuit certified the questions set out above.

II.

The first question essentially asks us to decide whether our general rule—that state entities lack capacity to challenge the constitutionality of a state statute—is any less applicable to public benefit corporations than it is to other types of governmental entities, such as municipalities. We hold that it is not, and that no "particularized inquiry" is necessary to determine whether public benefit corporations should be treated like the State for purposes of capacity.

***384** A.

Capacity "concerns a litigant's power to appear and bring its grievance before the court" (*Community Bd. 7 of Borough of Manhattan v. Schaffer,* 84 N.Y.2d 148, 155, 615 N.Y.S.2d 644, 639 N.E.2d 1 [1994]). Entities created by legislative enactment, such as the BPCA, ***551** "have neither an inherent nor a common-law right to sue" (*id.* at 155–156, 615

N.Y.S.2d 644, 639 N.E.2d 1). "Rather, their right to sue, if it exists at all, must be derived from the relevant enabling legislation or some other concrete statutory predicate" (*id.* at 156, 615 N.Y.S.2d 644, 639 N.E.2d 1). Capacity should not be confused with standing, which relates to whether a party has suffered an "injury in fact" conferring a "concrete interest in prosecuting the action" (*Society of Plastics Indus. v. County of Suffolk,* 77 N.Y.2d 761, 772–773, 570 N.Y.S.2d 778, 573 N.E.2d 1034 [1991]), and which "go[es] to the jurisdiction of the court" (*City of New York,* 86 N.Y.2d at 292, 631 N.Y.S.2d 553, 655 N.E.2d 649). Capacity, unlike standing, does not concern the injury a party suffered, but whether the legislature invested that party with authority to seek relief in court. As such, capacity is a question of legislative intent and substantive state law.

Generally, "municipalities and other local governmental corporate entities and their officers lack capacity to mount constitutional challenges to acts of the State and State legislation" (*id.* at 289, 631 N.Y.S.2d 553, 655 N.E.2d 649). During the more than 80 years predating our *City of New York* decision, our courts characterized this prohibition somewhat inconsistently, referring to it, at various times (and sometimes simultaneously), as a lack of capacity (*see County of Albany v. Hooker,* 204 N.Y. 1, 97 N.E. 403 [1912]), a lack of standing (*see Village of Herkimer v. Axelrod,* 58 N.Y.2d 1069, 462 N.Y.S.2d 633, 449 N.E.2d 413 [1983]; *Black Riv. Regulating Dist. v. Adirondack League Club,* 307 N.Y. 475, 489, 121 N.E.2d 428 [1954]; ****1232** *Matter of Town of Moreau v. County of Saratoga,* 142 A.D.2d 864, 531 N.Y.S.2d 61 [3d Dept.1988]; *City of Buffalo v. State Bd. of Equalization & Assessment,* 26 A.D.2d 213, 272 N.Y.S.2d 168 [3d Dept.1966]) or a substantive determination that the state acts complained of were not unconstitutional at all (*see Matter of County of Cayuga v. McHugh,* 4 N.Y.2d 609, 616, 176 N.Y.S.2d 643, 152 N.E.2d 73 [1958]; *Black Riv.,* 307 N.Y. at 489–490, 121 N.E.2d 428; *Matter of Bowen v. State Commn. of Correction,* 104 A.D.2d 238, 484 N.Y.S.2d 210 [3d Dept.1984]; *City of Utica v. County of Oneida,* 187 Misc. 960, 965–966, 65 N.Y.S.2d 467 [Sup.Ct., Oneida County 1946], *appeal dismissed* 70 N.Y.S.2d 582 [4th Dept.1947]). However, in *City of New York,* 86 N.Y.2d 286, 631 N.Y.S.2d 553, 655 N.E.2d 649, we definitively stated the rule in terms of capacity, as opposed to standing or substantive constitutional law. It has remained a capacity rule ever since (*see Matter of County of Chemung v. Shah,* 28 N.Y.3d 244, 262, 44 N.Y.S.3d 326, 66 N.E.3d 1044 [2016]; *Matter of County of Nassau v. State of New York,* 100 A.D.3d 1052, 953 N.Y.S.2d 339 [3d Dept.2012], ***385** *lv. dismissed and denied* 20 N.Y.3d 1092, 965 N.Y.S.2d 77, 987 N.E.2d 638 [2013]; *Matter of New York Blue Line Council, Inc. v. Adirondack Park Agency,* 86 A.D.3d 756, 758–759, 927 N.Y.S.2d 432 [3d Dept.2011], *lv. denied sub nom. Matter of Clinton County v. Adirondack Park Agency,* 18 N.Y.3d 806, 940 N.Y.S.2d 215, 963 N.E.2d 792 [2012]; *Gulotta v. State of New York,* 228 A.D.2d 555, 645 N.Y.S.2d 41 [2d Dept.1996], *appeal dismissed* 88 N.Y.2d 1053, 651 N.Y.S.2d 402, 674 N.E.2d 332 [1996], *lv. denied* 89 N.Y.2d 811, 657 N.Y.S.2d 403, 679 N.E.2d 642 [1997]).[2]

In *City of New York,* we rejected claims by the City of New York, Board of Education *****552** of the City, Mayor and Chancellor of the City School District that the State's statutory scheme for funding public education denied school children their constitutional rights under the Education Article of the State Constitution, the Equal Protection Clauses of the Federal and State Constitutions and title VI of the Civil Rights Act of 1964 (*see City of New York,* 86 N.Y.2d at 289, 631 N.Y.S.2d 553, 655 N.E.2d 649). We observed that "municipal corporate bodies ... are merely subdivisions of the State, created by the State for the convenient carrying out of the State's governmental powers and responsibilities as agents" and held that the municipal plaintiffs therefore lacked capacity to bring their claims (*id.* at 289–290, 631 N.Y.S.2d 553, 655 N.E.2d 649).

Our capacity rule reflects a self-evident proposition about legislative intent: the "manifest improbability" (*id.* at 293, 631 N.Y.S.2d 553, 655 N.E.2d 649) that the legislature would breathe constitutional rights into a public entity and then equip it with authority to police state legislation on the basis of those rights. It also reflects sound principles of judicial restraint, "the extreme reluctance of courts to intrude in the political relationships between the Legislature, the State and its governmental subdivisions" (*id.* at 296, 631 N.Y.S.2d 553, 655 N.E.2d 649). "[T]he Legislature, within constitutional limitations, may by legislative fiat diminish, modify or recall any power delegated" to its political subdivisions (*Matter of County of Cayuga v. McHugh,* 4 N.Y.2d 609, 614–615, 176 N.Y.S.2d 643, 152 N.E.2d 73 [1958]). "[T]he entire subject being one of governmental and public policy, ... the wrong, if any, created and existing by the acts of the legislature, must be corrected by the legislature, or by an action where the people, as distinguished from a municipal corporate body, are before the court" (****1233** *City of New York,* 86 N.Y.2d at 294, 631 N.Y.S.2d 553, 655 N.E.2d 649, quoting *Hooker,* 204 N.Y. at 18–19, 97 N.E. 403). Hence, with few exceptions, this capacity bar closes the courthouse doors to internal political disputes between the State and its subdivisions.

***386** The capacity rule is not absolute. A political subdivision with "express statutory authorization" to bring a constitutional challenge would not be found wanting in capacity (*id.* at 291, 631 N.Y.S.2d 553, 655 N.E.2d 649; *accord Hooker,* 204 N.Y. at 9, 97 N.E. 403), though a generic grant of authority to "sue or be sued" will be insufficient (*City of New York,* 86 N.Y.2d at

293, 631 N.Y.S.2d 553, 655 N.E.2d 649).[3] Even in the absence of explicit authority, the assertion of some constitutional rights may, by their nature, present special circumstances to which the general rule must yield (*see id.* at 291–292, 631 N.Y.S.2d 553, 655 N.E.2d 649). To date, we have identified a limited number of situations presenting such special circumstances, such as where a public entity is "vested with an entitlement to a specific fund by a statute" and the challenged statute adversely affects its interest in the fund (*Matter of Town of Moreau,* 142 A.D.2d at 865, 531 N.Y.S.2d 61; *accord* ***553** *City of New York,* 86 N.Y.2d at 291–292, 631 N.Y.S.2d 553, 655 N.E.2d 649; *County of Rensselaer v. Regan,* 173 A.D.2d 37, 578 N.Y.S.2d 274 [3d Dept.1991], *affd.* 80 N.Y.2d 988, 592 N.Y.S.2d 646, 607 N.E.2d 793 [1992]), where a state statute impinges on a municipality's home rule powers under the State Constitution (*see Town of Black Brook v. State of New York,* 41 N.Y.2d 486, 393 N.Y.S.2d 946, 362 N.E.2d 579 [1977]), or where a public entity asserts that if it is obliged to comply with a statute it "will by that very compliance be forced to violate a constitutional proscription" (*City of New York,* 86 N.Y.2d at 292, 631 N.Y.S.2d 553, 655 N.E.2d 649, quoting *Matter of Jeter v. Ellenville Cent. School Dist.,* 41 N.Y.2d 283, 287, 392 N.Y.S.2d 403, 360 N.E.2d 1086 [1977]).[4]

***387** **1234** We stress that the exceptions we have recognized to date are narrow. Under the general rule, we have barred public entities from challenging a wide variety of state actions, such as, e.g., the allocation of state funds amongst various localities (*see City of New York,* 86 N.Y.2d 286, 631 N.Y.S.2d 553, 655 N.E.2d 649; *Hooker,* 204 N.Y. 1, 97 N.E. 403), the modification of a village-operated hospital's operating certificate (*see Village of Herkimer,* 58 N.Y.2d 1069, 462 N.Y.S.2d 633, 449 N.E.2d 413), the closure of a local jail by the State (*see Matter of County of Cayuga,* 4 N.Y.2d at 616, 176 N.Y.S.2d 643, 152 N.E.2d 73), special exemptions from local real estate tax assessments (*see City of Buffalo,* 26 A.D.2d 213, 272 N.Y.S.2d 168), laws mandating that counties make certain expenditures (*see Gulotta,* 228 A.D.2d 555, 645 N.Y.S.2d 41), state land use regulations (*see New York Blue Line Council,* 86 A.D.3d at 758–759, 927 N.Y.S.2d 432) and state laws requiring electronic voting systems to be installed at polling places in lieu of lever-operated machines (*see County of Nassau,* 100 A.D.3d 1052, 953 N.Y.S.2d 339).

B.

BPCA contends that public benefit corporations like itself are not fully governmental in nature. Therefore, BPCA argues, a court must conduct a "particularized inquiry" (*John Grace & Co. v. State Univ. Constr. Fund,* 44 N.Y.2d 84, 88, 404 N.Y.S.2d 316, 375 N.E.2d 377 [1978]) to determine whether a particular public benefit corporation should be treated like the State before the capacity rule can be applied. For the reasons that follow, we disagree.

There are three types of public corporations: municipal corporations, district ***554** corporations and public benefit corporations (*see* General Construction Law § 65[b]). A public benefit corporation is "a corporation organized to construct or operate a public improvement wholly or partly within the state, the profits from which inure to the benefit of this or other states, or to the people thereof" (*id.* § 66[4]). Devised in the early twentieth century as "a new vehicle for funding public works projects" that "insulate[d] the State from the burden of long-term debt" (*Schulz v. State of New York,* 84 N.Y.2d 231, 244, 616 N.Y.S.2d 343, 639 N.E.2d 1140 [1994]), public benefit corporations are able to issue debt for which the State itself is not liable (*see* N.Y. Const., art. X, § 5). In addition, "[a]lthough created by the State and subject to dissolution by the State, these public corporations are independent and autonomous, deliberately designed to be able to function with a freedom and flexibility not permitted to an ordinary *388 State board, department or commission" *Matter of Plumbing, Heating, Piping & A.C. Contrs. Assn. v. New York State Thruway Auth.,* 5 N.Y.2d 420, 423, 185 N.Y.S.2d 534, 158 N.E.2d 238 (1959). We have therefore understood the primary utility of public benefit corporations as twofold: to "protect the State from liability" and to "enable public projects to be carried on free from restrictions otherwise applicable" (*id.* at 423, 185 N.Y.S.2d 534, 158 N.E.2d 238). In this context, we have sometimes described public benefit corporations as "enjoying an existence separate and apart from the State, its agencies and political subdivisions" (*Schulz,* 84 N.Y.2d at 246 n. 4, 616 N.Y.S.2d 343, 639 N.E.2d 1140 [collecting cases]).

These properties, however, do not bring public benefit corporations outside of the scope of our capacity rule. It is true that much of our analysis in *City of New York* rested on the "historical fact" that municipalities are "mere[ ] subdivisions" having no "right to contest the actions of their principal or creator" (**1235** *City of New York,* 86 N.Y.2d at 289–291, 631 N.Y.S.2d 553, 655 N.E.2d 649). However, our capacity rule is not a stilted axiom governing the position of the parts to the whole, or the relationship between the State as principal and its subdivisions as agents. Rather, as discussed above, it is nothing more

than a commonsense presumption of legislative intent, informed by practical concerns about judicial overreach. The features that arguably render public benefit corporations something more than mere subdivisions, namely, the separation of "their administrative and fiscal functions from the State" (*Collins v. Manhattan & Bronx Surface Tr. Operating Auth.,* 62 N.Y.2d 361, 368, 477 N.Y.S.2d 91, 465 N.E.2d 811 [1984]), do not diminish the considerations we have already mentioned that support this rule.

BPCA cites to a line of cases from this Court rejecting a per se rule that public benefit corporations are identified with the State. In those cases, we held that "[t]he mere fact that" a public benefit corporation

> "is an instrumentality of the State, and as such, engages in operations which are fundamentally governmental in nature does not inflexibly mandate a conclusion that it is the State or one of its agencies ... Instead, a particularized inquiry into the nature of the instrumentality and the statute claimed to be applicable to it is required" (*John Grace & Co.,* 44 N.Y.2d at 88, 404 N.Y.S.2d 316, 375 N.E.2d 377).

***389** Under the particular circumstances presented in those cases, we held that a public benefit corporation would be treated like the State for purposes of immunity from punitive damages (*see* *****555** *Clark–Fitzpatrick, Inc.,* 70 N.Y.2d 382, 521 N.Y.S.2d 653, 516 N.E.2d 190), but not for purposes of contract bidding requirements under the State Finance Law (*see Matter of Plumbing, Heating, Piping & A.C. Contrs. Assn.,* 5 N.Y.2d 420, 185 N.Y.S.2d 534, 158 N.E.2d 238), sovereign immunity (*Matter of Dormitory Auth. of State of N.Y. [Span Elec. Corp.],* 18 N.Y.2d 114, 271 N.Y.S.2d 983, 218 N.E.2d 693 [1966]), statutes providing for equitable relief to certain public contractors (*see John Grace & Co.,* 44 N.Y.2d 84, 404 N.Y.S.2d 316, 375 N.E.2d 377) or a provision of the Penal Law punishing the submission of false instruments to the State (*see People v. Miller,* 70 N.Y.2d 903, 524 N.Y.S.2d 386, 519 N.E.2d 297 [1987]).

However, applying this line of cases here would strip them of their context. The issue in each of these cases was whether a statute or common-law rule defining the State's rights or responsibilities vis-à-vis private parties could be extended to a public benefit corporation. Given the primary function of a public benefit corporation "to resemble in many respects a private business corporation ... as a means of expanding government operations into areas generally carried on by private enterprise" (*Collins,* 62 N.Y.2d at 368, 371, 477 N.Y.S.2d 91, 465 N.E.2d 811 [internal quotation marks omitted]), we understood that a public benefit corporation's *outward-facing* relations with private parties—such as employees, customers and other business counterparts—would not necessarily be subject to the same laws that might apply when one does business with the government. Hence, in most of these cases, our overriding aim was to give maximum effect to the legislature's intent; we closely analyzed the public benefit corporation's enabling act, or the statute claimed to be applicable to it, in order to determine whether the corporation was intended to assume the guise of a private person in its legal relations with the general public (*see Clark–Fitzpatrick, Inc.,* 70 N.Y.2d at 386–388, 521 N.Y.S.2d 653, 516 N.E.2d 190; *John Grace & Co.,* 44 N.Y.2d at 89, 404 N.Y.S.2d 316, 375 N.E.2d 377; *Matter of* ****1236** *Dormitory Auth.,* 18 N.Y.2d at 117–118, 271 N.Y.S.2d 983, 218 N.E.2d 693; *Matter of Plumbing, Heating, Piping & A.C. Contrs. Assn.,* 5 N.Y.2d at 423–424, 185 N.Y.S.2d 534, 158 N.E.2d 238). As for *Miller,* we were specifically concerned that the statute at issue, if made applicable to statements given to public benefit corporations, could impose criminal penalties without "fair warning" to the public (70 N.Y.2d at 907, 524 N.Y.S.2d 386, 519 N.E.2d 297, citing *People v. Nelson,* 69 N.Y.2d 302, 514 N.Y.S.2d 197, 506 N.E.2d 907 [1987]). None of the foregoing considerations apply where, as here, a court is called ***390** upon to evaluate a public benefit corporation's *inward-facing* relations with other state bodies.[5]

C.

The parties dispute the significance of two particular cases for our decision today. Plaintiffs and the Attorney General contend that this case falls within our ruling in *Black Riv.* *****556** *Regulating Dist. v. Adirondack League Club,* 307 N.Y. 475, 121 N.E.2d 428 (1954), where we held that the plaintiff, a river regulating district, could not maintain an action seeking a declaration that an act of the legislature was unconstitutional. By contrast, BPCA argues that our holding in *Patterson v. Carey,* 41 N.Y.2d 714, 395 N.Y.S.2d 411, 363 N.E.2d 1146 (1977) implicitly recognized that public corporations, under some circumstances, had capacity to bring such actions.

We agree with the plaintiffs and the Attorney General that our holding in *Black Riv.* precludes BPCA's proposed particularized inquiry approach. In that case, the Black River Regulating District (the District), a public corporation, sought a

declaration that the Stokes Act (L. 1950, ch. 803), which prohibited "any river regulating board" from constructing certain reservoirs, was unconstitutional (*Black Riv.,* 307 N.Y. at 483–485, 121 N.E.2d 428). We rejected the District's attempted challenge. We observed that the District's "only purpose," to construct reservoirs, was "a State purpose" and the District therefore had "no special character different from that of the State" (*id.* at 489, 121 N.E.2d 428). We also noted that the powers of the District to carry out these state purposes "are within the State's absolute discretion" to alter, impair or destroy (*id.* at 487, 121 N.E.2d 428). "[P]olitical power conferred by the Legislature," we explained, "confers no vested right against the government itself.... [T]he power conferred by the Legislature is akin to that of a public trust [and may] be exercised not for the benefit or at the will of the trustee but for the common good" (*id.* at 488, 121 N.E.2d 428).

***391** The District also argued that it could sue in order to vindicate the rights of its bondholders, whose bonds, it claimed, would be impaired if the Stokes Act were not struck down (*see Black Riv. Regulating Dist. v. Adirondack League Club,* 282 App.Div. 161, 168–170, 121 N.Y.S.2d 893 [4th Dept.1953], *revd.* 307 N.Y. 475, 121 N.E.2d 428 [1954]). We rejected this contention; the mere fact that the District could issue certificates of indebtedness, we ****1237** held, "does not confer upon [the District] an independent status by which they have standing ... to test the validity of the Stokes Act" (*Black Riv.,* 307 N.Y. at 489, 121 N.E.2d 428).

The precise holding in *Black Riv.,* as we phrased it at the time, was that the plaintiffs lacked "standing" (or "status") to seek a declaration that the Stokes Act was unconstitutional (*id.* at 489–490, 121 N.E.2d 428).[6] However, it is clear that there was no real issue of "standing" in that case; the defendant was a private landowner subject to a condemnation proceeding by the District, a proceeding that would have been unlawful unless the District obtained the declaration it sought that the Stokes Act was unconstitutional (*see Black Riv. Regulating Dist. v. Adirondack League Club,* 201 Misc. 808, 811, 115 N.Y.S.2d 572 [Sup.Ct., Oneida County 1952], *revd.* 282 App.Div. 161, 121 N.Y.S.2d 893 [1953], *revd.* 307 N.Y. 475, 121 N.E.2d 428 [1954]). Rather, in holding that the District did not have "status" to sue (*Black Riv.,* 307 N.Y. at 490, 121 N.E.2d 428), the Court was contemplating what we now recognize as capacity rather than standing (*see City of New York,* 86 N.Y.2d at 291, 631 N.Y.S.2d 553, 655 N.E.2d 649, citing *Black Riv.,* 307 N.Y. 475, 121 N.E.2d 428).

We find unpersuasive BPCA's attempt to distinguish *Black Riv.* BPCA argues that the District was only established as a "public corporation," not a "public benefit corporation." The Special Term in *Black* *****557** *Riv.* described the District's enabling statute as follows:

> "Section 431 provides that bodies corporate may be created 'to construct, maintain and operate reservoirs within such districts, subject to the provisions of this act, for the purpose of regulating the flow of streams, when required by the public welfare, including public health and safety. Such river regulating districts are declared to be public corporations and shall have perpetual existence and the power to acquire and hold such real estate ***392** and other property as may be necessary, to sue and be sued, to incur contract liabilities, to exercise the right of eminent domain and of assessment and taxation and to do all acts and exercise all powers authorized by and subject to the provision of this article. Such powers shall be exercised by and in the name of the board of the district' " (*Black Riv.,* 201 Misc. at 813, 115 N.Y.S.2d 572).

Therefore, it is clear that the District, in substance, if not in form, was a public benefit corporation (*see* General Construction Law § 66[4]; *see also Northern Elec. Power Co., L.P. v. Hudson Riv.-Black Riv. Regulating Dist.,* 122 A.D.3d 1185, 1186, 997 N.Y.S.2d 793 [3d Dept.2014] [describing the Black River Regulating District as a "public benefit corporation"]). We note that the District would not qualify as either a municipal corporation or a district corporation (*see* General Construction Law § 66[2], [3]), the only other types of public corporations (*see id.* § 65[b]).

BPCA argues that, even if *Black Riv.* involved a public benefit corporation, our analysis was consistent with BPCA's proposed "particularized inquiry" test. According to this argument, the Court conducted such a particularized inquiry when it specifically identified the District's purposes "to construct reservoirs" as "a State purpose" (307 N.Y. at 489, 121 N.E.2d 428). Although the District lacked power to sue in that particular case, BPCA argues that this does not necessarily foreclose challenges by other public benefit corporations with different purposes and under different circumstances. We do not read *Black Riv.* so narrowly. There was nothing special about reservoir construction ****1238** that compelled us to rule as we did; rather, it was enough that the District's raison d'être was to carry out its activities "for the common good" (*id.* at 488, 121 N.E.2d 428). BPCA's attempt to harmonize its approach with *Black Riv.* fails because our description of the District's purposes in that case would apply with equal force to any other public benefit corporation, for the "true beneficiary" of any New York public benefit corporation is the State of New York and its people (*Matter of New York Post Corp. v. Moses,* 10 N.Y.2d 199, 204, 219 N.Y.S.2d 7, 176 N.E.2d 709 [1961]).

BPCA's reliance on *Patterson,* 41 N.Y.2d 714, 395 N.Y.S.2d 411, 363 N.E.2d 1146 is misplaced. In that case, we considered an action by the members of the Board of the Jones Beach State Parkway Authority and the institutional trustee for the Authority's bondholders for a judgment declaring a state statute unconstitutional. However, as relevant here, we said only that "[w]e do agree with the Special ***393** Term ... that the governmental plaintiffs, as well as the institutional representative of the bondholders, have sufficient standing to maintain this action" (*id.* at 719 n., 395 N.Y.S.2d 411, 363 N.E.2d 1146). The Special Term's ruling, in turn, suggests that the issue in *Patterson* (unlike in *Black Riv.*) was standing as traditionally defined, rather than capacity (*see Patterson v. Carey,* 83 Misc.2d 372, 376, 370 N.Y.S.2d 783 [Sup.Ct., Albany County 1975] ["The individual plaintiffs as members of the Authority have the requisite *****558** standing to obtain a declaratory judgment ... There can be no doubt that plaintiffs have a 'personal stake in the outcome' of this litigation" (citing *Board of Educ. of Cent. School Dist. No. 1 v. Allen,* 20 N.Y.2d 109, 281 N.Y.S.2d 799, 228 N.E.2d 791 [1967], *affd.* 392 U.S. 236, 88 S.Ct. 1923, 20 L.Ed.2d 1060 [1968]; *Baker v. Carr,* 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 [1962])], *affd.* 52 A.D.2d 171, 383 N.Y.S.2d 414 [3d Dept.1976], *affd. as mod.* 41 N.Y.2d 714, 395 N.Y.S.2d 411, 363 N.E.2d 1146 [1977]).[7]

D.

We therefore hold that, under the capacity rule, public benefit corporations have no greater stature to challenge the constitutionality of state statutes than do municipal corporations or other local governmental entities. Of course, our holding today does not mean that public benefit corporations can never raise such constitutional challenges; like municipalities, they may avail themselves of an exception to the general rule (*see City of New York,* 86 N.Y.2d at 291–292, 631 N.Y.S.2d 553, 655 N.E.2d 649). However, courts need not engage in a "particularized inquiry" to determine whether a public benefit corporation should first be treated like the State. Unlike in other contexts, for purposes of our capacity bar, every public benefit corporation is the State.

III.

The second question, as originally certified, asks which of two purportedly inconsistent standards of review—the "reasonable[ness]" standard adopted in *Robinson v. Robins Dry Dock & Repair Co.,* 238 N.Y. 271, 280, 144 N.E. 579 (1924) or the "serious injustice" standard adopted in *Gallewski v. Hentz & Co.,* 301 N.Y. 164, 174, 93 N.E.2d 620 (1950)—governs the ****1239** constitutionality of a claim-revival statute under the Due Process Clause of the New York Constitution.

***394** We do not read these cases to be in substantial disagreement; however, this case presents an opportunity for this Court to reconcile them and articulate a uniform standard of review. Therefore, in accordance with the certification of the Second Circuit (*see In re World Trade Ctr. Lower Manhattan Disaster Site Litig.,* 846 F.3d at 70 ["we do not bind the Court of Appeals to the particular questions stated"]), we reformulate the second certified question as follows: "Under *Robinson* and *Gallewski,* what standard of review governs the merits of a New York State Due Process Clause challenge to a claim-revival statute?"

A.

At the outset, we note that the development of our law on claim-revival statutes has differed from the development of the federal rule.

Claim-revival statutes generally pose no issue under the Fourteenth Amendment to the United States Constitution (*see Plaut v. Spendthrift Farm, Inc.,* 514 U.S. 211, 229, 115 S.Ct. 1447, 131 L.Ed.2d 328 [1995] [statutes of limitations "can be extended, without violating the Due Process Clause, after the cause of the action arose and even after the statute itself has expired"]). The United States Supreme Court articulated the rule in *Chase Securities Corp. v. Donaldson:*

> ***559** "[W]here lapse of time has not invested a party with title to real or personal property, a state legislature, consistently with the Fourteenth Amendment, may repeal or extend a statute of limitations, even after right of action is barred thereby, restore to the plaintiff his remedy, and divest the defendant of the statutory bar" (325 U.S. 304, 311–312, 65 S.Ct. 1137, 89 L.Ed. 1628 [1945]).

Unlike the federal rule, our state standard has not turned on this formal distinction between claim-revival statutes that intrude upon a "vested" property interest and those that do not. Rather, as we illustrate below, our cases have taken a more functionalist approach, weighing the defendant's interests in the availability of a statute of limitations defense with the need to correct an injustice. Each time we have spoken on this topic, we described circumstances that would be sufficient for a claim-revival statute to satisfy the State Due Process Clause, ***395** with specific reference to the facts then before us. Each of these cases merits our close attention.[8]

B.

The first case in which we directly addressed the constitutionality of a claim-revival statute was *Robinson,* 238 N.Y. 271, 144 N.E. 579, where a plaintiff brought a wrongful death action against defendants for the death of her husband. At the time, there was a two-year statute of limitations for such actions; the action was brought in December 1920, more than two years after the victim's death. During the two years following her husband's death, the plaintiff applied for, and received, a workers' compensation award, which by law was her exclusive remedy against the defendants. However, these benefits were cut off approximately two years after her husband's death when the United States Supreme Court struck down the applicable New York workers' compensation provision as unconstitutional (*see Knickerbocker Ice Co. v. Stewart,* 253 U.S. 149, 40 S.Ct. 438, 64 L.Ed. 834 [1920]). In ***1240** response, the legislature amended the law in 1923 to allow such plaintiffs to commence an action, even if otherwise time-barred, within one year after the statute took effect.

The Court expressly declined to either adopt or reject the federal rule that the legislature had "general power to revive a cause of action for personal debts or a cause of action for tort," and decided that the case could be resolved on narrower grounds (*Robinson,* 238 N.Y. at 276–277, 144 N.E. 579; *cf. Campbell v. Holt,* 115 U.S. 620, 6 S.Ct. 209, 29 L.Ed. 483 [1885]). While the Court acknowledged the possibility that, in some cases, a claim-revival statute would be unconstitutional, it declared that "both instinct and reason revolt at the proposition that redress for a wrong must be denied" where the enforcement of a statute of limitations would be "contrary to all prevailing ideas of justice" (*id.* at 279, 144 N.E. 579). In support of this proposition, the Court quoted at length from two decisions by then-Chief Justice Holmes of the Supreme Judicial Court of Massachusetts, both of which were highly skeptical of striking down claim-revival statutes on constitutional grounds, but which did not outright embrace the proposition that such statutes were always constitutional (*see id.* at 277–279, 144 N.E. 579, citing ***396** *Danforth v. Groton Water Co.,* 178 Mass. 472, 59 N.E. 1033 [1901]; *Dunbar v. Boston & P.R. Corp.,* 181 Mass. 383, 63 N.E. 916 [1902]). In particular, ***560** the Court cited with approval Justice Holmes' observation that

> "the prevailing judgment of the profession has revolted at the attempt to place immunities which exist only by reason of some slight technical defect on absolutely the same footing as those which stand on fundamental grounds.... [M]ultitudes of cases have recognized the power of the Legislature to call a liability into being where there was none before, if the circumstances were such as to appeal with some strength to the prevailing views of justice and if the obstacle in the way of the creation seemed small" (*id.* at 278, 144 N.E. 579, quoting *Danforth,* 178 Mass. at 476–477, 59 N.E. at 1033–1034).

Ultimately, the Court upheld the claim-revival statute at bar on the grounds that there was "no arbitrary deprivation by the Legislature" and that the statute "was reasonable" in response to a situation that "call[ed] for remedy" (*id.* at 279–280, 144 N.E. 579).

The next case to revisit the *Robinson* doctrine was *Gallewski,* 301 N.Y. 164, 93 N.E.2d 620, an action by the administrator of the estate of Fritz B. Gutmann, a citizen and resident of the Netherlands. On May 10, 1940, the Netherlands was invaded by Nazi Germany. German authorities arrested Gutmann and deported him to a concentration camp; it was later learned that he was murdered there. Between May 14 and May 22, 1940, only days after the invasion, his New York brokerage firm executed a series of unauthorized securities transactions on his account. It was not until the liberation of the Netherlands in 1945 that a curator was appointed under Dutch law to administer Gutmann's assets. After the unauthorized transactions were discovered in 1946, the administrator of Gutmann's estate filed suit in 1948, but because the suit commenced more than six

years after the cause of action accrued, it was barred by the statute of limitations. However, after the commencement of the action, the legislature amended the law to toll the statute of limitations for citizens of Axis-occupied countries during the period of such occupation (*see* L. 1949, ch. 326). The statute operated retroactively so as to revive claims, such as the plaintiff's, that had already been time-barred at the time of enactment (*see Gallewski,* 301 N.Y. at 170–171, 93 N.E.2d 620).

****1241** Addressing the constitutionality of the statute, the Court held that it would "treat the case within the limits of our decision ***397** in the *Robinson* case," which "must be read, at the very least, as holding that a revival statute is not necessarily and per se void as a taking of 'property' without due process of law" (*id.* at 173, 174, 93 N.E.2d 620). The Court explained that *Robinson* "may be read, we think, as holding that the Legislature may constitutionally revive a personal cause of action where the circumstances are exceptional and are such as to satisfy the court that serious injustice would result to plaintiffs not guilty of any fault if the intention of the Legislature were not effectuated" (*id.* at 174, 93 N.E.2d 620). Unlike the "inclusive and categorical rule" adopted by federal courts, *Robinson* "leave[s] the court free to approach each revival statute on its individual merits, in the light of its own peculiar circumstances and setting" (*id.*). Applying the rule to the facts, the Court upheld the statute on the grounds that, "as in the *Robinson* case, the 'extension of the time to bring ... action was reasonable' " (*id.* at 175, 93 N.E.2d 620, quoting *Robinson,* 238 N.Y. at 280, 144 N.E. 579). As with *Robinson,* the *Gallewski* Court expressly declined to either adopt or reject the federal standard (*see id.* at 173, 93 N.E.2d 620).

*****561** We next addressed the topic in 1954, when we affirmed, without opinion, a decision of the Appellate Division upholding amendments to the Workers' Compensation Law reviving claims for caisson disease (*see Matter of McCann v. Walsh Constr. Co.,* 282 App.Div. 444, 123 N.Y.S.2d 509 [3d Dept.1953], *affd. without op.* 306 N.Y. 904, 119 N.E.2d 596 [1954]). The claimant in that case was exposed to compressed air as he worked on the construction of the Queens Midtown Tunnel, his last exposure being in 1938. He did not develop caisson disease symptoms until 1950. The law in effect in 1938 provided that an employee who contracted an occupational disease and then left his employer was not entitled to compensation unless the disease was contracted "within the twelve months previous to the date of disablement" (L. 1931, ch. 344). In 1946, the legislature "recognized that it was unjust to apply this general rule to a disease like caisson disease which was of a slow-starting or insidious nature," and therefore amended the law to exclude "compressed air illness" from this time limitation (L. 1946, ch. 642) (*McCann,* 282 App.Div. at 446–447, 123 N.Y.S.2d 509). In 1947, the legislature also amended the then-governing statute of limitations so that claims for slow-starting diseases could be commenced "within ninety days after disablement and after knowledge that the disease is or was due to the nature of the employment" (L. 1947, chs. 77, 624). These statutes retroactively revived the claimant's previously time-barred ***398** claims. The claimant sued within days of the onset of his first symptoms in 1950.

The Appellate Division recited *Gallewski's* holding that the legislature may revive a cause of action in response to a "serious injustice" (*McCann,* 282 App.Div. at 449, 123 N.Y.S.2d 509, quoting *Gallewski,* 301 N.Y. at 174, 93 N.E.2d 620). The *Gallewski* standard, according to the Court, "follow[ed]" *Robinson* (*id.*). Applying this standard, the Appellate Division easily found the law constitutional:

> "This is a classic instance of the granting of legislative relief in a situation where the arbitrary application of the Statute of Limitations would work injustice. As the Legislature recognized, in the case of a disease of an insidious character, the effects of which might be latent or long delayed, the right to compensation might be barred by the operation of the Statute of Limitations even before the claimant was aware of the fact that he had the disease. In these ****1242** circumstances, the Legislature did no more than to comply with the simple demands of justice in relieving innocent claimants of the effect of the statutory time limitations which would otherwise bar their right to compensation" (*id.* at 450, 123 N.Y.S.2d 509).

The last of our cases addressing the constitutionality of claim-revival statutes was *Hymowitz v. Eli Lilly & Co.,* 73 N.Y.2d 487, 541 N.Y.S.2d 941, 539 N.E.2d 1069 (1989). Numerous plaintiffs brought suit against defendant drug manufacturers, alleging that they were injured by the drug diethylstilbestrol (DES) taken by their mothers while pregnant. As the Court recognized, "due to the latent nature of DES injuries, many claims were barred by the Statute of Limitations before the injury was discovered" (*id.* at 503, 541 N.Y.S.2d 941, 539 N.E.2d 1069). The applicable statute of limitations period accrued on the plaintiffs' exposure to the drug; it was not until 1986 that the legislature addressed this problem and statutorily instituted a discovery rule for "the latent effects of exposure to any substance" (L. 1986, ch. 692, § 2). The same statute also revived for one year causes of action for exposure to DES that had previously been time-barred (*id.* § 4).

*****562** The *Hymowitz* Court suggested a possible inconsistency between the *Robinson* and *Gallewski* tests (*see Hymowitz,* 73 N.Y.2d at 514, 541 N.Y.S.2d 941, 539 N.E.2d 1069). The Court held, however, that it "need not light upon a precise test

here," since the statute at issue would pass muster even under the purportedly stricter *Gallewski* standard:

> ***399** "The latent nature of DES injuries is well known, and it is clear that in the past the exposure rule prevented the bringing of timely actions for recovery. Thus we believe that exceptional circumstances are presented, that an injustice has been rectified, and that the requirements of *Gallewski v. Hentz & Co.* (*supra*) have been met" (*id.*).

C.

The Second Circuit, in certifying this question, apparently read *Robinson* to hold that a statute will satisfy the State Constitution so long as it is "a 'reasonable' exercise of the Legislature's power" (*In re World Trade Ctr. Lower Manhattan Disaster Site Litig.,* 846 F.3d at 68, quoting *Robinson,* 238 N.Y. at 280, 144 N.E. 579). Our holding in *Robinson* was slightly more demanding than pure "reasonable[ness]": *Robinson* held that the Due Process Clause of the State Constitution is "satisfied if there was an apparent injustice which 'calls for [a] remedy,' and which is 'reasonable' and not 'arbitrary' " (*Hymowitz,* 73 N.Y.2d at 514, 541 N.Y.S.2d 941, 539 N.E.2d 1069, quoting *Robinson,* 238 N.Y. at 279–280, 144 N.E. 579).

A close reading of *Gallewski* reveals that it did not overrule or narrow *Robinson.* To the contrary, it expressly reaffirmed the *Robinson* standard (*see* 301 N.Y. at 175, 93 N.E.2d 620 ["Here, as in the *Robinson* case, the 'extension of the time to bring ... action was reasonable' "]). By elaborating that "[*Robinson*] may be read ... as holding that the Legislature may constitutionally revive a personal cause of action where the circumstances are exceptional and ... serious injustice would result to plaintiffs not guilty of any fault" (*id.* at 174, 93 N.E.2d 620), the Court was describing the particular circumstances of the case before it, providing additional color on *Robinson* and concluding that the extraordinary events of World War II more than satisfied the test. Any purported dichotomy between *Robinson's* and *Gallewski's* holdings is illusory.

The salient facts in each of *Robinson, Gallewski, McCann* and *Hymowitz* fall ****1243** into the same pattern. First, there existed an identifiable injustice that moved the legislature to act. In *Robinson,* it was the plaintiffs' exclusive reliance on a provision of the workers' compensation law that was struck down by the United States Supreme Court (*see* 238 N.Y. at 279, 144 N.E. 579); in *Gallewski,* it was the occupation of the plaintiffs' countries of residence during World War II (*see* 301 N.Y. at 175, 93 N.E.2d 620); in *Hymowitz* and *McCann,* it was latent injuries caused by harmful exposure, which ***400** the plaintiffs were not able to attribute to an action or omission of the defendant until the statutory period to bring a claim had already expired (*see Hymowitz,* 73 N.Y.2d at 514–515, 541 N.Y.S.2d 941, 539 N.E.2d 1069; *McCann,* 282 App.Div. at 445–446, 123 N.Y.S.2d 509). Second, in each case, the legislature's revival of the plaintiff's claims for a limited period of time was reasonable in light of that injustice.

A more heightened standard would be too strict. In the context of a claim-revival statute, there is no principled way for a court to test whether a particular injustice is "serious" or whether a particular class of plaintiffs is blameless; such moral determinations are left to the elected *****563** branches of government. While we have traditionally expressed an "aversion to retroactive legislation" (*Matter of Hodes v. Axelrod,* 70 N.Y.2d 364, 370–371, 520 N.Y.S.2d 933, 515 N.E.2d 612 [1987]), of which claim-revival statutes are one species (*see Matter of Decker v. Pouvailsmith Corp.,* 252 N.Y. 1, 5–6, 168 N.E. 442 [1929]), "we have noted that the modern cases reflect a less rigid view of the Legislature's right to pass such legislation" (*Hodes,* 70 N.Y.2d at 371, 520 N.Y.S.2d 933, 515 N.E.2d 612; *see also Usery v. Turner Elkhorn Mining Co.,* 428 U.S. 1, 15, 96 S.Ct. 2882, 49 L.Ed.2d 752 [1976] ["legislative Acts adjusting the burdens and benefit of economic life come to the Court with a presumption of constitutionality"]). Nonetheless, there must first be a judicial determination that the revival statute was a reasonable measure to address an injustice.

D.

We now arrive at our answer to the second certified question, as reformulated herein. The cases we have just discussed all express one and the same rule: a claim-revival statute will satisfy the Due Process Clause of the State Constitution if it was enacted as a reasonable response in order to remedy an injustice.

IV.

Accordingly, the first certified question should be answered in the negative and the second certified question, as reformulated, should be answered in accordance with this opinion.

RIVERA, J. (concurring).

We have accepted the following two certified questions from the Second Circuit.

> "(1) Before New York State's capacity-to-sue doctrine may be applied to determine whether a State-created public benefit corporation has the capacity ***401** to challenge a State statute, must it first be determined whether the public benefit corporation 'should be treated like the State,' [(*Clark–Fitzpatrick, Inc. v. Long Is. R.R. Co.,* 70 N.Y.2d 382, 387, 521 N.Y.S.2d 653, 516 N.E.2d 190 [1987])], based on a 'particularized inquiry into the nature of the instrumentality and the statute claimed to be applicable to it,' [(*John Grace & Co. v. State Univ. Constr. Fund,* 44 N.Y.2d 84, 88, 404 N.Y.S.2d 316, 375 N.E.2d 377 [1978])], and if so, what considerations are relevant to that inquiry?; and
>
> "(2) Does the 'serious injustice' standard articulated in [****1244** *Gallewski v. Hentz & Co.,* 301 N.Y. 164, 174, 93 N.E.2d 620 (1950)], or the less stringent 'reasonableness' standard articulated in [*Robinson v. Robins Dry Dock & Repair Co.,* 238 N.Y. 271, 144 N.E. 579 (1924)], govern the merits of a due process challenge under the New York State Constitution to a claim-revival statute?" (*In re World Trade Ctr. Lower Manhattan Disaster Site Litig.,* 846 F.3d 58, 70 [2d Cir.2017]).

I write separately to expand on the majority's answer to the first certified question, and to explain why, in our answer to the second question, we should expressly adopt the federal rule, according to which claim-revival statutes do not raise due process concerns unless "lapse of time has ... [ ]vested a party with title to real or personal property" (*Chase Securities Corp. v. Donaldson,* 325 U.S. 304, 311, 65 S.Ct. 1137, 89 L.Ed. 1628 [1945]).

A. First Certified Question: Exceptions to the General No–Capacity Rule

With respect to the first certified question, I agree with the majority's comprehensive and well-reasoned analysis explaining that a public benefit corporation, like a municipal or local government entity, *****564** lacks capacity to sue unless the circumstances of the case support an exception to that rule. We have recognized exceptions to the capacity to sue bar where there is

> "(1) an express statutory authorization to bring such a suit; (2) where the State legislation adversely affects a municipality's proprietary interest in a specific fund of moneys; (3) where the State statute impinges upon 'Home Rule' powers of a municipality constitutionally guaranteed under article IX of the State Constitution; [or] (4) where the municipal ***402** challengers assert that if they are obliged to comply with the State statute they will by that very compliance be forced to violate a constitutional proscription" (*City of New York v. State of New York,* 86 N.Y.2d 286, 291–292, 631 N.Y.S.2d 553, 655 N.E.2d 649 [1995] [internal quotation marks and citations omitted]).

We have never stated that this list is exhaustive. While no "particularized inquiry" is necessary to determine whether a public benefit corporation should be treated like the State (because "for purposes of our capacity bar, every public benefit corporation is the State" [majority op. at 393, 67 N.Y.S.3d at 558, 89 N.E.3d at 1238]), when a public benefit corporation

seeks to sue the State, a court must determine whether its suit fits into one of the previously identified exceptions or some other exception deemed appropriate under the particular facts of the case. To reach that determination, a court must consider the common thread in the existing exceptions, which recognize the constitutional protections afforded state-created entities, as well as their legislative grant of authority. These exceptions are intended to ensure that state-created entities are not thwarted in achieving their constitutionally- and statutorily-mandated purposes within our democratic system of government.

The legislature may, of course, redefine, unchallenged, the powers and authority of a public benefit corporation (*Black Riv. Regulating Dist. v. Adirondack League Club,* 307 N.Y. 475, 487, 121 N.E.2d 428 [1954]), even dissolve the corporation. What it cannot do is prevent the corporation from exercising its authority to fulfill its statutorily-mandated purpose in compliance with the constitution and its enabling statutes.

To determine what a public benefit corporation may do, courts must scrutinize the public benefit corporation's laws, purpose, and the constitutional and statutory scheme into which it fits. As "[g]overnmental entities ... [are] artificial creatures of statute, ... [they] have neither an ****1245** inherent nor a common-law right to sue" (*Community Bd. 7 of Borough of Manhattan v. Schaffer,* 84 N.Y.2d 148, 155–156, 615 N.Y.S.2d 644, 639 N.E.2d 1 [1994]). Any capacity to challenge a state statute, then, "must be derived from the relevant enabling legislation or some other concrete statutory predicate" or, as relevant, our constitutional framework (*id.* at 156, 615 N.Y.S.2d 644, 639 N.E.2d 1). Courts should therefore attend to the nature and purpose of the public benefit corporation seeking to bring suit, examining "the legislative [and constitutional] scheme" that encompasses it, with special attention to the public benefit ***403** corporation's "power[s] and responsibilit[ies]" (*Matter of City of New York v. City Civ. Serv. Commn.,* 60 N.Y.2d 436, 441, 470 N.Y.S.2d 113, 458 N.E.2d 354 [1983]). Courts should look to the public benefit corporation's (i) organic legislation, (ii) other legislation, if any, that the corporation is charged with implementing, (iii) the public benefit corporation's "functional responsibilit[ies]" (*Community Bd. 7,* 84 N.Y.2d at 156, 615 N.Y.S.2d 644, 639 N.E.2d 1, quoting *****565** *Matter of City of New York v. City Civ. Serv. Commn.,* 60 N.Y.2d at 445, 470 N.Y.S.2d 113, 458 N.E.2d 354), (iv) indicia of legislative intent, and (v), as relevant or implicated, the State Constitution.

B. Second Certified Question: Claim–Revival Statutes Do Not Deprive a Party of a Non–Vested Due Process Right

The second certified question asks what standard governs the constitutionality of claim-revival statutes under our State Due Process Clause. The majority reformulates this question to focus narrowly on our prior decisions in *Robinson v. Robins Dry Dock & Repair Co.,* 238 N.Y. 271, 144 N.E. 579 (1924) and *Gallewski v. Hentz & Co.,* 301 N.Y. 164, 93 N.E.2d 620 (1950) (*see* majority op. at 393–394, 67 N.Y.S.3d at 557-59, 89 N.E.3d at 1238-39). I have no disagreement with the majority's analysis of these cases. However, I would go beyond harmonizing our holdings in prior claim-revival cases and take the opportunity this question presents to state expressly that a claim-revival statute is constitutional unless it deprives a party of a vested property interest.*

The United States Supreme Court has determined that "where lapse of time has not invested a party with title to real or personal property, a state legislature, consistently with the ***404** Fourteenth Amendment, may repeal or extend a statute of limitations, even after right of action is barred thereby, restore to the plaintiff [the] remedy, and divest the defendant of the statutory bar" (****1246** *Chase Securities Corp. v. Donaldson,* 325 U.S. 304, 311–312, 65 S.Ct. 1137, 89 L.Ed. 1628 [1945]). This "long[-standing] statement of the law of the Fourteenth Amendment" reflects the truism that statutes of limitations are not born of technical legal principles that underlie judicial decisionmaking, but instead are creatures of the legislature and represent policy judgments solely within the purview of elected officials (*id.* at 312, 65 S.Ct. 1137). As the Supreme Court has explained:

> "Statutes of limitation find their justification in necessity and convenience rather than in logic. They represent expedients, rather than principles. They are practical and pragmatic devices to spare the courts from litigation of stale claims, and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost. They are by definition arbitrary, and their operation does not discriminate between the just and the unjust claim,

> or the voidable and unavoidable delay. They have come into the law not through the judicial process but through legislation. They represent ***566** a public policy about the privilege to litigate. Their shelter has never been regarded as what now is called a 'fundamental' right or what used to be called a 'natural' right of the individual. [A party] may, of course, have the protection of the policy while it exists, but the history of pleas of limitation shows them to be good only by legislative grace and to be subject to a relatively large degree of legislative control" (*id.* at 314, 65 S.Ct. 1137 [citation omitted]).

Thus, the Court has explained that "[t]he Fourteenth Amendment does not make an act of state legislation void merely because it has some retrospective operation. What it does forbid is the taking of life, liberty or property without due process of law ... [and], certainly it cannot be said that lifting the bar of a statute of limitation so as to restore a remedy lost through mere lapse of time is *per se* an offense against the Fourteenth Amendment" (*id.* at 315–316, 65 S.Ct. 1137 [emphasis added]).

Even under our more expansive State Due Process Clause (*see e.g. People v. LaValle,* 3 N.Y.3d 88, 127, 783 N.Y.S.2d 485, 817 N.E.2d 341 [2004] [gathering **405** cases]), we are still concerned with an actual deprivation of life, liberty or property (*see* N.Y. Const., art. I, § 6 ["No person shall be deprived of life, liberty or property without due process of law"]). No such deprivation is at issue where a defendant seeks merely to cut short the time during which a plaintiff may sue. A defendant has no separate vested right in the timing of a lawsuit or the final date upon which a plaintiff may seek relief. Defendant may find it objectionable that the State Legislature saw fit to provide plaintiffs more time to pursue their remedy, but because the legislature did not violate any fundamental right of the defendant in doing so, defendant has no grounds to legally challenge the claim-revival statute.

Adopting the federal standard, which recognizes the legislature's authority to revive claims where defendant is not deprived of a vested interest, is logically, historically, and jurisprudentially sound. Besides, it would seem to operate functionally the same as the rule announced by the majority today—that a claim-revival statute does not violate due process so long as it constitutes "a reasonable response in order to remedy an injustice" (majority op. at 400, 67 N.Y.S.3d at 563, 89 N.E.3d at 1243). That rule would appear to be no barrier to enactment of claim-revival laws. The standard is easily met. It is not difficult to establish that a statute is "a reasonable response." Indeed, every time this Court has considered the issue in the past it has upheld the legislature's claim-revival statute as a proper response to the problem the legislature sought to address **1247 (*see Robinson,* 238 N.Y. at 280, 144 N.E. 579; *Gallewski,* 301 N.Y. at 174–175, 93 N.E.2d 620; *Matter of McCann v. Walsh Constr. Co.,* 282 App.Div. 444, 450, 123 N.Y.S.2d 509 [3d Dept.1953], *affd. without op.* 306 N.Y. 904, 119 N.E.2d 596 [1954]; *Hymowitz v. Eli Lilly & Co.,* 73 N.Y.2d 487, 514, 541 N.Y.S.2d 941, 539 N.E.2d 1069 [1989]; *see also In re World Trade Ctr. Lower Manhattan Disaster Site Litig.,* 846 F.3d at 69 [noting that "neither party has cited to us, nor have we found, any case in which any New York state court has struck down any statute reviving expired claims"]).

Certainly the judiciary is not the proper body to make the hard policy decisions behind these statutes. Instead, and appropriate to its position in our democratic system of government, the judiciary will defer to the legislative determination of what constitutes an injustice precisely because "there is no principled way for a court to test whether a particular injustice is 'serious' or whether a particular class of ***567** plaintiffs is blameless; [and] such moral determinations are left to the elected branches of government" (majority op. at 400, 67 N.Y.S.3d at 562, 89 N.E.3d at 1243).

406 Just as has been true every other time the Court has considered the constitutionality of a claim-revival statute, the rule announced by the majority will result in a finding that the statute does not deprive the defendant of due process. Rather than have a court attempt to balance policy considerations that are in fact consigned to the legislature, I would resolve the question directly and recognize the obvious: unless it impinges on a separate vested property right and not merely the hope of avoiding litigation, a claim-revival statute does not violate due process, because defendant has no fundamental right to a statute of limitations in perpetuity.

WILSON, J. (concurring).

I subscribe fully to the Court's answer to the second certified question. I write separately because I do not view the first certified question as involving an issue of "capacity," even though a few of our decisions describe it that way. Nor do I view it as a question of when a public benefit corporation should be treated as if it were the State. The question, as I see it, is

whether and under what circumstances a public benefit corporation can challenge a legislative act as unconstitutional. That is not a question of capacity, which has a firm and long-standing legal meaning relating to the binary ability to sue and be sued (or not), but of the power of a legislatively-created entity to challenge an action of its creator. The answer to that question is derived from the structure of government and the roles of the coordinate branches. We have most often articulated that doctrine not as one of capacity, but of "standing" or "power," which comes closer to describing the forces at work here.

The general presumption that legislatively created entities cannot challenge acts of the legislature derives from "the supreme power of the Legislature over its creatures" (*Black Riv. Regulating Dist. v. Adirondack League Club,* 307 N.Y. 475, 488, 121 N.E.2d 428 [1954] ["political power conferred by the Legislature confers no vested right as against the government itself"]). That presumption is rooted in the structure of government; legislatively-created entities, such as public benefit corporations, are subservient political entities. An entity's power is given by the legislature, and "[h]ow long it shall exist or how it may be modified or altered belongs exclusively to the people to determine" (*id.* at 488, 121 N.E.2d 428). Accordingly, it is the rare case when the entity may challenge an act of the legislature. Admittedly, our decisions have not always been ****1248** clear in terminology; from time to time, we have muddied the waters. The appropriate response ***407** today, as requested by the United States Court of Appeals for the Second Circuit, is to clear away the mud.

I.

> "There is a difference between capacity to sue, which is the right to come into court, and a cause of action, which is the right to relief in court. Incapacity to sue exists when there is some legal disability, such as infancy or lunacy or a want of title in the plaintiff to the character in which he sues. The plaintiff was duly appointed receiver and has a legal capacity to sue as such, and, hence, could bring the defendants into court by the service of a summons upon them even if he had no cause of action against them. On the other hand, an infant has no capacity to sue, and, hence, could not lawfully cause the defendants to be *****568** brought into court even if he had a good cause of action against them. Incapacity to sue is not the same as insufficiency of facts to sue upon" (*Ward v. Petrie,* 157 N.Y. 301, 311, 51 N.E. 1002 [1898]).

Capacity is defined as "the satisfaction of a legal qualification, such as legal age or soundness of mind, that determines one's ability to sue or be sued" (Black's Law Dictionary [10th ed. 2014], capacity). Capacity concerns "a litigant's power to appear and bring its grievance before the court" (*Community Bd. 7 of Borough of Manhattan v. Schaffer,* 84 N.Y.2d 148, 155, 615 N.Y.S.2d 644, 639 N.E.2d 1 [1994]). "Capacity may depend on a litigant's status or ... on authority to sue or be sued" (*Silver v. Pataki,* 96 N.Y.2d 532, 537, 730 N.Y.S.2d 482, 755 N.E.2d 842 [2001]). The capacity of governmental entities to sue can be either express or implied (*see* 84 N.Y.2d at 155–156, 615 N.Y.S.2d 644, 639 N.E.2d 1 ["Being artificial creatures of statute, (governmental) entities have neither an inherent nor a common-law right to sue. Rather, their right to sue, if it exists at all, must be derived from the relevant enabling legislation or some other concrete statutory predicate"]). Thus, where the power to sue is expressly granted, an entity has capacity to sue or be sued; no further inquiry is required.

Here, there is no question that the Battery Park City Authority (BPCA) has the capacity to sue and be sued. Its enabling legislation specifically grants it that power, unlike the community board in *Community Bd. 7,* which lacked any express statutory authority to sue or be sued (*compare* Public Authorities Law § 1974[1] [expressly providing that the BPCA "shall ***408** have power" "(t)o sue and be sued"], *with Community Bd. 7* at 157, 615 N.Y.S.2d 644, 639 N.E.2d 1 ["neither New York City Charter § 2800 nor the relevant ULURP provisions expressly authorize community boards to bring suit"]). Indeed, if the BPCA lacked legal capacity, this lawsuit would not exist, and Jimmy Nolan's Law—which extended the statute of limitations for actions against a public corporation—would have been futile.

Whether a natural person or artificial entity may sue or be sued is a question of capacity. Whether a governmental entity may sue to challenge a governmental action could properly be thought of as one of general justiciability, but equally could be expressed as one of standing, which is the way most of our decisions have framed it. Standing has two components: a jurisdictional component, so that if a party suffers no injury, it may not sue; and a prudential component, involving "rules of self-restraint," which includes the determination that a party is well-situated to bring an action on its own or on behalf of

another (*see Society of Plastics Indus. v. County of Suffolk,* 77 N.Y.2d 761, 773, 570 N.Y.S.2d 778, 573 N.E.2d 1034 [1991] [explaining the "prudential limitations" of standing include ****1249** "a general prohibition on one litigant raising the legal rights of another; a ban on adjudication of generalized grievances more appropriately addressed by the representative branches; and the requirement that the interest or injury asserted fall within the zone of interests protected by the statute invoked"]). We have cautioned that "the concept of capacity is often confused with the concept of standing, but the two legal doctrines are not interchangeable," and that "[t]he concept of a lack of capacity ... has also occasionally been intermingled with the analytically distinct concept of a failure to state a cause of action" (*Community Bd. 7,* 84 N.Y.2d at 154–155, 615 N.Y.S.2d 644, 639 N.E.2d 1), yet we sometimes have failed to heed our own warnings.

In the context of challenges brought by legislatively-created entities to actions of *****569** the legislature, we have usually described the issue as one of "power," "standing," or "status," rather than "capacity." The occasional imprecise introduction of the word "capacity" is traceable to a quirk of jurisdiction evident in *County of Albany v. Hooker,* 204 N.Y. 1, 97 N.E. 403 (1912), which was adopted many years later in *City of New York v. State of New York,* 86 N.Y.2d 286, 289, 631 N.Y.S.2d 553, 655 N.E.2d 649 (1995). In *Hooker,* the Appellate Division certified a question for appeal, casting it as: "Has the county of Albany legal capacity to bring this action?" Explaining that our court's "jurisdiction is restricted to a review of that question," we painstakingly noted that the "Revised ***409** Statutes of 1829 ... provided: 'Each county, as a body corporate, has capacity ... To sue and be sued in the manner prescribed by law"; and the Constitution of 1846 "provided that 'All corporations shall have the right to sue, and shall be subject to be sued in all courts, in like cases, as natural persons.' And such provision was continued in the Constitution of 1894"; and finally, that by statute, "A county is a municipal corporation." (204 N.Y. at 9–11, 97 N.E. 403.) After emphasizing the capacity of counties to sue and be sued, *Hooker* held that "the action cannot be maintained by the plaintiff, and the wrong, if any, created and existing by the acts of the legislature, must be corrected by the legislature" (*id.* at 18, 97 N.E. 403). *Hooker* rested on the proposition that counties, like "the several towns[,] are political divisions, organized for the convenient exercise of the political power of the state; and are no more corporations than the judicial, or the senate and assembly districts" (*id.,* quoting *Lorillard v. Town of Monroe,* 11 N.Y. 392, 394 [1854]).[1]

Most of the decisions cited by the majority do not express the underlying issue as one of capacity. In *Matter of County of Cayuga v. McHugh,* 4 N.Y.2d 609, 176 N.Y.S.2d 643, 152 N.E.2d 73 (1958), Cayuga County sued the State Commission of Correction. We did not mention capacity; instead, we reached the merits and held that the Commission's action was not arbitrary (****1250** *id.* at 613, 176 N.Y.S.2d 643, 152 N.E.2d 73). In *Town of Black Brook v. State of New York,* 41 N.Y.2d 486, 489, 393 N.Y.S.2d 946, 362 N.E.2d 579 (1977), there is likewise no mention of the town's capacity to sue; we determined that the town had "standing" to pursue its claim against the State. In *Village of Herkimer v. Axelrod,* 58 N.Y.2d 1069, 1071, 462 N.Y.S.2d 633, 449 N.E.2d 413 (1983), we held that a municipal hospital lacked "standing" to sue the State Department of Health; again, there is no mention of the hospital's lack of capacity.

As the majority notes, the case most closely analogous to the present matter, *Black Riv.,* speaks only in terms of "status," ***410** "standing" or "power," not capacity.[2] The majority concludes that *Black* *****570** *Riv.,* despite discussing standing and not capacity, was really about capacity and involved "no real issue of 'standing,' " because the District's condemnation proceeding against a private landowner would have been unlawful unless the District obtained a declaration that the Stokes Act was unconstitutional. To the contrary, the District clearly had the power to sue and be sued—else it could not have brought a condemnation proceeding irrespective of the Stokes Act's constitutionality. Moreover, our detailed rationale does not mention the inability of the District to sue or be sued, but rather the District's lack of standing to challenge an act of the legislature, which is supreme over it: "Inherent in the grant of legislative power is the plenary power to alter or revoke.... The interests of the plaintiffs then are only those of the State and the State cannot challenge its own acts" (307 N.Y. at 489, 121 N.E.2d 428). The District had no injury-in-fact from the Stokes Act, because the District itself could be eliminated or altered by legislative command.

The Appellate Division cases cited by the majority are largely in accord with our prior decisions, treating the issue as one of standing. *Matter of Town of Moreau v. County of Saratoga,* 142 A.D.2d 864, 531 N.Y.S.2d 61 (3d Dept.1988), *County of Rensselaer v. Regan,* 173 A.D.2d 37, 578 N.Y.S.2d 274 (3d Dept.1991), *affd.* 80 N.Y.2d 988, 592 N.Y.S.2d 646, 607 N.E.2d 793 (1992), and *City of Buffalo v. State Bd. of Equalization & Assessment,* 26 A.D.2d 213, 272 N.Y.S.2d 168 (3d Dept.1966) discuss the issue in terms of standing only, not capacity. The two Appellate Division cases cited by the majority that do characterize the issue as one of capacity, *Matter of New York Blue Line Council, Inc. v. Adirondack Park Agency,* 86 A.D.3d 756, 927 N.Y.S.2d 432 (3d Dept.2011) and *Matter of County of Nassau v. State of New York,* 100 A.D.3d 1052, 953 N.Y.S.2d 339 (3d Dept.2012), were decided after *City of New York,* and repeat the wayward "capacity" language therein.

What the relevant cases have in common—and as to this, I believe the majority and I agree—is that the restriction on governmental entities challenging legislative action derives ***411** from the intrinsic structure of our government and separation of powers concerns. The legislative branch has the power to create entities (including public benefit corporations) to carry out its functions; the legislature also has the power to change, affect, and even eliminate those entities entirely. Because it is within the legislature's plenary power ****1251** to do so, the courts generally have no role in determining the wisdom of legislative enactments regarding those entities. Judicial restrictions based on the separation of powers usually implicate justiciability, not capacity (*see Matter of New York State Inspection, Sec. & Law Enforcement Empls., Dist. Council 82, AFSCME, AFL–CIO v. Cuomo,* 64 N.Y.2d 233, 239, 485 N.Y.S.2d 719, 475 N.E.2d 90 [1984]; *Matter of Korn v. Gulotta,* 72 N.Y.2d 363, 381, 534 N.Y.S.2d 108, 530 N.E.2d 816 [1988]; *see also Jiggetts v. Grinker,* 75 N.Y.2d 411, 415, 554 N.Y.S.2d 92, 553 N.E.2d 570 [1990] ["policy choices ... are matters for the executive and legislative branches of government and the place to question their wisdom lies not in the courts but elsewhere"]). Indeed, the issue here is as much one of justiciability as of standing: *****571** in the ordinary case, the judiciary would not interfere in a legislative decision to eliminate, modify or impair an entity of its own creation. It is not our function to second-guess the wisdom of legislation that adversely affects only a legislatively-created entity. The majority explains that the rationale for the so-called "capacity bar" reflects concerns of "judicial restraint" and "governmental and public policy," and that the "capacity bar closes the courthouse doors to internal political disputes between the State and its subdivisions." Those principles, by their own words, implicate standing and justiciability, not capacity.

II.

I would tackle the certified question in stages. First, as the majority notes, we need to reformulate the question asked by the United States Court of Appeals for the Second Circuit, because the issue is much more specific than when a public benefit corporation should be treated like the State. Second, under the majority's test or mine, there is a "particularized inquiry," in the sense of an examination of facts particular to the entity's ability to sue and be sued (capacity) and its injury-in-fact and prudential concerns (standing and justiciability to me; capacity to the majority), but those are not the "particularized inquiry" of *John Grace & Co. v. State Univ. Constr. Fund,* 44 N.Y.2d 84, 88, 404 N.Y.S.2d 316, 375 N.E.2d 377 (1978). Third, the Second Circuit has invited us to indicate how this particular case should be resolved, and I would accept that invitation.

***412** A.

The cases identified by the Second Circuit in the first certified question, *John Grace & Co.* and *Clark–Fitzpatrick, Inc. v. Long Is. R.R. Co.,* 70 N.Y.2d 382, 521 N.Y.S.2d 653, 516 N.E.2d 190 (1987), are not germane to the question of whether a public benefit corporation can challenge a legislative act as unconstitutional. I agree with the majority on this. *Clark–Fitzpatrick* holds that punitive damages are not available against public benefit corporations, and *John Grace & Co.* holds that a statute giving contractors relief from fuel cost spikes during the energy crisis did not apply to contracts with public authorities, but was limited to contracts with the State itself. Those cases do not relate to the power of public benefit corporations to sue or be sued, or under what circumstances they might be able to challenge an act of the State. I would reformulate the certified question to ask whether and under what circumstances a public benefit corporation can challenge a statute as unconstitutional.

B.

Putting aside the labels of "standing," "status," "power," or "capacity" used in our decisions and the decisions of the lower courts, the case law can be distilled into the following propositions. First, the general rule is that a legislatively-created artificial ****1252** entity cannot challenge an action of the legislature, because that entity is a creature of the legislature, the legislature is vested with lawmaking authority, and the legislature may abolish or alter its creatures at will (*see Black Riv.* at 487, 121 N.E.2d 428 ["The number and nature of (the regulating district's) powers are within the State's absolute discretion and any alteration, impairment or destruction of those powers by the Legislature presents no question of constitutionality"]). In that sense, those subordinate legislative creations have no cognizable injury resulting from legislative action, because our system of government vests the lawmaking power in the legislature, not to be challenged by subordinate entities, whether those are municipalities, public authorities, public *****572** benefit corporations, or otherwise. Second, there are circumstances in which the general rule can be overcome. Those fall into two basic categories: (A) when the State Constitution grants a right specific to the subordinate governmental unit, that unit may challenge legislative action as violative of the specific constitutional grant to it (*see e.g. Town of Black Brook v. State of New York,* 41 N.Y.2d 486, 489, 393 N.Y.S.2d 946, 362 N.E.2d 579 [1977] ["When, indeed, ***413** a local government's claim is based on one of the protections of article IX (the Municipal Home Rule Law), the principle underlying the otherwise general rule prohibiting it from questioning legislative action affecting its powers is no longer applicable"]); and (B) when the challenged legislative action impairs the rights of a third party, and the subordinate governmental unit is both affected and in a good position to bring the claim when compared to other potential litigants, that unit may challenge the legislative action (*see e.g. Patterson v. Carey,* 41 N.Y.2d 714, 724, 395 N.Y.S.2d 411, 363 N.E.2d 1146 [1977] [allowing the Jones Beach Parkway Authority to challenge section 153–c of the Public Authorities Law as violating the portions of the New York Constitution setting forth the Comptroller's powers]).

In category (A), the traditional concerns of standing are satisfied: the injury to the subordinate entity is direct and the right constitutionally guaranteed to it. In category (B), the concerns animating prudential standing come into play: there must be some actual injury to the subordinate governmental entity, but that alone is not sufficient; the courts must determine as a matter of prudence whether it is appropriate for the entity to bring the suit, taking into account the strong presumption that legislatively-created entities cannot challenge legislative actions (*see Black Riv.* at 488, 121 N.E.2d 428 ["The concept of the supreme power of the Legislature over its creatures has been respected and followed in many decisions"]) and the "general prohibition on one litigant raising the legal rights of another" (*Society of Plastics,* 77 N.Y.2d at 773, 570 N.Y.S.2d 778, 573 N.E.2d 1034). Generally, if the third parties are the better-suited litigants, then the entity would not have standing to sue. However, sometimes the entity will be the better-suited litigant, and standing doctrine allows suit in those instances. In this regard, the inquiry is necessarily case-specific, and could be characterized as "particularized." Even the consideration of the applicability of the majority's four exceptions drawn from *City of New York* is case-specific—as is each of our prior decisions and of the decisions of the lower courts. Those same factors would figure into the determination if the issue was framed as one of justiciability rather than standing: a claim by a legislatively-created entity purporting to challenge a statute should not be justiciable if there is no specific constitutional guarantee to that entity and the only injury is to the entity itself, or the injury is to some third party who is better suited to bring the claim on its own behalf.

****1253** Our case that best encompasses the above structure is *Patterson v. Carey,* 41 N.Y.2d 714, 395 N.Y.S.2d 411, 363 N.E.2d 1146 (1977). The Jones Beach Parkway ***414** Authority raised the parkway toll from 10¢ to 25¢, and the State enacted legislation repealing the toll. The Jones Beach Parkway Authority and the trustee for bondholders sued the State, challenging the legislation as unconstitutional. Although the decision does not expressly delineate between plaintiffs and claims, the structure of the decision does so quite clearly. As to the claims that the legislation unconstitutionally impaired the Authority's finances and with it, the value of the bonds, we were silent as to the impairment *****573** of the Authority's finances, focusing exclusively on the bondholders' rights when finding the statute unconstitutional (*see id.* at 720–722, 395 N.Y.S.2d 411, 363 N.E.2d 1146). In contrast, when addressing the claim that the legislation's restriction on the State Comptroller's procedures for auditing the Authority encroached on the Comptroller's constitutional authority, we focused exclusively on the Authority's claim (*see id.* at 723–725, 395 N.Y.S.2d 411, 363 N.E.2d 1146). Implicitly, we determined that the Authority did not have standing to pursue the claims relating to impairment of its finances, though the bondholders did, and the Authority had sufficient standing to challenge the statute's restriction of the Comptroller's auditing powers, because the Authority was affected by the restrictions and well-suited to challenge them. The majority, too, understands *Patterson* as a decision about standing, not capacity.

The four exceptions set out in *City of New York* are an application of the above principles in the context of municipal

corporations, which—unlike public benefit corporations—have constitutional protections running directly to them. For that reason, however unlikely it is that a county, city, town or village would be able to challenge a legislative action, the possibility that a public benefit corporation would be able to do so is substantially more remote.

C.

Unlike the majority, I would accept the Second Circuit's invitation to provide "specific guidance ... as to the appropriate result of the inquiry in this particular case" (*In re World Trade Ctr. Lower Manhattan Disaster Site Litig.,* 846 F.3d 58, 70 [2d Cir.2017], *certified question accepted* 28 N.Y.3d 1159, 49 N.Y.S.3d 89, 71 N.E.3d 581 [2017]). It is uncommon for the Second Circuit to suggest that we provide guidance as to the proper disposition of a case before it, but in this case, the Second Circuit's suggestion makes eminent sense. The legislature made a choice, in the wake of an unprecedented terrorist attack, to extend the statute of limitations ***415** for claims brought by first responders. The questions here purely concern New York public policy surrounding relief efforts in the wake of that attack—including what future first responders might expect from the legislature; the structure of New York State government; and the power of the New York State Legislature. Those are not in any sense federal questions, and relate powerfully to New York's status as a sovereign state. As implicitly recognized by the Second Circuit's invitation, New York State has an overriding interest in deciding the lawfulness of Jimmy Nolan's Law, which indisputably complies with the Due Process Clause of the Fourteenth Amendment.

I cannot speak for the majority. Whether thought of as "capacity," "justiciability" or "standing," I believe the clear result here is that the BPCA may not challenge the constitutionality of Jimmy Nolan's Law. No constitutional protection runs directly to the BPCA entitling it to ****1254** avoid claim-revival statutes, the BPCA does not seek to vindicate the constitutional rights of others and, even if it did, there is no showing that it would be better situated to vindicate those rights than the third parties would be.

Chief Judge DiFIORE and Judges RIVERA, STEIN, FAHEY and GARCIA concur, Judge RIVERA in a concurring opinion; Judge WILSON concurs in a separate concurring opinion.

Following certification of questions by the United States Court of Appeals for the Second Circuit and acceptance of the questions *****574** by this Court pursuant to section 500.27 of this Court's Rules of Practice, and after hearing argument by counsel for the parties and consideration of the briefs and the record submitted, first certified question answered in the negative and second certified question, as reformulated, answered in accordance with the opinion herein.

All Citations

30 N.Y.3d 377, 89 N.E.3d 1227, 67 N.Y.S.3d 547, 2017 N.Y. Slip Op. 08166

Footnotes

1 Though asserted in Federal District Court, New York law furnished the substantive law governing these claims (*see* Air Transportation Safety and System Stabilization Act, Pub. L. 107–42, § 408[b][2], 115 U.S. Stat. 241 [Sept. 22, 2001]; *In re World Trade Ctr. Lower Manhattan Disaster Site Litig.,* 846 F.3d at 62 n. 2).

2 In line with these precedents, all parties agree that the relevant bar to BPCA's challenge to Jimmy Nolan's Law, if it exists at all, is

a capacity bar. None of the parties have asked us to reconfigure the rule as one of standing.

3 We disagree with the assertion in Judge Wilson's concurrence that capacity is a "binary," all-or-nothing proposition (Wilson, J., concurring op. at 406, 67 N.Y.3d at 567, 89 N.E.3d at 1247). To the contrary, we have recognized that "[c]apacity is examined with a view towards the relief sought" (*Excess Line Assn. of N.Y. [ELANY] v. Waldorf & Assoc.,* 30 N.Y.3d 119, 123, 65 N.Y.S.3d 85, 87 N.E.3d 117 [2017]), which means that the same party may have capacity to bring one kind of claim but not another (*see Matter of Graziano v. County of Albany,* 3 N.Y.3d 475, 479–481, 787 N.Y.S.2d 689, 821 N.E.2d 114 [2004]; *Silver v. Pataki,* 96 N.Y.2d 532, 537–538, 730 N.Y.S.2d 482, 755 N.E.2d 842 [2001]).

4 Our capacity rule is ultimately derived from a line of analogous federal cases sometimes referred to as the "*Hunter* cases" (*see Hunter v. Pittsburgh,* 207 U.S. 161, 28 S.Ct. 40, 52 L.Ed. 151 [1907]; *see also Williams v. Mayor of Baltimore,* 289 U.S. 36, 53 S.Ct. 431, 77 L.Ed. 1015 [1933]; *Trenton v. New Jersey,* 262 U.S. 182, 43 S.Ct. 534, 67 L.Ed. 937 [1923]). Other state and federal courts, including the Supreme Court of the United States, have identified some possible additional exceptions to the *Hunter* cases (*see e.g. Gomillion v. Lightfoot,* 364 U.S. 339, 342–345, 81 S.Ct. 125, 5 L.Ed.2d 110 [1960] [equal protection challenges to race-based redistricting]; *Branson Sch. Dist. RE–82 v. Romer,* 161 F.3d 619, 628–629 [10th Cir.1998] [Supremacy Clause challenge], *cert. denied* 526 U.S. 1068, 119 S.Ct. 1461, 143 L.Ed.2d 546 [1999]; *Rogers v. Brockette,* 588 F.2d 1057, 1067–1071 [5th Cir.1979] [Supremacy Clause challenge]; *Star–Kist Foods, Inc. v. County of Los Angeles,* 42 Cal.3d 1, 227 Cal.Rptr. 391, 719 P.2d 987 [1986 in bank] [Dormant Commerce Clause challenge], *cert. denied* 480 U.S. 930, 107 S.Ct. 1565, 94 L.Ed.2d 758 [1987]; *but see Indian Oasis–Baboquivari Unified Sch. Dist. No. 40 of Pima County, Ariz. v. Kirk,* 91 F.3d 1240, 1242–1243 [9th Cir.1996] [rejecting Supremacy Clause challenge], *appeal dismissed* 109 F.3d 634 [9th Cir.1997 en banc]). We have not yet considered whether analogous exceptions exist for purposes of New York's capacity rule. In any event, they are not relevant here.

5 BPCA argues that this case, too, involves a public benefit corporation's relationship with private third parties—the plaintiffs—and therefore falls within the "particularized inquiry" line of cases. This argument is unavailing. We are not distinguishing the "particularized inquiry" cases on the grounds that they only involved disputes between public benefit corporations and private parties—clearly, not all of them did (*see e.g. Miller,* 70 N.Y.2d 903, 524 N.Y.S.2d 386, 519 N.E.2d 297). Rather, the distinction is that, in those cases, the right, privilege or duty of the State claimed to be applicable to the public benefit corporation was one that regulated the State's legal relations with private parties, as opposed to a rule, such as our capacity rule, that only governs intrastate relations.

6 Separately, the Court held that the law was constitutional on the merits (*see id.*).

7 The Special Term appeared to be relying on the United States Supreme Court's suggestion in *Allen,* on writ of certiorari from this Court, that local public officials who took an oath to support the United States Constitution had a "personal stake in the outcome" of the litigation (*Allen,* 392 U.S. at 241 n. 5, 88 S.Ct. 1923), thus satisfying the standing requirements articulated in *Baker* (*see Baker,* 369 U.S. at 204, 82 S.Ct. 691).

8 Although the parties disagree as to what the standard of review is, all parties agree that it should reflect our existing case law in some sense. Neither the plaintiffs nor the Attorney General have asked us to adopt the federal standard in this case.

* As a general rule, the Court considers only those arguments raised by the parties or which arise by necessity in our analysis of the questions explicitly presented. These limitations are grounded in prudential concerns closely connected with the consideration of concrete cases and controversies. However, here we are not deciding the appeal of a case, subject to our usual jurisdictional and reviewability limitations. Instead, we are presented with a certified question from the Second Circuit, which it has invited us to reformulate as we deem appropriate. Thus, this case does not raise the usual prudential concerns that arise when we pronounce on issues not properly developed below or by the parties.

Moreover, the argument I advance here is hardly novel or in need of greater prior elaboration. As the majority's comprehensive discussion of our case law makes abundantly clear, the constitutionality of claim-revival statutes has been before us on several earlier occasions, and each time this Court has discussed the Supreme Court's Fourteenth Amendment analysis. I do no more here. We are in no way disadvantaged by deciding the applicability of the federal rule now, when it is obvious the Court is already well familiar with the issues, our constitutional standards, and the federal analysis.

1 Although it might be tempting to read *Hooker* as suggesting that counties have capacity to sue in their proprietary role but not in their governmental role, that reading is unsatisfactory, because counties can be sued in their governmental role, and can sue private citizens while acting in their governmental role. *Hooker* must be understood in its jurisdictional posture, where this Court, constrained to answer the question posed by the Appellate Division without the ability to reformulate it to remove the word "capacity," "assumed that by the question submitted it is intended that this court shall determine whether the county has capacity to maintain the *particular action* stated in the complaint" (204 N.Y. at 9, 97 N.E. 403 [emphasis added]). That emendation, though restating the word "capacity," emphasizes that the court's rule is claim-specific, meaning it is not one of capacity, but of standing, justiciability or existence of a cause of action.

2 In *Black Riv.,* the Black River Regulating District challenged the Stokes Act as unconstitutional. We held that

"the plaintiffs are without power to challenge the validity of the act or the Constitution ...

"The issuance of certificates of indebtedness does not confer upon plaintiffs an independent status by which they have standing, either as a body politic or as individuals, to test the validity of the Stokes Act" (307 N.Y. at 489, 121 N.E.2d 428).

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70 N.Y.2d 225
Court of Appeals of New York.

In the Matter of Hansel L. McGEE, Respondent
v.
Jeffrey R. KORMAN, Appellant, and Board of Elections of the City of New York, Respondent.
(And a Related Proceeding.)
Jeffrey R. Korman and Lee L. Holzman, Appellants.
In the Matter of Jeffrey R. KORMAN and Lee L. Holzman, Appellants
v.
Alice SACHS et al., Constituting the Board of Elections of the City of New York, and Lorraine Backal, Respondents.
(And Related Proceedings.)
Lorraine Backal, Respondent.

Aug. 27, 1987.

Synopsis
Potential candidates filed designating petitions for nomination as candidates for office of surrogate. The Board of Elections invalidated one of the petitions and validated the other petition. Judicial review was sought. The Supreme Court, Bronx County, Mugglin, J., entered judgment rendering both petitions invalid. Potential candidates appealed. The Appellate Division, 518 N.Y.S.2d 976 and 518 N.Y.S.2d 940, reversed. Appeals were taken. The Court of Appeals held that: (1) the Appellate Division could not declare Election Law unconstitutional on grounds that were first advanced at the Appellate Division, and (2) failure to secure requisite signatures on designating petitions was not excused by shortened signature period.

Orders of the Appellate Division reversed and judgments of the Supreme Court reinstated.

Attorneys and Law Firms

***227 ***350 **236** Paul A. Victor, New York City, for appellants.

***228** John Patrick Deveney, New York City, for Hansel L. McGee, respondent.

Kathryn E. Freed, New York City, for Lorraine Backal, respondent.

Robert Abrams, Atty. Gen. (Tarquin Jay Bromley, New York City, O. Peter Sherwood and Lawrence S. Kahn, Albany, of counsel), in support of the constitutionality of New York State Election Law § 6–136.

***229 OPINION OF THE COURT**

PER CURIAM.

The Appellate Division, in appeals taken by contesting candidates, Lee L. Holzman, Hansel McGee and Lorraine Backal, and an ***351** objector, Jeffrey R. Korman, has declared **237 Election Law § 6–136(2)(b) unconstitutional, concluding that by requiring candidates for the same elective office in counties of substantially equivalent population to collect different numbers of signatures, the statute denied equal protection.

Holzman, Backal and McGee, all filed designating petitions for nomination as the Democratic candidate for the office of Surrogate of Bronx County in the September 15, 1987 Democratic primary election, the office having become vacant on July 2, 1987, by virtue of the removal of the sitting Surrogate. Cross challenges to the petitions were filed with the Board of Elections by the candidates and Korman. The Board invalidated the McGee petition because it contained fewer than the requisite 5,000 valid signatures of registered Democratic voters residing in Bronx County, and validated the Holzman and Backal petitions. Following these determinations, petitions and cross petitions to validate and invalidate the designating petitions on various grounds were filed in Supreme Court. McGee and Backal raised, among other things, a constitutional challenge to the 5,000–signature requirement of Election Law § 6–136(2)(b),* as being unduly burdensome in light of the shortened time period for collecting signatures following the recent removal of the sitting Surrogate, and thus unconstitutionally *230 impeding access to the ballot. They argued that instead of the normal 37 days provided by the election calendar for the September primary (*see,* Election Law § 6–134 [6]; § 6–158[1]), they were impermissibly afforded only 15 days.

Supreme Court rejected this constitutional argument. That court, as is relevant here, invalidated the Backal designating petition, finding that it contained fewer than the 5,000 valid signatures required under Election Law § 6–136(2)(b). In a separate order, the court dismissed McGee's petition to validate his designating petition, concluding that he had not secured the requisite number of valid signatures.

The only constitutional issue presented by either Backal or McGee before Supreme Court, or in related Federal court proceedings, and in respect to which notice was given to the Attorney-General (*see,* Executive Law § 71; CPLR 1012), was the contention that the 5,000–signature requirement, under the circumstances, unconstitutionally interfered with access to the ballot. Nonetheless, at the Appellate Division, Backal and McGee advanced an alternative constitutional argument. They maintained that the requirement of Election Law § 6–136(2)(b) that a candidate for countywide office within the City of New York submit 5,000 signatures, while requiring a candidate for the identical office in a county of comparable population outside the City of New York to submit only 2,000 signatures, violates principles of equal protection and the one-person-one-vote rule (*see, Gray v. Sanders,* 372 U.S. 368, 381, 83 S.Ct. 801, 809, 9 L.Ed.2d 821).

In separate orders, the Appellate Division declared Election Law § 6–136(2)(b) invalid, reversed, on the law, the judgments of Supreme Court, and directed that the names of Backal and McGee be placed on the ballot for the September 15 Democratic primary election. The Appellate Division rejected the contention of Backal and McGee that the signature requirement unconstitutionally burdened them because of the shortened time period, and predicated its determination solely upon the equal protection issue raised for the first time in that court. The court took judicial notice ***352** of the fact that there are counties outside **238 the City of New York which have populations exceeding that of Bronx County, where candidates for the office of Surrogate need file only 2,000 signatures, and found the challenged provision facially invalid in that it provides for geographically based disparate treatment of candidates for the same office in counties of substantially equivalent population. We now reverse.

*231 Enactments of the Legislature—a coequal branch of government—may not casually be set aside by the judiciary. The applicable legal principles for finding invalidity are firmly embedded in the law: statutes are presumed constitutional; while the presumption is rebuttable, invalidity must be demonstrated beyond a reasonable doubt (*Wiggins v. Town of Somers,* 4 N.Y.2d 215, 218–219, 173 N.Y.S.2d 579, 149 N.E.2d 869). Where a statute is challenged as irrational or arbitrary, a court may even hypothesize the motivations of the State Legislature to discern any conceivable legitimate objective promoted by the provision under attack (*Maresca v. Cuomo,* 64 N.Y.2d 242, 251, 485 N.Y.S.2d 724, 475 N.E.2d 95). The drastic step of striking a statute as unconstitutional is to be taken only as a last resort (*Wiggins v. Town of Somers,* 4 N.Y.2d 215, 173 N.Y.S.2d 579, 149 N.E.2d 869, *supra*).

A determination of invalidity—with ramifications beyond the parties and their immediate dispute—necessarily must be founded upon an adequate record, the parties having properly raised their contentions and presented their proof in the lower

courts. Also important to the procedure for challenging the constitutionality of a State statute is notification to the Attorney-General (*see,* Executive Law § 71; CPLR 1012). This opportunity for participation by the State's chief legal officer insures that all of the people of the State may be represented when the constitutionality of their laws is put in issue. Notice to the Attorney-General serves the additional function of ensuring the development of an adequate record upon which the court may base its determination.

Here, the equal protection ground upon which Backal and McGee ultimately prevailed was first advanced at the Appellate Division. Despite conflicting and qualified representations made before us on oral argument, the record reveals no earlier reference to this ground. To the contrary, it indicates that Backal and McGee were pressing an entirely different constitutional challenge—that the abbreviated period for collecting signatures denied them equal access to the ballot—and so advised the Attorney-General. There is no evidence that any notice was provided to the Attorney-General that the differing signature requirements based upon geographic location were being challenged as unconstitutional. Thus, the mechanism designed to afford a necessary opportunity to examine fully particular challenges to the constitutionality of statutes was not set in motion and not satisfied. As was demonstrated in this case, such failure not only ignores fundamental principles of separation of powers, but also adversely ***232** affects the judicial review process which requires a full presentation and record upon which constitutional determinations must be based.

We conclude, for the reasons stated by the lower courts, that respondents' challenge based on the shortened signature period, advanced by them in support of affirmance, is without merit.

The orders of the Appellate Division, 518 N.Y.S.2d 976, 518 N.Y.S.2d 940, should be reversed, and the judgments of Supreme Court reinstated.

WACHTLER, C.J., and SIMONS, KAYE, ALEXANDER, TITONE, HANCOCK and BELLACOSA, JJ., concur in PER CURIAM opinion.

In *Matter of McGee v. Korman:* Order reversed, without costs, and judgment of Supreme Court, Bronx County, dismissing the petition to validate the McGee designating petition reinstated.

In *Matter of Korman v. Sachs:* Order reversed, without costs, and judgment of Supreme Court, Bronx County, granting *****353 **239** the petition to invalidate the Backal designating petition reinstated.

All Citations

70 N.Y.2d 225, 513 N.E.2d 236, 519 N.Y.S.2d 350

Footnotes

* Election Law § 6–136(2)(b) provides, in pertinent part:

"2. All other petitions must be signed by not less than five per centum, as determined by the preceding enrollment, of the then enrolled voters of the party residing within the political unit in which the office or position is to be voted for, provided, however, that for the following public offices the number of signatures need not exceed the following limits * * *

"(b) For any office to be filled by all the voters of any county or borough within the city of New York, five thousand signatures".

Paragraph (d) of the same section provides: "(d) For any office to be filled by all the voters of cities or counties, except the city of New York and counties therein, containing more than two hundred fifty thousand inhabitants according to the last preceding federal enumeration, two thousand signatures".

513 N.E.2d 236, 519 N.Y.S.2d 350

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427 F.Supp.3d 286
United States District Court, N.D. New York.

Frank J. MEROLA, Plaintiff,
v.
Andrew M. CUOMO et al., Defendants.

1:19-cv-899 (GLS/TWD)
|
Signed 12/13/2019

Synopsis

Background: County clerk brought action against State of New York to challenge New York's Driver's License Access and Privacy Act (DLAPA), which, among other things, expanded approved forms of identification accepted for obtaining driver's license. State moved to dismiss, and clerk sought preliminary injunction.

Holdings: The District Court, Gary L. Sharpe, Senior District Judge, held that:

clerk had standing to challenge DLAPA as preempted by federal law, but

clerk lacked capacity to sue under New York law to challenge DLAPA.

Motions granted in part and denied in part.

Attorneys and Law Firms

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FOR AMICUS CURIAE: HON. WILLIAM TONG, Attorney General of Connecticut OF COUNSEL: JOSHUA PERRY, ESQ., P.O. Box 120, 55 Elm Street, Hartford, CT 06106.

MEMORANDUM-DECISION AND ORDER

Gary L. Sharpe, Senior District Judge

I. Introduction

To the dissatisfaction of the parties and public-at-large, courts are at times unable to pass upon the merits of a case for one ***288** reason or another. There are various reasons why the ultimate question for which parties seek judicial review cannot be broached. This is such a case. It should be noted that cases like this one, where the court is constrained to dismiss without deciding the legal issues at play — here, a challenge to New York's Driver's License Access and Privacy Act (DLAPA),[1] more commonly referred to as the "Green Light Law" — does not mean in the vernacular that the "law is legal," despite what any politician may claim, (Dkt. No. 27, Attach. 7 at 2). Indeed the court has not and cannot pass upon that question no matter how compelling the arguments are on one side or the other. With that caveat in mind, the court turns to the issues now before it.

Pending are a motion for a preliminary injunction filed by plaintiff Frank J. Merola, Clerk of the County of Rennselaer, New York, and a cross motion to dismiss pursuant to Rule 12(c) of the Federal Rules of Civil Procedure[2] filed by defendants Andrew M. Cuomo, Governor of the State of New York, Letitia A. James, Attorney General of the State of New York, and Mark J.F. Schroeder, Commissioner of the New York State Department of Motor Vehicles (DMV) (hereinafter collectively referred to as "the State"). (Dkt. Nos. 27, 30.)[3] For the reasons that follow, the State's cross motion to dismiss is granted, and Merola's motion for a preliminary injunction is denied as moot.

II. Background[4]

The DLAPA, which goes into effect on December 14, 2019, modifies sections 201, ***289** 502, and 508 of the New York Vehicle and Traffic Law. *See* L. 2019, ch 37. The amendments alter the New York State driver's licensing scheme in three material ways that are at issue here by: (1) forbidding disclosure or sharing of applicant information except under limited circumstances; (2) expanding the approved forms of identification accepted for obtaining a driver's license; and (3) requiring prompt notice to an individual about whom a request for information was made by "any agency that primarily enforces immigration law." *Id.* §§ 2-6. Some county clerks throughout the State of New York, like Merola, are required to perform DMV functions, such as the issuance of driver's licenses. *See* N.Y. Veh. & Traf. Law § 205(1).

Broadly speaking, Merola challenges the DLAPA as prempted by federal law. (Compl. ¶¶ 40, 78, Dkt. No. 1.) He contends that he confronts a dilemma: comply with the DLAPA and violate the United States Constitution and expose himself to federal criminal liability, or refuse to comply with the DLAPA and be subject to removal from office and a loss of funding. (Compl. ¶ 77; Dkt. No. 32 at 5-6.) The State promotes this legislation as advancing "public safety and economic growth." (Dkt. No. 30, Attach. 1 at 1.)

Some sixteen days before this action was commenced, a near-identical case was commenced in the United States District Court for the Western District of New York, involving a similar challenge to the DLAPA. (*Kearns v. Cuomo*, Dkt. No. 1, 1:19-cv-902.) The plaintiff there, Michael Kearns, is the Clerk of Erie County, and he brought his action against the same defendants named in this matter. (*See generally id.*) That action has since been dismissed for lack of standing and an appeal is pending with the Second Circuit. *See Kearns v. Cuomo*, 415 F.Supp.3d 319 (W.D.N.Y. 2019), *appeal docketed*, No. 19-3769 (2d Cir. Nov. 13, 2019).

III. Standards of Review

"The standard for addressing a Rule 12(c) motion for judgment on the pleadings is the same as that for a Rule 12(b)(6) motion to dismiss for failure to state a claim." *Wright v. Monroe Cmty. Hosp.*, 493 F. App'x 233, 234 (2d Cir. 2012) (internal

quotation marks and citation omitted). For a full discussion of the governing standard, the court refers the parties to its prior decision in *Ellis v. Cohen & Slamowitz, LLP*, 701 F. Supp. 2d 215, 218 (N.D.N.Y. 2010), *abrogated on other grounds by Altman v. J.C. Christensen & Assocs., Inc.*, 786 F.3d 191 (2d Cir. 2015).

As mentioned above, *see supra* note 2, to the extent that standing is challenged, the State's motion is properly considered under Rule 12(b)(1). Under Rule 12(b)(1), the standard of review is similar to that of Rule 12(b)(6), except that the court "may refer to evidence outside the pleadings ... [and a] plaintiff asserting subject matter jurisdiction has the burden of proving by a preponderance of the evidence that it exists." *Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000) (citations omitted).

IV. Discussion

A. Cross Motion to Dismiss

The State makes a handful of arguments in support of its cross motion to dismiss. (Dkt. No. 30, Attach. 1.) Two of them urge dismissal for the threshold issues of lack of standing and capacity, while the others go to the merits of Merola's claims. (*Id.* at 9-35.)

***290** *i. Standing*

Standing is a "threshold question," which should be addressed at the outset of the litigation. *See Nat'l Org. for Women, Inc. v. Scheidler*, 510 U.S. 249, 255, 114 S.Ct. 798, 127 L.Ed.2d 99 (1994). The broad contours of standing — an injury-in-fact, causation, and redressability, *see Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992) — and the finer points were discussed at length in *Kearns v. Cuomo*, 415 F.Supp.3d 319, 2019 WL 5849513, but Merola's sole theory of standing here is different from that proffered in *Kearns*. (Dkt. No. 32 at 3-9.)

Relying on *Board of Education of Central School District No. 1 v. Allen*, 392 U.S. 236, 88 S.Ct. 1923, 20 L.Ed.2d 1060 (1968), and *Aguayo v. Richardson*, 473 F.2d 1090 (2d Cir. 1973), Merola contends that he "unquestionably [has] established oath-of-office standing to pursue his claims in his official capacity as County Clerk." (Dkt. No. 32 at 3.)[5] While the State attempted to get out in front of this theory in its memorandum of law filed in support of its cross motion, it primarily focused on other bases of standing, or the lack thereof. (Dkt. No. 30, Attach. 1 at 11-20.) That is, in part, the fault of the briefing schedule, which was set to accommodate the sensitive timing issues in this case, and the State has not had the opportunity[6] to address Merola's specific contentions about oath-of-office standing raised in his response. In any case, the State argues that compliance with the DLAPA is not at odds with either the Federal or State Constitutions. (*Id.* at 19.) It claims further that Merola's subjective belief that his compliance would violate the Federal Constitution is insufficient, and his argument about the adverse consequences that would befall him (removal from office and loss of licensing revenue) are "highly speculative and premature." (*Id.* at 19-20.)

In *Allen*, the Supreme Court indicated, in dicta, the existence of standing where a plaintiff who "ha[s] taken an oath to support the United States Constitution" is "in the position of having to choose between violating [his] oath and taking a step—refusal to comply with [a challenged state statute]—that would be likely to bring [his] expulsion from office and also" a loss of funding. 392 U.S. at 241 n.5, 88 S.Ct. 1923. This doctrine, sometimes called the " 'dilemma' theory of standing," has been recognized by the Supreme Court, Second Circuit, and other Circuits in subsequent cases, although it is infrequently invoked. *Bd. of Educ. of Mt. Sinai Union Free Sch. Dist. v. N.Y. State Teachers Ret. Sys.*, 60 F.3d 106, 112 (2d Cir. 1995); *see* ***291** *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 544 n.7, 106 S.Ct. 1326, 89 L.Ed.2d 501 (1986); *Aguayo*, 473 F.2d at 1100.

Here, Merola took an oath of office in which he "solemnly sw[ore] that [he] w[ould] support the constitution of the United

States, and the constitution of the State of New York, and that [he] w[ould] faithfully discharge the duties of the office ..., according to the best of [his] ability." (Dkt. No. 27, Attach. 2 ¶ 8.) He argues that the only requirement he need meet in order to establish oath-of-office standing is his good faith belief that compliance with the DLAPA would require him to violate the Federal Constitution. (Dkt. No. 32 at 5.) Merola disputes the applicability of *Finch v. Mississippi State Med. Association, Inc.*, 585 F.2d 765, 774 (5th Cir. 1978), *modified*, 594 F.2d 163 (5th Cir. 1979), relied upon by the State, (Dkt. No. 30, Attach. 1 at 19-20), which held that a mere belief that a statute violates the constitution is insufficient to establish standing, *see Finch*, 585 F.2d at 774, as at odds with *Allen* and *Aguayo*, and not binding on this court in any event, (Dkt. No. 32 at 6). Alternatively, Merola argues that he has adequately demonstrated a realistic threat of removal from office or the loss of funding should those requirements be deemed a part of the test for oath-of-office standing by this court. (*Id.* at 6-7.) Because the briefing is lacking on the finer points, and Merola has made a colorable argument for standing based on his oath of office, (*id.* at 5-6), dismissal on this ground would be inappropriate at this juncture.

ii. Capacity

The State contends that Merola lacks capacity to sue under New York law and that he cannot demonstrate that he should benefit from an exception to the general bar preventing municipalities and their officers from challenging state legislation. (Dkt. No. 30, Attach. 1 at 9-11.) In opposition, Merola argues that the DLAPA would require him to violate a federal constitutional proscription, namely the Supremacy Clause, as well as a state constitutional proscription "on voting by non-citizens," and that he, therefore, has capacity to sue despite the general bar against suits by municipal officers. (Dkt. No. 32 at 9.) Because Merola lacks capacity as discussed below, dismissal is required.

Capacity, juxtaposed with standing, "is conceived to be a party's personal right to litigate in a federal court." 6A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1542 (3d ed. Supp. 2019). The "[c]apacity to sue or be sued is determined," as relevant here, "by the law of the state where the court is located." Fed. R. Civ. P. 17(b)(3). In New York, municipalities, and, by extension, their officers, lack capacity to sue because they "are merely subdivisions of the State, created by the State for the convenient carrying out of the State's governmental powers and responsibilities as its agents." *City of New York v. New York*, 86 N.Y.2d 286, 290, 631 N.Y.S.2d 553, 655 N.E.2d 649 (1995). There are limited "exceptions to the general rule barring local governmental challenges to State legislation," only one of which is at issue here: "where 'the municipal challengers assert that if they are obliged to comply with the State statute they will by that very compliance be forced to violate a constitutional proscription.' " *Id.* at 291-92, 631 N.Y.S.2d 553, 655 N.E.2d 649 (quoting *In re Jeter v. Ellenville Cent. Sch. Dist.*, 41 N.Y.2d 283, 287, 392 N.Y.S.2d 403, 360 N.E.2d 1086 (1977) (citing *Board of Education of Central School District No. 1 v. Allen*, 20 N.Y.2d 109, 281 N.Y.S.2d 799, 228 N.E.2d 791 (1967), *aff'd*, 392 U.S. 236, 88 S.Ct. 1923, 20 L.Ed.2d 1060 (1968))); *see* ***292** *Bd. of Educ. of Roosevelt Union Free Sch. Dist. v. Bd. of Trustees of State Univ. of New York*, 185 Misc. 2d 704, 708, 713 N.Y.S.2d 908 (Sup. Ct. 2000), *aff'd as modified*, 282 A.D.2d 166, 723 N.Y.S.2d 262 (3d Dep't 2001).

Merola contends that his compliance with the DLAPA will force him to violate proscriptions in both the Federal and State Constitutions. (Dkt. No. 32 at 9.) He snarkily points the finger at the State for "not surprisingly, fail[ing] to provide a single citation for the unsupportable argument that the Supremacy Clause is not a 'constitutional proscription.' " (*Id.*) While his observation is true, it is similarly true that he failed to cite contrary authority. Insofar as his one-sentence State Constitution argument is concerned, which is best described as half-hearted, Merola provides no citation to where in the State Constitution the "proscription on voting by non-citizens," (*id.*), exists, leaving the court to guess.

While the court is loathe to engage in semantics, it is necessary here. A "proscription" is a prohibition or "an imposed restraint or restriction." Merriam Webster's Collegiate Dictionary (10th ed. 1997). Anecdotally, New York courts have interpreted constitutional or statutory proscriptions to be something expressly forbidden and along the lines of "no (blank) shall (blank)." *See, e.g., Bellanca v. N.Y. State Liquor Auth.*, 54 N.Y.2d 228, 230-31, 445 N.Y.S.2d 87, 429 N.E.2d 765 (1981) (referring to an older version of N.Y. Alco. Bev. Cont. Law § 106(6-a)'s prohibition against topless dancing as a "blanket *proscription* against all topless dancing" as well as New York State Constitution Art. 1, § 8's prohibition against any law abridging speech as a proscription (emphasis added)); *accord Weiner v. McCord*, 264 A.D.2d 864, 866, 694 N.Y.S.2d 807 (3d Dep't 1999) (considering the following language: "No member of this state shall be disfranchised" as an express constitutional proscription).

With this interpretation in mind, Merola's first argument carries no weight. Indeed, the Supremacy Clause contains no proscription whatsoever. The Clause in its entirety provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. art. VI, cl. 2. No proscription is evident, unlike, for example, the First Amendment's "Congress shall make no law ...," *id.* amend. I, or the Fourth Amendment's proclamation that the right against unreasonable searches "shall not be violated," *id.* amend. IV. The list of federal constitutional proscriptions is long, but it does not include the Supremacy Clause and, therefore, cannot support Merola's assertion.

Merola's argument about the State Constitution fares no better. As mentioned above, no citation is provided to the supposed "proscription on voting by non-citizens." (Dkt. No. 32 at 9.) However, Article I, § 1 of the New York State Constitution provides:

> No member of this state shall be disfranchised, or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land, or the judgment of his or her peers, except that the legislature may provide that there shall be no primary election held to nominate candidates for public office or to elect persons to party positions for any political party or parties in any unit of representation of the state from which such candidates or persons are nominated or elected whenever ***293** there is no contest or contests for such nominations or election as may be prescribed by general law.

If this is the wellspring of the proscription referenced by Merola, it does not help his cause. The language contains a proscription, *see Weiner*, 264 A.D.2d at 866, 694 N.Y.S.2d 807 — a prohibition against disenfranchisement — but it is not what Merola claims it to be: *a proscription on voting by non-citizens*.[7] The court by no means intends to intimate that the DLAPA results in disenfranchisement, but, even if it did along the lines of Merola's argument, his claim that "as the State agent offering voter registration" he would be required "to violate the State Constitution proscription on voting by non-citizens," (Dkt. No. 32 at 9), is steps removed and wholly speculative. The DLAPA requires no such conduct by Merola. This is chiefly so because any prospective non-citizen voter licensed to drive under the DLAPA would have to affirmatively lie about his or her eligibility to vote. (Dkt. No. 30, Attach. 1 at 4-5.) Ultimately, the county board of elections is tasked with review and examination of voting applications and verification of the applicant's identity. *See* N.Y. Elec. Law § 5-210(8)-(9). For obvious reasons, it cannot be said that Merola would be forced to violate the State Constitution's proscription against disenfranchisement in the event that such a person engages in criminal conduct. For all of these reasons, Merola cannot demonstrate that he has capacity to sue under the constitutional proscription exception, and dismissal is required.

B. Preliminary Injunction

Because dismissal is required given Merola's lack of capacity to bring suit, his motion for a preliminary injunction, (Dkt; No. 27), is denied as moot.

V. Conclusion

WHEREFORE, for the foregoing reasons, it is hereby

ORDERED that the State of Connecticut's letter motion seeking permission to file an amicus curiae brief (Dkt. No. 33) is **GRANTED**; and it is further

ORDERED that the State's letter motion seeking permission to respond to the United States' memorandum of law (Dkt. No. 35) is **DENIED**; and it is further

ORDERED that the State's cross motion to dismiss (Dkt. No. 30) is **GRANTED**, and the complaint (Dkt. No. 1) is **DISMISSED**; and it is further

ORDERED that Merola's motion for a preliminary injunction (Dkt. No. 27) is **DENIED** as moot; and it is further

ORDERED that the Clerk close this case; and it is further

ORDERED that the Clerk provide a copy of this Memorandum-Decision and Order to the parties.

IT IS SO ORDERED.

All Citations

427 F.Supp.3d 286

Footnotes

1 *See* L. 2019, ch 37.

2 Without any explanation why they may be properly considered on a Rule 12(c) motion, the State submitted affidavits and attached exhibits from two Department of Motor Vehicle employees for the purpose of providing background information. (Dkt. No. 30, Attachs. 2-6.) The matters presented outside of the pleadings must be excluded from consideration absent any argument why they may be properly considered without conversion to summary judgment. *See* Fed. R. Civ. P. 12(d); *Sira v. Morton*, 380 F.3d 57, 67 (2d Cir. 2004) (explaining that the complaint includes any attached written instrument, materials incorporated by reference, and documents integral to the complaint). It is unclear why the State moved for dismissal pursuant to Rule 12(c) only. (Dkt. No. 30, Attach. 1 at 1.) When standing is lacking, the court's subject matter jurisdiction is implicated and the proper method for seeking dismissal on that basis is Rule 12(b)(1), which would allow for the submission and consideration by the court of matters outside the pleadings. In any case, where standing is questioned, even under a rule that would ordinarily require the court to exclude matters presented outside of the pleadings, like Rule 12(b)(6) or (c), "the district court is authorized to consider matters outside the pleadings and make findings of fact when necessary." *First Capital Asset Mgmt. v. Brickellbush, Inc.*, 218 F. Supp. 2d 369, 378 (S.D.N.Y. 2002) (citations omitted), *on reconsideration*, 219 F. Supp. 2d 576 (S.D.N.Y. 2002), *aff'd sub nom. First Capital Asset Mgmt. v. Satinwood, Inc.*, 385 F.3d 159 (2d Cir. 2004). For this reason, the court has considered Merola's declaration, which was submitted in conjunction with his preliminary injunction motion, (Dkt. No. 27, Attach. 2), to the extent that it bears on the standing question.

3 The court has also considered an amicus curiae brief filed by the Attorney General of Connecticut on behalf of the State of Connecticut and joined by California, the District of Columbia, Delaware, Hawaii, Illinois, Maryland, Nevada, Oregon, Vermont, and Washington, (Dkt. No. 33, Attach. 1), and a memorandum of law filed by the United States as intervenor pursuant to Rule 5.1(c) of the Federal Rules of Civil Procedure and 28 U.S.C. § 2403(a) to defend the constitutionality of 8 U.S.C. §§ 1373 and 1644, (Dkt. No. 34). The amicus curiae brief and United States' memorandum of law present arguments that are ultimately not germane to the disposition of the case.

4 In addition to the court's prior Summary Order, (Dkt. No. 22 at 1-2), the Decision and Order in *Kearns v. Cuomo*, 415 F.Supp.3d 319, 323-25, 2019 WL 5849513, at *2-3 (W.D.N.Y. 2019), *appeal docketed*, No. 19-3769 (2d Cir. Nov. 13, 2019), includes relevant background information.

5 Merola makes no effort to oppose the several other arguments, largely overlapping with those that formed the basis of the dismissal for lack of standing in *Kearns*, which have also been advanced by the State here. (*Compare* Dkt. No. 30, Attach. 1 at 11-20, *with* Dkt. No. 32 at 3-9.) In addition, Merola, who brings this action only in his official capacity, has requested leave to amend to add individual capacity claims in the event the court "deems it necessary and appropriate." (Dkt. No. 32 at 8 n.5.) The court does not

engage in such hand-holding. If Merola was inclined to seek leave to amend, he should have done so consistent with the Local Rules of Practice. *See* N.D.N.Y. L.R. 7.1(a)(4). Additionally, it is not clear how Merola would establish standing by bringing his causes of action in his individual capacity. Indeed, *Kearns* soundly rejected individual standing under nearly identical circumstances. *See* 415 F.Supp.3d at 330-36, 2019 WL 5849513, at *6-12.

6 Despite the limitations of the briefing schedule, the State did not request permission to file an otherwise unpermitted reply in further support of its cross motion, which is contemplated by the Local Rules of Practice. *See* N.D.N.Y. L.R. 7.1(c).

7 The court is left to guess at whether Merola intends to suggest that watering down the vote with ineligible voters who fraudulently register disenfranchises lawful voters. Just like his failure to elaborate upon his argument about where in the State Constitution the proscription exists, he has not adequately explained his argument in this regard, which is a basis to reject it.

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115 S.Ct. 2475
Supreme Court of the United States

Zell MILLER, et al., Appellants,
v.
Davida JOHNSON et al.
Lucious ABRAMS, Jr., et al., Appellants,
v.
Davida JOHNSON et al.
UNITED STATES, Appellant,
v.
Davida JOHNSON et al.

Nos. 94–631, 94–797, and 94–929.
|
Argued April 19, 1995.
|
Decided June 29, 1995.

Synopsis
Georgia residents brought action challenging constitutionality of redistricting legislation in seeking injunction against its further use in congressional elections. A three-judge panel of the United States District Court for the Southern District of Georgia determined that redistricting plan violated equal protection principles, 864 F.Supp. 1354. Appeal was taken. The Supreme Court, Justice Kennedy, held that: (1) bizarre shape was not threshold requirement of claim of racial gerrymandering under *Shaw* ; (2) allegation that race was legislature's dominant and controlling rationale in drawing district lines was sufficient to state claim under *Shaw* ; and (3) Georgia's congressional redistricting plan violates the equal protection clause.

Affirmed and remanded.

Justice O'Connor concurred and filed opinion.

Justice Stevens dissented and filed opinion.

Justice Ginsburg dissented and filed an opinion in which Justices Stevens and Breyer joined and in which Justice Souter joined in part.

****2480** *Syllabus*[*]

***900** In *Shaw v. Reno,* 509 U.S. 630, 113 S.Ct. 2816, 125 L.Ed.2d 511, this Court articulated the equal protection principles that govern a State's drawing of congressional districts, noting that laws that explicitly distinguish between individuals on racial grounds fall within the core of the Equal Protection Clause's prohibition against race-based decisionmaking, that this prohibition extends to laws neutral on their face but unexplainable on grounds other than race, and that redistricting legislation that is so bizarre on its face that it is unexplainable on grounds other than race demands the same strict scrutiny given to other state laws that classify citizens by race. Georgia's most recent congressional districting plan contains three majority-black districts and was adopted after the Justice Department refused to preclear, under § 5 of the Voting Rights Act (Act), two earlier plans that each contained only two majority-black districts. Appellees, voters in the new Eleventh

District—which joins metropolitan black neighborhoods together with the poor black populace of coastal areas 260 miles away—challenged the district on the ground that it was a racial gerrymander in violation of the Equal Protection Clause as interpreted in *Shaw.* The District Court agreed, holding that evidence of the state legislature's purpose, as well as the district's irregular borders, showed that race was the overriding and predominant force in the districting determination. The court assumed that compliance with the Act would be a compelling interest, but found that the plan was not narrowly tailored to meet that interest since the Act did not require three majority-black districts.

Held: Georgia's congressional redistricting plan violates the Equal Protection Clause. Pp. 2485–2494.

(a) Parties alleging that a State has assigned voters on the basis of race are neither confined in their proof to evidence regarding a district's geometry and makeup nor required to make a threshold showing of bizarreness. A district's shape is relevant to *Shaw*'s equal protection analysis not because bizarreness is a necessary element of the constitutional ***901** wrong or a threshold requirement of proof, but because it may be persuasive circumstantial evidence that race for its own sake, and not other districting principles, was a legislature's dominant and controlling rationale in drawing district ****2481** lines. In some exceptional cases, a reapportionment plan may be so highly irregular that, on its face, it rationally cannot be understood as anything other than an effort to segregate voters based on race, but where the district is not so bizarre, parties may rely on other evidence to establish race-based districting. The very stereotypical assumptions the Equal Protection Clause forbids underlie the argument that the Clause's general proscription on race-based decisionmaking does not obtain in the districting context because redistricting involves racial consideration. While redistricting usually implicates a political calculus in which various interests compete for recognition, it does not follow that individuals of the same race share a single political interest. Nor can the analysis used to assess the vote dilution claim in *United Jewish Organizations of Williamsburgh, Inc. v. Carey,* 430 U.S. 144, 97 S.Ct. 996, 51 L.Ed.2d 229, be applied to resuscitate this argument. Pp. 2485–2488.

(b) Courts must exercise extraordinary caution in adjudicating claims that a State has drawn race-based district lines. The plaintiff must show, whether through circumstantial evidence of a district's shape and demographics or more direct evidence of legislative purpose, that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a district. To make this showing, a plaintiff must prove that the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, respect for political subdivisions or communities defined by actual shared interests, to racial considerations. P. 2488.

(c) The District Court applied the correct analysis here, and its finding that race was the predominant factor motivating the Eleventh District's drawing was not clearly erroneous. It need not be decided whether the district's shape, standing alone, was sufficient to establish that the district is unexplainable on grounds other than race, for there is considerable additional evidence showing that the state legislature was motivated by a predominant, overriding desire to create a third majority-black district in order to comply with the Justice Department's preclearance demands. The District Court's well-supported finding justified its rejection of the various alternative explanations offered for the district. Appellants cannot refute the claim of racial gerrymandering by arguing the legislature complied with traditional districting principles, since those factors were subordinated to racial objectives. Nor are there tangible communities of interest spanning the district's hundreds of miles that can be called upon to rescue the plan. Since race ***902** was the predominant, overriding factor behind the Eleventh District's drawing, the State's plan is subject to strict scrutiny and can be sustained only if it is narrowly tailored to achieve a compelling state interest. Pp. 2488–2490.

(d) While there is a significant state interest in eradicating the effects of past racial discrimination, there is little doubt that Georgia's true interest was to satisfy the Justice Department's preclearance demands. Even if compliance with the Act, standing alone, could provide a compelling interest, it cannot do so here, where the district was not reasonably necessary under a constitutional reading and application of the Act. To say that the plan was required in order to obtain preclearance is not to say that it was required by the Act's substantive requirements. Georgia's two earlier plans were ameliorative and could not have violated § 5 unless they so discriminated on the basis of race or color as to violate the Constitution. However, instead of grounding its objections on evidence of a discriminatory purpose, the Justice Department appears to have been driven by its maximization policy. In utilizing § 5 to require States to create majority-minority districts whenever possible, the Department expanded its statutory authority beyond Congress' intent for § 5: to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise. The policy also raises serious constitutional concerns because its implicit command that States may engage in presumptive unconstitutional race-based districting brings ****2482** the Act, once upheld as a proper exercise of Congress' Fifteenth Amendment authority, into tension with the Fourteenth Amendment. Pp. 2490–2494.

864 F.Supp. 1354 (S.D.Ga.1994), affirmed and remanded.

KENNEDY, J., delivered the opinion of the Court, in which REHNQUIST, C.J., and O'CONNOR, SCALIA, and THOMAS, JJ., joined. O'CONNOR, J., filed a concurring opinion, *post*, p. 2497. STEVENS, J., filed a dissenting opinion, *post*, p. 2497. GINSBURG, J., filed a dissenting opinion, in which STEVENS and BREYER, JJ., joined, and in which SOUTER, J., joined except as to Part III–B, *post*, p. 2499.

Attorneys and Law Firms

David F. Walbert, Atlanta, GA, for appellants in Nos. 94–631 and 94–797.

Drew S. Days, III, Washington, DC, for appellant in No. 94–929.

***903** A. Lee Parks, Atlanta, GA, for appellees.

Opinion

Justice KENNEDY delivered the opinion of the Court.

The constitutionality of Georgia's congressional redistricting plan is at issue here. In *Shaw v. Reno,* 509 U.S. 630, 113 S.Ct. 2816, 125 L.Ed.2d 511 (1993), we held that a plaintiff states a claim under the Equal Protection Clause by alleging that a state redistricting plan, on its face, has no rational explanation save as an effort to separate voters on the basis of race. The question we now decide is whether Georgia's new Eleventh District gives rise to a valid equal protection claim under the principles announced ***904** in *Shaw,* and, if so, whether it can be sustained nonetheless as narrowly tailored to serve a compelling governmental interest.

I

A

The Equal Protection Clause of the Fourteenth Amendment provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const., Amdt. 14, § 1. Its central mandate is racial neutrality in governmental decisionmaking. See, *e.g., Loving v. Virginia,* 388 U.S. 1, 11, 87 S.Ct. 1817, 1823, 18 L.Ed.2d 1010 (1967); *McLaughlin v. Florida,* 379 U.S. 184, 191–192, 85 S.Ct. 283, 287–288, 13 L.Ed.2d 222 (1964); see also *Brown v. Board of Education,* 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954). Though application of this imperative raises difficult questions, the basic principle is straightforward: "Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination.... This perception of racial and ethnic distinctions is rooted in our Nation's constitutional and demographic history." *Regents of Univ. of Cal. v. Bakke,* 438 U.S. 265, 291, 98 S.Ct. 2733, 2748, 57 L.Ed.2d 750 (1978) (opinion of Powell, J.). This rule obtains with equal force regardless of "the race of those burdened or benefited by a particular classification." *Richmond v. J.A. Croson Co.,* 488 U.S. 469, 494, 109 S.Ct. 706, 722, 102 L.Ed.2d 854 (1989) (plurality opinion) (citations omitted); *id.,* at 520, 109 S.Ct., at 735 (SCALIA, J., concurring in judgment) ("I agree ... with Justice O'CONNOR's conclusion that strict scrutiny must be applied to all governmental classification by race"); see also *Adarand Constructors, Inc. v. Peña,* 515 U.S. 200, 224, 115 S.Ct. 2097, 2111, 132 L.Ed.2d 158 (1995); *Bakke, supra,* at

289–291, 98 S.Ct., at 2747–2748 (opinion of Powell, J.). Laws classifying citizens on the basis of race cannot be upheld unless they are narrowly tailored to achieving a compelling state interest. See, *e.g., Adarand,* at 227, 115 S.Ct., at 2113; *Croson, supra,* at 494, 109 S.Ct., at 722 (plurality opinion); *Wygant v. Jackson Bd. of Ed.,* 476 U.S. 267, 274, 280, and n. 6, 106 S.Ct. 1842, 1847, 1850, and n. 6, 90 L.Ed.2d 260 (1986) (plurality opinion).

****2483 *905** In *Shaw v. Reno, supra,* we recognized that these equal protection principles govern a State's drawing of congressional districts, though, as our cautious approach there discloses, application of these principles to electoral districting is a most delicate task. Our analysis began from the premise that "[l]aws that explicitly distinguish between individuals on racial grounds fall within the core of [the Equal Protection Clause's] prohibition." *Id.,* at 642, 113 S.Ct., at 2824. This prohibition extends not just to explicit racial classifications, but also to laws neutral on their face but " 'unexplainable on grounds other than race.' " *Id.,* at 644, 113 S.Ct., at 2825 (quoting *Arlington Heights v. Metropolitan Housing Development Corp.,* 429 U.S. 252, 266, 97 S.Ct. 555, 563, 50 L.Ed.2d 450 (1977)). Applying this basic equal protection analysis in the voting rights context, we held that "redistricting legislation that is so bizarre on its face that it is 'unexplainable on grounds other than race,' ... demands the same close scrutiny that we give other state laws that classify citizens by race." 509 U.S., at 644, 113 S.Ct., at 2825 (quoting *Arlington Heights, supra,* at 266, 97 S.Ct., at 563).

This litigation requires us to apply the principles articulated in *Shaw* to the most recent congressional redistricting plan enacted by the State of Georgia.

B

In 1965, the Attorney General designated Georgia a covered jurisdiction under § 4(b) of the Voting Rights Act (*Act*), 79 Stat. 438, as amended, 42 U.S.C. § 1973b(b). 30 Fed.Reg. 9897 (1965); see 28 CFR pt. 51, App.; see also *City of Rome v. United States,* 446 U.S. 156, 161, 100 S.Ct. 1548, 1553, 64 L.Ed.2d 119 (1980). In consequence, § 5 of the Act requires Georgia to obtain either administrative preclearance by the Attorney General or approval by the United States District Court for the District of Columbia of any change in a "standard, practice, or procedure with respect to voting" made after November 1, 1964. 42 U.S.C. § 1973c. The preclearance mechanism applies to ***906** congressional redistricting plans, see, *e.g., Beer v. United States,* 425 U.S. 130, 133, 96 S.Ct. 1357, 1360, 47 L.Ed.2d 629 (1976), and requires that the proposed change "not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color." 42 U.S.C. § 1973c. "[T]he purpose of § 5 has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Beer, supra,* at 141, 96 S.Ct., at 1363.

Between 1980 and 1990, one of Georgia's 10 congressional districts was a majority-black district, that is, a majority of the district's voters were black. The 1990 Decennial Census indicated that Georgia's population of 6,478,216 persons, 27% of whom are black, entitled it to an additional eleventh congressional seat, App. 9, prompting Georgia's General Assembly to redraw the State's congressional districts. Both the House and the Senate adopted redistricting guidelines which, among other things, required single-member districts of equal population, contiguous geography, nondilution of minority voting strength, fidelity to precinct lines where possible, and compliance with §§ 2 and 5 of the Act, 42 U.S.C. §§ 1973, 1973c. See App. 11–12. Only after these requirements were met did the guidelines permit drafters to consider other ends, such as maintaining the integrity of political subdivisions, preserving the core of existing districts, and avoiding contests between incumbents. *Id.,* at 12.

A special session opened in August 1991, and the General Assembly submitted a congressional redistricting plan to the Attorney General for preclearance on October 1, 1991. The legislature's plan contained two majority-minority districts, the Fifth and Eleventh, and an additional district, the Second, in which blacks comprised just over 35% of the voting age population. Despite the plan's increase in the number of majority-black districts from one to two and the absence of any evidence of an intent to discriminate against minority voters, 864 F.Supp. 1354, 1363, and n. 7 (SD Ga.1994), the ***907** Department of Justice refused preclearance on January 21, 1992. App. 99–107. The Department's objection letter noted a concern that Georgia had created only two majority-minority districts, ****2484** and that the proposed plan did not "recognize"

certain minority populations by placing them in a majority-black district. *Id.,* at 105, 105–106.

The General Assembly returned to the drawing board. A new plan was enacted and submitted for preclearance. This second attempt assigned the black population in Central Georgia's Baldwin County to the Eleventh District and increased the black populations in the Eleventh, Fifth, and Second Districts. The Justice Department refused preclearance again, relying on alternative plans proposing three majority-minority districts. *Id.,* at 120–126. One of the alternative schemes relied on by the Department was the so-called "max-black" plan, 864 F.Supp., at 1360, 1362–1363, drafted by the American Civil Liberties Union (ACLU) for the General Assembly's black caucus. The key to the ACLU's plan was the "Macon/Savannah trade." The dense black population in the Macon region would be transferred from the Eleventh District to the Second, converting the Second into a majority-black district, and the Eleventh District's loss in black population would be offset by extending the Eleventh to include the black populations in Savannah. *Id.,* at 1365–1366. Pointing to the General Assembly's refusal to enact the Macon/Savannah swap into law, the Justice Department concluded that Georgia had "failed to explain adequately" its failure to create a third majority-minority district. App. 125. The State did not seek a declaratory judgment from the District Court for the District of Columbia. 864 F.Supp., at 1366, n. 11.

Twice spurned, the General Assembly set out to create three majority-minority districts to gain preclearance. *Id.,* at 1366. Using the ACLU's "max-black" plan as its benchmark, *id.,* at 1366–1367, the General Assembly enacted a plan that

> ***908** "bore all the signs of [the Justice Department's] involvement: The black population of Meriwether County was gouged out of the Third District and attached to the Second District by the narrowest of land bridges; Effingham and Chatham Counties were split to make way for the Savannah extension, which itself split the City of Savannah; and the plan as a whole split 26 counties, 23 more than the existing congressional districts." *Id.,* at 1367. See Appendix A, *infra*, following p. 2494.

The new plan also enacted the Macon/Savannah swap necessary to create a third majority-black district. The Eleventh District lost the black population of Macon, but picked up Savannah, thereby connecting the black neighborhoods of metropolitan Atlanta and the poor black populace of coastal Chatham County, though 260 miles apart in distance and worlds apart in culture. In short, the social, political, and economic makeup of the Eleventh District tells a tale of disparity, not community. See 864 F.Supp. at 1376–1377, 1389–1390; Plaintiff's Exh. No. 85, pp. 10–27 (report of Timothy G. O'Rourke, Ph.D.). As the appendices to this opinion attest,

> "[t]he populations of the Eleventh are centered around four discrete, widely spaced urban centers that have absolutely nothing to do with each other, and stretch the district hundreds of miles across rural counties and narrow swamp corridors." 864 F.Supp., at 1389 (footnote omitted).
>
> "The dense population centers of the approved Eleventh District were all majority-black, all at the periphery of the district, and in the case of Atlanta, Augusta and Savannah, all tied to a sparsely populated rural core by even less populated land bridges. Extending from Atlanta to the Atlantic, the Eleventh covered 6,784.2 square miles, splitting eight counties and five municipalities along the way." *Id.,* at 1367 (footnote omitted).

***909** The Almanac of American Politics has this to say about the Eleventh District: "Geographically, it is a monstrosity, stretching from Atlanta to Savannah. Its core is the plantation country in the center of the state, lightly populated, but heavily black. It links by narrow corridors the black neighborhoods in Augusta, Savannah and southern DeKalb County." M. Barone & G. Ujifusa, Almanac of American Politics 356 (1994). Georgia's plan included three majority-black districts, though, and received Justice Department preclearance on April 2, 1992. Plaintiff's Exh. No. 6; see 864 F.Supp., at 1367.

****2485** Elections were held under the new congressional redistricting plan on November 4, 1992, and black candidates were elected to Congress from all three majority-black districts. *Id.,* at 1369. On January 13, 1994, appellees, five white voters from the Eleventh District, filed this action against various state officials (Miller Appellants) in the United States District Court for the Southern District of Georgia. *Id.,* at 1369, 1370. As residents of the challenged Eleventh District, all appellees had standing. See *United States v. Hays,* 515 U.S. 737, 744–745, 115 S.Ct. 2431, 2436, 132 L.Ed.2d 635 (1995). Their suit alleged that Georgia's Eleventh District was a racial gerrymander and so a violation of the Equal Protection Clause as interpreted in *Shaw v. Reno.* A three-judge court was convened pursuant to 28 U.S.C. § 2284, and the United States and a number of Georgia residents intervened in support of the defendant-state officials.

A majority of the District Court panel agreed that the Eleventh District was invalid under *Shaw,* with one judge dissenting. 864 F.Supp. 1354 (1994). After sharp criticism of the Justice Department for its use of partisan advocates in its dealings with

state officials and for its close cooperation with the ACLU's vigorous advocacy of minority district maximization, the majority turned to a careful interpretation of our opinion in *Shaw.* It read *Shaw* to require strict scrutiny whenever race is the "overriding, predominant force" in the redistricting process. ***910** 864 F.Supp., at 1372 (emphasis deleted). Citing much evidence of the legislature's purpose and intent in creating the final plan, as well as the irregular shape of the district (in particular several appendages drawn for the obvious purpose of putting black populations into the district), the court found that race was the overriding and predominant force in the districting determination. *Id.,* at 1378. The court proceeded to apply strict scrutiny. Though rejecting proportional representation as a compelling interest, it was willing to assume that compliance with the Act would be a compelling interest. *Id.,* at 1381–1382. As to the latter, however, the court found that the Act did not require three majority-black districts, and that Georgia's plan for that reason was not narrowly tailored to the goal of complying with the Act. *Id.,* at 1392–1393.

Appellants filed notices of appeal and requested a stay of the District Court's judgment, which we granted pending the filing and disposition of the appeals in this litigation, *Miller v. Johnson,* 512 U.S. 1283, 115 S.Ct. 36, 129 L.Ed.2d 932 (1994). We later noted probable jurisdiction. 513 U.S. 1071, 115 S.Ct. 713, 130 L.Ed.2d 620 (1995); see 28 U.S.C. § 1253.

II

A

Finding that the "evidence of the General Assembly's intent to racially gerrymander the Eleventh District is overwhelming, and practically stipulated by the parties involved," the District Court held that race was the predominant, overriding factor in drawing the Eleventh District. 864 F.Supp., at 1374; see *id.,* at 1374–1378. Appellants do not take issue with the court's factual finding of this racial motivation. Rather, they contend that evidence of a legislature's deliberate classification of voters on the basis of race cannot alone suffice to state a claim under *Shaw.* They argue that, regardless of the legislature's purposes, a plaintiff must demonstrate that a district's shape is so bizarre that it is unexplainable other than on the basis of race, and that ***911** appellees failed to make that showing here. Appellants' conception of the constitutional violation misapprehends our holding in *Shaw* and the equal protection precedent upon which *Shaw* relied.

Shaw recognized a claim "analytically distinct" from a vote dilution claim. 509 U.S., at 652, 113S.Ct., at 2830; see *id.,* at 649–650, 113 S.Ct., at 2828. Whereas a vote dilution claim alleges that the State has enacted a particular voting scheme as a purposeful device "to minimize or cancel out the voting potential of racial or ethnic minorities," *Mobile v. Bolden,* 446 U.S. 55, 66, 100 S.Ct. 1490, 1499, 64 L.Ed.2d 47 (1980) (citing cases), an action disadvantaging voters of a particular race, the essence of the equal protection claim recognized in *Shaw* is that the ****2486** State has used race as a basis for separating voters into districts. Just as the State may not, absent extraordinary justification, segregate citizens on the basis of race in its public parks, *New Orleans City Park Improvement Assn. v. Detiege,* 358 U.S. 54, 79 S.Ct. 99, 3 L.Ed.2d 46 (1958) *(per curiam),* buses, *Gayle v. Browder,* 352 U.S. 903, 77 S.Ct. 145, 1 L.Ed.2d 114 (1956) *(per curiam),* golf courses, *Holmes v. Atlanta,* 350 U.S. 879, 76 S.Ct. 141, 100 L.Ed. 776 (1955) *(per curiam),* beaches, *Mayor of Baltimore v. Dawson,* 350 U.S. 877, 76 S.Ct. 133, 100 L.Ed. 774 (1955) *(per curiam),* and schools, *Brown v. Board of Education,* 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954), so did we recognize in *Shaw* that it may not separate its citizens into different voting districts on the basis of race. The idea is a simple one: "At the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens 'as individuals, not "as simply components of a racial, religious, sexual or national class." ' " *Metro Broadcasting, Inc. v. FCC,* 497 U.S. 547, 602, 110 S.Ct. 2997, 3028, 111 L.Ed.2d 445 (1990) (O'CONNOR, J., dissenting) (quoting *Arizona Governing Comm. for Tax Deferred Annuity and Deferred Compensation Plans v. Norris,* 463 U.S. 1073, 1083, 103 S.Ct. 3492, 3498, 77 L.Ed.2d 1236 (1983)); cf. *Northeastern Fla. Chapter, Associated Gen. Contractors of America v. Jacksonville,* 508 U.S. 656, 666, 113 S.Ct. 2297, 2303, 124 L.Ed.2d 586 (1993) (" 'injury in fact' " was "denial of equal treatment ..., not the ultimate inability to obtain the benefit"). When the State assigns voters on the basis of race, it engages in ***912** the offensive and demeaning assumption that voters of a particular race,

because of their race, "think alike, share the same political interests, and will prefer the same candidates at the polls." *Shaw, supra,* at 647, 113 S.Ct., at 2827; see *Metro Broadcasting, supra,* at 636, 110 S.Ct., at 3046 (KENNEDY, J., dissenting). Race-based assignments "embody stereotypes that treat individuals as the product of their race, evaluating their thoughts and efforts—their very worth as citizens—according to a criterion barred to the Government by history and the Constitution." *Metro Broadcasting, supra,* at 604, 110 S.Ct., at 3029 (O'CONNOR, J., dissenting) (citation omitted); see *Powers v. Ohio,* 499 U.S. 400, 410, 111 S.Ct. 1364, 1370, 113 L.Ed.2d 411 (1991) ("Race cannot be a proxy for determining juror bias or competence"); *Palmore v. Sidoti,* 466 U.S. 429, 432, 104 S.Ct. 1879, 1881, 80 L.Ed.2d 421 (1984) ("Classifying persons according to their race is more likely to reflect racial prejudice than legitimate public concerns; the race, not the person, dictates the category"). They also cause society serious harm. As we concluded in *Shaw:*

> "Racial classifications with respect to voting carry particular dangers. Racial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions; it threatens to carry us further from the goal of a political system in which race no longer matters—a goal that the Fourteenth and Fifteenth Amendments embody, and to which the Nation continues to aspire. It is for these reasons that race-based districting by our state legislatures demands close judicial scrutiny." *Shaw, supra,* at 657, 113 S.Ct., at 2832.

Our observation in *Shaw*of the consequences of racial stereotyping was not meant to suggest that a district must be bizarre on its face before thereis a constitutional violation. Nor was our conclusion in *Shaw* that in certain instances a district'sappearance (or, to be more precise, its appearance in combination withcertain demographic evidence) can give rise to an equal protection claim, 509 U.S., at 649, 113 S.Ct., at 2828, a holding that bizarreness was athreshold showing, as appellants believe ***913** it to be. Our circumspect approach and narrow holding in *Shaw* did not erect an artificial rule barringaccepted equal protection analysis in other redistricting cases. Shape is relevant not because bizarreness is a necessary elementof the constitutional wrong or a threshold requirement of proof, but because it may be persuasive circumstantial evidence that race for its own sake, and not other districting principles, was the legislature's dominant and controlling rationale in drawing its districtlines. The logical implication, as courts applying *Shaw* have recognized, is that parties may rely on evidence other than bizarreness to establish race-based districting. See *Shaw v. Hunt,* 861 F.Supp. 408, 431 (EDNC 1994); *Hays v.* ****2487** *Louisiana,* 839 F.Supp. 1188, 1195 (WD La.1993), vacated, 512 U.S. 1230, 114 S.Ct. 2731, 129 L.Ed.2d 853 (1994); but see *DeWitt v. Wilson,* 856 F.Supp. 1409, 1413 (ED Cal.1994).

Our reasoning in *Shaw* compels this conclusion. We recognized in *Shaw* that, outside the districting context, statutes are subject to strict scrutiny under the Equal Protection Clause not just when they contain express racial classifications, but also when, though race neutral on their face, they are motivated by a racial purpose or object. 509 U.S., at 644, 113 S.Ct., at 2825. In the rare case, where the effect of government action is a pattern " 'unexplainable on grounds other than race,' " *ibid.* (quoting *Arlington Heights,* 429 U.S., at 266, 97 S.Ct., at 563), "[t]he evidentiary inquiry is ... relatively easy," *Arlington Heights, supra,* at 266, 97 S.Ct., at 563 (footnote omitted). As early as *Yick Wo v. Hopkins,* 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886), the Court recognized that a laundry permit ordinance was administered in a deliberate way to exclude all Chinese from the laundry business; and in *Gomillion v. Lightfoot,* 364 U.S. 339, 81 S.Ct. 125, 5 L.Ed.2d 110 (1960), the Court concluded that the redrawing of Tuskegee, Alabama's municipal boundaries left no doubt that the plan was designed to exclude blacks. Even in those cases, however, it was the presumed racial purpose of state action, not its stark manifestation, that was the constitutional violation. Patterns of discrimination as conspicuous as these are rare, and ***914** are not a necessary predicate to a violation of the Equal Protection Clause. Cf. *Arlington Heights, supra,* at 266, n. 14, 97 S.Ct., at 563, n. 14. In the absence of a pattern as stark as those in *Yick Wo* or *Gomillion,* "impact alone is not determinative, and the Court must look to other evidence" of race-based decisionmaking. *Arlington Heights, supra,* at 266, 97 S.Ct., at 563 (footnotes omitted).

Shaw applied these same principles to redistricting. "In some exceptional cases, a reapportionment plan may be so highly irregular that, on its face, it rationally cannot be understood as anything other than an effort to 'segregat[e] ... voters' on the basis of race." *Shaw, supra,* at 646–647, 113 S.Ct., at 2826 (quoting *Gomillion, supra,* at 341, 81 S.Ct., at 127). In other cases, where the district is not so bizarre on its face that it discloses a racial design, the proof will be more "difficul[t]." 509 U.S., at 646, 113 S.Ct., at 2826. Although it was not necessary in *Shaw* to consider further the proof required in these more difficult cases, the logical import of our reasoning is that evidence other than a district's bizarre shape can be used to support the claim.

Appellants and some of their *amici* argue that the Equal Protection Clause's general proscription on race-based decisionmaking does not obtain in the districting context because redistricting by definition involves racial considerations. Underlying their argument are the very stereotypical assumptions the Equal Protection Clause forbids. It is true that redistricting in most cases will implicate a political calculus in which various interests compete for recognition, but it does

not follow from this that individuals of the same race share a single political interest. The view that they do is "based on the demeaning notion that members of the defined racial groups ascribe to certain 'minority views' that must be different from those of other citizens," *Metro Broadcasting,* 497 U.S., at 636, 110 S.Ct., at 3046 (KENNEDY, J., dissenting), the precise use of race as a proxy the Constitution prohibits. Nor can the argument that districting cases are excepted from standard equal protection precepts be resuscitated by ***915** *United Jewish Organizations of Williamsburgh, Inc. v. Carey,* 430 U.S. 144, 97 S.Ct. 996, 51 L.Ed.2d 229 (1977), where the Court addressed a claim that New York violated the Constitution by splitting a Hasidic Jewish community in order to include additional majority-minority districts. As we explained in *Shaw,* a majority of the Justices in *UJO* construed the complaint as stating a vote dilution claim, so their analysis does not apply to a claim that the State has separated voters on the basis of race. 509 U.S., at 652, 113 S.Ct., at 2829. To the extent any of the opinions in that "highly fractured decision," *id.,* at 651, 113 S.Ct., at 2829, can be interpreted as suggesting that a State's assignment of voters on the basis of race would be subject to anything ****2488** but our strictest scrutiny, those views ought not be deemed controlling.

In sum, we make clear that parties alleging that a State has assigned voters on the basis of race are neither confined in their proof to evidence regarding the district's geometry and makeup nor required to make a threshold showing of bizarreness. Today's litigation requires us further to consider the requirements of the proof necessary to sustain this equal protection challenge.

B

Federal-court review of districting legislation represents a serious intrusion on the most vital of local functions. It is well settled that "reapportionment is primarily the duty and responsibility of the State." *Chapman v. Meier,* 420 U.S. 1, 27, 95 S.Ct. 751, 766, 42 L.Ed.2d 766 (1975); see, *e.g., Voinovich v. Quilter,* 507 U.S. 146, 156–157, 113 S.Ct. 1149, 1156–1157, 122 L.Ed.2d 500 (1993); *Growe v. Emison,* 507 U.S. 25, 34, 113 S.Ct. 1075, 1081, 122 L.Ed.2d 388 (1993). Electoral districting is a most difficult subject for legislatures, and so the States must have discretion to exercise the political judgment necessary to balance competing interests. Although race-based decisionmaking is inherently suspect, *e.g., Adarand,* 515 U.S., at 218, 115 S.Ct., at 2108 (citing *Bakke,* 438 U.S., at 291, 98 S.Ct., at 2748 (opinion of Powell, J.)), until a claimant makes a showing sufficient to support that allegation the good faith of a state legislature must be presumed, see *id.* at 318–319, 98 S.Ct., at 2762–2763 (opinion of Powell, J.). The courts, in assessing the sufficiency of a challenge to a districting plan, must be sensitive to the complex ***916** interplay of forces that enter a legislature's redistricting calculus. Redistricting legislatures will, for example, almost always be aware of racial demographics; but it does not follow that race predominates in the redistricting process. *Shaw, supra,* at 646, 113 S.Ct., at 2826; see *Personnel Administrator of Mass. v. Feeney,* 442 U.S. 256, 279, 99 S.Ct. 2282, 2296, 60 L.Ed.2d 870 (1979) (" '[D]iscriminatory purpose' ... implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker ... selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects") (footnotes and citation omitted). The distinction between being aware of racial considerations and being motivated by them may be difficult to make. This evidentiary difficulty, together with the sensitive nature of redistricting and the presumption of good faith that must be accorded legislative enactments, requires courts to exercise extraordinary caution in adjudicating claims that a State has drawn district lines on the basis of race. The plaintiff's burden is to show, either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district. To make this showing, a plaintiff must prove that the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, and respect for political subdivisions or communities defined by actual shared interests, to racial considerations. Where these or other race-neutral considerations are the basis for redistricting legislation, and are not subordinated to race, a State can "defeat a claim that a district has been gerrymandered on racial lines." *Shaw, supra,* 515 U.S., at 647, 113 S.Ct., at 2827. These principles inform the plaintiff's burden of proof at trial. Of course, courts must also recognize these principles, and the intrusive potential of judicial intervention into the legislative realm, when assessing under the Federal Rules of Civil ***917** Procedure the adequacy of a plaintiff's showing at the various stages of litigation and determining whether to permit discovery or trial to proceed. See, *e.g.,* Fed.Rules Civ.Proc. 12(b) and (e), 26(b)(2), 56; see also *Celotex Corp. v. Catrett,* 477 U.S. 317, 327, 106 S.Ct. 2548, 2554, 91 L.Ed.2d 265 (1986).

In our view, the District Court applied the correct analysis, and its finding that race was the predominant factor motivating the drawing of the Eleventh District was not clearly erroneous. The court found it was ****2489** "exceedingly obvious" from the shape of the Eleventh District, together with the relevant racial demographics, that the drawing of narrow land bridges to incorporate within the district outlying appendages containing nearly 80% of the district's total black population was a deliberate attempt to bring black populations into the district. 864 F.Supp., at 1375; see *id.,* at 1374–1376. Although by comparison with other districts the geometric shape of the Eleventh District may not seem bizarre on its face, when its shape is considered in conjunction with its racial and population densities, the story of racial gerrymandering seen by the District Court becomes much clearer. See Appendix B, *infra*, at 2496; see also App. 133. Although this evidence is quite compelling, we need not determine whether it was, standing alone, sufficient to establish a *Shaw* claim that the Eleventh District is unexplainable other than by race. The District Court had before it considerable additional evidence showing that the General Assembly was motivated by a predominant, overriding desire to assign black populations to the Eleventh District and thereby permit the creation of a third majority-black district in the Second. 864 F.Supp., at 1372, 1378.

The court found that "it became obvious," both from the Justice Department's objection letters and the three preclearance rounds in general, "that [the Justice Department] would accept nothing less than abject surrender to its maximization agenda." *Id.,* at 1366, n. 11; see *id.,* at 1360–1367; see also *Arlington Heights,* 429 U.S., at 267, 97 S.Ct., at 564 ("historical ***918** background of the decision is one evidentiary source"). It further found that the General Assembly acquiesced and as a consequence was driven by its overriding desire to comply with the Department's maximization demands. The court supported its conclusion not just with the testimony of Linda Meggers, the operator of "Herschel," Georgia's reapportionment computer, and "probably the most knowledgeable person available on the subject of Georgian redistricting," 864 F.Supp., at 1361, 1363, n. 6, 1366, but also with the State's own concessions. The State admitted that it " 'would not have added those portions of Effingham and Chatham Counties that are now in the [far southeastern extension of the] present Eleventh Congressional District but for the need to include additional black population in that district to offset the loss of black population caused by the shift of predominantly black portions of Bibb County in the Second Congressional District which occurred in response to the Department of Justice's March 20th, 1992, objection letter.' " *Id.,* at 1377. It conceded further that "[t]o the extent that precincts in the Eleventh Congressional District are split, a substantial reason for their being split was the objective of increasing the black population of that district." *Ibid.* And in its brief to this Court, the State concedes that "[i]t is undisputed that Georgia's eleventh is the product of a desire by the General Assembly to create a majority black district." Brief for Miller Appellants 30. Hence the trial court had little difficulty concluding that the Justice Department "spent months demanding purely race-based revisions to Georgia's redistricting plans, and that Georgia spent months attempting to comply." 864 F.Supp., at 1377. On this record, we fail to see how the District Court could have reached any conclusion other than that race was the predominant factor in drawing Georgia's Eleventh District; and in any event we conclude the court's finding is not clearly erroneous. Cf. *Wright v. Rockefeller,* 376 U.S. 52, 56–57, 84 S.Ct. 603, 605, 11 L.Ed.2d 512 (1964) (evidence presented "conflicting inferences" and therefore "failed to ***919** prove that the New York Legislature was either motivated by racial considerations or in fact drew the districts on racial lines").

In light of its well-supported finding, the District Court was justified in rejecting the various alternative explanations offered for the district. Although a legislature's compliance with "traditional districting principles such as compactness, contiguity, and respect for political subdivisions" may well suffice to refute a claim of racial gerrymandering, *Shaw,* 509 U.S., at 647, 113 S.Ct., at 2827, appellants cannot make such a refutation where, as here, those factors were subordinated to racial objectives. Georgia's Attorney General objected to the Justice Department's demand for three majority-black districts on the ground that to do so the ****2490** State would have to "violate all reasonable standards of compactness and contiguity." App. 118. This statement from a state official is powerful evidence that the legislature subordinated traditional districting principles to race when it ultimately enacted a plan creating three majority-black districts, and justified the District Court's finding that "every [objective districting] factor that could realistically be subordinated to racial tinkering in fact suffered that fate." 864 F.Supp., at 1384; see *id.,* at 1364, n. 8; *id.,* at 1375 ("While the boundaries of the Eleventh do indeed follow many precinct lines, this is because Ms. Meggers designed the Eleventh District along racial lines, and race data was most accessible to her at the precinct level").

Nor can the State's districting legislation be rescued by mere recitation of purported communities of interest. The evidence was compelling "that there are no tangible 'communities of interest' spanning the hundreds of miles of the Eleventh District." *Id.,* at 1389–1390. A comprehensive report demonstrated the fractured political, social, and economic interests within the Eleventh District's black population. See Plaintiff's Exh. No. 85, pp. 10–27 (report of Timothy G. O'Rourke, Ph.D.). It is apparent that it was not alleged ***920** shared interests but rather the object of maximizing the district's black population and

obtaining Justice Department approval that in fact explained the General Assembly's actions. 864 F.Supp., at 1366, 1378, 1380. A State is free to recognize communities that have a particular racial makeup, provided its action is directed toward some common thread of relevant interests. "[W]hen members of a racial group live together in one community, a reapportionment plan that concentrates members of the group in one district and excludes them from others may reflect wholly legitimate purposes." *Shaw,* 509 U.S., at 646, 113 S.Ct., at 2826. But where the State assumes from a group of voters' race that they "think alike, share the same political interests, and will prefer the same candidates at the polls," it engages in racial stereotyping at odds with equal protection mandates. *Id.,* at 647, 113 S.Ct., at 2827; cf. *Powers v. Ohio,* 499 U.S. 400, 410, 111 S.Ct. 1364, 1370, 113 L.Ed.2d 411 (1991) ("We may not accept as a defense to racial discrimination the very stereotype the law condemns").

Race was, as the District Court found, the predominant, overriding factor explaining the General Assembly's decision to attach to the Eleventh District various appendages containing dense majority-black populations. 864 F.Supp., at 1372, 1378. As a result, Georgia's congressional redistricting plan cannot be upheld unless it satisfies strict scrutiny, our most rigorous and exacting standard of constitutional review.

III

Tosatisfy strict scrutiny, the State must demonstrate that its districting legislation is narrowly tailored to achieve a compellinginterest. *Shaw, supra,* at 653–657, 113 S.Ct., at 2830–2832; see also *Croson,* 488 U.S., at 494, 109 S.Ct., at 722 (plurality opinion); *Wygant,* 476 U.S., at 274, 280, and n. 6, 106 S.Ct., at 1847, 1850, and n. 6 (plurality opinion); cf. *Adarand,* 515 U.S., at 227, 115 S.Ct., at 2114. There is a "significant state interest in eradicating the effects of past racial discrimination." *Shaw, supra,* at 656, 113 S.Ct., at 2831. The State does not argue, however, that it created the Eleventh District to remedy past discrimination, and with good ***921** reason: There is little doubt that the State's true interest in designing the Eleventh District was creating a third majority-black district to satisfy the Justice Department's preclearance demands. 864 F.Supp., at 1378 ("[T]he only interest the General Assembly had in mind when drafting the current congressional plan was satisfying [the Justice Department's] preclearance requirements"); *id.,* at 1366; compare *Wygant, supra,* at 277, 106 S.Ct., at 1848 (plurality opinion) (under strict scrutiny, State must have convincing evidence that remedial action is necessary before implementing affirmative action), with *Heller v. Doe,* 509 U.S. 312, 320, 113 S.Ct. 2637, 2642, 125 L.Ed.2d 257 (1993) (under rational-basis review, legislature need not " 'actually articulate at any time the purpose or rationale supporting its classification' ") (quoting *Nordlinger v. Hahn,* 505 U.S. 1, 15, 112 S.Ct. 2326, 2334, 120 L.Ed.2d 1 (1992)). Whether or not in some cases compliance with the Act, standing ****2491** alone, can provide a compelling interest independent of any interest in remedying past discrimination, it cannot do so here. As we suggested in *Shaw,* compliance with federal antidiscrimination laws cannot justify race-based districting where the challenged district was not reasonably necessary under a constitutional reading and application of those laws. See 509 U.S., at 653–655, 113 S.Ct., at 2830–2831. The congressional plan challenged here was not required by the Act under a correct reading of the statute.

The Justice Department refused to preclear both of Georgia's first two submitted redistricting plans. The District Court found that the Justice Department had adopted a "black-maximization" policy under § 5, and that it was clear from its objection letters that the Department would not grant preclearance until the State made the "Macon/Savannah trade" and created a third majority-black district. 864 F.Supp., at 1366, 1380. It is, therefore, safe to say that the congressional plan enacted in the end was required in order to obtain preclearance. It does not follow, however, that the plan was required by the substantive provisions of the Act.

***922** We do not accept the contention that the State has a compelling interest in complying with whatever preclearance mandates the Justice Department issues. When a state governmental entity seeks to justify race-based remedies to cure the effects of past discrimination, we do not accept the government's mere assertion that the remedial action is required. Rather, we insist on a strong basis in evidence of the harm being remedied. See, *e.g., Shaw, supra,* at 656, 113 S.Ct., at 2831–2832; *Croson, supra,* at 500–501, 109 S.Ct., at 725; *Wygant, supra,* at 276–277, 106 S.Ct. at 1848 (plurality opinion). "The history of racial classifications in this country suggests that blind judicial deference to legislative or executive pronouncements of necessity has no place in equal protection analysis." *Croson, supra,* at 501, 109 S.Ct., at 725. Our presumptive skepticism of

all racial classifications, see *Adarand, supra,* at 223–224, 115 S.Ct., at 2110–2111, prohibits us as well from accepting on its face the Justice Department's conclusion that racial districting is necessary under the Act. Where a State relies on the Department's determination that race-based districting is necessary to comply with the Act, the judiciary retains an independent obligation in adjudicating consequent equal protection challenges to ensure that the State's actions are narrowly tailored to achieve a compelling interest. See *Shaw, supra,* at 654, 113 S.Ct., at 2830–2831. Were we to accept the Justice Department's objection itself as a compelling interest adequate to insulate racial districting from constitutional review, we would be surrendering to the Executive Branch our role in enforcing the constitutional limits on race-based official action. We may not do so. See, *e.g., United States v. Nixon,* 418 U.S. 683, 704, 94 S.Ct. 3090, 3105, 41 L.Ed.2d 1039 (1974) (judicial power cannot be shared with Executive Branch); *Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 177, 2 L.Ed. 60 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is"); cf. *Baker v. Carr,* 369 U.S. 186, 211, 82 S.Ct. 691, 706, 7 L.Ed.2d 663 (1962) (Supreme Court is "ultimate interpreter of the Constitution"); *Cooper v. Aaron,* 358 U.S. 1, 18, 78 S.Ct. 1401, 1409, 3 L.Ed.2d 5 (1958) ("permanent and indispensable feature of our constitutional system" is that "the federal ***923** judiciary is supreme in the exposition of the law of the Constitution").

For the same reasons, we think it inappropriate for a court engaged in constitutional scrutiny to accord deference to the Justice Department's interpretation of the Act. Although we have deferred to the Department's interpretation in certain statutory cases, see, *e.g., Presley v. Etowah County Comm'n,* 502 U.S. 491, 508–509, 112 S.Ct. 820, 831, 117 L.Ed.2d 51 (1992), and cases cited therein, we have rejected agency interpretations to which we would otherwise defer where they raise serious constitutional questions. ****2492** *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council,* 485 U.S. 568, 574–575, 108 S.Ct. 1392, 1396–1397, 99 L.Ed.2d 645 (1988). When the Justice Department's interpretation of the Act compels race-based districting, it by definition raises a serious constitutional question, see, *e.g., Bakke,* 438 U.S., at 291, 98 S.Ct., at 2748 (opinion of Powell, J.) ("Racial and ethnic distinctions of any sort are inherently suspect" under the Equal Protection Clause), and should not receive deference.

Georgia's drawing of the Eleventh District was not required under the Act because there was no reasonable basis to believe that Georgia's earlier enacted plans violated § 5. Wherever a plan is "ameliorative," a term we have used to describe plans increasing the number of majority-minority districts, it "cannot violate § 5 unless the new apportionment itself so discriminates on the basis of race or color as to violate the Constitution." *Beer,* 425 U.S., at 141, 96 S.Ct., at 1363. Georgia's first and second proposed plans increased the number of majority-black districts from 1 out of 10 (10%) to 2 out of 11 (18.18%). These plans were "ameliorative" and could not have violated § 5's nonretrogression principle. *Ibid.* Acknowledging as much, see Brief for United States 29; 864 F.Supp., at 1384–1385, the United States now relies on the fact that the Justice Department may object to a state proposal either on the ground that it has a prohibited purpose or a prohibited effect, see, *e.g.,* ***924** *Pleasant Grove v. United States,* 479 U.S. 462, 469, 107 S.Ct. 794, 798, 93 L.Ed.2d 866 (1987). The Government justifies its preclearance objections on the ground that the submitted plans violated § 5's purpose element. The key to the Government's position, which is plain from its objection letters if not from its briefs to this Court, compare App. 105–106, 124–125 with Brief for United States 31–33, is and always has been that Georgia failed to proffer a nondiscriminatory purpose for its refusal in the first two submissions to take the steps necessary to create a third majority-minority district.

The Government's position is insupportable. "[A]meliorative changes, even if they fall short of what might be accomplished in terms of increasing minority representation, cannot be found to violate section 5 unless they so discriminate on the basis of race or color as to violate the Constitution." Days, Section 5 and the Role of the Justice Department, in B. Grofman & C. Davidson, Controversies in Minority Voting 56 (1992). Although it is true we have held that the State has the burden to prove a nondiscriminatory purpose under § 5, *e.g., Pleasant Grove, supra,* at 469, 107 S.Ct., at 798, Georgia's Attorney General provided a detailed explanation for the State's initial decision not to enact the max-black plan, see App. 117–119. The District Court accepted this explanation, 864 F.Supp., at 1365, and found an absence of any discriminatory intent, *id.,* at 1363, and n. 7. The State's policy of adhering to other districting principles instead of creating as many majority-minority districts as possible does not support an inference that the plan "so discriminates on the basis of race or color as to violate the Constitution," *Beer, supra,* at 141, 96 S.Ct., at 1363; see *Mobile v. Bolden,* 446 U.S. 55, 100 S.Ct. 1490, 64 L.Ed.2d 47 (1980) (plurality opinion), and thus cannot provide any basis under § 5 for the Justice Department's objection.

Instead of grounding its objections on evidence of a discriminatory purpose, it would appear the Government was driven by its policy of maximizing majority-black districts. Although the Government now disavows having had that ***925** policy, see Brief for United States 35, and seems to concede its impropriety, see Tr. of Oral Arg. 32–33, the District Court's well-documented factual finding was that the Department did adopt a maximization policy and followed it in objecting to

Georgia's first two plans.* One of the two ****2493** Department of Justice line attorneys overseeing the Georgia preclearance process himself disclosed that " 'what we did and what I did specifically was to take a ... map of the State of Georgia shaded for race, shaded by minority concentration, and overlay the districts that were drawn by the State of Georgia and see how well those lines adequately reflected black voting strength.' " 864 F.Supp., at 1362, n. 4. In utilizing § 5 to require States to create majority-minority districts wherever possible, the Department of Justice expanded its authority under the statute beyond what Congress intended and we have upheld.

Section 5 was directed at preventing a particular set of invidious practices that had the effect of "undo[ing] or defeat[ing] the rights recently won by nonwhite voters." ***926** H.R.Rep. No. 91–397, p. 8 (1969). As we explained in *Beer v. United States,*

> " 'Section 5 was a response to a common practice in some jurisdictions of staying one step ahead of the federal courts by passing new discriminatory voting laws as soon as the old ones had been struck down. That practice had been possible because each new law remained in effect until the Justice Department or private plaintiffs were able to sustain the burden of proving that the new law, too, was discriminatory.... Congress therefore decided, as the Supreme Court held it could, "to shift the advantage of time and inertia from the perpetrators of the evil to its victim," by "freezing election procedures in the covered areas unless the changes can be shown to be nondiscriminatory." ' " 425 U.S., at 140, 96 S.Ct., at 1363 (quoting H.R.Rep. No. 94–196, pp. 57–58 (1975) (footnotes omitted)).

Based on this historical understanding, we recognized in *Beer* that "the purpose of § 5 has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." 425 U.S., at 141, 96 S.Ct., at 1363. The Justice Department's maximization policy seems quite far removed from this purpose. We are especially reluctant to conclude that § 5 justifies that policy given the serious constitutional concerns it raises. In *South Carolina v. Katzenbach,* 383 U.S. 301, 86 S.Ct. 803, 15 L.Ed.2d 769 (1966), we upheld § 5 as a necessary and constitutional response to some States' "extraordinary stratagem[s] of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination in the face of adverse federal court decrees." *Id.,* at 335, 86 S.Ct., at 822 (footnote omitted); see also *City of Rome v. United States,* 446 U.S., at 173–183, 100 S.Ct., at 1559–1564. But our belief in *Katzenbach* that the federalism costs exacted by § 5 preclearance could be justified by those extraordinary circumstances does not ***927** mean they can be justified in the circumstances of this litigation. And the Justice Department's implicit command that States engage in presumptively unconstitutional race-based districting brings the Act, once upheld as a proper exercise of Congress' authority under § 2 of the Fifteenth Amendment, *Katzenbach, supra,* at 327, 337, 86 S.Ct., at 818, 823, into tension with the Fourteenth Amendment. As we recalled in *Katzenbach* itself, Congress' exercise of its Fifteenth Amendment authority even when otherwise proper still must " 'consist with the letter and spirit of the constitution.' " 383 U.S., at 326, 86 S.Ct., at 817 (quoting *McCulloch v. Maryland,* 4 Wheat. 316, 421, 4 L.Ed. 579 (1819)). We need not, however, resolve these troubling and difficult constitutional questions today. There is no indication Congress intended such a far-reaching application of § 5, so we reject the Justice Department's interpretation of the statute and avoid the constitutional problems that interpretation raises. See, *e.g., DeBartolo Corp. v.* ****2494** *Florida Gulf Coast Trades Council,* 485 U.S., at 575, 108 S.Ct., at 1397.

IV

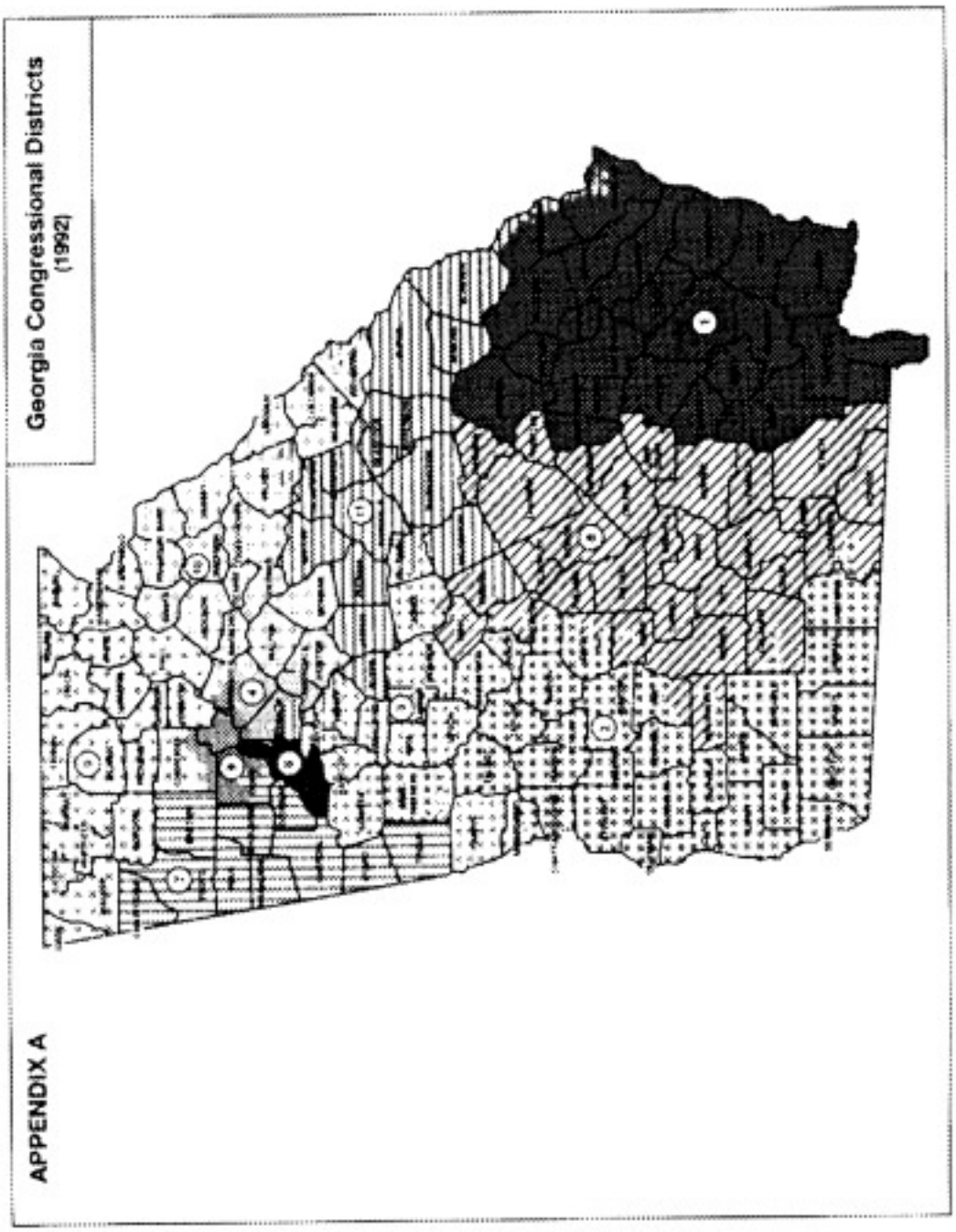
The Act, and its grant of authority to the federal courts to uncover official efforts to abridge minorities' right to vote, has been of vital importance in eradicating invidious discrimination from the electoral process and enhancing the legitimacy of our political institutions. Only if our political system and our society cleanse themselves of that discrimination will all members of the polity share an equal opportunity to gain public office regardless of race. As a Nation we share both the obligation and the aspiration of working toward this end. The end is neither assured nor well served, however, by carving electorates into racial blocs. "If our society is to continue to progress as a multi-racial democracy, it must recognize that the automatic invocation of race stereotypes retards that progress and causes continued hurt and injury." *Edmonson v. Leesville Concrete Co.,* 500 U.S. 614, 630–631, 111 S.Ct. 2077, 2088, 114 L.Ed.2d 660 (1991). It takes a shortsighted and ***928** unauthorized view of the Voting Rights Act to invoke that statute, which has played a decisive role in redressing some of our worst forms of discrimination, to demand the very racial stereotyping the Fourteenth Amendment forbids.

* * *

The judgment of the District Court is affirmed, and the cases are remanded for further proceedings consistent with this decision.

It is so ordered.

****2495**



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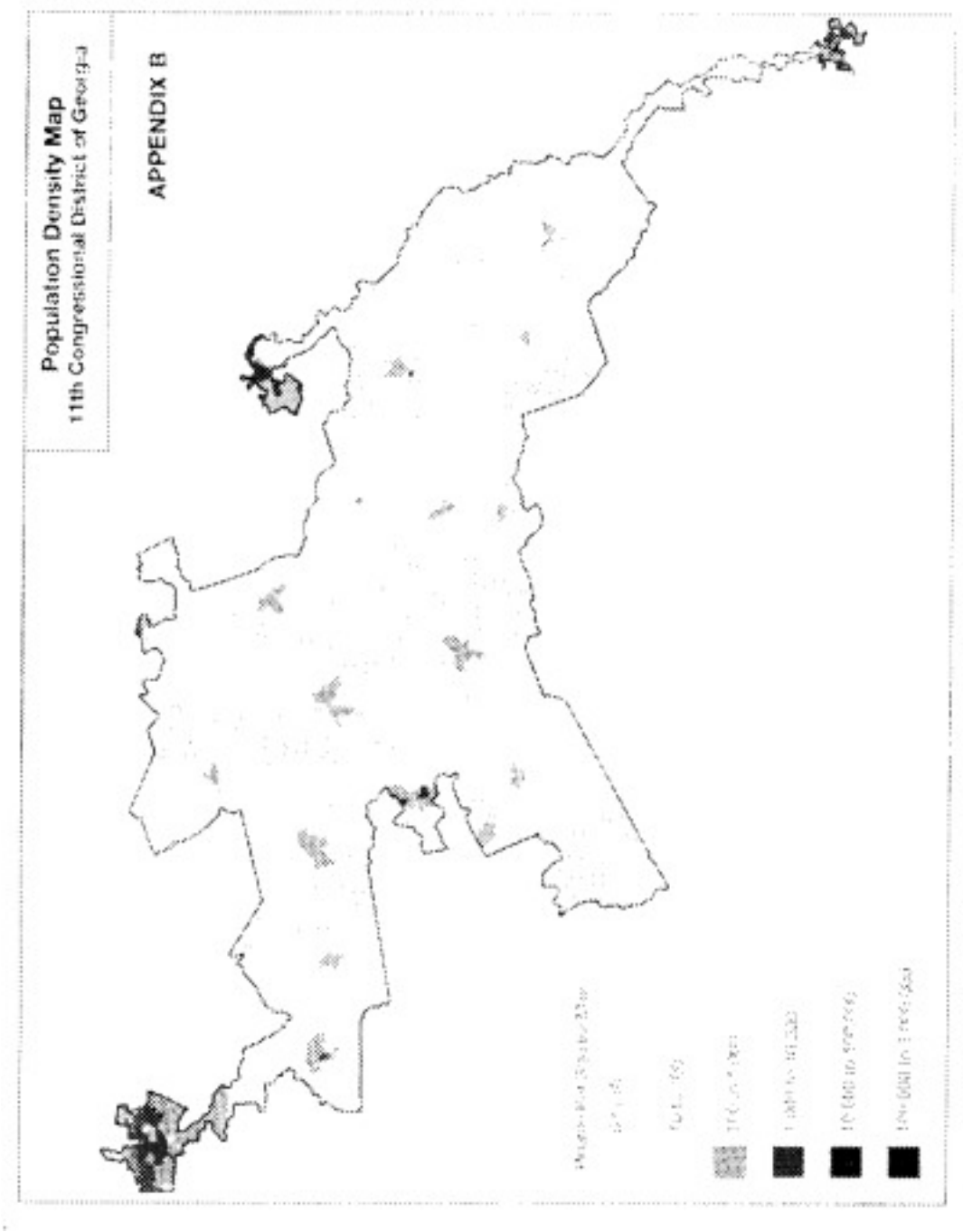


**2497 Justice O'CONNOR, concurring.

I understand the threshold standard the Court adopts—that "the legislature subordinated traditional race-neutral districting principles ... to racial considerations," *ante,* at 2488—to be a demanding one. To invoke strict scrutiny, a plaintiff must show that the State has relied on race in substantial disregard of customary and traditional districting practices. Those practices provide a crucial frame of reference and therefore constitute a significant governing principle in cases of this kind. The

standard would be no different if a legislature had drawn the boundaries to favor some other ethnic group; certainly the standard does not treat efforts to create majority-minority districts *less* favorably than similar efforts on behalf of other groups. Indeed, the driving force behind the adoption of the Fourteenth Amendment was the desire to end legal discrimination against blacks.

Application of the Court's standard does not throw into doubt the vast majority of the Nation's 435 congressional districts, where presumably the States have drawn the boundaries in accordance with their customary districting principles. That is so even though race may well have been ***929** considered in the redistricting process. See *Shaw v. Reno,* 509 U.S. 630, 646, 113 S.Ct. 2816, 2826, 125 L.Ed.2d 511 (1993); *ante,* at 2488. But application of the Court's standard helps achieve *Shaw* 's basic objective of making extreme instances of gerrymandering subject to meaningful judicial review. I therefore join the Court's opinion.

Justice STEVENS, dissenting.

Justice GINSBURG has explained why the District Court's opinion on the merits was erroneous and why this Court's law-changing decision will breed unproductive litigation. I join her excellent opinion without reservation. I add these comments because I believe the appellees in these cases, like the appellees in *United States v. Hays,* 515 U.S. 737, 115 Ct. 2431, 132 L.Ed.2d 635, have not suffered any legally cognizable injury.

In *Shaw v. Reno,* 509 U.S. 630, 113 S.Ct. 2816, 125 L.Ed.2d 511 (1993), the Court crafted a new cause of action with two novel, troubling features. First, the Court misapplied the term "gerrymander," previously used to describe grotesque line-drawing by a dominant group to maintain or enhance its political power at a minority's expense, to condemn the efforts of a majority (whites) to share its power with a minority (African-Americans). Second, the Court dispensed with its previous insistence in vote dilution cases on a showing of injury to an identifiable group of voters, but it failed to explain adequately what showing a plaintiff must make to establish standing to litigate the newly minted *Shaw* claim. Neither in *Shaw* itself nor in the cases decided today has the Court coherently articulated what injury this cause of action is designed to redress. Because appellees have alleged no legally cognizable injury, they lack standing, and these cases should be dismissed. See *Hays,* 515 U.S., at 750–751, 115 S.Ct., at 2439 (STEVENS, J., concurring in judgment).

Even assuming the validity of *Shaw,* I cannot see how appellees in these cases could assert the injury the Court attributes to them. Appellees, plaintiffs below, are white ***930** voters in Georgia's Eleventh Congressional District. The Court's conclusion that they have standing to maintain a *Shaw* claim appears to rest on a theory that their placement in the Eleventh District caused them " 'representational harms.' " *Hays,* at 744, 115 S.Ct., at 2436, cited *ante,* at 2485. The *Shaw* Court explained the concept of "representational harms" as follows: "When a district obviously is created solely to effectuate the perceived common interests of one racial group, elected officials are more likely to believe that their primary obligation is to represent only the members of that group, rather than their constituency as a whole." *Shaw,* 509 U.S., at 648, 113 S.Ct., at 2827. Although the *Shaw* Court attributed representational harms solely to a message sent by the legislature's action, those harms can only come about if the message is received—that is, first, if all or most black voters support the same candidate, and, second, if the successful candidate ignores the interests of her white constituents. Appellees' standing, ****2498** in other words, ultimately depends on the very premise the Court purports to abhor: that voters of a particular race " 'think alike, share the same political interests, and will prefer the same candidates at the polls.' " *Ante,* at 2486 (quoting *Shaw,* 509 U.S., at 647, 113 S.Ct., at 2827). This generalization, as the Court recognizes, is "offensive and demeaning." *Ante,* at 2486.

In particular instances, of course, members of one race may vote by an overwhelming margin for one candidate, and in some cases that candidate will be of the same race. "Racially polarized voting" is one of the circumstances plaintiffs must prove to advance a vote dilution claim. *Thornburg v. Gingles,* 478 U.S. 30, 56–58, 106 S.Ct. 2752, 2769–2770, 92 L.Ed.2d 25 (1986). Such a claim allows voters to allege that gerrymandered district lines have impaired their ability to elect a candidate of their own race. The Court emphasizes, however, that a so-called *Shaw* claim is " 'analytically distinct' from a vote dilution claim," *ante,* at 2485 (quoting *Shaw,* 509 U.S., at 652, 113 S.Ct., at 2830). Neither in *Shaw,* nor in *Hays,* nor in the instant cases has the Court answered the ***931** question its analytic distinction raises: If the *Shaw* injury does not flow from an increased probability that white candidates will lose, then how can the increased probability that black candidates will win cause white

voters, such as appellees, cognizable harm?[1]

The Court attempts an explanation in these cases by equating the injury it imagines appellees have suffered with the injuries African-Americans suffered under segregation. The heart of appellees' claim, by the Court's account, is that "a State's assignment of voters on the basis of race," *ante,* at 2487, violates the Equal Protection Clause for the same reason a State may not "segregate citizens on the basis of race in its public parks, *New Orleans City Park Improvement Assn. v. Detiege,* 358 U.S. 54, 79 S.Ct. 99, 3 L.Ed.2d 46 (1958) *(per curiam),* buses, *Gayle v. Browder,* 352 U.S. 903, 77 S.Ct. 145, 1 L.Ed.2d 114 (1956) *(per curiam),* golf courses, *Holmes v. Atlanta,* 350 U.S. 879, 76 S.Ct. 141, 100 L.Ed. 776 (1955) *(per curiam),* beaches, *Mayor of Baltimore v. Dawson,* 350 U.S. 877, 76 S.Ct. 133, 100 L.Ed. 774 (1955) *(per curiam),* and schools, *Brown v. Board of Education,* 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954)." *Ante,* at 2486. This equation, however, fails to elucidate the elusive *Shaw* injury. Our desegregation cases redressed the *exclusion* of black citizens from public facilities reserved for whites. In these cases, in contrast, any voter, black or white, may live in the Eleventh District. What appellees contest is the *inclusion* of too many black voters in the district as drawn. In my view, if appellees allege no vote dilution, that inclusion can cause them no conceivable injury.

The Court's equation of *Shaw* claims with our desegregation decisions is inappropriate for another reason. In each of those cases, legal segregation frustrated the public interest in diversity and tolerance by barring African-Americans ***932** from joining whites in the activities at issue. The districting plan here, in contrast, serves the interest in diversity and tolerance by increasing the likelihood that a meaningful number of black representatives will add their voices to legislative debates. See *post,* at 2506 (GINSBURG, J., dissenting). "There is no moral or constitutional equivalence between a policy that is designed to perpetuate a caste system and one that seeks to eradicate racial subordination." *Adarand Constructors, Inc. v. Peña,* 515 U.S., at 243, 115 S.Ct., at 2120 (STEVENS, J., dissenting); see also *id.,* at 247–248, n. 5, 115 S.Ct., at 2122–2123, n. 5. That racial integration of the sort attempted by Georgia now appears more vulnerable to judicial challenge than some policies alleged to perpetuate racial bias, cf. *Allen v. Wright,* 468 U.S. 737, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984), is anomalous, to say the least.

Equally distressing is the Court's equation of traditional gerrymanders, designed to maintain or enhance a dominant group's power, with a dominant group's decision to share ****2499** its power with a previously underrepresented group. In my view, districting plans violate the Equal Protection Clause when they "serve no purpose other than to favor one segment—whether racial, ethnic, religious, economic, or political—that may occupy a position of strength at a particular point in time, or to disadvantage a politically weak segment of the community." *Karcher v. Daggett,* 462 U.S. 725, 748, 103 S.Ct. 2653, 2668–2669, 77 L.Ed.2d 133 (1983) (STEVENS, J., concurring). In contrast, I do not see how a districting plan that favors a politically weak group can violate equal protection. The Constitution does not mandate any form of proportional representation, but it certainly permits a State to adopt a policy that promotes fair representation of different groups. Indeed, this Court squarely so held in *Gaffney v. Cummings,* 412 U.S. 735, 93 S.Ct. 2321, 37 L.Ed.2d 298 (1973):

> "[N]either we nor the district courts have a constitutional warrant to invalidate a state plan, otherwise ***933** within tolerable population limits, because it undertakes, not to minimize or eliminate the political strength of any group or party, but to recognize it and, through districting, provide a rough sort of proportional representation in the legislative halls of the State." *Id.,* at 754, 93 S.Ct., at 2332.

The Court's refusal to distinguish an enactment that helps a minority group from enactments that cause it harm is especially unfortunate at the intersection of race and voting, given that African-Americans and other disadvantaged groups have struggled so long and so hard for inclusion in that most central exercise of our democracy. See *post,* at 2500–2501 (GINSBURG, J., dissenting). I have long believed that treating racial groups differently from other identifiable groups of voters, as the Court does today, is itself an invidious racial classification. Racial minorities should receive neither more nor less protection than other groups against gerrymanders.[2] *A fortiori,* racial minorities should not be less eligible than other groups to benefit from districting plans the majority designs to aid them.

I respectfully dissent.

***934** Justice GINSBURG, with whom Justice STEVENS and Justice BREYER join, and with whom Justice SOUTER joins except as to Part III–B, dissenting.

Legislative districting is highly political business. This Court has generally respected the competence of state legislatures to attend to the task. When race is the issue, however, we have recognized the need for judicial intervention to prevent dilution of minority voting strength. Generations of rank discrimination against African–Americans, as citizens and voters, account for that surveillance.

Two Terms ago, in *Shaw v. Reno,* 509 U.S. 630, 113 S.Ct. 2816, 125 L.Ed.2d 511 (1993), this Court took up a claim "analytically distinct" from a vote dilution claim. *Id.,* at 652, 113 S.Ct., at 2830. *Shaw* authorized judicial intervention in "extremely irregular" apportionments, *id.,* at 642, 113 S.Ct., at 2824, in which the legislature cast aside traditional districting practices to consider race alone—in the *Shaw* case, to create a district in North Carolina in which African–Americans would compose a majority of the voters.

Today the Court expands the judicial role, announcing that federal courts are to undertake searching review of any district with contours "predominant[ly] motivat[ed]" by race: "[S]trict scrutiny" will be triggered not ****2500** only when traditional districting practices are abandoned, but also when those practices are "subordinated to"—given less weight than—race. See *ante,* at 2488. Applying this new "race-as-predominant-factor" standard, the Court invalidates Georgia's districting plan even though Georgia's Eleventh District, the focus of today's dispute, bears the imprint of familiar districting practices. Because I do not endorse the Court's new standard and would not upset Georgia's plan, I dissent.

I

At the outset, it may be useful to note points on which the Court does not divide. First, we agree that federalism and the slim judicial competence to draw district lines weigh ***935** heavily against judicial intervention in apportionment decisions; as a rule, the task should remain within the domain of state legislatures. See *ante,* at 2488; *Reynolds v. Sims,* 377 U.S. 533, 586, 84 S.Ct. 1362, 1394, 12 L.Ed.2d 506 (1964) ("[L]egislative reapportionment is primarily a matter for legislative consideration and determination...."). Second, for most of our Nation's history, the franchise has not been enjoyed equally by black citizens and white voters. To redress past wrongs and to avert any recurrence of exclusion of blacks from political processes, federal courts now respond to Equal Protection Clause and Voting Rights Act complaints of state action that dilutes minority voting strength. See, *e.g., Thornburg v. Gingles,* 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986); *White v. Regester,* 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973). Third, to meet statutory requirements, state legislatures must sometimes consider race as a factor highly relevant to the drawing of district lines. See Pildes & Niemi, Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election–District Appearances After *Shaw v. Reno,* 92 Mich.L.Rev. 483, 496 (1993) ("compliance with the [Voting Rights Act] and *Gingles* necessarily requires race-conscious districting"). Finally, state legislatures may recognize communities that have a particular racial or ethnic makeup, even in the absence of any compulsion to do so, in order to account for interests common to or shared by the persons grouped together. See *Shaw,* 509 U.S., at 646, 113 S.Ct., at 2826 ("[W]hen members of a racial group live together in one community, a reapportionment plan that concentrates members of the group in one district and excludes them from others may reflect wholly legitimate purposes.").

Therefore, the fact that the Georgia General Assembly took account of race in drawing district lines—a fact not in dispute—does not render the State's plan invalid. To offend the Equal Protection Clause, all agree, the legislature had to do more than consider race. How much more, is the issue that divides the Court today.

***936** A

"We say once again what has been said on many occasions: reapportionment is primarily the duty and responsibility of the State through its legislature or other body, rather than of a federal court." *Chapman v. Meier,* 420 U.S. 1, 27, 95 S.Ct. 751, 766, 42 L.Ed.2d 766 (1975); see also *ante,* at 2488. The Constitution itself allocates this responsibility to States. U.S. Const., Art. I, § 2; *Growe v. Emison,* 507 U.S. 25, 34, 113 S.Ct. 1075, 1081, 122 L.Ed.2d 388 (1993).

"Districting inevitably has sharp political impact and inevitably political decisions must be made by those charged with the task." *White v. Weiser,* 412 U.S. 783, 795–796, 93 S.Ct. 2348, 2355, 37 L.Ed.2d 335 (1973). District lines are drawn to accommodate a myriad of factors—geographic, economic, historical, and political—and state legislatures, as arenas of compromise and electoral accountability, are best positioned to mediate competing claims; courts, with a mandate to adjudicate, are ill equipped for the task.

B

Federal courts have ventured into the political thicket of apportionment when necessary to secure to members of racial minorities equal voting rights—rights denied in many States, including Georgia, until not long ago.

The Fifteenth Amendment, ratified in 1870, declares that the right to vote "shall not be denied ... by any State on account of ****2501** race." That declaration, for generations, was often honored in the breach; it was greeted by a near century of "unremitting and ingenious defiance" in several States, including Georgia. *South Carolina v. Katzenbach,* 383 U.S. 301, 309, 86 S.Ct. 803, 808, 15 L.Ed.2d 769 (1966). After a brief interlude of black suffrage enforced by federal troops but accompanied by rampant violence against blacks, Georgia held a constitutional convention in 1877. Its purpose, according to the convention's leader, was to " 'fix it so that the people shall rule and the Negro shall never be heard from.' " McDonald, Binford, & Johnson, Georgia, in Quiet Revolution in the South 68 (C. Davidson ***937** & B. Grofman eds. 1994) (quoting Robert Toombs). In pursuit of this objective, Georgia enacted a cumulative poll tax, requiring voters to show they had paid past as well as current poll taxes; one historian described this tax as the "most effective bar to Negro suffrage ever devised." A. Stone, Studies in the American Race Problem 354–355 (1908).

In 1890, the Georgia General Assembly authorized "white primaries"; keeping blacks out of the Democratic primary effectively excluded them from Georgia's political life, for victory in the Democratic primary was tantamount to election. McDonald, Binford, & Johnson, *supra,* at 68–69. Early in this century, Georgia Governor Hoke Smith persuaded the legislature to pass the "Disenfranchisement Act of 1908"; true to its title, this measure added various property, "good character," and literacy requirements that, as administered, served to keep blacks from voting. *Id.,* at 69; see also *Katzenbach,* 383 U.S., at 310, 86 S.Ct., at 809 (tests of this order were "specifically designed to prevent Negroes from voting"). The result, as one commentator observed 25 years later, was an " 'almost absolute exclusion of the Negro voice in state and federal elections.' " McDonald, Binford, & Johnson, *supra,* at 70 (quoting R. Wardlaw, Negro Suffrage in Georgia, 1867–1930, p. 69 (unpublished 1932)).

Faced with a political situation scarcely open to self-correction—disenfranchised blacks had no electoral influence, hence no muscle to lobby the legislature for change—the Court intervened. It invalidated white primaries, see *Smith v. Allwright,* 321 U.S. 649, 64 S.Ct. 757, 88 L.Ed. 987 (1944), and other burdens on minority voting. See, *e.g., Schnell v. Davis,* 336 U.S. 933, 69 S.Ct. 749, 93 L.Ed. 1093 (1949) *(per curiam)* (discriminatory application of voting tests); *Lane v. Wilson,* 307 U.S. 268, 59 S.Ct. 872, 83 L.Ed. 1281 (1939) (procedural hurdles); *Guinn v. United States,* 238 U.S. 347, 35 S.Ct. 926, 59 L.Ed. 1340 (1915) (grandfather clauses).

It was against this backdrop that the Court, construing the Equal Protection Clause, undertook to ensure that apportionment ***938** plans do not dilute minority voting strength. See, *e.g., Rogers v. Lodge,* 458 U.S. 613, 617, 102 S.Ct. 3272, 3275, 73 L.Ed.2d 1012 (1982); *Regester,* 412 U.S., at 765, 93 S.Ct., at 2339; *Wright v. Rockefeller,* 376 U.S. 52, 57, 84 S.Ct. 603, 605–606, 11 L.Ed.2d 512 (1964). By enacting the Voting Rights Act of 1965, Congress heightened federal judicial involvement in apportionment, and also fashioned a role for the Attorney General. Section 2 creates a federal right of action

to challenge vote dilution. Section 5 requires States with a history of discrimination to preclear any changes in voting practices with either a federal court (a three-judge United States District Court for the District of Columbia) or the Attorney General.

These Court decisions and congressional directions significantly reduced voting discrimination against minorities. In the 1972 election, Georgia gained its first black Member of Congress since Reconstruction, and the 1981 apportionment created the State's first majority-minority district.[1] This voting district, however, was not gained easily. Georgia created it only after the United States District Court for the District of Columbia refused to preclear a predecessor apportionment plan that included no such district—an omission due in part to the influence of Joe Mack Wilson, then Chairman of the Georgia House Reapportionment Committee. ****2502** As Wilson put it only 14 years ago, " 'I don't want to draw nigger districts.' " *Busbee v. Smith,* 549 F.Supp. 494, 501 (DC 1982).

II

A

Before *Shaw v. Reno,* 509 U.S. 630, 113 S.Ct. 2816, 125 L.Ed.2d 511 (1993), this Court invoked the Equal Protection Clause to justify intervention in the quintessentially political task of legislative districting in two circumstances: to enforce the one-person-one-vote requirement, see *Reynolds v. Sims,* 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964); and ***939** to prevent dilution of a minority group's voting strength, see *Regester,* 412 U.S., at 765, 93 S.Ct., at 2339; *Wright,* 376 U.S., at 57, 84 S.Ct., at 605–606.[2]

In *Shaw,* the Court recognized a third basis for an equal protection challenge to a State's apportionment plan. The Court wrote cautiously, emphasizing that judicial intervention is exceptional: "Strict judicial scrutiny" is in order, the Court declared, if a district is "so extremely irregular on its face that it rationally can be viewed only as an effort to segregate the races for purposes of voting." 509 U.S., at 642, 113 S.Ct., at 2824.

"[E]xtrem[e] irregular[ity]" was evident in *Shaw,* the Court explained, setting out this description of the North Carolina voting district under examination:

> "It is approximately 160 miles long and, for much of its length, no wider than the I–85 corridor. It winds in snakelike fashion through tobacco country, financial centers, and manufacturing areas until it gobbles in enough enclaves of black neighborhoods. Northbound and southbound drivers on I–85 sometimes find themselves in separate districts in one county, only to 'trade' districts when they enter the next county. Of the 10 counties through which District 12 passes, 5 are cut into 3 different districts; even towns are divided. At one point the district remains contiguous only because it intersects at a single point with two other districts before crossing over them. One state legislator has remarked that ' "[i]f you drove down the interstate with both car ***940** doors open, you'd kill most of the people in the district." ' Washington Post, Apr. 20, 1993, p. A4. The district even has inspired poetry: 'Ask not for whom the line is drawn; it is drawn to avoid thee.' Grofman, Would Vince Lombardi Have Been Right If He Had Said: 'When It Comes to Redistricting, Race Isn't Everything, It's the *Only* Thing'?, 14 Cardozo L.Rev. 1237, 1261, n. 96 (1993) (internal quotation marks omitted)." *Shaw,* Id., at 635–636, 113 S.Ct., at 2820–2821 (some citations and internal quotation marks omitted).

The problem in *Shaw* was not the plan architects' consideration of race as relevant in redistricting. Rather, in the Court's estimation, it was the virtual exclusion of other factors from the calculus. Traditional districting practices were cast aside, the Court concluded, with race alone steering placement of district lines.

B

The record before us does not show that race similarly overwhelmed traditional districting practices in Georgia. Although the Georgia General Assembly prominently considered race in shaping the Eleventh District, race did not crowd out all other factors, as the Court found it did in North Carolina's delineation of the *Shaw* district.

In contrast to the snake-like North Carolina district inspected in *Shaw,* Georgia's Eleventh District is hardly "bizarre," "extremely irregular," or "irrational on its face." ****2503** *Id.,* at 642, 644, 658, 113 S.Ct., at 2824, 2825, 2848. Instead, the Eleventh District's design reflects significant consideration of "traditional districting factors (such as keeping political subdivisions intact) and the usual political process of compromise and trades for a variety of nonracial reasons." 864 F.Supp. 1354, 1397, n. 5 (SD Ga.1994) (Edmondson, J., dissenting); cf. *ante,* at 2489 ("geometric shape of the Eleventh District may not seem bizarre on its face"). The district covers a core area in central and eastern ***941** Georgia, and its total land area of 6,780 square miles is about average for the State. Defendant's Exh. 177, p. 4.[3] The border of the Eleventh District runs 1,184 miles, in line with Georgia's Second District, which has a 1,243–mile border, and the State's Eighth District, with a border running 1,155 miles. See 864 F.Supp., at 1396 (Edmondson, J., dissenting).[4]

Nor does the Eleventh District disrespect the boundaries of political subdivisions. Of the 22 counties in the district, 14 are intact and 8 are divided. See Joint Exh. 17. That puts the Eleventh District at about the state average in divided counties. By contrast, of the Sixth District's five counties, none are intact, *ibid.,* and of the Fourth District's four counties, just one is intact. *Ibid.*[5] Seventy-one percent of the Eleventh District's boundaries track the borders of political subdivisions. See 864 F.Supp., at 1396 (Edmondson, J., dissenting). Of the State's 11 districts, 5 score worse than the Eleventh District on this criterion, and 5 score better. ***942** See Defendant's Exh. 177, p. 4.[6] Eighty-three percent of the Eleventh District's geographic area is composed of intact counties, above average for the State's congressional districts. 864 F.Supp., at 1396 (Edmondson, J., dissenting).[7] And notably, the Eleventh District's boundaries largely follow precinct lines.[8]

Evidence at trial similarly shows that considerations other than race went into determining the Eleventh District's boundaries. For a "political reason"—to accommodate the request of an incumbent State Senator regarding the placement of the precinct in which his son lived—the DeKalb County portion of the Eleventh District was drawn to include a particular (largely white) precinct. 2 Tr. 187, 202. The corridor through Effingham County was substantially narrowed at the request of a (white) State Representative. 2 Tr. 189–190, 212–214. In Chatham County, the district was trimmed to exclude ****2504** a heavily black community in Garden City because a State Representative wanted to keep the city intact inside the neighboring First District. 2 Tr. 218–219. The Savannah extension was configured by "the narrowest means possible" to avoid splitting the city of Port Wentworth. 4 Tr. 172–174, 175–178, 181–183.

***943** Georgia's Eleventh District, in sum, is not an outlier district shaped without reference to familiar districting techniques. Tellingly, the district that the Court's decision today unsettles is not among those on a statistically calculated list of the 28 most bizarre districts in the United States, a study prepared in the wake of our decision in *Shaw.* See Pildes & Niemi, 92 Mich.L.Rev., at 565.

The Court suggests that it was not Georgia's Legislature, but the U.S. Department of Justice, that effectively drew the lines, and that Department officers did so with nothing but race in mind. Yet the "Max–Black" plan advanced by the Attorney General was not the plan passed by the Georgia General Assembly.[9] See 864 F.Supp., at 1396–1397, n. 5 (Edmondson, J., dissenting) ("The Max–Black plan did influence to some degree the shape of the ultimate Eleventh District.... [But] the actual Eleventh is *not* identical to the Max–Black plan. The Eleventh, to my eye, is significantly different in shape in many ways. These differences show ... consideration of other matters beyond race....").[10]

And although the Attorney General refused preclearance to the first two plans approved by Georgia's Legislature, the State

was not thereby disarmed; Georgia could have demanded relief from the Department's objections by instituting a civil action in the United States District Court for the District of Columbia, with ultimate review in this Court. Instead of pursuing that avenue, the State chose to adopt the plan here in controversy—a plan the State forcefully defends ***944** before us. We should respect Georgia's choice by taking its position on brief as genuine.

D

Along with attention to size, shape, and political subdivisions, the Court recognizes as an appropriate districting principle, "respect for ... communities defined by actual shared interests." *Ante,* at 2488. The Court finds no community here, however, because a report in the record showed "fractured political, social, and economic interests within the Eleventh District's black population." *Ante,* at 2490.

But ethnicity itself can tie people together, as volumes of social science literature have documented—even people with divergent economic interests. For this reason, ethnicity is a significant force in political life. As stated in a classic study of ethnicity in one city of immigrants:

> "[M]any elements—history, family and feeling, interest, formal organizational life—operate to keep much of New York life channeled within the bounds of the ethnic group....
>
> "... The political realm ... is least willing to consider [ethnicity] a purely private affair....
>
> . . . . .
>
> "[P]olitical life itself emphasizes the ethnic character of the city, with its balanced tickets and its special appeals...." N. Glazer & D. Moynihan, Beyond the Melting Pot 19–20 (1963).

See also, *e.g.,* E. Litt, Beyond Pluralism: Ethnic Politics in America 2 (1970) ("[E]thnic forces play a surprisingly persistent role in our politics."); Ethnic Group Politics, Preface ix (H. Bailey & E. Katz eds. 1969) ("[E]thnic identifications do exist and ... one cannot really understand the American political ****2505** process without giving special attention to racial, religious and national minorities.").

To accommodate the reality of ethnic bonds, legislatures have long drawn voting districts along ethnic lines. Our ***945** Nation's cities are full of districts identified by their ethnic character—Chinese, Irish, Italian, Jewish, Polish, Russian, for example. See, *e.g.,* S. Erie, Rainbow's End: Irish–Americans and the Dilemmas of Urban Machine Politics, 1840–1985, p. 91 (1988) (describing Jersey City's "Horseshoe district" as "lumping most of the city's Irish together"); Coveted Landmarks Add a Twist to Redistricting Task, Los Angeles Times, Sept. 10, 1991, pp. A1, A24 ("In San Francisco in 1961, ... an Irish Catholic [State Assembly member] 'wanted his district drawn following [Catholic] parish lines so all the parishes where he went to baptisms, weddings and funerals would be in his district'...."); Stone, Goode: Bad and Indifferent, Washington Monthly, July–Aug. 1986, pp. 27, 28 (discussing "The Law of Ethnic Loyalty— ... a universal law of politics," and identifying "predominantly Italian wards of South Philadelphia," a "Jewish Los Angeles district," and a "Polish district in Chicago"). The creation of ethnic districts reflecting felt identity is not ordinarily viewed as offensive or demeaning to those included in the delineation.

III

To separate permissible and impermissible use of race in legislative apportionment, the Court orders strict scrutiny for districting plans "predominantly motivated" by race. No longer can a State avoid judicial oversight by giving—as in this case—genuine and measurable consideration to traditional districting practices. Instead, a federal case can be mounted whenever plaintiffs plausibly allege that other factors carried less weight than race. This invitation to litigate against the State seems to me neither necessary nor proper.

A

The Court derives its test from diverse opinions on the relevance of race in contexts distinctly unlike apportionment. ***946** See *ante,* at 2485–2486.[11] The controlling idea, the Court says, is " 'the simple command [at the heart of the Constitution's guarantee of equal protection] that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class.' " See *ante,* at 2485 (quoting *Metro Broadcasting, Inc. v. FCC,* 497 U.S. 547, 602, 110 S.Ct. 2997, 3028, 111 L.Ed.2d 445 (1990) (O'CONNOR, J., dissenting)) (some internal quotation marks omitted). But cf. *Strauder v. West Virginia,* 100 U.S. 303, 307, 25 L.Ed. 664 (1880) (pervading purpose of post-Civil ****2506** War Amendments was to bar discrimination against once-enslaved race).

***947** In adopting districting plans, however, States do not treat people as individuals. Apportionment schemes, by their very nature, assemble people in groups. States do not assign voters to districts based on merit or achievement, standards States might use in hiring employees or engaging contractors. Rather, legislators classify voters in groups—by economic, geographical, political, or social characteristics—and then "reconcile the competing claims of [these] groups." *Davis v. Bandemer,* 478 U.S. 109, 147, 106 S.Ct. 2797, 2818, 92 L.Ed.2d 85 (1986) (O'CONNOR, J., concurring in judgment).

That ethnicity defines some of these groups is a political reality. Until now, no constitutional infirmity has been seen in districting Irish or Italian voters together, for example, so long as the delineation does not abandon familiar apportionment practices. See *supra,* at 2504–2505. If Chinese–Americans and Russian–Americans may seek and secure group recognition in the delineation of voting districts, then African–Americans should not be dissimilarly treated. Otherwise, in the name of equal protection, we would shut out "the very minority group whose history in the United States gave birth to the Equal Protection Clause." See *Shaw,* 509 U.S., at 679, 113 S.Ct., at 2845 (STEVENS, J., dissenting).[12]

B

Under the Court's approach, judicial review of the same intensity, *i.e.,* strict scrutiny, is in order once it is determined that an apportionment is predominantly motivated by race. It matters not at all, in this new regime, whether the apportionment dilutes or enhances minority voting strength. As very recently observed, however, "[t]here is no moral or ***948** constitutional equivalence between a policy that is designed to perpetuate a caste system and one that seeks to eradicate racial subordination." *Adarand Constructors, Inc. v. Peña,* 515 U.S., at 243, 115 S.Ct., at 2120 (STEVENS, J., dissenting).

Special circumstances justify vigilant judicial inspection to protect minority voters—circumstances that do not apply to majority voters. A history of exclusion from state politics left racial minorities without clout to extract provisions for fair representation in the lawmaking forum. See *supra,* at 2500–2502. The equal protection rights of minority voters thus could have remained unrealized absent the Judiciary's close surveillance. Cf. *United States v. Carolene Products Co.,* 304 U.S. 144, 153, n. 4, 58 S.Ct. 778, 783, n. 4, 82 L.Ed. 1234 (1938) (referring to the "more searching judicial inquiry" that may properly attend classifications adversely affecting "discrete and insular minorities"). The majority, by definition, encounters no such blockage. White voters in Georgia do not lack means to exert strong pressure on their state legislators. The force of

their numbers is itself a powerful determiner of what the legislature will do that does not coincide with perceived majority interests.

State legislatures like Georgia's today operate under federal constraints imposed by the Voting Rights Act—constraints justified by history and designed by Congress to make once-subordinated people free and equal citizens. But these federal constraints do not leave majority voters in need of extraordinary judicial solicitude. The Attorney General, who administers the Voting Rights Act's preclearance requirements, is herself a political actor. She has a duty to enforce the law Congress passed, and she is no doubt aware of the political cost of venturing too far to the detriment of majority voters. Majority voters, furthermore, can press the State to seek judicial review if the Attorney General refuses to preclear a plan that the voters favor. Finally, the Act is itself a political measure, subject to modification in the political process.

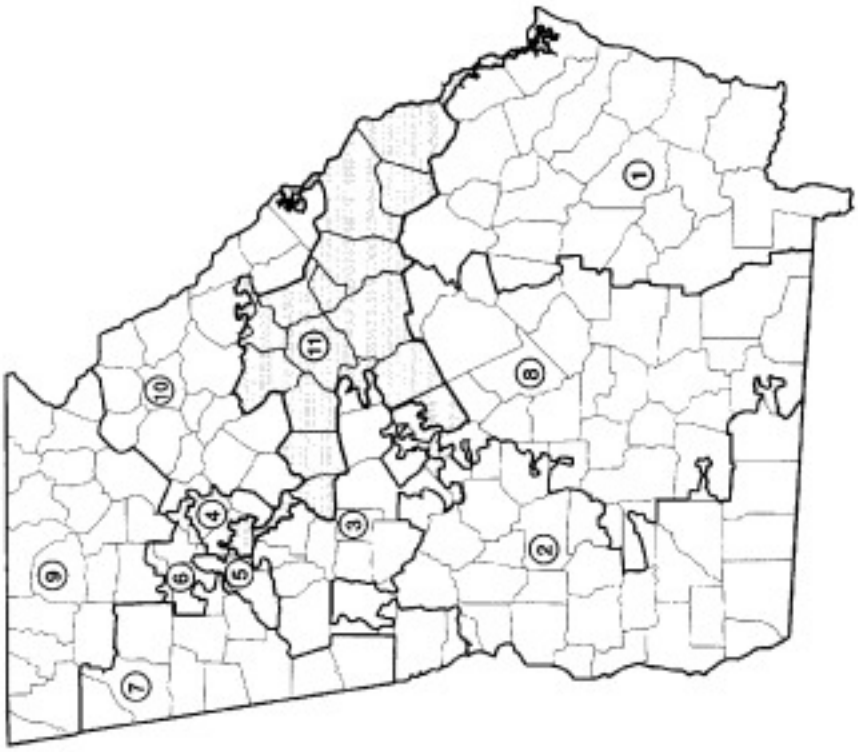
****2507 *949** C

The Court's disposition renders redistricting perilous work for state legislatures. Statutory mandates and political realities may require States to consider race when drawing district lines. See *supra,* at 2500. But today's decision is a counterforce; it opens the way for federal litigation if "traditional ... districting principles" arguably were accorded less weight than race. See *ante,* at 2488. Genuine attention to traditional districting practices and avoidance of bizarre configurations seemed, under *Shaw,* to provide a safe harbor. See 509 U.S., at 647, 113 S.Ct., at 2827 ("[T]raditional districting principles such as compactness, contiguity, and respect for political subdivisions ... are objective factors that may serve to defeat a claim that a district has been gerrymandered on racial lines."). In view of today's decision, that is no longer the case.

Only after litigation—under either the Voting Rights Act, the Court's new *Miller* standard, or both—will States now be assured that plans conscious of race are safe. Federal judges in large numbers may be drawn into the fray. This enlargement of the judicial role is unwarranted. The reapportionment plan that resulted from Georgia's political process merited this Court's approbation, not its condemnation. Accordingly, I dissent.

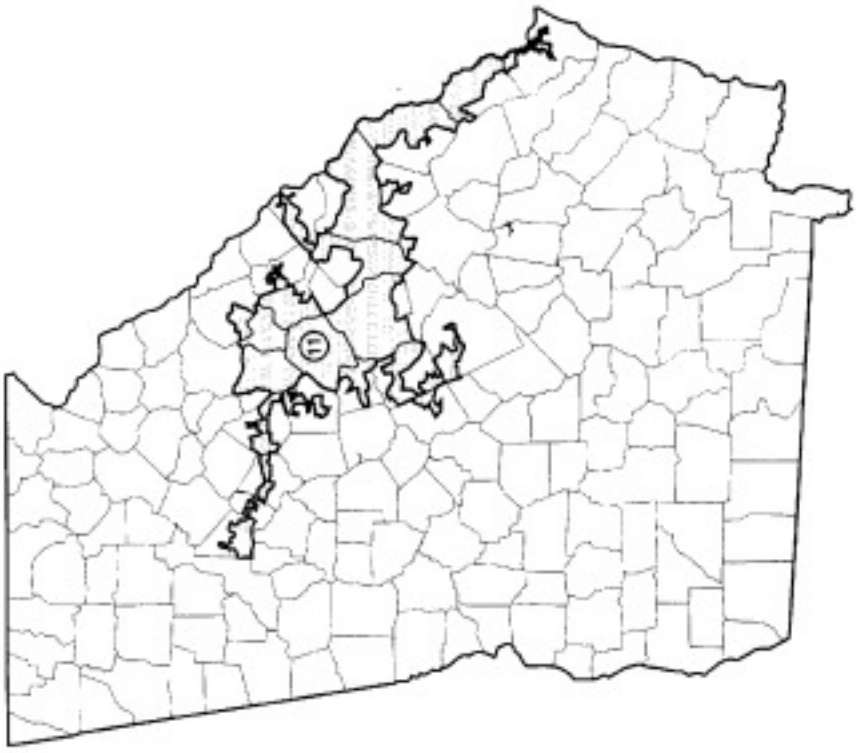
****2508**

APPENDIX B
Current Congressional Districts



Georgia

APPENDIX A
Proposed Eleventh District
Under "Max-Black" Plan



Georgia

**2509

Tabular or graphic material set at this point is not displayable.

All Citations

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Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

* See 864 F.Supp. 1354, 1361 (SD Ga.1994) (quoting Rep. Tyrone Brooks, who recalled on the Assembly Floor that " 'the Attorney General ... specifically told the states covered by the Act that wherever possible, you must draw majority black districts, wherever possible' "); *id.,* at 1362–1363, and n. 4 (citing 3 Tr. 23–24: Assistant Attorney General answering "Yes" to question whether "the Justice Department did take the position in a number of these cases, that if alternative plans demonstrated that more minority districts could be drawn than the state was proposing to draw ... that did, in fact, violate Section 2 of the Voting Rights Act?"); 864 F.Supp., at 1365–1366; *id.,* at 1366, n. 11 ("[I]t became obvious that [the Justice Department] would accept nothing less than abject surrender to its maximization agenda"); *id.,* at 1368 ("It apparently did not occur to [the Justice Department] that increased 'recognition' of minority voting strength, while perhaps admirable, is properly tempered with other districting considerations"); *id.,* at 1382–1383 (expressing doubts as to the constitutionality of [the Justice Department's] " 'maximization' policy"); *id.,* at 1383, n. 35 (citing other courts that have "criticize[d] [the Justice Department's] maximization propensities").

1 White voters obviously lack standing to complain of the other injury the Court has recognized under *Shaw:* the stigma blacks supposedly suffer when assigned to a district because of their race. See *Hays,* 515 U.S., at 744, 115 S.Ct., at 2436; cf. *Adarand Constructors, Inc. v. Peña,* 515 U.S., at 247–248, n. 5, 115 S.Ct., at 2122–2123, n. 5 (STEVENS, J., dissenting).

2 "In my opinion an interpretation of the Constitution which afforded one kind of political protection to blacks and another kind to members of other identifiable groups would itself be invidious. Respect for the citizenry in the black community compels acceptance of the fact that in the long run there is no more certainty that these individuals will vote alike than will individual members of any other ethnic, economic, or social group. The probability of parallel voting fluctuates as the blend of political issues affecting the outcome of an election changes from time to time to emphasize one issue, or a few, rather than others, as dominant. The facts that a political group has its own history, has suffered its own special injustices, and has its own congeries of special political interests, do not make one such group different from any other in the eyes of the law. The members of each go to the polls with equal dignity and with an equal right to be protected from invidious discrimination." *Cousins v. City Council of Chicago,* 466 F.2d 830, 852 (CA7 1972) (Stevens, J., dissenting).

1 Georgia's population is approximately 27 percent black. 864 F.Supp. 1354, 1385 (SD Ga.1994).

2 In the vote dilution category, *Gomillion v. Lightfoot,* 364 U.S. 339, 81 S.Ct. 125, 5 L.Ed.2d 110 (1960), was a pathmarker. There, the city of Tuskegee redrew its boundaries to exclude black voters. This apportionment was unconstitutional not simply because it was motivated by race, but notably because it had a dilutive effect: It disenfranchised Tuskegee's black community. See *id.,* at 341, 81 S.Ct., at 127 ("The essential inevitable effect of this redefinition of Tuskegee's boundaries is to remove from the city all save only four or five of its 400 Negro voters while not removing a single white voter or resident. The result of the Act is to deprive the Negro petitioners discriminatorily of the benefits of residence in Tuskegee, including, *inter alia,* the right to vote in municipal

elections.”).

3 Georgia’s First, Second, and Eighth Districts each have a total area of over 10,100 square miles. 864 F.Supp., at 1396 (Edmondson, J., dissenting).

4 Although the Eleventh District comes within 58 miles of crossing the entire State, this is not unusual in Georgia: The Ninth District spans the State’s entire northern border, and the First, Second, and Eighth Districts begin at the Florida border and stretch north to almost the middle of the State. See *ibid.* (Edmondson, J., dissenting). In the 1980’s, Georgia’s Eighth District extended even farther, in an irregular pattern from the southeast border with Florida to nearly the Atlanta suburbs. See App. 80.

5 The First District has 20 intact counties and parts of 2 others. The Second District has 23 intact counties and parts of 12 others. The Third District has 8 intact counties and parts of 8 others. The Fifth District is composed of parts of 4 counties. The Seventh District has 10 intact counties and part of 1 county. The Eighth District has 22 intact counties and parts of 10 others. The Ninth District has 19 intact counties and part of 1 other. The Tenth District has 16 intact counties and parts of 3 others. See Joint Exh. 17.

6 The Sixth District scores lowest, with just 45 percent of its boundaries following political subdivision lines. The Ninth District rates highest, with 91 percent. Defendant’s Exh. 177, p. 3.

7 On this measure, only three districts—the First, Seventh, and Ninth—rate higher than the Eleventh District. Excluding the Fifth and Sixth Districts, which contain no intact counties, the scores range from about 30 percent for the Fourth District to 97 percent for the Seventh District. *Id.,* at 4.

8 The Court turns the significance of this fact on its head by stating: “ ‘While the boundaries of the Eleventh do indeed follow many precinct lines, this is because Ms. Meggers designed the Eleventh District along racial lines, and race data was most accessible to her at the precinct level.’ ” *Ante,* at 2490 (quoting 864 F.Supp., at 1384). To this curious comment, one can only demur. Yes, Georgia’s plan considered race, but by following precinct lines, it did so in an altogether proper way, *i.e.,* without disregarding traditional districting practices.

9 Appendixes A, B, and C to this opinion depict, respectively, the proposed Eleventh District under the “Max–Black” plan, Georgia’s current congressional districts, and the district in controversy in *Shaw.*

10 Indeed, a “key” feature, *ante,* at 2484, of the “Max–Black” plan—placing parts of Savannah in the Eleventh District—first figured in a proposal adopted by Georgia’s Senate even before the Attorney General suggested this course. 864 F.Supp., at 1394, n. 1 (Edmondson, J., dissenting).

11 I would follow precedent directly on point. In *United Jewish Organizations of Williamsburgh, Inc. v. Carey,* 430 U.S. 144, 97 S.Ct. 996, 51 L.Ed.2d 229 (1977) *(UJO),* even though the State “deliberately used race in a purposeful manner” to create majority-minority districts, *id.,* at 165, 97 S.Ct., at 1010 (opinion of White, J., joined by REHNQUIST and STEVENS, JJ.), seven of eight Justices participating voted to uphold the State’s plan without subjecting it to strict scrutiny. Five Justices specifically agreed that the intentional creation of majority-minority districts does not give rise to an equal protection claim, absent proof that the districting diluted the majority’s voting strength. See *ibid.* (opinion of White, J., joined by REHNQUIST and STEVENS, JJ.); *id.,* at 179–180, 97 S.Ct., at 1016–1017 (Stewart, J., concurring in judgment, joined by Powell, J.).

Nor is *UJO* best understood as a vote dilution case. Petitioners' claim in *UJO* was that the State had "violated the Fourteenth and Fifteenth Amendments by *deliberately revising its reapportionment plan along racial lines.*" *Id.,* at 155, 97 S.Ct., at 1005 (opinion of White, J., joined by Brennan, Blackmun, and STEVENS, JJ.) (emphasis added). Petitioners themselves stated: " 'Our argument is ... that the history of the area demonstrates that there could be—and in fact was—*no reason other than race* to divide the community at this time.' " *Id.,* at 154, n. 14, 97 S.Ct., at 1004, n. 14 (quoting Brief for Petitioners, O.T. 1976, No. 75–104, p. 6, n. 6) (emphasis in Brief for Petitioners).

Though much like the claim in *Shaw,* the *UJO* claim failed because the *UJO* district adhered to traditional districting practices. See 430 U.S., at 168, 97 S.Ct., at 1011 (opinion of White, J., joined by REHNQUIST and STEVENS, JJ.) ("[W]e think it ... permissible for a State, *employing sound districting principles such as compactness and population equality, ...* [to] creat[e] districts that will afford fair representation to the members of those racial groups who are sufficiently numerous *and whose residential patterns afford the opportunity of creating districts* in which they will be in the majority.") (emphasis added).

12 Race-conscious practices a State may elect to pursue, of course, are not as limited as those it may be required to pursue. See *Voinovich v. Quilter,* 507 U.S. 146, 156, 113 S.Ct. 1149, 1156, 122 L.Ed.2d 500 (1993) ("[F]ederal courts may not order the creation of majority-minority districts unless necessary to remedy a violation of federal law. But that does not mean that the State's powers are similarly limited. Quite the opposite is true....") (citation omitted).

End of Document

97 S.Ct. 568
Supreme Court of the United States

MT. HEALTHY CITY SCHOOL DISTRICT BOARD OF EDUCATION, Petitioner,
v.

Fred DOYLE.

No. 75-1278.
|
Argued Nov. 3, 1976.
|
Decided Jan. 11, 1977.

Synopsis
An untenured teacher, having been discharged from his employment, brought an action against his former employer for reinstatement and damages, claiming that the school district's refusal to rehire him violated his rights under the First and Fourteenth Amendments. The District Court found that the teacher's exercise of his right of free speech had played a substantial part in the board of education's decision not to rehire the teacher, and that he was entitled to reinstatement with back pay, and the Court of Appeals, 529 F.2d 524, affirmed. The Supreme Court, Mr. Justice Rehnquist, held, inter alia, that the fact that constitutionally protected conduct played a substantial part in the decision not to rehire the teacher did not necessarily amount to a constitutional violation justifying remedial action, and that the district court should have gone on to determine whether the board of education had shown by a preponderance of the evidence that it would have reached the same decision even in the absence of protected conduct by the teacher.

Vacated and remanded.

****569** Syllabus*

***274** Respondent, an untenured teacher (who had previously been involved in an altercation with another teacher, an argument with school cafeteria employees, an incident in which he swore at students, and an incident in which he made obscene gestures to girl students), conveyed through a telephone call to a radio station the substance of a memorandum relating to teacher dress and appearance that the school principal had circulated to various teachers. The radio station announced the adoption of the dress code as a news item. Thereafter, petitioner School Board, adopting a recommendation of the superintendent, advised respondent that he would not be rehired and cited his lack of tact in handling professional matters, with specific mention of the radio station and obscene-gesture incidents. Respondent then brought this action against petitioner for reinstatement and damages, claiming that petitioner's refusal to rehire him violated his rights under the First and Fourteenth Amendments. Although respondent asserted jurisdiction under both 28 U.S.C. s 1343 and s 1331, the District Court rested jurisdiction only on s 1331. The District Court, which found that the incidents involving respondent had occurred, concluded that the telephone call was "clearly protected by the First Amendment" and that because it had played a "substantial part" in petitioner's decision not to rehire respondent he was entitled to reinstatement with backpay. The Court of Appeals affirmed. Petitioner, in addition to attacking the District Court's jurisdiction under s 1331 on the ground that the $10,000 jurisdictional requirement of that provision was not satisfied in this case, raised an additional jurisdictional issue after this Court had granted certiorari and after petitioner had filed its reply brief, claiming that respondent's only substantive constitutional claim arises under 42 U.S.C. s 1983 and that because petitioner School Board is not a "person" for purposes of s 1983, liability may no more be imposed on it where federal jurisdiction rests on s 1331 than ****570** where jurisdiction is grounded on s 1343. Held:

1. Respondent's complaint sufficiently pleaded jurisdiction under 28 U.S.C. s 1331. Though the amount in controversy

thereunder must ***275** exceed $10,000, even if the District Court had chosen to award only compensatory damages, it was far from a "legal certainty" at the time of suit that respondent would not have been entitled to more than that amount. St. Paul Indemnity Co. v. Red Cab Co., 303 U.S. 283, 288-289, 58 S.Ct. 586, 590, 82 L.Ed. 845. Pp. 570-571.

2. Petitioner in making its belated contention concerning s 1983 failed to preserve the issue whether the complaint stated a claim upon which relief could be granted against it. Because the question involved is not of the jurisdictional sort which the Court raises on its own motion, it is assumed without deciding that respondent could sue under s 1331 without regard to the limitations imposed by s 1983. Pp. 571-572.

3. Since under Ohio law the "State" does not include "political subdivisions" (a category including school districts), and the record shows that a local school board like petitioner is more like a county or city than it is an arm of the State, petitioner is not immune from suit under the Eleventh Amendment. Pp. 572-573.

4. Respondent's constitutional claims are not defeated because he did not have tenure. Perry v. Sindermann, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570. P. 574.

5. That conduct protected by the First and Fourteenth Amendments played a substantial part in the decision not to rehire respondent does not necessarily amount to a constitutional violation justifying remedial action. The proper test is one that protects against the invasion of constitutional rights without commanding undesirable consequences not necessary to the assurance of those rights. Since respondent here satisfied the burden of showing that his conduct was constitutionally protected and was a motivating factor in the petitioner's decision not to rehire him, the District Court should have gone on to determine whether petitioner had shown by a preponderance of the evidence that it would have reached the same decision even in the absence of the protected conduct. Pp. 574-576.

529 F.2d 524, vacated and remanded.

Attorneys and Law Firms

Philip S. Olinger, for petitioner.

Michael H. Gottesman, Washington, D. C., for respondent.

Opinion

***276** Mr. Justice REHNQUIST delivered the opinion of the Court.

Respondent Doyle sued petitioner Mt. Healthy Board of Education in the United States District Court for the Southern District of Ohio. Doyle claimed that the Board's refusal to renew his contract in 1971 violated his rights under the First and Fourteenth Amendments to the United States Constitution. After a bench trial the District Court held that Doyle was entitled to reinstatement with backpay. The Court of Appeals for the Sixth Circuit affirmed the judgment, 529 F.2d 524, and we granted the Board's petition for certiorari, 425 U.S. 933, 96 S.Ct. 1662, 48 L.Ed.2d 174, to consider an admixture of jurisdictional and constitutional claims.

I

(1) Although the respondent's complaint asserted jurisdiction under both 28 U.S.C. s 1343 and 28 U.S.C. s 1331, the District Court rested its jurisdiction only on s 1331. Petitioner's first jurisdictional contention, which we have little difficulty disposing of, asserts that the $10,000 amount in controversy required by that section is not satisfied in this case.

The leading case on this point is St. Paul Indemnity Co. v. Red Cab Co., 303 U.S. 283, 58 S.Ct. 586, 82 L.Ed. 845 (1938), which stated this test:
"(T)he sum claimed by the plaintiff controls if the claim is apparently made in good faith. It must appear to a legal certainty that the claim is really for less ****571** than the jurisdictional amount to justify dismissal. The inability of plaintiff to recover an amount adequate to give the court jurisdiction does not show his bad faith or oust the jurisdiction." Id., at 288-289, 58 S.Ct., at 590. (Footnotes omitted.)

We have cited this rule with approval as recently as Weinberger v. Wiesenfeld, 420 U.S. 636, 642 n. 10, 95 S.Ct. 1225, 1230, 43 L.Ed.2d 514 (1975), and think it requires disposition of the jurisdictional question ***277** tendered by the petition in favor of the respondent. At the time Doyle brought this action for reinstatement and $50,000 damages, he had already accepted a job in a different school system paying approximately $2,000 per year less than he would have earned with the Mt. Healthy Board had he been rehired. The District Court in fact awarded Doyle compensatory damages in the amount of $5,158 by reason of income already lost at the time it ordered his reinstatement. Even if the District Court had chosen to award only compensatory damages and not reinstatement, it was far from a "legal certainty" at the time of suit that Doyle would not have been entitled to more than $10,000.

II

The Board has filed a document entitled "Supplemental Authorities" in which it raises quite a different "jurisdictional" issue from that presented in its petition for certiorari and disposed of in the preceding section of this opinion. Relying on the District Court opinion in Weathers v. West Yuma County School Dist., 387 F.Supp. 552, 556 (Colo.1974), the Board contends that even though Doyle may have met the jurisdictional amount requirement of s 1331 it may not be subjected to liability in this case because Doyle's only substantive constitutional claim arises under 42 U.S.C. s 1983. Because it is not a "person" for purposes of s 1983, the Board reasons, liability may no more be imposed on it where federal jurisdiction is grounded on 28 U.S.C. s 1331 than where such jurisdiction is grounded on 28 U.S.C. s 1343.

The District Court avoided this issue by reciting that it had not "stated any conclusion on the possible Monroe-Kenosha problem in this case since it seems that the case is properly here as a s 1331 case, as well as a s 1983 one." Pet. for Cert. 14a-15a. This reference to our decisions in Monroe v. Pape, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961), and City of Kenosha v. Bruno, 412 U.S. 507, 93 S.Ct. 2222, 37 L.Ed.2d 109 (1973), where it was held ***278** that a municipal corporation is not a suable "person" under s 1983, raises the question whether petitioner Board in this case is sufficiently like the municipal corporations in those cases so that it, too, is excluded from s 1983 liability.

The quoted statement of the District Court makes clear its view that if the jurisdictional basis for the action is s 1331, the limitations contained in 42 U.S.C. s 1983 do not apply. The Board argues, on the contrary, that since Congress in s 1983 has expressly created a remedy relating to violations of constitutional rights under color of state law, one who seeks to recover for such violations is bound by the limitations contained in s 1983 whatever jurisdictional section he invokes.

The question of whether the Board's arguments should prevail, or whether as respondent urged in oral argument, we should, by analogy to our decision in Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971), imply a cause of action directly from the Fourteenth Amendment which would not be subject to the limitations contained in s 1983, is one which has never been decided by this Court. Counsel for respondent at oral argument suggested that it is an extremely important question and one which should not be decided on this record. We agree with respondent.
(2) The Board has raised this question for the first time in a document filed after its reply brief in this Court. Were it in truth a contention that the District Court ****572** lacked jurisdiction, we would be obliged to consider it, even as we are obliged to inquire sua sponte whenever a doubt arises as to the existence of federal jurisdiction. Liberty Mutual Ins. Co. v. Wetzel, 424 U.S. 737, 740, 96 S.Ct. 1202, 1204, 47 L.Ed.2d 435 (1976); Louisville & Nashville R. Co. v. Mottley, 211 U.S. 149, 152, 29 S.Ct. 42, 43, 53 L.Ed. 126 (1908). And if this were a s 1983 action, brought under the special jurisdictional provision of 28

U.S.C. s 1343 which requires no amount in controversy, it would be appropriate for this Court to inquire, for jurisdictional purposes ***279** whether a statutory action had in fact been alleged. City of Kenosha v. Bruno, supra. However, where an action is brought under s 1331, the catchall federal-question provision requiring in excess of $10,000 in controversy, jurisdiction is sufficiently established by allegation of a claim under the Constitution or federal statutes, unless it "clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction . . . ." Bell v. Hood, 327 U.S. 678, 682, 66 S.Ct. 773, 776, 90 L.Ed. 939 (1946); Montana-Dakota Utilities Co. v. Northwestern Pub. Serv. Co., 341 U.S. 246, 249, 71 S.Ct. 692, 694, 95 L.Ed. 912 (1951).

(3) Here respondent alleged that the Board had violated his rights under the First and Fourteenth Amendments and claimed the jurisdictionally necessary amount of damages. The claim that the Board is a "person" under s 1983, even assuming the correctness of the Board's argument that the s 1331 action is limited by the restrictions of s 1983, is not so patently without merit as to fail the test of Bell v. Hood, supra. Therefore, the question as to whether the respondent stated a claim for relief under s 1331 is not of the jurisdictional sort which the Court raises on its own motion. The related question of whether a school district is a person for purposes of s 1983 is likewise not before us. We leave those questions for another day, and assume, without deciding, that the respondent could sue under s 1331 without regard to the limitations imposed by 42 U.S.C. s 1983.

III

The District Court found it unnecessary to decide whether the Board was entitled to immunity from suit in the federal courts under the Eleventh Amendment, because it decided that any such immunity had been waived by Ohio statute and decisional law. In view of the treatment of waiver by a State of its Eleventh Amendment immunity from suit in Ford Motor Co. v. Dept. of Treasury, 323 U.S. 459, 464-466, 65 S.Ct. 347, 350-351, 89 L.Ed. 389 (1945), we are less sure than was the District Court ***280** that Ohio had consented to suit against entities such as the Board in the federal courts. We prefer to address instead the question of whether such an entity had any Eleventh Amendment immunity in the first place, since if we conclude that it had none it will be unnecessary to reach the question of waiver.

(4, 5) The bar of the Eleventh Amendment to suit in federal courts extends to States and state officials in appropriate circumstances, Edelman v. Jordan, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974); Ford Motor Co. v. Dept. of Treasury, supra, but does not extend to counties and similar municipal corporations. See Lincoln County v. Luning, 133 U.S. 529, 530, 10 S.Ct. 363, 33 L.Ed. 766 (1890); Moor v. County of Alameda, 411 U.S. 693, 717-721, 93 S.Ct. 1785, 1799-1801, 36 L.Ed.2d 596 (1973). The issue here thus turns on whether the Mt. Healthy Board of Education is to be treated as an arm of the State partaking of the State's Eleventh Amendment immunity, or is instead to be treated as a municipal corporation or other political subdivision to which the Eleventh Amendment does not extend. The answer depends, at least in part, upon the nature of the entity created by state law. Under Ohio law the "State" does not include "political subdivisions," and "political subdivisions" do include local school districts. Ohio Rev.Code Ann. s 2743.01 (Page Supp.1975). Petitioner is but one of many local school boards within the State of Ohio. It is subject to some ****573** guidance from the State Board of Education, Ohio Rev.Code Ann. s 3301.07 (Page 1972 and Supp.1975), and receives a significant amount of money from the State. Ohio Rev.Code Ann. s 3317 (Page 1972 and Supp.1975). But local school boards have extensive powers to issue bonds, Ohio Rev.Code Ann. s 133.27 (Page 1969), and to levy taxes within certain restrictions of state law. Ohio Rev.Code Ann. ss 5705.02, 5705.03, 5705.192, 5705.194 (Page 1973 and Supp.1975). On balance, the record before us indicates that a local school board such as petitioner is more like a county or city than it is like an arm of the State. We ***281** therefore hold that it was not entitled to assert any Eleventh Amendment immunity from suit in the federal courts.

IV

Having concluded that respondent's complaint sufficiently pleaded jurisdiction under 28 U.S.C. s 1331, that the Board has failed to preserve the issue whether that complaint stated a claim upon which relief could be granted against the Board, and that the Board is not immune from suit under the Eleventh Amendment, we now proceed to consider the merits of respondent's claim under the First and Fourteenth Amendments.

Doyle was first employed by the Board in 1966. He worked under one-year contracts for the first three years, and under a two-year contract from 1969 to 1971. In 1969 he was elected president of the Teachers' Association, in which position he worked to expand the subjects of direct negotiation between the Association and the Board of Education. During Doyle's one-year term as president of the Association, and during the succeeding year when he served on its executive committee, there was apparently some tension in relations between the Board and the Association.

Beginning early in 1970, Doyle was involved in several incidents not directly connected with his role in the Teachers' Association. In one instance, he engaged in an argument with another teacher which culminated in the other teacher's slapping him. Doyle subsequently refused to accept an apology and insisted upon some punishment for the other teacher. His persistence in the matter resulted in the suspension of both teachers for one day, which was followed by a walkout by a number of other teachers, which in turn resulted in the lifting of the suspensions.

On other occasions, Doyle got into an argument with employees of the school cafeteria over the amount of spaghetti which had been served him; referred to students, in connection ***282** with a disciplinary complaint, as "sons of bitches"; and made an obscene gesture to two girls in connection with their failure to obey commands made in his capacity as cafeteria supervisor. Chronologically the last in the series of incidents which respondent was involved in during his employment by the Board was a telephone call by him to a local radio station. It was the Board's consideration of this incident which the court below found to be a violation of the First and Fourteenth Amendments.

In February 1971, the principal circulated to various teachers a memorandum relating to teacher dress and appearance, which was apparently prompted by the view of some in the administration that there was a relationship between teacher appearance and public support for bond issues. Doyle's response to the receipt of the memorandum on a subject which he apparently understood was to be settled by joint teacher-administration action was to convey the substance of the memorandum to a disc jockey at WSAI, a Cincinnati radio station, who promptly announced the adoption of the dress code as a news item. Doyle subsequently apologized to the principal, conceding that he should have made some prior communication of his criticism to the school administration.
Approximately one month later the superintendent made his customary annual recommendations to the Board as to the rehiring of nontenured teachers. He recommended that Doyle not be rehired. The ****574** same recommendation was made with respect to nine other teachers in the district, and in all instances, including Doyle's, the recommendation was adopted by the Board. Shortly after being notified of this decision, respondent requested a statement of reasons for the Board's actions. He received a statement citing "a notable lack of tact in handling professional matters which leaves much doubt as to your sincerity in establishing good school relationships." That general statement was followed ***283** by references to the radio station incident and to the obscene-gesture incident.[1]

The District Court found that all of these incidents had in fact occurred. It concluded that respondent Doyle's telephone call to the radio station was "clearly protected by the First Amendment," and that because it had played a "substantial part" in the decision of the Board not to renew Doyle's employment, he was entitled to reinstatement with backpay. App. to Pet. for Cert. 12a-13a. The District Court did not expressly state what test it was applying in determining that the incident in question involved conduct protected by the First Amendment, but simply held that the communication to the radio station was such conduct. The Court of Appeals affirmed in a brief per curiam opinion. 529 F.2d 524.
(6) Doyle's claims under the First and Fourteenth Amendments are not defeated by the fact that he did not have tenure. Even though he could have been discharged for no reason whatever, and had no constitutional right to a hearing prior to the decision not to rehire him, Board of Regents v. Roth, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972), he may nonetheless establish a claim to reinstatement if the decision not to rehire him was made by reason of his exercise of constitutionally ***284** protected First Amendment freedoms. Perry v. Sindermann, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972).

That question of whether speech of a government employee is constitutionally protected expression necessarily entails striking "a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the

interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." Pickering v. Board of Education, 391 U.S. 563, 568, 88 S.Ct. 1731, 1734, 20 L.Ed.2d 811 (1968). There is no suggestion by the Board that Doyle violated any established policy, or that its reaction to his communication to the radio station was anything more than an ad hoc response to Doyle's action in making the memorandum public. We therefore accept the District Court's finding that the communication was protected by the First and Fourteenth Amendments. We are not, however, entirely in agreement with that court's manner of reasoning from this finding to the conclusion that Doyle is entitled to reinstatement with backpay.

The District Court made the following "conclusions" on this aspect of the case:
"1) If a non-permissible reason, e. g., exercise of First Amendment rights, played a substantial part in the decision not to renew even in the face of other permissible grounds the decision may not stand (citations omitted).

"2) A non-permissible reason did play a substantial part. That is clear from the letter of the Superintendent immediately following the Board's decision, which stated two reasons the one, the conversation with the radio station clearly protected ****575** by the First Amendment. A court may not engage in any limitation of First Amendment rights based on 'tact' that is not to say that the 'tactfulness' is irrelevant to other issues in this case." App. to Pet. for Cert. 12a-13a.

***285** At the same time, though, it stated that
"(i)n fact, as this Court sees it and finds, both the Board and the Superintendent were faced with a situation in which there did exist in fact reason . . . independent of any First Amendment rights or exercise thereof, to not extend tenure." Id., at 12a.

(7) Since respondent Doyle had no tenure, and there was therefore not even a state-law requirement of "cause" or "reason" before a decision could be made not to renew his employment, it is not clear what the District Court meant by this latter statement. Clearly the Board legally could have dismissed respondent had the radio station incident never come to its attention. One plausible meaning of the court's statement is that the Board and the Superintendent not only could, but in fact would have reached that decision had not the constitutionally protected incident of the telephone call to the radio station occurred. We are thus brought to the issue whether, even if that were the case, the fact that the protected conduct played a "substantial part" in the actual decision not to renew would necessarily amount to a constitutional violation justifying remedial action. We think that it would not.

A rule of causation which focuses solely on whether protected conduct played a part, "substantial" or otherwise, in a decision not to rehire, could place an employee in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing. The difficulty with the rule enunciated by the District Court is that it would require reinstatement in cases where a dramatic and perhaps abrasive incident is inevitably on the minds of those responsible for the decision to rehire, and does indeed play a part in that decision even if the same decision would have been reached had the incident not occurred. The constitutional principle at stake is sufficiently vindicated if such an employee is placed in no ***286** worse a position than if he had not engaged in the conduct. A borderline or marginal candidate should not have the employment question resolved against him because of constitutionally protected conduct. But that same candidate ought not to be able, by engaging in such conduct, to prevent his employer from assessing his performance record and reaching a decision not to rehire on the basis of that record, simply because the protected conduct makes the employer more certain of the correctness of its decision.

This is especially true where, as the District Court observed was the case here, the current decision to rehire will accord "tenure." The long-term consequences of an award of tenure are of great moment both to the employee and to the employer. They are too significant for us to hold that the Board in this case would be precluded, because it considered constitutionally protected conduct in deciding not to rehire Doyle, from attempting to prove to a trier of fact that quite apart from such conduct Doyle's record was such that he would not have been rehired in any event.

In other areas of constitutional law, this Court has found it necessary to formulate a test of causation which distinguishes between a result caused by a constitutional violation and one not so caused. We think those are instructive in formulating the test to be applied here.

In Lyons v. Oklahoma, 322 U.S. 596, 64 S.Ct. 1208, 88 L.Ed. 1481 (1944), the Court held that even though the first

confession given by a defendant had been involuntary, the Fourteenth Amendment did not prevent the State from using a second confession obtained 12 hours later if the coercion surrounding the first confession had been sufficiently dissipated as to make the second confession voluntary. In Wong Sun v. United States, 371 U.S. 471, 491, 83 S.Ct. 407, 419, 9 L.Ed.2d 441 (1963), the Court ****576** was willing to assume that a defendant's arrest had been unlawful but held that "the connection between the arrest and the statement (given several days later) had 'become so attenuated as to ***287** dissipate the taint.' Nardone v. United States, 308 U.S. 338, 341, 60 S.Ct. 266, 84 L.Ed. 307." Parker v. North Carolina, 397 U.S. 790, 796, 90 S.Ct. 1458, 25 L.Ed.2d 785 (1970), held that even though a confession be assumed to have been involuntary in the constitutional sense of the word, a guilty plea entered over a month later met the test for the voluntariness of such a plea. The Court in Parker relied on the same quoted language from Nardone, supra, as did the Court in Wong Sun, supra. While the type of causation on which the taint cases turn may differ somewhat from that which we apply here, those cases do suggest that the proper test to apply in the present context is one which likewise protects against the invasion of constitutional rights without commanding undesirable consequences not necessary to the assurance of those rights.

Initially, in this case, the burden was properly placed upon respondent to show that his conduct was constitutionally protected, and that this conduct was a "substantial factor" or to put it in other words, that it was a "motivating factor"[2] in the Board's decision not to rehire him. Respondent having carried that burden, however, the District Court should have gone on to determine whether the Board had shown by a preponderance of the evidence that it would have reached the same decision as to respondent's reemployment even in the absence of the protected conduct.

We cannot tell from the District Court opinion and conclusions, nor from the opinion of the Court of Appeals affirming the judgment of the District Court, what conclusion those courts would have reached had they applied this test. The judgment of the Court of Appeals is therefore vacated, and the case remanded for further proceedings consistent with this opinion.

So ordered.

All Citations

429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471, 1 IER Cases 76

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Timber & Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

1 "I. You have shown a notable lack of tact in handling professional matters which leaves much doubt as to your sincerity in establishing good school relationships.

"A. You assumed the responsibility to notify W.S.A.I. Radio Station in regards to the suggestion of the Board of Education that teachers establish an appropriate dress code for professional people. This raised much concern not only within this community, but also in neighboring communities.

"B. You used obscene gestures to correct students in a situation in the cafeteria causing considerable concern among those students present.

"Sincerely yours,

"Rex Ralph

"Superintendent"

2 See Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S., at 270-271, n. 21, 97 S.Ct., at 566.

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127 S.Ct. 2738
Supreme Court of the United States

PARENTS INVOLVED IN COMMUNITY SCHOOLS, Petitioner,
v.
SEATTLE SCHOOL DISTRICT NO. 1 et al.
Crystal D. Meredith, custodial parent and next friend of Joshua Ryan McDonald, Petitioner,
v.
Jefferson County Board of Education et al.

Nos. 05–908, 05–915.
|
Argued Dec. 4, 2006.
|
Decided June 28, 2007.

Synopsis

Background: Parents brought action against school district challenging, under Equal Protection Clause, student assignment plan that relied on racial classification to allocate slots in oversubscribed high schools. The United States District Court for the District of Washington, Barbara Jacobs Rothstein, J., 137 F.Supp.2d 1224, entered summary judgment for school district, and the United States Court of Appeals for the Ninth Circuit, on rehearing en banc, ultimately affirmed, 426 F.3d 1162. In separate action, another parent brought similar suit against school board that used racial classification in student assignment plan for elementary school assignments and transfer requests. The United States District Court for the Western District of Kentucky, John G. Heyburn II, Chief Judge, 330 F.Supp.2d 834, upheld assignment plan, and the United States Court of Appeals for the Sixth Circuit, 416 F.3d 513, affirmed. The Supreme Court granted certiorari in both cases.

Holdings: The Supreme Court, Chief Justice Roberts, held that:

parents had standing;

allegedly compelling interest of diversity in higher education could not justify districts' use of racial classifications in student assignment plans, abrogating *Comfort v. Lynn School Comm.*, 418 F.3d 1; and

districts failed to show that use of racial classifications in their student assignment plans was necessary to achieve their stated goal of racial diversity.

Reversed and remanded.

Justice Thomas filed concurring opinion.

Justice Kennedy concurred in part, concurred in the judgment, and filed opinion.

Justice Stevens filed dissenting opinion.

Justice Breyer filed dissenting opinion in which Justices Stevens, Souter, and Ginsburg joined.

**2740 *701 *Syllabus*[*]
Respondent school districts voluntarily adopted student assignment plans that rely on race to determine which schools certain children may attend. The Seattle district, which has never operated legally segregated schools or been subject to court-ordered desegregation, classified children as white or nonwhite, and used **2741 the racial classifications as a "tiebreaker" to allocate slots in particular high schools. The Jefferson County, Ky., district was subject to a desegregation decree until 2000, when the District Court dissolved the decree after finding that the district had eliminated the vestiges of prior segregation to the greatest extent practicable. In 2001, the district adopted its plan classifying students as black or "other" in order to make certain elementary school assignments and to rule on transfer requests.

Petitioners, an organization of Seattle parents (Parents Involved) and the mother of a Jefferson County student (Joshua), whose children were or could be assigned under the foregoing plans, filed these suits contending, *inter alia,* that allocating children to different public schools based solely on their race violates the Fourteenth Amendment's equal protection guarantee. In the Seattle case, the District Court granted the school district summary judgment, finding, *inter alia,* that its plan survived strict scrutiny on the federal constitutional claim because it was narrowly tailored to serve a compelling government interest. The Ninth Circuit affirmed. In the Jefferson County case, the District Court found that the school district had asserted a compelling interest in maintaining racially diverse schools, and that its plan was, in all relevant respects, narrowly tailored to serve that interest. The Sixth Circuit affirmed.

Held: The judgments are reversed, and the cases are remanded.

No. 05–908, 426 F.3d 1162; No. 05–915, 416 F.3d 513, reversed and remanded.

THE CHIEF JUSTICE delivered the opinion of the Court with respect to Parts I, II, III–A, and III–C, concluding:

*702 1. The Court has jurisdiction in these cases. Seattle argues that Parents Involved lacks standing because its current members' claimed injuries are not imminent and are too speculative in that, even if the district maintains its current plan and reinstitutes the racial tiebreaker, those members will only be affected if their children seek to enroll in a high school that is oversubscribed and integration positive. This argument is unavailing; the group's members have children in all levels of the district's schools, and the complaint sought declaratory and injunctive relief on behalf of members whose elementary and middle school children may be denied admission to the high schools of their choice in the future. The fact that those children may not be denied such admission based on their race because of undersubscription or oversubscription that benefits them does not eliminate the injury claimed. The group also asserted an interest in not being forced to compete in a race-based system that might prejudice its members' children, an actionable form of injury under the Equal Protection Clause, see, *e.g., Adarand Constructors, Inc. v. Peña,* 515 U.S. 200, 211, 115 S.Ct. 2097, 132 L.Ed.2d 158. The fact that Seattle has ceased using the racial tiebreaker pending the outcome here is not dispositive, since the district vigorously defends its program's constitutionality, and nowhere suggests that it will not resume using race to assign students if it prevails. See *Friends of Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.,* 528 U.S. 167, 189, 120 S.Ct. 693, 145 L.Ed.2d 610. Similarly, the fact that Joshua has been granted a transfer does not eliminate the Court's jurisdiction; Jefferson County's racial guidelines apply at all grade levels and he may again be subject to race-based assignment in middle school. Pp. 2750 – 2751.

2. The school districts have not carried their heavy burden of showing that the interest they seek to achieve justifies the extreme means they have chosen— **2742 discriminating among individual students based on race by relying upon racial classifications in making school assignments. Pp. 2751 – 2755, 2759 – 2761.

(a) Because "racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification," *Fullilove v. Klutznick,* 448 U.S. 448, 537, 100 S.Ct. 2758, 65 L.Ed.2d 902 (STEVENS, J., dissenting), governmental distributions of burdens or benefits based on individual racial classifications are reviewed under strict scrutiny, *e.g., Johnson v. California,* 543 U.S. 499, 505–506, 125 S.Ct. 1141, 160 L.Ed.2d 949. Thus, the school districts must demonstrate that their use of such classifications is "narrowly tailored" to achieve a "compelling" government interest. *Adarand, supra,* at 227, 115 S.Ct. 2097.

Although remedying the effects of past intentional discrimination is a compelling interest under the strict scrutiny test, see *Freeman v. Pitts,* 503 U.S. 467, 494, 112 S.Ct. 1430, 118 L.Ed.2d 108, that interest is not involved here because the *703 Seattle schools were never segregated by law nor subject to court-ordered desegregation, and the desegregation decree to which the Jefferson County schools were previously subject has been dissolved. Moreover, these cases are not governed by

Grutter v. Bollinger, 539 U.S. 306, 328, 123 S.Ct. 2325, 156 L.Ed.2d 304, in which the Court held that, for strict scrutiny purposes, a government interest in student body diversity "in the context of higher education" is compelling. That interest was not focused on race alone but encompassed "all factors that may contribute to student body diversity," *id.,* at 337, 123 S.Ct. 2325, including, *e.g.,* having "overcome personal adversity and family hardship," *id.,* at 338, 123 S.Ct. 2325. Quoting Justice Powell's articulation of diversity in *Regents of Univ. of Cal. v. Bakke,* 438 U.S. 265, 314–315, 98 S.Ct. 2733, 57 L.Ed.2d 750, the *Grutter* Court noted that " 'it is not an interest in simple ethnic diversity, in which a specified percentage of the student body is in effect guaranteed to be members of selected ethnic groups,' that can justify the use of race," 539 U.S., at 324–325, 123 S.Ct. 2325, but " 'a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element,' " *id.,* at 325, 123 S.Ct. 2325. In the present cases, by contrast, race is not considered as part of a broader effort to achieve "exposure to widely diverse people, cultures, ideas, and viewpoints," *id.,* at 330, 123 S.Ct. 2325; race, for some students, is determinative standing alone. The districts argue that other factors, such as student preferences, affect assignment decisions under their plans, but under each plan when race comes into play, it is decisive by itself. It is not simply one factor weighed with others in reaching a decision, as in *Grutter* ; it is *the* factor. See *Gratz v. Bollinger,* 539 U.S. 244, 275, 123 S.Ct. 2411, 156 L.Ed.2d 257. Even as to race, the plans here employ only a limited notion of diversity, viewing race exclusively in white/nonwhite terms in Seattle and black/"other" terms in Jefferson County. The *Grutter* Court expressly limited its holding—defining a specific type of broad-based diversity and noting the unique context of higher education—but these limitations were largely disregarded by the lower courts in extending *Grutter* to the sort of classifications at issue here. Pp. 2751 – 2755.

(b) Despite the districts' assertion that they employed individual racial classifications in a way necessary to achieve their stated ends, the minimal effect these classifications have on student assignments suggests that other means would be effective. Seattle's racial tiebreaker results, in the end, only in shifting a small number of students between schools. Similarly, Jefferson ****2743** County admits that its use of racial classifications has had a minimal effect, and claims only that its guidelines provide a firm definition of the goal of racially integrated schools, thereby providing administrators with authority to collaborate with principals and staff to maintain schools within the desired range. Classifying and assigning schoolchildren according to a binary conception of ***704** race is an extreme approach in light of this Court's precedents and the Nation's history of using race in public schools, and requires more than such an amorphous end to justify it. In *Grutter,* in contrast, the consideration of race was viewed as indispensable in more than tripling minority representation at the law school there at issue. See 539 U.S., at 320, 123 S.Ct. 2325. While the Court does not suggest that *greater* use of race would be preferable, the minimal impact of the districts' racial classifications on school enrollment casts doubt on the necessity of using such classifications. The districts have also failed to show they considered methods other than explicit racial classifications to achieve their stated goals. Narrow tailoring requires "serious, good faith consideration of workable race-neutral alternatives," *id.,* at 339, 123 S.Ct. 2325, and yet in Seattle several alternative assignment plans—many of which would not have used express racial classifications—were rejected with little or no consideration. Jefferson County has failed to present any evidence that it considered alternatives, even though the district already claims that its goals are achieved primarily through means other than the racial classifications. Pp. 2759 – 2761.

THE CHIEF JUSTICE, joined by Justice SCALIA, Justice THOMAS, and Justice ALITO, concluded for additional reasons in Parts III–B and IV that the plans at issue are unconstitutional under this Court's precedents. Pp. 2754 – 2759, 2761 – 2768.

1. The Court need not resolve the parties' dispute over whether racial diversity in schools has a marked impact on test scores and other objective yardsticks or achieves intangible socialization benefits because it is clear that the racial classifications at issue are not narrowly tailored to the asserted goal. In design and operation, the plans are directed only to racial balance, an objective this Court has repeatedly condemned as illegitimate. They are tied to each district's specific racial demographics, rather than to any pedagogic concept of the level of diversity needed to obtain the asserted educational benefits. Whatever those demographics happen to be drives the required "diversity" number in each district. The districts offer no evidence that the level of racial diversity necessary to achieve the asserted educational benefits happens to coincide with the racial demographics of the respective districts, or rather the districts' white/nonwhite or black/"other" balance, since that is the only diversity addressed by the plans. In *Grutter,* the number of minority students the school sought to admit was an undefined "meaningful number" necessary to achieve a genuinely diverse student body, 539 U.S., at 316, 335–336, 123 S.Ct. 2325, and the Court concluded that the law school did not count back from its applicant pool to arrive at that number, *id.,* at 335–336, 123 S.Ct. 2325. Here, in contrast, the schools worked backward to achieve a ***705** particular type of racial balance, rather than working forward from some demonstration of the level of diversity that provides the purported benefits. This is a fatal flaw under the Court's existing precedent. See, *e.g., Freeman,* 503 U.S., at 494, 112 S.Ct. 1430. Accepting racial balancing as a compelling state interest would justify imposing racial proportionality throughout American society, contrary to the Court's

repeated admonitions ****2744** that this is unconstitutional. While the school districts use various verbal formulations to describe the interest they seek to promote—racial diversity, avoidance of racial isolation, racial integration—they offer no definition suggesting that their interest differs from racial balancing. Pp. 2754 – 2759.

2. If the need for the racial classifications embraced by the school districts is unclear, even on the districts' own terms, the costs are undeniable. Government action dividing people by race is inherently suspect because such classifications promote "notions of racial inferiority and lead to a politics of racial hostility," *Richmond v. J.A. Croson, Co.,* 488 U.S. 469, 493, 109 S.Ct. 706, "reinforce the belief, held by too many for too much of our history, that individuals should be judged by the color of their skin," *Shaw v. Reno,* 509 U.S. 630, 657, 113 S.Ct. 2816, 125 L.Ed.2d 511, and "endorse race-based reasoning and the conception of a Nation divided into racial blocs, thus contributing to an escalation of racial hostility and conflict," *Metro Broadcasting, Inc. v. FCC,* 497 U.S. 547, 603, 110 S.Ct. 2997, 111 L.Ed.2d 445 (O'Connor, J., dissenting). When it comes to using race to assign children to schools, history will be heard. In *Brown v. Board of Education,* 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873, the Court held that segregation deprived black children of equal educational opportunities regardless of whether school facilities and other tangible factors were equal, because the classification and separation themselves denoted inferiority. *Id.,* at 493–494, 74 S.Ct. 686. It was not the inequality of the facilities but the fact of legally separating children based on race on which the Court relied to find a constitutional violation in that case. *Id.,* at 494, 74 S.Ct. 686. The districts here invoke the ultimate goal of those who filed *Brown* and subsequent cases to support their argument, but the argument of the plaintiff in *Brown* was that the Equal Protection Clause "prevents states from according differential treatment to American children on the basis of their color or race," and that view prevailed—this Court ruled in its remedial opinion that *Brown* required school districts "to achieve a system of determining admission to the public schools *on a nonracial basis*." *Brown v. Board of Education,* 349 U.S. 294, 300–301, 75 S.Ct. 753, 99 L.Ed. 1083 (emphasis added). Pp. 2761 – 2768.

Justice KENNEDY agreed that the Court has jurisdiction to decide these cases and that respondents' student assignment plans are not narrowly tailored to achieve the compelling goal of diversity properly defined, but concluded that some parts of the plurality opinion imply an ***706** unyielding insistence that race cannot be a factor in instances when it may be taken into account. Pp. 2788 – 2797.

(a) As part of its burden of proving that racial classifications are narrowly tailored to further compelling interests, the government must establish, in detail, how decisions based on an individual student's race are made in a challenged program. The Jefferson County Board of Education fails to meet this threshold mandate when it concedes it denied Joshua's requested kindergarten transfer on the basis of his race under its guidelines, yet also maintains that the guidelines do not apply to kindergartners. This discrepancy is not some simple and straightforward error that touches only upon the peripheries of the district's use of individual racial classifications. As becomes clearer when the district's plan is further considered, Jefferson County has explained how and when it employs these classifications only in terms so broad and imprecise that they cannot withstand strict scrutiny. In its briefing it fails to make clear—even in the limited respects implicated by Joshua's initial assignment and transfer denial—whether in ****2745** fact it relies on racial classifications in a manner narrowly tailored to the interest in question, rather than in the far-reaching, inconsistent, and ad hoc manner that a less forgiving reading of the record would suggest. When a court subjects governmental action to strict scrutiny, it cannot construe ambiguities in favor of the government. In the Seattle case, the school district has gone further in describing the methods and criteria used to determine assignment decisions based on individual racial classifications, but it has nevertheless failed to explain why, in a district composed of a diversity of races, with only a minority of the students classified as "white," it has employed the crude racial categories of "white" and "non-white" as the basis for its assignment decisions. Far from being narrowly tailored, this system threatens to defeat its own ends, and the district has provided no convincing explanation for its design. Pp. 2788 – 2791.

(b) The plurality opinion is too dismissive of government's legitimate interest in ensuring that all people have equal opportunity regardless of their race. In administering public schools, it is permissible to consider the schools' racial makeup and adopt general policies to encourage a diverse student body, one aspect of which is its racial composition. Cf. *Grutter v. Bollinger, supra*. School authorities concerned that their student bodies' racial compositions interfere with offering an equal educational opportunity to all are free to devise race-conscious measures to address the problem in a general way and without treating each student in different fashion based solely on a systematic, individual typing by race. Such measures may include strategic site selection of new schools; drawing attendance zones with general recognition of neighborhood ***707** demographics; allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance, and other statistics by race.

Each respondent has failed to provide the necessary support for the proposition that there is no other way than individual racial classifications to avoid racial isolation in their school districts. Cf. *Croson*, *supra*, at 501, 109 S.Ct. 706, 102 L.Ed.2d 854. In these cases, the fact that the number of students whose assignment depends on express racial classifications is small suggests that the schools could have achieved their stated ends through different means, including the facially race-neutral means set forth above or, if necessary, a more nuanced, individual evaluation of school needs and student characteristics that might include race as a component. The latter approach would be informed by *Grutter,* though the criteria relevant to student placement would differ based on the students' age, the parents' needs, and the schools' role. Pp. 2791 – 2793.

ROBERTS, C. J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, III–A, and III–C, in which SCALIA, KENNEDY, THOMAS, and ALITO, JJ., joined, and an opinion with respect to Parts III–B and IV, in which SCALIA, THOMAS, and ALITO, JJ., joined. THOMAS, J., filed a concurring opinion, *post*, p. 2768. KENNEDY, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 2788. STEVENS, J., filed a dissenting opinion, *post*, p. 2797. BREYER, J., filed a dissenting opinion, in which STEVENS, SOUTER, and GINSBURG, JJ., joined, *post*, p. 2800.

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Opinion

Chief Justice ROBERTS announced the judgment of the Court, and delivered the opinion of the Court with respect to Parts I, II, III–A, and III–C, and an opinion with respect to Parts III–B and IV, in which Justice SCALIA, Justice THOMAS, and Justice ALITO join.

***709** The school districts in these cases voluntarily adopted student assignment plans that rely upon race to determine ***710** which public schools certain children may attend. The Seattle school district classifies children as white or nonwhite; the Jefferson County school district as black or "other." In Seattle, this racial classification is used to allocate slots in oversubscribed high schools. In Jefferson County, it is used to make certain elementary school assignments and to rule on transfer requests. In each case, the school district relies upon an individual student's race in assigning that student to a particular school, so that the racial balance at the school falls within a predetermined range based on the racial composition of the school district as a whole. Parents of students denied assignment to particular schools under these ***711** plans solely because of their race brought suit, contending that allocating children to different public schools on the basis of race violated the Fourteenth Amendment guarantee of equal protection. The Courts of Appeals below upheld the plans. We granted certiorari, and now reverse.

I

Both cases present the same underlying legal question—whether a public school that had not operated legally segregated schools or has been found to be unitary may choose to classify students by race and rely upon that classification in making school assignments. Although we examine the plans under the same legal framework, the specifics of the two plans, and the circumstances surrounding their adoption, are in some respects quite different.

A

Seattle School District No. 1 operates 10 regular public high schools. In 1998, it adopted the plan at issue in this case for assigning students to these schools. App. in No. 05–908, pp. 90a–92a.[1] The plan ****2747** allows incoming ninth graders to choose from among any of the district's high schools, ranking however many schools they wish in order of preference.

Some schools are more popular than others. If too many students list the same school as their first choice, the district employs a series of "tiebreakers" to determine who will fill the open slots at the oversubscribed school. The first tiebreaker selects for admission students who have a sibling ***712** currently enrolled in the chosen school. The next tiebreaker depends upon the racial composition of the particular school and the race of the individual student. In the district's public schools approximately 41 percent of enrolled students are white; the remaining 59 percent, comprising all other racial groups, are classified by Seattle for assignment purposes as nonwhite. *Id.,* at 38a, 103a.[2] If an oversubscribed school is not within 10 percentage points of the district's overall white/nonwhite racial balance, it is what the district calls "integration positive," and the district employs a tiebreaker that selects for assignment students whose race "will serve to bring the school into balance." *Id.,* at 38a. See *Parents Involved VII,* 426 F.3d 1162, 1169–1170 (C.A.9 2005) (en banc).[3] If it is still necessary to select students for the school after using the racial tiebreaker, the next tiebreaker is the geographic proximity of the school to the student's residence. App. in No. 05–908, at 38a.

Seattle has never operated segregated schools—legally separate schools for students of different races—nor has it ever been subject to court-ordered desegregation. It nonetheless employs the racial tiebreaker in an attempt to address the effects of racially identifiable housing patterns on school assignments. Most white students live in the northern part of Seattle, most students of other racial backgrounds in the southern part. *Parents Involved VII, supra,* at 1166. Four of Seattle's high schools are located in the north—Ballard, Nathan Hale, Ingraham, and Roosevelt—and five in the south—Rainier Beach, Cleveland, West Seattle, ***713** Chief Sealth, and Franklin. One school—Garfield—is more or less in the center of Seattle. App. in No. 05–908, at 38a–39a, 45a.

For the 2000–2001 school year, five of these schools were oversubscribed—Ballard, Nathan Hale, Roosevelt, Garfield, and Franklin—so much so that 82 percent of incoming ninth graders ranked one of these schools as their first choice. *Id.,* at 38a. Three of the oversubscribed schools were "integration positive" because the school's white enrollment the previous school year was greater than 51 percent—Ballard, Nathan Hale, and Roosevelt. Thus, more nonwhite students (107, 27, and 82, respectively) who selected one of these three schools as a top choice received placement at the school than would have been the case had race not been considered, and proximity been the next tiebreaker. *Id.,* at 39a–40a. Franklin was ****2748** "integration positive" because its nonwhite enrollment the previous school year was greater than 69 percent; 89 more white students were assigned to Franklin by operation of the racial tiebreaker in the 2000–2001 school year than otherwise would have been. *Ibid.* Garfield was the only oversubscribed school whose composition during the 1999–2000 school year was within the racial guidelines, although in previous years Garfield's enrollment had been predominantly nonwhite, and the racial tiebreaker had been used to give preference to white students. *Id.,* at 39a.

Petitioner Parents Involved in Community Schools (Parents Involved) is a nonprofit corporation comprising the parents of children who have been or may be denied assignment to their chosen high school in the district because of their race. The concerns of Parents Involved are illustrated by Jill Kurfirst, who sought to enroll her ninth-grade son, Andy Meeks, in Ballard High School's special Biotechnology Career Academy. Andy suffered from attention deficit hyperactivity disorder and dyslexia, but had made good progress with hands-on instruction, and his mother and middle school teachers thought that the

smaller biotechnology program ***714** held the most promise for his continued success. Andy was accepted into this selective program but, because of the racial tiebreaker, was denied assignment to Ballard High School. *Id.,* at 143a–146a, 152a–160a. Parents Involved commenced this suit in the Western District of Washington, alleging that Seattle's use of race in assignments violated the Equal Protection Clause of the Fourteenth Amendment,[4] Title VI of the Civil Rights Act of 1964,[5] and the Washington Civil Rights Act.[6] *Id.,* at 28a–35a.

The District Court granted summary judgment to the school district, finding that state law did not bar the district's use of the racial tiebreaker and that the plan survived strict scrutiny on the federal constitutional claim because it was narrowly tailored to serve a compelling government interest. 137 F.Supp.2d 1224, 1240 (W.D.Wash.2001) (*Parents Involved I*). The Ninth Circuit initially reversed based on its interpretation of the Washington Civil Rights Act, 285 F.3d 1236, 1253 (2002) (*Parents Involved II*), and enjoined the district's use of the integration tiebreaker, *id.,* at 1257. Upon realizing that the litigation would not be resolved in time for assignment decisions for the 2002–2003 school year, the Ninth Circuit withdrew its opinion, 294 F.3d 1084 (2002) (*Parents Involved III*), vacated the injunction, and, pursuant to Wash. Rev.Code § 2.60.020 (2006), certified the state-law question to the Washington Supreme Court, 294 F.3d 1085, 1087 (2002) (*Parents Involved IV*).

***715** The Washington Supreme Court determined that the State Civil Rights Act bars only preferential treatment programs "where race or gender is used by government to select a less qualified applicant over a more qualified applicant," and not "[p]rograms which are racially neutral, such as the [district's] open choice plan." ****2749** *Parents Involved in Community Schools v. Seattle School Dist., No. 1,* 149 Wash.2d 660, 689–690, 663, 72 P.3d 151, 166, 153 (2003) (en banc) (*Parents Involved V*). The state court returned the case to the Ninth Circuit for further proceedings. *Id.,* at 690, 72 P.3d, at 167.

A panel of the Ninth Circuit then again reversed the District Court, this time ruling on the federal constitutional question. *Parents Involved VI,* 377 F.3d 949 (2004). The panel determined that while achieving racial diversity and avoiding racial isolation are compelling government interests, *id.,* at 964, Seattle's use of the racial tiebreaker was not narrowly tailored to achieve these interests, *id.,* at 980. The Ninth Circuit granted rehearing en banc, 395 F.3d 1168 (2005), and overruled the panel decision, affirming the District Court's determination that Seattle's plan was narrowly tailored to serve a compelling government interest, *Parents Involved VII,* 426 F.3d, at 1192–1193. We granted certiorari. 547 U.S. 1177, 126 S.Ct. 2351, 165 L.Ed.2d 277 (2006).

B

Jefferson County Public Schools operates the public school system in metropolitan Louisville, Kentucky. In 1973 a federal court found that Jefferson County had maintained a segregated school system, *Newburg Area Council, Inc. v. Board of Ed. of Jefferson Cty.,* 489 F.2d 925, 932 (CA6), vacated and remanded, 418 U.S. 918, 94 S.Ct. 3208, 3209, 41 L.Ed.2d 1160, reinstated with modifications, 510 F.2d 1358, 1359 (C.A.6 1974), and in 1975 the District Court entered a desegregation decree. See *Hampton v. Jefferson Cty. Bd. of Ed.,* 72 F.Supp.2d 753, 762–764 (W.D.Ky.1999). Jefferson County operated under this decree until 2000, when the District Court dissolved the decree after ***716** finding that the district had achieved unitary status by eliminating "[t]o the greatest extent practicable" the vestiges of its prior policy of segregation. *Hampton v. Jefferson Cty. Bd. of Ed.,* 102 F.Supp.2d 358, 360 (2000). See *Board of Ed. of Oklahoma City Public Schools v. Dowell,* 498 U.S. 237, 249–250, 111 S.Ct. 630, 112 L.Ed.2d 715 (1991); *Green v. School Bd. of New Kent Cty.,* 391 U.S. 430, 435–436, 88 S.Ct. 1689, 20 L.Ed.2d 716 (1968).

In 2001, after the decree had been dissolved, Jefferson County adopted the voluntary student assignment plan at issue in this case. App. in No. 05–915, p. 77. Approximately 34 percent of the district's 97,000 students are black; most of the remaining 66 percent are white. *McFarland v. Jefferson Cty. Public Schools,* 330 F.Supp.2d 834, 839–840, and n. 6 (W.D.Ky.2004) (*McFarland I*). The plan requires all nonmagnet schools to maintain a minimum black enrollment of 15 percent, and a maximum black enrollment of 50 percent. App. in No. 05–915, at 81; *McFarland I, supra,* at 842.

At the elementary school level, based on his or her address, each student is designated a "resides" school to which students within a specific geographic area are assigned; elementary resides schools are "grouped into clusters in order to facilitate

integration." App. in No. 05–915, at 82. The district assigns students to nonmagnet schools in one of two ways: Parents of kindergartners, first graders, and students new to the district may submit an application indicating a first and second choice among the schools within their cluster; students who do not submit such an application are assigned within the cluster by the district. "Decisions to assign students to schools within each cluster are based on available space within the schools and the racial guidelines in the District's current student assignment plan." *Id.,* at 38. If a school has reached the "extremes of the ****2750** racial guidelines," a student whose race would contribute to the school's racial imbalance will not be assigned there. *Id.,* at 38–39, 82. After assignment, students at all grade levels ***717** are permitted to apply to transfer between nonmagnet schools in the district. Transfers may be requested for any number of reasons, and may be denied because of lack of available space or on the basis of the racial guidelines. *Id.,* at 43.[7]

When petitioner Crystal Meredith moved into the school district in August 2002, she sought to enroll her son, Joshua McDonald, in kindergarten for the 2002–2003 school year. His resides school was only a mile from his new home, but it had no available space—assignments had been made in May, and the class was full. Jefferson County assigned Joshua to another elementary school in his cluster, Young Elementary. This school was 10 miles from home, and Meredith sought to transfer Joshua to a school in a different cluster, Bloom Elementary, which—like his resides school—was only a mile from home. See Tr. in *McFarland I*, pp. 1–49 through 1–54 (Dec. 8, 2003). Space was available at Bloom, and intercluster transfers are allowed, but Joshua's transfer was nonetheless denied because, in the words of Jefferson County, "[t]he transfer would have an adverse effect on desegregation compliance" of Young. App. in No. 05–915, at 97.[8]

Meredith brought suit in the Western District of Kentucky, alleging violations of the Equal Protection Clause of the Fourteenth Amendment. The District Court found that Jefferson County had asserted a compelling interest in maintaining ***718** racially diverse schools, and that the assignment plan was (in all relevant respects) narrowly tailored to serve that compelling interest. *McFarland I, supra,* at 837.[9] The Sixth Circuit affirmed in a *per curiam* opinion relying upon the reasoning of the District Court, concluding that a written opinion "would serve no useful purpose." *McFarland v. Jefferson Cty. Public Schools,* 416 F.3d 513, 514 (2005) (*McFarland II*). We granted certiorari. 547 U.S. 1178, 126 S.Ct. 2351, 165 L.Ed.2d 277 (2006).

II

As a threshold matter, we must assure ourselves of our jurisdiction. Seattle argues that Parents Involved lacks standing because none of its current members can claim an imminent injury. Even if the district maintains the current plan and reinstitutes the racial tiebreaker, Seattle argues, Parents Involved members will only be affected if their children seek to enroll in a Seattle public high school and choose an oversubscribed school that is integration positive—too speculative a ****2751** harm to maintain standing. Brief for Respondents in No. 05–908, pp. 16–17.

This argument is unavailing. The group's members have children in the district's elementary, middle, and high schools, App. in No. 05–908, at 299a–301a; Affidavit of Kathleen Brose Pursuant to this Court's Rule 32.3 (Lodging of Petitioner Parents Involved), and the complaint sought declaratory and injunctive relief on behalf of Parents Involved members whose elementary and middle school children may be "denied admission to the high schools of their choice when they apply for those schools in the future," App. in No. 05–908, at 30a. The fact that it is possible that children of group members will not be denied admission to a school ***719** based on their race—because they choose an undersubscribed school or an oversubscribed school in which their race is an advantage—does not eliminate the injury claimed. Moreover, Parents Involved also asserted an interest in not being "forced to compete for seats at certain high schools in a system that uses race as a deciding factor in many of its admissions decisions." *Ibid.* As we have held, one form of injury under the Equal Protection Clause is being forced to compete in a race-based system that may prejudice the plaintiff, *Adarand Constructors, Inc. v. Peña,* 515 U.S. 200, 211, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995); *Northeastern Fla. Chapter, Associated Gen. Contractors of America v. Jacksonville,* 508 U.S. 656, 666, 113 S.Ct. 2297, 124 L.Ed.2d 586 (1993), an injury that the members of Parents Involved can validly claim on behalf of their children.

In challenging standing, Seattle also notes that it has ceased using the racial tiebreaker pending the outcome of this litigation.

Brief for Respondents in No. 05–908, at 16–17. But the district vigorously defends the constitutionality of its race-based program, and nowhere suggests that if this litigation is resolved in its favor it will not resume using race to assign students. Voluntary cessation does not moot a case or controversy unless "subsequent events ma[ke] it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur," *Friends of Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.,* 528 U.S. 167, 189, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000) (quoting *United States v. Concentrated Phosphate Export Assn., Inc.,* 393 U.S. 199, 203, 89 S.Ct. 361, 21 L.Ed.2d 344 (1968); internal quotation marks omitted), a heavy burden that Seattle has clearly not met.

Jefferson County does not challenge our jurisdiction, Tr. of Oral Arg. in No. 05–915, p. 48, but we are nonetheless obliged to ensure that it exists, *Arbaugh v. Y & H Corp.,* 546 U.S. 500, 514, 126 S.Ct. 1235, 163 L.Ed.2d 1097 (2006). Although apparently Joshua has now been granted a transfer to Bloom, the school to which transfer was denied under the racial guidelines, Tr. of Oral Arg. in No. 05–915, at 45, the racial guidelines apply at all grade ***720** levels. Upon Joshua's enrollment in middle school, he may again be subject to assignment based on his race. In addition, Meredith sought damages in her complaint, which is sufficient to preserve our ability to consider the question. *Los Angeles v. Lyons,* 461 U.S. 95, 109, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983).

III

A

It is well established that when the government distributes burdens or benefits on the basis of individual racial classifications, that action is reviewed under strict scrutiny. *Johnson v. California,* 543 U.S. 499, 505–506, 125 S.Ct. 1141, 160 L.Ed.2d 949 (2005); ****2752** *Grutter v. Bollinger,* 539 U.S. 306, 326, 123 S.Ct. 2325, 156 L.Ed.2d 304 (2003); *Adarand, supra,* at 224, 115 S.Ct. 2097. As the Court recently reaffirmed, " 'racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification.' " *Gratz v. Bollinger,* 539 U.S. 244, 270, 123 S.Ct. 2411, 156 L.Ed.2d 257 (2003) (quoting *Fullilove v. Klutznick,* 448 U.S. 448, 537, 100 S.Ct. 2758, 65 L.Ed.2d 902 (1980) (STEVENS, J., dissenting); brackets omitted). In order to satisfy this searching standard of review, the school districts must demonstrate that the use of individual racial classifications in the assignment plans here under review is "narrowly tailored" to achieve a "compelling" government interest. *Adarand, supra,* at 227, 115 S.Ct. 2097.

Without attempting in these cases to set forth all the interests a school district might assert, it suffices to note that our prior cases, in evaluating the use of racial classifications in the school context, have recognized two interests that qualify as compelling. The first is the compelling interest of remedying the effects of past intentional discrimination. See *Freeman v. Pitts,* 503 U.S. 467, 494, 112 S.Ct. 1430, 118 L.Ed.2d 108 (1992). Yet the Seattle public schools have not shown that they were ever segregated by law, and were not subject to court-ordered desegregation decrees. The Jefferson County public schools were previously segregated by law and were subject to a desegregation decree entered in 1975. In 2000, the District Court that entered that decree dissolved it, finding that Jefferson ***721** County had "eliminated the vestiges associated with the former policy of segregation and its pernicious effects," and thus had achieved "unitary" status. *Hampton,* 102 F.Supp.2d, at 360. Jefferson County accordingly does not rely upon an interest in remedying the effects of past intentional discrimination in defending its present use of race in assigning students. See Tr. of Oral Arg. in No. 05–915, at 38.

Nor could it. We have emphasized that the harm being remedied by mandatory desegregation plans is the harm that is traceable to segregation, and that "the Constitution is not violated by racial imbalance in the schools, without more." *Milliken v. Bradley,* 433 U.S. 267, 280, n. 14, 97 S.Ct. 2749, 53 L.Ed.2d 745 (1977). See also *Freeman, supra,* at 495–496, 112 S.Ct. 1430; *Dowell,* 498 U.S., at 248, 111 S.Ct. 630; *Milliken v. Bradley,* 418 U.S. 717, 746, 94 S.Ct. 3112, 41 L.Ed.2d 1069 (1974). Once Jefferson County achieved unitary status, it had remedied the constitutional wrong that allowed race-based assignments. Any continued use of race must be justified on some other basis.[10]

**2753 *722 The second government interest we have recognized as compelling for purposes of strict scrutiny is the interest in diversity in higher education upheld in *Grutter,* 539 U.S., at 328, 123 S.Ct. 2325. The specific interest found compelling in *Grutter* was student body diversity "in the context of higher education." *Ibid.* The diversity interest was not focused on race alone but encompassed "all factors that may contribute to student body diversity." *Id.,* at 337, 123 S.Ct. 2325. We described the various types of diversity that the law school sought:

> "[The law school's] policy makes clear there are many possible bases for diversity admissions, and provides examples of admittees who have lived or traveled widely abroad, are fluent in several languages, have overcome personal adversity and family hardship, have exceptional records of extensive community service, and have had successful careers in other fields." *Id.,* at 338, 123 S.Ct. 2325 (brackets and internal quotation marks omitted).

The Court quoted the articulation of diversity from Justice Powell's opinion in *Regents of Univ. of Cal. v. Bakke,* 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978), noting that "it is not an interest in simple ethnic diversity, in which a specified percentage of the student body is in effect guaranteed to be members of selected ethnic groups, that can justify the use of race." *Grutter, supra,* at 324–325, 123 S.Ct. 2325 (citing and quoting *Bakke, supra,* at 314–315, 98 S.Ct. 2733 (opinion of Powell, J.); brackets and internal quotation marks omitted). Instead, what was upheld in *Grutter* was consideration of "a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element." 539 U.S., at 325, 123 S.Ct. 2325 (quoting *Bakke, supra,* at 315, 98 S.Ct. 2733 (opinion of Powell, J.); internal quotation marks omitted).

The entire gist of the analysis in *Grutter* was that the admissions program at issue there focused on each applicant as an individual, and not simply as a member of a particular racial group. The classification of applicants by race upheld ***723** in *Grutter* was only as part of a "highly individualized, holistic review," 539 U.S., at 337, 123 S.Ct. 2325. As the Court explained, "[t]he importance of this individualized consideration in the context of a race-conscious admissions program is paramount." *Ibid.* The point of the narrow tailoring analysis in which the *Grutter* Court engaged was to ensure that the use of racial classifications was indeed part of a broader assessment of diversity, and not simply an effort to achieve racial balance, which the Court explained would be "patently unconstitutional." *Id.,* at 330, 123 S.Ct. 2325.

In the present cases, by contrast, race is not considered as part of a broader effort to achieve "exposure to widely diverse people, cultures, ideas, and viewpoints," *ibid.*; race, for some students, is determinative standing alone. The districts argue that other factors, such as student preferences, affect assignment decisions under their plans, but under each plan when race comes into play, it is decisive by itself. It is not simply one factor weighed with others in reaching a decision, as in *Grutter* ; it is *the* factor. Like the University of Michigan undergraduate plan struck down in *Gratz,* 539 U.S., at 275, 123 S.Ct. 2411, the plans here "do not ****2754** provide for a meaningful individualized review of applicants" but instead rely on racial classifications in a "nonindividualized, mechanical" way, *id.,* at 276, 280, 123 S.Ct. 2411 (O'Connor, J., concurring).

Even when it comes to race, the plans here employ only a limited notion of diversity, viewing race exclusively in white/nonwhite terms in Seattle and black/"other" terms in Jefferson County.[11] But see *Metro Broadcasting, Inc. v. FCC,* 497 U.S. 547, 610, 110 S.Ct. 2997, 111 L.Ed.2d 445 (1990) (O'Connor, J., dissenting) ("We are a Nation not of black and white alone, but one teeming with divergent ***724** communities knitted together by various traditions and carried forth, above all, by individuals"). The Seattle "Board Statement Reaffirming Diversity Rationale" speaks of the "inherent educational value" in "[p]roviding students the opportunity to attend schools with diverse student enrollment," App. in No. 05–908, at 128a, 129a. But under the Seattle plan, a school with 50 percent Asian–American students and 50 percent white students but no African–American, Native–American, or Latino students would qualify as balanced, while a school with 30 percent Asian–American, 25 percent African–American, 25 percent Latino, and 20 percent white students would not. It is hard to understand how a plan that could allow these results can be viewed as being concerned with achieving enrollment that is " 'broadly diverse,' " *Grutter, supra,* at 329, 123 S.Ct. 2325.

Prior to *Grutter,* the courts of appeals rejected as unconstitutional attempts to implement race-based assignment plans—such as the plans at issue here—in primary and secondary schools. See, *e.g., Eisenberg v. Montgomery Cty. Public Schools,* 197 F.3d 123, 133 (C.A.4 1999); *Tuttle v. Arlington Cty. School Bd.,* 195 F.3d 698, 701 (C.A.4 1999) (*per curiam*); *Wessmann v. Gittens,* 160 F.3d 790, 809 (C.A.1 1998). See also *Ho v. San Francisco Unified School Dist.,* 147 F.3d 854, 865 (C.A.9 1998). After *Grutter,* however, the two Courts of Appeals in these cases, and one other, found that race-based assignments were permissible at the elementary and secondary level, largely in reliance on that case. See *Parents Involved VII,* 426 F.3d, at 1166; *McFarland II,* 416 F.3d, at 514; *Comfort v. Lynn School Comm.,* 418 F.3d 1, 13 (C.A.1 2005) (en banc).

In upholding the admissions plan in *Grutter,* though, this Court relied upon considerations unique to institutions of higher education, noting that in light of "the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition." 539 U.S., at 329, 123 S.Ct. 2325. See also ***725** *Bakke,* 438 U.S., at 312, 313, 98 S.Ct. 2733 (opinion of Powell, J.). The Court explained that "[c]ontext matters" in applying strict scrutiny, and repeatedly noted that it was addressing the use of race "in the context of higher education." *Grutter, supra,* at 327, 328, 334, 123 S.Ct. 2325. The Court in *Grutter* expressly articulated key limitations on its holding—defining a specific type of broad-based diversity and noting the unique context of higher education—but these limitations were largely disregarded by the lower courts in extending *Grutter* to uphold race-based assignments in elementary and secondary schools. The present cases are not governed by *Grutter*.

****2755** B

Perhaps recognizing that reliance on *Grutter* cannot sustain their plans, both school districts assert additional interests, distinct from the interest upheld in *Grutter,* to justify their race-based assignments. In briefing and argument before this Court, Seattle contends that its use of race helps to reduce racial concentration in schools and to ensure that racially concentrated housing patterns do not prevent nonwhite students from having access to the most desirable schools. Brief for Respondents in No. 05–908, at 19. Jefferson County has articulated a similar goal, phrasing its interest in terms of educating its students "in a racially integrated environment." App. in No. 05–915, at 22.[12] Each school district argues that educational and broader socialization benefits flow from a racially diverse learning environment, and each contends that because the diversity they seek ***726** is racial diversity—not the broader diversity at issue in *Grutter*—it makes sense to promote that interest directly by relying on race alone.

The parties and their *amici* dispute whether racial diversity in schools in fact has a marked impact on test scores and other objective yardsticks or achieves intangible socialization benefits. The debate is not one we need to resolve, however, because it is clear that the racial classifications employed by the districts are not narrowly tailored to the goal of achieving the educational and social benefits asserted to flow from racial diversity. In design and operation, the plans are directed only to racial balance, pure and simple, an objective this Court has repeatedly condemned as illegitimate.

The plans are tied to each district's specific racial demographics, rather than to any pedagogic concept of the level of diversity needed to obtain the asserted educational benefits. In Seattle, the district seeks white enrollment of between 31 and 51 percent (within 10 percent of "the district white average" of 41 percent), and nonwhite enrollment of between 49 and 69 percent (within 10 percent of "the district minority average" of 59 percent). App. in No. 05–908, at 103a. In Jefferson County, by contrast, the district seeks black enrollment of no less than 15 or more than 50 percent, a range designed to be "equally above and below Black student enrollment systemwide," *McFarland I,* 330 F.Supp.2d, at 842, based on the objective of achieving at "all schools ... an African–American enrollment equivalent to the average district-wide African–American enrollment" of 34 percent, App. in No. 05–915, at 81. In Seattle, then, the benefits of racial diversity require enrollment of at least 31 percent white students; in Jefferson County, at least 50 percent. There must be at least 15 percent nonwhite students under Jefferson County's plan; in Seattle, more than three times that figure. This comparison makes clear that the racial demographics in each district—whatever they happen to be— ***727** drive the required "diversity" numbers. The plans here are not tailored to achieving a degree of diversity necessary to realize the asserted educational benefits; instead the plans are tailored, in the words of Seattle's Manager ****2756** of Enrollment Planning, Technical Support, and Demographics, to "the goal established by the school board of attaining a level of diversity within the schools that approximates the district's overall demographics." App. in No. 05–908, at 42a.

The districts offer no evidence that the level of racial diversity necessary to achieve the asserted educational benefits happens to coincide with the racial demographics of the respective school districts—or rather the white/nonwhite or black/"other" balance of the districts, since that is the only diversity addressed by the plans. Indeed, in its brief Seattle simply assumes that the educational benefits track the racial breakdown of the district. See Brief for Respondents in No. 05–908, at 36 ("For Seattle, 'racial balance' is clearly not an end in itself but rather a measure of the extent to which the educational goals the

plan was designed to foster are likely to be achieved"). When asked for "a range of percentage that would be diverse," however, Seattle's expert said it was important to have "sufficient numbers so as to avoid students feeling any kind of specter of exceptionality." App. in No. 05–908, at 276a. The district did not attempt to defend the proposition that anything outside its range posed the "specter of exceptionality." Nor did it demonstrate in any way how the educational and social benefits of racial diversity or avoidance of racial isolation are more likely to be achieved at a school that is 50 percent white and 50 percent Asian–American, which would qualify as diverse under Seattle's plan, than at a school that is 30 percent Asian–American, 25 percent African–American, 25 percent Latino, and 20 percent white, which under Seattle's definition would be racially concentrated.

Similarly, Jefferson County's expert referred to the importance of having "at least 20 percent" minority group representation ***728** for the group "to be visible enough to make a difference," and noted that "small isolated minority groups in a school are not likely to have a strong effect on the overall school." App. in No. 05–915, at 159, 147. The Jefferson County plan, however, is based on a goal of replicating at each school "an African–American enrollment equivalent to the average district-wide African–American enrollment." *Id.,* at 81. Joshua McDonald's requested transfer was denied because his race was listed as "other" rather than black, and allowing the transfer would have had an adverse effect on the racial guideline compliance of Young Elementary, the school he sought to leave. *Id.,* at 21. At the time, however, Young Elementary was 46.8 percent black. *Id.,* at 73. The transfer might have had an adverse effect on the effort to approach districtwide racial proportionality at Young, but it had nothing to do with preventing either the black or "other" group from becoming "small" or "isolated" at Young.

In fact, in each case the extreme measure of relying on race in assignments is unnecessary to achieve the stated goals, even as defined by the districts. For example, at Franklin High School in Seattle, the racial tiebreaker was applied because nonwhite enrollment exceeded 69 percent, and resulted in an incoming ninth-grade class in 2000–2001 that was 30.3 percent Asian–American, 21.9 percent African–American, 6.8 percent Latino, 0.5 percent Native–American, and 40.5 percent Caucasian. Without the racial tiebreaker, the class would have been 39.6 percent Asian–American, 30.2 percent African–American, 8.3 percent Latino, 1.1 percent Native–American, and 20.8 percent Caucasian. See App. in No. 05–908, at 308a. When the actual racial breakdown is considered, enrolling students without regard to their ****2757** race yields a substantially diverse student body under any definition of diversity.[13]

***729** In *Grutter,* the number of minority students the school sought to admit was an undefined "meaningful number" necessary to achieve a genuinely diverse student body. 539 U.S., at 316, 335–336, 123 S.Ct. 2325. Although the matter was the subject of disagreement on the Court, see *id.,* at 346–347, 123 S.Ct. 2325 (SCALIA, J., concurring in part and dissenting in part); *id.,* at 382–383, 123 S.Ct. 2325 (Rehnquist, C. J., dissenting); *id.,* at 388–392, 123 S.Ct. 2325 (KENNEDY, J., dissenting), the majority concluded that the law school did not count back from its applicant pool to arrive at the "meaningful number" it regarded as necessary to diversify its student body. *Id.,* at 335–336, 123 S.Ct. 2325. Here the racial balance the districts seek is a defined range set solely by reference to the demographics of the respective school districts.

This working backward to achieve a particular type of racial balance, rather than working forward from some demonstration of the level of diversity that provides the purported benefits, is a fatal flaw under our existing precedent. We have many times over reaffirmed that "[r]acial balance is not ***730** to be achieved for its own sake." *Freeman,* 503 U.S., at 494, 112 S.Ct. 1430. See also *Richmond v. J.A. Croson Co.,* 488 U.S. 469, 507, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989); *Bakke,* 438 U.S., at 307, 98 S.Ct. 2733 (opinion of Powell, J.) ("If petitioner's purpose is to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin, such a preferential purpose must be rejected ... as facially invalid"). *Grutter* itself reiterated that "outright racial balancing" is "patently unconstitutional." 539 U.S., at 330, 123 S.Ct. 2325.

Accepting racial balancing as a compelling state interest would justify the imposition of racial proportionality throughout American society, contrary to our repeated recognition that "[a]t the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class." *Miller v. Johnson,* 515 U.S. 900, 911, 115 S.Ct. 2475, 132 L.Ed.2d 762 (1995) (quoting *Metro Broadcasting,* 497 U.S., at 602, 110 S.Ct. 2997 (O'Connor, J., dissenting); internal quotation ****2758** marks omitted).[14] Allowing racial balancing as a compelling end in itself would "effectively assur[e] that race will always be relevant in American life, and that the 'ultimate goal' of 'eliminating entirely from governmental decisionmaking such irrelevant factors as a human being's race' will never be achieved." *Croson, supra,* at 495, 109 S.Ct. 706 (plurality opinion of O'Connor, J.) (quoting *Wygant v. Jackson Bd. of Ed.,* 476 U.S. 267, 320, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986) (STEVENS, J.,

dissenting), in turn quoting ***731** *Fullilove,* 448 U.S., at 547, 100 S.Ct. 2758 (STEVENS, J., dissenting); brackets and citation omitted). An interest "linked to nothing other than proportional representation of various races ... would support indefinite use of racial classifications, employed first to obtain the appropriate mixture of racial views and then to ensure that the [program] continues to reflect that mixture." *Metro Broadcasting, supra,* at 614, 110 S.Ct. 2997 (O'Connor, J., dissenting).

The validity of our concern that racial balancing has "no logical stopping point," *Croson, supra,* at 498, 109 S.Ct. 706 (quoting *Wygant, supra,* at 275, 106 S.Ct. 1842 (plurality opinion); internal quotation marks omitted); see also *Grutter, supra,* at 343, 123 S.Ct. 2325, is demonstrated here by the degree to which the districts tie their racial guidelines to their demographics. As the districts' demographics shift, so too will their definition of racial diversity. See App. in No. 05–908, at 103a (describing application of racial tiebreaker based on "*current* white percentage" of 41 percent and "*current* minority percentage" of 59 percent (emphasis added)).

The Ninth Circuit below stated that it "share[d] in the hope" expressed in *Grutter* that in 25 years racial preferences would no longer be necessary to further the interest identified in that case. *Parents Involved VII,* 426 F.3d, at 1192. But in Seattle the plans are defended as necessary to address the consequences of racially identifiable housing patterns. The sweep of the mandate claimed by the district is contrary to our rulings that remedying past societal discrimination does not justify race-conscious government action. See, *e.g., Shaw v. Hunt,* 517 U.S. 899, 909–910, 116 S.Ct. 1894, 135 L.Ed.2d 207 (1996) ("[A]n effort to alleviate the effects of societal discrimination is not a compelling interest"); *Croson, supra,* at 498–499, 109 S.Ct. 706; *Wygant,* 476 U.S., at 276, 106 S.Ct. 1842 (plurality opinion) ("Societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy"); *id.,* at 288, 106 S.Ct. 1842 (O'Connor, J., concurring in part and concurring in judgment) ("[A] governmental agency's interest in remedying 'societal' discrimination,that ***732** is, discrimination not traceable to its own actions, cannot be deemed sufficiently compelling to pass constitutional muster").

The principle that racial balancing is not permitted is one of substance, not semantics. Racial balancing is not transformed from "patently unconstitutional" to a compelling state interest simply by relabeling it "racial diversity." While the school districts use various verbal formulations to ****2759** describe the interest they seek to promote—racial diversity, avoidance of racial isolation, racial integration—they offer no definition of the interest that suggests it differs from racial balance. See, *e.g.,* App. in No. 05–908, at 257a ("Q. What's your understanding of when a school suffers from racial isolation?" "A. I don't have a definition for that"); *id.,* at 228a–229a ("I don't think we've ever sat down and said, 'Define racially concentrated school exactly on point in quantitative terms.' I don't think we've ever had that conversation"); Tr. in *McFarland I,* at 1–90 (Dec. 8, 2003) ("Q." "How does the Jefferson County School Board define diversity ... ?" "A. Well, we want to have the schools that make up the percentage of students of the population").

Jefferson County phrases its interest as "racial integration," but integration certainly does not require the sort of racial proportionality reflected in its plan. Even in the context of mandatory desegregation, we have stressed that racial proportionality is not required, see *Milliken,* 433 U.S., at 280, n. 14, 97 S.Ct. 2749 ("[A desegregation] order contemplating the substantive constitutional right [to a] particular degree of racial balance or mixing is ... infirm as a matter of law" (internal quotation marks omitted)); *Swann v. Charlotte–Mecklenburg Bd. of Ed.,* 402 U.S. 1, 24, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971) ("The constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole"), and here Jefferson County has already been found to have eliminated the vestiges of its prior segregated school system.

***733** The en banc Ninth Circuit declared that "when a racially diverse school system is the goal (or racial concentration or isolation is the problem), there is no more effective means than a consideration of race to achieve the solution." *Parents Involved VII, supra,* at 1191. For the foregoing reasons, this conclusory argument cannot sustain the plans. However closely related race-based assignments may be to achieving racial balance, that itself cannot be the goal, whether labeled "racial diversity" or anything else. To the extent the objective is sufficient diversity so that students see fellow students as individuals rather than solely as members of a racial group, using means that treat students solely as members of a racial group is fundamentally at cross-purposes with that end.

C

The districts assert, as they must, that the way in which they have employed individual racial classifications is necessary to achieve their stated ends. The minimal effect these classifications have on student assignments, however, suggests that other means would be effective. Seattle's racial tiebreaker results, in the end, only in shifting a small number of students between schools. Approximately 307 student assignments were affected by the racial tiebreaker in 2000–2001; the district was able to track the enrollment status of 293 of these students. App. in No. 05–908, at 162a. Of these, 209 were assigned to a school that was one of their choices, 87 of whom were assigned to the same school to which they would have been assigned without the racial tiebreaker. Eighty-four students were assigned to schools that they did not list as a choice, but 29 of those students would have been assigned to their respective school without the racial tiebreaker, and 3 were able to attend one of the oversubscribed schools due to waitlist and capacity adjustments. *Id.,* at 162a–163a. In over one-third of the assignments affected by the racial tiebreaker, then, the use of race in the end made no ****2760** difference, and the district could identify ***734** only 52 students who were ultimately affected adversely by the racial tiebreaker in that it resulted in assignment to a school they had not listed as a preference and to which they would not otherwise have been assigned.

As the panel majority in *Parents Involved VI* concluded:

> "[T]he tiebreaker's annual effect is thus merely to shuffle a few handfuls of different minority students between a few schools—about a dozen additional Latinos into Ballard, a dozen black students into Nathan Hale, perhaps two dozen Asians into Roosevelt, and so on. The District has not met its burden of proving these marginal changes ... outweigh the cost of subjecting hundreds of students to disparate treatment based solely upon the color of their skin." 377 F.3d, at 984–985.

Similarly, Jefferson County's use of racial classifications has only a minimal effect on the assignment of students. Elementary school students are assigned to their first- or second-choice school 95 percent of the time, and transfers, which account for roughly 5 percent of assignments, are only denied 35 percent of the time—and presumably an even smaller percentage are denied on the basis of the racial guidelines, given that other factors may lead to a denial. *McFarland I,* 330 F.Supp.2d, at 844–845, nn. 16, 18. Jefferson County estimates that the racial guidelines account for only 3 percent of assignments. Brief in Opposition in No. 05–915, p. 7, n. 4; Tr. of Oral Arg. in No. 05–915, at 46. As Jefferson County explains, "the racial guidelines have minimal impact in this process, because they 'mostly influence student assignment in subtle and indirect ways.' " Brief for Respondents in No. 05–915, pp. 8–9.

While we do not suggest that *greater* use of race would be preferable, the minimal impact of the districts' racial classifications on school enrollment casts doubt on the necessity of using racial classifications. In *Grutter,* the consideration of race was viewed as indispensable in more than tripling minority ***735** representation at the law school—from 4 to 14.5 percent. See 539 U.S., at 320, 123 S.Ct. 2325. Here the most Jefferson County itself claims is that "because the guidelines provide a firm definition of the Board's goal of racially integrated schools, they 'provide administrators with the authority to facilitate, negotiate and collaborate with principals and staff to maintain schools within the 15–50% range.' " Brief in Opposition in No. 05–915, at 7 (quoting *McFarland I, supra,* at 842). Classifying and assigning schoolchildren according to a binary conception of race is an extreme approach in light of our precedents and our Nation's history of using race in public schools, and requires more than such an amorphous end to justify it.

The districts have also failed to show that they considered methods other than explicit racial classifications to achieve their stated goals. Narrow tailoring requires "serious, good faith consideration of workable race-neutral alternatives," *Grutter, supra,* at 339, 123 S.Ct. 2325, and yet in Seattle several alternative assignment plans—many of which would not have used express racial classifications—were rejected with little or no consideration. See, *e.g.,* App. in No. 05–908, at 224a–225a, 253a–259a, 307a. Jefferson County has failed to present any evidence that it considered alternatives, even though the district already claims that its goals are achieved primarily through means other than the racial classifications. Brief for Respondents in No. 05–915, at 8–9. Cf. *Croson,* 488 U.S., at 519, 109 S.Ct. 706 (KENNEDY, J., concurring in part and ****2761** concurring in judgment) (racial classifications permitted only "as a last resort").

IV

Justice BREYER's dissent takes a different approach to these cases, one that fails to ground the result it would reach in law. Instead, it selectively relies on inapplicable precedent and even dicta while dismissing contrary holdings, alters and misapplies our well-established legal framework for assessing equal protection challenges to express racial classifications, ***736** and greatly exaggerates the consequences of today's decision.

To begin with, Justice BREYER seeks to justify the plans at issue under our precedents recognizing the compelling interest in remedying past intentional discrimination. See *post,* at 2809 – 2813. Not even the school districts go this far, and for good reason. The distinction between segregation by state action and racial imbalance caused by other factors has been central to our jurisprudence in this area for generations. See, *e.g., Milliken,* 433 U.S., at 280, n. 14, 97 S.Ct. 2749; *Freeman,* 503 U.S., at 495–496, 112 S.Ct. 1430 ("Where resegregation is a product not of state action but of private choices, it does not have constitutional implications"). The dissent elides this distinction between *de jure* and *de facto* segregation, casually intimates that Seattle's school attendance patterns reflect illegal segregation, *post,* at 2802, 2809 – 2810, 2812,[15] and fails to credit the judicial determination—under the most rigorous standard—that Jefferson County had eliminated the vestiges of prior segregation. The dissent thus alters in fundamental ways not only the facts presented here but the established law.

Justice BREYER's reliance on *McDaniel v. Barresi,* 402 U.S. 39, 91 S.Ct. 1287, 28 L.Ed.2d 582 (1971), *post,* at 2812 – 2813, 2815 – 2816, highlights how far removed the discussion in the dissent is from the question actually presented in these cases. *McDaniel* concerned a Georgia school system that had been segregated by law. There was no doubt that the county had operated a "dual school ***737** system," 402 U.S., at 41, 91 S.Ct. 1287, and no one questions that the obligation to disestablish a school system segregated by law can include race-conscious remedies—whether or not a court had issued an order to that effect. See *supra,* at 2806. The present cases are before us, however, because the Seattle school district was never segregated by law, and the Jefferson County district has been found to be unitary, having eliminated the vestiges of its prior dual status. The justification for race-conscious remedies in *McDaniel* is therefore not applicable here. The dissent's persistent refusal to accept this distinction—its insistence on viewing the racial classifications here as if they were just like the ones in *McDaniel,* "devised to overcome a history of segregated public schools," *post,* at 2825 – 2826—explains its inability to understand why the remedial justification for racial classifications cannot decide these cases.

****2762** Justice BREYER's dissent next relies heavily on dicta from *Swann v. Charlotte–Mecklenburg Bd. of Ed.,* 402 U.S., at 16, 91 S.Ct. 1267—far more heavily than the school districts themselves. Compare *post,* at 2801, 2811 – 2815, with Brief for Respondents in No. 05–908, at 19–20; Brief for Respondents in No. 05–915, at 31. The dissent acknowledges that the two-sentence discussion in *Swann* was pure dicta, *post,* at 2811 – 2812, but nonetheless asserts that it demonstrates a "basic principle of constitutional law" that provides "authoritative legal guidance," *post,* at 2811 – 2812, 2816. Initially, as the Court explained just last Term, "we are not bound to follow our dicta in a prior case in which the point now at issue was not fully debated." *Central Va. Community College v. Katz,* 546 U.S. 356, 363, 126 S.Ct. 990, 163 L.Ed.2d 945 (2006). That is particularly true given that, when *Swann* was decided, this Court had not yet confirmed that strict scrutiny applies to racial classifications like those before us. See n. 16, *infra*. There is nothing "technical" or "theoretical," *post,* at 2816, about our approach to such dicta. See, *e.g., Cohens v. Virginia,* 6 Wheat. 264, 399–400, 5 L.Ed. 257 (1821) (Marshall, C.J.) (explaining why dicta is not binding).

***738** Justice BREYER would not only put such extraordinary weight on admitted dicta, but relies on the statement for something it does not remotely say. *Swann* addresses only a possible state objective; it says nothing of the permissible *means*—race conscious or otherwise—that a school district might employ to achieve that objective. The reason for this omission is clear enough, since the case did not involve any voluntary means adopted by a school district. The dissent's characterization of *Swann* as recognizing that "the Equal Protection Clause permits local school boards to use race-conscious criteria to achieve positive race-related goals" is—at best—a dubious inference. *Post,* at 2811–2812. Even if the dicta from *Swann* were entitled to the weight the dissent would give it, and no dicta is, it not only did not address the question presented in *Swann,* it also does not address the question presented in these cases—whether the school districts' use of racial classifications to achieve their stated goals is permissible.

Further, for all the lower court cases Justice BREYER cites as evidence of the "prevailing legal assumption," *post*, at 2813, embodied by *Swann,* very few are pertinent. Most are not. For example, the dissent features *Tometz v. Board of Ed., Waukegan City School Dist. No. 61,* 39 Ill.2d 593, 597–598, 237 N.E.2d 498, 501 (1968), as evidence that "state and federal courts had considered the matter settled and uncontroversial." *Post,* at 2813. But *Tometz* addressed a challenge to a statute

requiring race-consciousness in drawing school attendance boundaries—an issue well beyond the scope of the question presented in these cases. Importantly, it considered that issue only under rational-basis review, 39 Ill.2d, at 600, 237 N.E.2d, at 502 ("The test of any legislative classification essentially is one of reasonableness"), which even the dissent grudgingly recognizes is an improper standard for evaluating express racial classifications. Other cases cited are similarly inapplicable. See, *e.g.,* ***739** *Citizens for Better Ed. v. Goose Creek Consol. Independent School Dist.,* 719 S.W.2d 350, 352–353 (Tex.App.1986) (upholding rezoning plan under rational-basis review).[16]

****2763** Justice BREYER's dissent next looks for authority to a footnote in ***740** *Washington v. Seattle School Dist. No. 1,* 458 U.S. 457, 472, n. 15, 102 S.Ct. 3187, 73 L.Ed.2d 896 (1982), *post,* at 2830 – 2831, but there this Court expressly noted that it was *not* passing on the propriety of race-conscious student assignments in the absence of a finding of *de jure* segregation. Similarly, the citation of *Crawford v. Board of Ed. of Los Angeles,* 458 U.S. 527, 102 S.Ct. 3211, 73 L.Ed.2d 948 (1982), *post,* at 2813, in which a state referendum prohibiting a race-based assignment plan was challenged, is inapposite—in *Crawford* the Court again expressly reserved the question presented by these cases. 458 U.S., at 535, n. 11, 102 S.Ct. 3211. Such reservations and preliminary analyses of course did not decide the merits of this question—as evidenced by the disagreement among the lower courts on this issue. Compare *Eisenberg,* 197 F.3d, at 133, with *Comfort,* 418 F.3d, at 13.

Justice BREYER's dissent also asserts that these cases are controlled by *Grutter,* claiming that the existence of a compelling interest in these cases "follows *a fortiori* " from *Grutter, post,* at 2822, 2834 – 2836, and accusing us of tacitly overruling that case, see *post,* at 2834 – 2836. The dissent overreads *Grutter,* however, in suggesting that it renders pure racial balancing a constitutionally compelling interest; *Grutter* itself recognized that using race simply to achieve racial balance would be "patently unconstitutional," 539 U.S., at 330, 123 S.Ct. 2325. The Court was exceedingly careful in describing the interest furthered in *Grutter* as "not an interest in simple ethnic diversity" but rather a "far broader array of qualifications and characteristics" in which race was but a single element. *Id.*, at 324–325, 123 S.Ct. 2325 (internal ****2764** quotation marks omitted). We take the *Grutter* Court at its word. We simply do not understand how Justice BREYER can maintain that classifying every schoolchild as black or white, and using that classification as a determinative factor in assigning children to achieve pure racial balance, can be regarded as "less burdensome, and hence more narrowly tailored" than the consideration of race in *Grutter, post,* at 2825 – 2826, when the Court in *Grutter* stated that "[t]he importance of ... individualized consideration" in the program was "paramount," and consideration ***741** of race was one factor in a "highly individualized, holistic review," 539 U.S., at 337, 123 S.Ct. 2325. Certainly if the constitutionality of the stark use of race in these cases were as established as the dissent would have it, there would have been no need for the extensive analysis undertaken in *Grutter*. In light of the foregoing, Justice BREYER's appeal to *stare decisis* rings particularly hollow. See *post,* at 2835 – 2836.

At the same time it relies on inapplicable desegregation cases, misstatements of admitted dicta, and other noncontrolling pronouncements, Justice BREYER's dissent candidly dismisses the significance of this Court's repeated *holdings* that all racial classifications must be reviewed under strict scrutiny, see *post,* at 2816 – 2817, 2818 – 2820, arguing that a different standard of review should be applied because the districts use race for beneficent rather than malicious purposes, see *post,* at 2816 – 2820.

This Court has recently reiterated, however, that " '*all* racial classifications [imposed by government] ... must be analyzed by a reviewing court under strict scrutiny.' " *Johnson,* 543 U.S., at 505, 125 S.Ct. 1141 (quoting *Adarand,* 515 U.S., at 227, 115 S.Ct. 2097; emphasis added by *Johnson* Court). See also *Grutter, supra,* at 326, 123 S.Ct. 2325 ("[G]overnmental action based on race—a group classification long recognized as in most circumstances irrelevant and therefore prohibited—should be subjected to detailed judicial inquiry" (internal quotation marks and emphasis omitted)). Justice BREYER nonetheless relies on the good intentions and motives of the school districts, stating that he has found "no case that ... repudiated this constitutional asymmetry between that which seeks to *exclude* and that which seeks to *include* members of minority races." *Post,* at 2815 – 2816 (emphasis in original). We have found many. Our cases clearly reject the argument that motives affect the strict scrutiny analysis. See *Johnson, supra,* at 505, 125 S.Ct. 1141 ("We have insisted on strict scrutiny in every context, even for so-called 'benign' racial classifications"); *Adarand, supra*, at 227, 115 S.Ct. 2097 (rejecting idea that " 'benign' " racial classifications may ***742** be held to "different standards"); *Croson,* 488 U.S., at 500, 109 S.Ct. 706 ("Racial classifications are suspect, and that means that simple legislative assurances of good intention cannot suffice").

This argument that different rules should govern racial classifications designed to include rather than exclude is not new; it has been repeatedly pressed in the past, see, *e.g., Gratz,* 539 U.S., at 282, 123 S.Ct. 2411 (BREYER, J., concurring in judgment); *id.,* at 301, 123 S.Ct. 2411 (GINSBURG, J., dissenting); *Adarand, supra,* at 243, 115 S.Ct. 2097 (STEVENS, J.,

dissenting); *Wygant,* 476 U.S., at 316–317, 106 S.Ct. 1842 (STEVENS, J., dissenting), and has been repeatedly rejected. See also *Bakke,* 438 U.S., at 289–291, 98 S.Ct. 2733 (opinion of Powell, J.) (rejecting argument that strict scrutiny should be applied only to classifications that disadvantage minorities, stating "[r]acial and ethnic distinctions of any sort are inherently ****2765** suspect and thus call for the most exacting judicial examination").

The reasons for rejecting a motives test for racial classifications are clear enough. "The Court's emphasis on 'benign racial classifications' suggests confidence in its ability to distinguish good from harmful governmental uses of racial criteria. History should teach greater humility .... '[B]enign' carries with it no independent meaning, but reflects only acceptance of the current generation's conclusion that a politically acceptable burden, imposed on particular citizens on the basis of race, is reasonable." *Metro Broadcasting,* 497 U.S., at 609–610, 110 S.Ct. 2997 (O'Connor, J., dissenting). See also *Adarand, supra,* at 226, 115 S.Ct. 2097 (" '[I]t may not always be clear that a so-called preference is in fact benign' " (quoting *Bakke, supra,* at 298, 98 S.Ct. 2733 (opinion of Powell, J.))). Accepting Justice BREYER's approach would "do no more than move us from 'separate but equal' to 'unequal but benign.' " *Metro Broadcasting, supra,* at 638, 110 S.Ct. 2997 (KENNEDY, J., dissenting).

Justice BREYER speaks of bringing "the races" together (putting aside the purely black-and-white nature of the plans) as the justification for excluding individuals on the basis of their race.) See *post,* at 2815 – 2816. Again, this approach ***743** to racial classifications is fundamentally at odds with our precedent, which makes clear that the Equal Protection Clause "protect [s] *persons,* not *groups,*" *Adarand,* 515 U.S., at 227, 115 S.Ct. 2097 (emphasis in original). See *ibid.* ("[A]ll governmental action based on race—a *group* classification long recognized as 'in most circumstances irrelevant and therefore prohibited,' *Hirabayashi* [*v. United States,* 320 U.S. 81, 100, 63 S.Ct. 1375, 87 L.Ed. 1774 (1943)]—should be subjected to detailed judicial inquiry to ensure that the *personal* right to equal protection of the laws has not been infringed" (emphasis in original)); *Metro Broadcasting, supra,* at 636, 110 S.Ct. 2997 (KENNEDY, J., dissenting) ("[O]ur Constitution protects each citizen as an individual, not as a member of a group"); *Bakke, supra,* at 289, 98 S.Ct. 2733 (opinion of Powell, J.) (The Fourteenth Amendment creates rights " 'guaranteed to the individual. The rights established are personal rights' "). This fundamental principle goes back, in this context, to *Brown* itself. See *Brown v. Board of Education,* 349 U.S. 294, 300, 75 S.Ct. 753, 99 L.Ed. 1083 (1955) (*Brown II*) ("At stake is the *personal* interest of the plaintiffs in admission to public schools ... on a nondiscriminatory basis" (emphasis added)). For the dissent, in contrast, " 'individualized scrutiny' is simply beside the point." *Post,* at 2829 – 2830.

Justice BREYER's position comes down to a familiar claim: The end justifies the means. He admits that "there is a cost in applying 'a state-mandated racial label,' " *post,* at 2836, but he is confident that the cost is worth paying. Our established strict scrutiny test for racial classifications, however, insists on "detailed examination, both as to ends *and* as to means." *Adarand, supra,* at 236, 115 S.Ct. 2097 (emphasis added). Simply because the school districts may seek a worthy goal does not mean they are free to discriminate on the basis of race to achieve it, or that their racial classifications should be subject to less exacting scrutiny.

Despite his argument that these cases should be evaluated under a "standard of review that is not 'strict' in the traditional sense of that word," *post,* at 2819 – 2820, Justice BREYER still purports ***744** to apply strict scrutiny to these cases. See *ibid.* It is evident, however, that Justice BREYER's brand of narrow tailoring is quite unlike anything found in our precedents. ****2766** Without any detailed discussion of the operation of the plans, the students who are affected, or the districts' failure to consider race-neutral alternatives, the dissent concludes that the districts have shown that these racial classifications are necessary to achieve the districts' stated goals. This conclusion is divorced from any evaluation of the actual impact of the plans at issue in these cases—other than to note that the plans "often have no effect." *Post,* at 2824 – 2825.[17] Instead, the dissent suggests that some combination of the development of these plans over time, the difficulty of the endeavor, and the good faith of the districts suffices to demonstrate that these stark and controlling racial classifications are constitutional. The Constitution and our precedents require more.

In keeping with his view that strict scrutiny should not apply, Justice BREYER repeatedly urges deference to local school boards on these issues. See, *e.g., post,* at 2811, 2826 – 2827, 2835 – 2836. Such deference "is fundamentally at odds with our equal protection jurisprudence. We put the burden on state actors to demonstrate that their race-based policies are justified." *Johnson,* 543 U.S., at 506, n. 1, 125 S.Ct. 1141. See *Croson, supra,* at 501, 109 S.Ct. 706 ("The history of racial classifications in this country suggests that blind judicial deference to legislative or executive pronouncements of necessity has no place in ***745** equal protection analysis"); *West Virginia Bd. of Ed. v. Barnette,* 319 U.S. 624, 637, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943) ("The Fourteenth Amendment ... protects the citizen against the State itself and all of its

creatures—Boards of Education not excepted").

Justice BREYER's dissent ends on an unjustified note of alarm. It predicts that today's decision "threaten[s]" the validity of "[h]undreds of state and federal statutes and regulations." *Post,* at 2833; see also *post,* at 2814 – 2815. But the examples the dissent mentions—for example, a provision of the No Child Left Behind Act of 2001 that requires States to set measurable objectives to track the achievement of students from major racial and ethnic groups, 20 U.S.C. § 6311(b)(2)(C)(v) (2000 ed., Supp. IV)—have nothing to do with the pertinent issues in these cases.

Justice BREYER also suggests that other means for achieving greater racial diversity in schools are necessarily unconstitutional if the racial classifications at issue in these cases cannot survive strict scrutiny. *Post,* at 2831 – 2834. These other means—*e.g.,* where to construct new schools, how to allocate resources among schools, and which academic offerings to provide to attract students to certain schools—implicate different considerations than the explicit racial classifications at issue in these cases, and we express no opinion on their validity—not even in dicta. Rather, we employ the familiar and well-established analytic approach of strict scrutiny to evaluate the plans at issue today, an approach that in no way warrants the dissent's cataclysmic concerns. Under ****2767** that approach, the school districts have not carried their burden of showing that the ends they seek justify the particular extreme means they have chosen—classifying individual students on the basis of their race and discriminating among them on that basis.

* * *

If the need for the racial classifications embraced by the school districts is unclear, even on the districts' own terms, the costs are undeniable. "[D]istinctions between citizens ***746** solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Adarand,* 515 U.S., at 214, 115 S.Ct. 2097 (internal quotation marks omitted). Government action dividing us by race is inherently suspect because such classifications promote "notions of racial inferiority and lead to a politics of racial hostility," *Croson,* 488 U.S., at 493, 109 S.Ct. 706 (plurality opinion), "reinforce the belief, held by too many for too much of our history, that individuals should be judged by the color of their skin," *Shaw v. Reno,* 509 U.S. 630, 657, 113 S.Ct. 2816, 125 L.Ed.2d 511 (1993), and "endorse race-based reasoning and the conception of a Nation divided into racial blocs, thus contributing to an escalation of racial hostility and conflict." *Metro Broadcasting,* 497 U.S., at 603, 110 S.Ct. 2997 (O'Connor, J., dissenting). As the Court explained in *Rice v. Cayetano,* 528 U.S. 495, 517, 120 S.Ct. 1044, 145 L.Ed.2d 1007 (2000), "[o]ne of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities."

All this is true enough in the contexts in which these statements were made—government contracting, voting districts, allocation of broadcast licenses, and electing state officers—but when it comes to using race to assign children to schools, history will be heard. In *Brown v. Board of Education,* 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954) (*Brown I*), we held that segregation deprived black children of equal educational opportunities regardless of whether school facilities and other tangible factors were equal, because government classification and separation on grounds of race themselves denoted inferiority. *Id.,* at 493–494, 74 S.Ct. 686. It was not the inequality of the facilities but the fact of legally separating children on the basis of race on which the Court relied to find a constitutional violation in 1954. See *id.,* at 494, 74 S.Ct. 686 (" 'The impact [of segregation] is greater when it has the sanction of the law' "). The next Term, we accordingly stated that "full compliance" with *Brown I* required school districts "to achieve a system of ***747** determining admission to the public schools *on a nonracial basis*." *Brown II,* 349 U.S., at 300–301, 75 S.Ct. 753 (emphasis added).

The parties and their *amici* debate which side is more faithful to the heritage of *Brown,* but the position of the plaintiffs in *Brown* was spelled out in their brief and could not have been clearer: "[T]he Fourteenth Amendment prevents states from according differential treatment to American children on the basis of their color or race." Brief for Appellants in Nos. 1, 2, and 4 and for Respondents in No. 10 on Reargument in *Brown I,* O.T.1953, p. 15 (Summary of Argument). What do the racial classifications at issue here do, if not accord differential treatment on the basis of race? As counsel who appeared before this Court for the plaintiffs in *Brown* put it: "We have one fundamental contention which we will seek to develop in

the course of this argument, and that contention is that no State has any authority under the equal-protection clause of the Fourteenth Amendment to use race as a factor in ****2768** affording educational opportunities among its citizens." Tr. of Oral Arg. in *Brown I,* O.T. 1952, No. 8, p. 7 (Robert L. Carter, Dec. 9, 1952). There is no ambiguity in that statement. And it was that position that prevailed in this Court, which emphasized in its remedial opinion that what was "[a]t stake is the personal interest of the plaintiffs in admission to public schools as soon as practicable *on a nondiscriminatory basis,*" and what was required was "determining admission to the public schools *on a nonracial basis*." *Brown II, supra,* at 300–301, 75 S.Ct. 753 (emphasis added). What do the racial classifications do in these cases, if not determine admission to a public school on a racial basis?

Before *Brown,* schoolchildren were told where they could and could not go to school based on the color of their skin. The school districts in these cases have not carried the heavy burden of demonstrating that we should allow this once again—even for very different reasons. For schools that never segregated on the basis of race, such as Seattle, or that have removed the vestiges of past segregation, such as ***748** Jefferson County, the way "to achieve a system of determining admission to the public schools on a nonracial basis," *Brown II, supra*, at 300–301, 75 S.Ct. 753, is to stop assigning students on a racial basis. The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.

The judgments of the Courts of Appeals for the Sixth and Ninth Circuits are reversed, and the cases are remanded for further proceedings.

It is so ordered.

Justice THOMAS, concurring.

Today, the Court holds that state entities may not experiment with race-based means to achieve ends they deem socially desirable. I wholly concur in THE CHIEF JUSTICE's opinion. I write separately to address several of the contentions in Justice BREYER's dissent (hereinafter dissent). Contrary to the dissent's arguments, resegregation is not occurring in Seattle or Louisville; these school boards have no present interest in remedying past segregation; and these race-based student-assignment programs do not serve any compelling state interest. Accordingly, the plans are unconstitutional. Disfavoring a colorblind interpretation of the Constitution, the dissent would give school boards a free hand to make decisions on the basis of race—an approach reminiscent of that advocated by the segregationists in *Brown v. Board of Education,* 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954). This approach is just as wrong today as it was a half century ago. The Constitution and our cases require us to be much more demanding before permitting local school boards to make decisions based on race.

I

The dissent repeatedly claims that the school districts are threatened with resegregation and that they will succumb to that threat if these plans are declared unconstitutional. It also argues that these plans can be justified as part of the school boards' attempts to "eradicat[e] earlier school segregation." ***749** See, *e.g., post,* at 2801 – 2802. Contrary to the dissent's rhetoric, neither of these school districts is threatened with resegregation, and neither is constitutionally compelled or permitted to undertake race-based remediation. Racial imbalance is not segregation, and the mere incantation of terms like resegregation and remediation cannot make up the difference.

A

Because this Court has authorized and required race-based remedial measures to **2769 address *de jure* segregation, it is important to define segregation clearly and to distinguish it from racial imbalance. In the context of public schooling, segregation is the deliberate operation of a school system to "carry out a governmental policy to separate pupils in schools solely on the basis of race." *Swann v. Charlotte–Mecklenburg Bd. of Ed.,* 402 U.S. 1, 6, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971); see also *Monroe v. Board of Comm'rs of Jackson,* 391 U.S. 450, 452, 88 S.Ct. 1700, 20 L.Ed.2d 733 (1968). In *Brown,* this Court declared that segregation was unconstitutional under the Equal Protection Clause of the Fourteenth Amendment. *Swann, supra,* at 6, 91 S.Ct. 1267; see also *Green v. School Bd. of New Kent Cty.,* 391 U.S. 430, 435, 88 S.Ct. 1689, 20 L.Ed.2d 716 (1968) ("[T]he State, acting through the local school board and school officials, organized and operated a dual system, part 'white' and part 'Negro.' It was such dual systems that 14 years ago *Brown* [, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873,] held unconstitutional and a year later *Brown* [*v. Board of Education*, 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083 (1955),] held must be abolished").[1]

Racial imbalance is the failure of a school district's individual schools to match or approximate the demographic makeup of the student population at large. Cf. *Washington* *750 *v. Seattle School Dist. No. 1,* 458 U.S. 457, 460, 102 S.Ct. 3187, 73 L.Ed.2d 896 (1982). Racial imbalance is not segregation.[2] Although presently observed racial imbalance might result from past *de jure* segregation, racial imbalance can also result from any number of innocent private decisions, including voluntary housing choices. See *Swann, supra,* at 25–26, 91 S.Ct. 1267; *Missouri v. Jenkins,* 515 U.S. 70, 116, 115 S.Ct. 2038, 132 L.Ed.2d 63 (1995) (THOMAS, J., concurring). Because racial imbalance is not inevitably linked to unconstitutional segregation, it is not unconstitutional in and of itself. *Dayton Bd. of Ed. v. Brinkman,* 433 U.S. 406, 413, 97 S.Ct. 2766, 53 L.Ed.2d 851 (1977); *Dayton Bd. of Ed. v. Brinkman,* 443 U.S. 526, 531, n. 5, 99 S.Ct. 2971, 61 L.Ed.2d 720 (1979) ("Racial imbalance ... is not *per se* a constitutional violation"); *Freeman v. Pitts,* 503 U.S. 467, 494, 112 S.Ct. 1430, 118 L.Ed.2d 108 (1992); see also *Swann, supra,* at 31–32, 91 S.Ct. 1267; cf. *Milliken v. Bradley,* 418 U.S. 717, 740–741, and n. 19, 94 S.Ct. 3112, 41 L.Ed.2d 1069 (1974).

Although there is arguably a danger of racial imbalance in schools in Seattle and Louisville, there is no danger of resegregation. No one contends that Seattle has established or that Louisville has reestablished a dual school system that separates students on the basis of race. The statistics cited in Appendix A to the dissent are not to the contrary. See *post,* at 2837 – 2839. At most, those statistics show a national trend toward classroom racial imbalance. However, racial imbalance without intentional state action to separate the races does not amount to segregation. To raise the specter of resegregation to defend **2770 these programs is to ignore the meaning of the word and the nature of the cases before us.[3]

*751 B

Just as the school districts lack an interest in preventing resegregation, they also have no present interest in remedying past segregation. The Constitution generally prohibits government race-based decisionmaking, but this Court has authorized the use of race-based measures for remedial purposes in two narrowly defined circumstances. First, in schools that were formerly segregated by law, race-based measures are sometimes constitutionally compelled to remedy prior school segregation. Second, in *Croson,* the Court appeared willing to authorize a government unit to remedy past discrimination for which it was responsible. *Richmond v. J.A. Croson Co.,* 488 U.S. 469, 504, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989). Without explicitly resting on either of these strands of doctrine, the dissent repeatedly invokes the school districts' supposed interests in remedying past segregation. Properly analyzed, though, these plans do not fall within either existing category of permissible race-based remediation.

1

The Constitution does not permit race-based government decisionmaking simply because a school district claims a remedial purpose and proceeds in good faith with arguably pure motives. *Grutter v. Bollinger,* 539 U.S. 306, 371, 123 S.Ct. 2325, 156 L.Ed.2d 304 (2003) ***752** THOMAS, J., concurring in part and dissenting in part) (citing *Adarand Constructors, Inc. v. Peña,* 515 U.S. 200, 239, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995) (SCALIA, J., concurring in part and concurring in judgment)). Rather, race-based government decisionmaking is categorically prohibited unless narrowly tailored to serve a compelling interest. *Grutter, supra,* at 326, 123 S.Ct. 2325; see also Part II–A, *infra*. This exacting scrutiny "has proven automatically fatal" in most cases. *Jenkins, supra,* at 121, 115 S.Ct. 2038 (THOMAS, J., concurring); cf. *Hirabayashi v. United States,* 320 U.S. 81, 100, 63 S.Ct. 1375, 87 L.Ed. 1774 (1943) ("[R]acial discriminations are in most circumstances irrelevant and therefore prohibited"). And appropriately so. "The Constitution abhors classifications based on race, not only because those classifications can harm favored races or are based on illegitimate motives, but also because every time the government places citizens on racial registers and makes race relevant to the provision of burdens or benefits, it demeans us all." *Grutter, supra,* at 353, 123 S.Ct. 2325 (opinion of THOMAS, J.). Therefore, as a general rule, all race-based government ****2771** decisionmaking—regardless of context—is unconstitutional.

2

This Court has carved out a narrow exception to that general rule for cases in which a school district has a "history of maintaining two sets of schools in a single school system deliberately operated to carry out a governmental policy to separate pupils in schools solely on the basis of race."[4] *Swann,* 402 U.S., at 5–6, 91 S.Ct. 1267. In such cases, race-based remedial ***753** measures are sometimes required.[5] *Green,* 391 U.S., at 437–438, 88 S.Ct. 1689; cf. *United States v. Fordice,* 505 U.S. 717, 745, 112 S.Ct. 2727, 120 L.Ed.2d 575 (1992) (THOMAS, J., concurring).[6] But without a history of state-enforced racial separation, a school district has no affirmative legal obligation to take race-based remedial measures to eliminate segregation and its vestiges.

Neither of the programs before us today is compelled as a remedial measure, and no one makes such a claim. Seattle has no history of *de jure* segregation; therefore, the Constitution did not require Seattle's plan.[7] Although Louisville ***754** once operated ****2772** a segregated school system and was subject to a Federal District Court's desegregation decree, see *ante,* at 2803; *Hampton v. Jefferson Cty. Bd. of Ed.,* 102 F.Supp.2d 358, 376–377 (W.D.Ky.2000), that decree was dissolved in 2000, *id.,* at 360. Since then, no race-based remedial measures have been required in Louisville. Thus, the race-based student-assignment plan at issue here, which was instituted the year after the dissolution of the desegregation decree, was not even arguably required by the Constitution.

3

Aside from constitutionally compelled remediation in schools, this Court has permitted government units to remedy prior racial discrimination only in narrow circumstances. See *Wygant v. Jackson Bd. of Ed.,* 476 U.S. 267, 277, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986) (plurality opinion). Regardless of the constitutional validity of such remediation, see *Croson,* 488 U.S., at 524–525, 109 S.Ct. 706 (SCALIA, J., concurring in judgment), it does not apply here. Again, neither school board asserts that its race-based actions were taken to remedy prior discrimination. Seattle provides three forward-looking—as opposed to remedial—justifications for its race-based assignment plan. Brief for Respondents in No. 05–908, pp. 24–34. Louisville asserts several similar forward-looking interests, Brief for Respondents in No. 05–915, pp. 24–29, and at oral argument,

counsel for Louisville disavowed any claim that Louisville's argument "depend[ed] in any way on the prior de jure segregation," Tr. of Oral Arg. in No. 05–915, p. 38.

Furthermore, for a government unit to remedy past discrimination for which it was responsible, the Court has required it to demonstrate "a 'strong basis in evidence for its conclusion that remedial action was necessary.' " ***755** *Croson, supra*, at 500, 109 S.Ct. 706 (quoting *Wygant, supra,* at 277, 106 S.Ct. 1842 (plurality opinion)). Establishing a "strong basis in evidence" requires proper findings regarding the extent of the government unit's past racial discrimination. *Croson,* 488 U.S., at 504, 109 S.Ct. 706. The findings should "define the scope of any injury [and] the necessary remedy," *id.,* at 505, 109 S.Ct. 706, and must be more than "inherently unmeasurable claims of past wrongs," *id.,* at 506, 109 S.Ct. 706. Assertions of general societal discrimination are plainly insufficient. *Id.,* at 499, 504, 109 S.Ct. 706; *Wygant, supra,* at 274, 106 S.Ct. 1842 (plurality opinion); cf. *Regents of Univ. of Cal. v. Bakke,* 438 U.S. 265, 310, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978) (opinion of Powell, J.). Neither school district has made any such specific findings. For Seattle, the dissent attempts to make up for this failing by adverting to allegations made in past complaints filed against the Seattle school district. However, allegations in complaints cannot substitute for specific findings of prior discrimination—even when those allegations lead to settlements with complaining parties. Cf. *Croson, supra,* at 505, 109 S.Ct. 706; *Wygant, supra,* at 279, n. 5, 106 S.Ct. 1842 (plurality opinion). As for Louisville, its slate was cleared by the District Court's 2000 dissolution decree, which effectively declared that there were no longer any effects of *de jure* discrimination in need of remediation.[8]

****2773 *756** Despite the dissent's repeated intimation of a remedial purpose, neither of the programs in question qualifies as a permissible race-based remedial measure. Thus, the programs are subject to the general rule that government race-based decisionmaking is unconstitutional.

C

As the foregoing demonstrates, racial balancing is sometimes a constitutionally permissible remedy for the discrete legal wrong of *de jure* segregation, and when directed to that end, racial balancing is an exception to the general rule that government race-based decisionmaking is unconstitutional. Perhaps for this reason, the dissent conflates the concepts of segregation and racial imbalance: If racial imbalance equates to segregation, then it must also be constitutionally acceptable to use racial balancing to remedy racial imbalance.

For at least two reasons, however, it is wrong to place the remediation of segregation on the same plane as the remediation of racial imbalance. First, as demonstrated above, the two concepts are distinct. Although racial imbalance can result from *de jure* segregation, it does not necessarily, and the further we get from the era of state-sponsored racial separation, the less likely it is that racial imbalance has a traceable connection to any prior segregation. See *Freeman,* 503 U.S., at 496, 112 S.Ct. 1430; *Jenkins,* 515 U.S., at 118, 115 S.Ct. 2038 (THOMAS, J., concurring).

Second, a school cannot "remedy" racial imbalance in the same way that it can remedy segregation. Remediation of past *de jure* segregation is a one-time process involving the redress of a discrete legal injury inflicted by an identified entity. At some point, the discrete injury will be remedied, and the school district will be declared unitary. See *Swann,* 402 U.S., at 31, 91 S.Ct. 1267. Unlike *de jure* segregation, there is no ultimate remedy for racial imbalance. Individual schools will fall in and out of balance in the natural course, and the appropriate balance itself will shift with a school district's changing ***757** demographics. Thus, racial balancing will have to take place on an indefinite basis—a continuous process with no identifiable culpable party and no discernable end point. In part for those reasons, the Court has never permitted outright racial balancing solely for the purpose of achieving a particular racial balance.

II

Lacking a cognizable interest in remediation, neither of these plans can survive strict scrutiny because neither plan serves a genuinely compelling state interest. The dissent avoids reaching that conclusion by unquestioningly accepting the assertions of selected social scientists while completely ignoring the fact that those assertions are the subject of fervent debate. Ultimately, the dissent's entire analysis is corrupted by the considerations that lead it initially to question whether strict scrutiny should apply at all. What emerges is a version of "strict scrutiny" that combines hollow assurances of harmlessness with reflexive acceptance of conventional wisdom. When it ****2774** comes to government race-based decisionmaking, the Constitution demands more.

A

The dissent claims that "the law requires application here of a standard of review that is not 'strict' in the traditional sense of that word." *Post,* at 2819 – 2820. This view is informed by dissents in our previous cases and the concurrences of two Court of Appeals judges. *Post,* at 34–36 (citing 426 F.3d 1162, 1193–1194 (C.A.9 2005) (Kozinski, J., concurring); *Comfort v. Lynn School Comm.,* 418 F.3d 1, 28–29 (C.A.1 2005) (Boudin, C. J., concurring)). Those lower court judges reasoned that programs like these are not "aimed at oppressing blacks" and do not "seek to give one racial group an edge over another." *Id.,* at 27; 426 F.3d, at 1193 (Kozinski, J., concurring). They were further persuaded that these plans differed from other race-based programs this Court has considered because they are "certainly more benign than laws ***758** that favor or disfavor one race, segregate by race, or create quotas for or against a racial group," *Comfort,* 418 F.3d, at 28 (Boudin, C. J., concurring), and they are "far from the original evils at which the Fourteenth Amendment was addressed," *id.,* at 29; 426 F.3d, at 1195 (Kozinski, J., concurring). Instead of strict scrutiny, Judge Kozinski would have analyzed the plans under "robust and realistic rational basis review." *Id.,* at 1194.

These arguments are inimical to the Constitution and to this Court's precedents.[9] We have made it unusually clear that strict scrutiny applies to *every* racial classification. *Adarand,* 515 U.S., at 227, 115 S.Ct. 2097; *Grutter,* 539 U.S., at 326, 123 S.Ct. 2325; *Johnson v. California,* 543 U.S. 499, 505, 125 S.Ct. 1141, 160 L.Ed.2d 949 (2005) ("We have insisted on strict scrutiny in every context, even for so-called 'benign' racial classifications").[10] There are good reasons not to apply a lesser standard to these cases. The constitutional problems with government race-based decisionmaking are not diminished in the slightest by the presence or absence of an intent to oppress any race or by the real or asserted well-meaning motives for the race-based decisionmaking. *Adarand,* 515 U.S., at 228–229, 115 S.Ct. 2097. Purportedly benign race-based decisionmaking suffers the same constitutional infirmity as invidious race-based decisionmaking. ***759** *Id.,* at 240, 115 S.Ct. 2097 (THOMAS, J., concurring in part and concurring in judgment) ("As far as the Constitution is concerned, it is irrelevant whether a government's racial classifications are drawn by those who wish to oppress a race or by those who have a sincere desire to help those thought to be disadvantaged").

****2775** Even supposing it mattered to the constitutional analysis, the race-based student-assignment programs before us are not as benign as the dissent believes. See *post,* at 2818 – 2819. "[R]acial paternalism and its unintended consequences can be as poisonous and pernicious as any other form of discrimination." *Adarand, supra,* at 241, 115 S.Ct. 2097 (opinion of THOMAS, J.). As these programs demonstrate, every time the government uses racial criteria to "bring the races together," *post,* at 2815 – 2816, someone gets excluded, and the person excluded suffers an injury solely because of his or her race. The petitioner in the Louisville case received a letter from the school board informing her that her *kindergartner* would not be allowed to attend the school of petitioner's choosing because of the child's race. App. in No. 05–915, p. 97. Doubtless, hundreds of letters like this went out from both school boards every year these race-based assignment plans were in operation. This type of exclusion, solely on the basis of race, is precisely the sort of government action that pits the races against one another, exacerbates racial tension, and "provoke[s] resentment among those who believe that they have been wronged by the government's use of race." *Adarand, supra,* at 241, 115 S.Ct. 2097 (opinion of THOMAS, J.). Accordingly, these plans are simply one more variation on the government race-based decisionmaking we have consistently held must be

subjected to strict scrutiny. *Grutter, supra,* at 326, 123 S.Ct. 2325.

B

Though the dissent admits to discomfort in applying strict scrutiny to these plans, it claims to have nonetheless applied that exacting standard. But in its search for a compelling ***760** interest, the dissent casually accepts even the most tenuous interests asserted on behalf of the plans, grouping them all under the term " 'integration.' " See *post,* at 2820. " '[I]ntegration,' " we are told, has "three essential elements." *Ibid.* None of these elements is compelling. And the combination of the three unsubstantiated elements does not produce an interest any more compelling than that represented by each element independently.

1

According to the dissent, integration involves "an interest in setting right the consequences of prior conditions of segregation." *Ibid*. For the reasons explained above, the records in these cases do not demonstrate that either school board's plan is supported by an interest in remedying past discrimination. Part I–B, *supra*.

Moreover, the school boards have no interest in remedying the sundry consequences of prior segregation unrelated to schooling, such as "housing patterns, employment practices, economic conditions, and social attitudes." *Post,* at 2820 – 2821. General claims that past school segregation affected such varied societal trends are "too amorphous a basis for imposing a racially classified remedy," *Wygant,* 476 U.S., at 276, 106 S.Ct. 1842 (plurality opinion), because "[i]t is sheer speculation" how decades-past segregation in the school system might have affected these trends, see *Croson,* 488 U.S., at 499, 109 S.Ct. 706. Consequently, school boards seeking to remedy those societal problems with race-based measures in schools today would have no way to gauge the proper scope of the remedy. *Id.,* at 498, 109 S.Ct. 706. Indeed, remedial measures geared toward such broad and unrelated societal ills have " 'no logical stopping point,' " *ibid.,* and threaten to become "ageless in their reach into the past, and timeless in their ability to affect the future," ****2776** *Wygant, supra,* at 276, 106 S.Ct. 1842 (plurality opinion). See *Grutter, supra*, at 342, 123 S.Ct. 2325 (stating the "requirement that all governmental use of race must have a logical end point").

***761** Because the school boards lack any further interest in remedying segregation, this element offers no support for the purported interest in "integration."

2

Next, the dissent argues that the interest in integration has an educational element. The dissent asserts that racially balanced schools improve educational outcomes for black children. In support, the dissent unquestioningly cites certain social science research to support propositions that are hotly disputed among social scientists. In reality, it is far from apparent that coerced racial mixing has any educational benefits, much less that integration is necessary to black achievement.

Scholars have differing opinions as to whether educational benefits arise from racial balancing. Some have concluded that black students receive genuine educational benefits. See, *e.g.,* Crain & Mahard, Desegregation and Black Achievement: A Review of the Research, 42 Law & Contemp. Prob. 17, 48 (Summer 1978). Others have been more circumspect. See, *e.g.,* Henderson, Greenberg, Schneider, Uribe, & Verdugo, High–Quality Schooling for African American Students, in Beyond Desegregation 162, 166 (M. Shujaa ed. 1996) ("Perhaps desegregation does not have a single effect, positive or negative, on the academic achievement of African American students, but rather some strategies help, some hurt, and still others make no difference whatsoever. It is clear to us that focusing simply on demographic issues detracts from focusing on improving schools"). And some have concluded that there are no demonstrable educational benefits. See, *e.g.,* Armor & Rossell, Desegregation and Resegregation in the Public Schools, in Beyond the Color Line: New Perspectives on Race and Ethnicity in America 219, 239, 251 (A. Thernstrom & S. Thernstrom eds.2002).

The *amicus* briefs in the cases before us mirror this divergence of opinion. Supporting the school boards, one *amicus* ***762** has assured us that "both early desegregation research and recent statistical and econometric analyses ... indicate that there are positive effects on minority student achievement scores arising from diverse school settings." Brief for American Educational Research Association 10. Another brief claims that "school desegregation has a modest positive impact on the achievement of African–American students." App. to Brief for 553 Social Scientists as *Amici Curiae* 13–14 (footnote omitted). Yet neither of those briefs contains specific details like the magnitude of the claimed positive effects or the precise demographic mix at which those positive effects begin to be realized. Indeed, the social scientists' brief rather cautiously claims the existence of any benefit at all, describing the "positive impact" as "modest," *id.,* at 13, acknowledging that "there appears to be little or no effect on math scores," *id.,* at 14, and admitting that the "underlying reasons for these gains in achievement are not entirely clear," *id.,* at 15.[11]

****2777** Other *amici* dispute these findings. One *amicus* reports that "[i]n study after study, racial composition of a student body, when isolated, proves to be an insignificant determinant of student achievement." Brief for Dr. John Murphy et al. in No. 05–908, p. 8; see also *id.,* at 9 ("[T]here is no evidence that diversity in the K–12 classroom positively affectsstudent ***763** achievement"). Another *amicus* surveys several social science studies and concludes that "a fair and comprehensive analysis of the research shows that there is no clear and consistent evidence of [educational] benefits." Brief for David J. Armor et al. 29.

Add to the inconclusive social science the fact of black achievement in "racially isolated" environments. See T. Sowell, Education: Assumptions Versus History 7–38 (1986). Before *Brown,* the most prominent example of an exemplary black school was Dunbar High School. Sowell, Education: Assumptions Versus History, at 29 ("[I]n the period 1918–1923, Dunbar graduates earned fifteen degrees from Ivy League colleges, and ten degrees from Amherst, Williams, and Wesleyan"). Dunbar is by no means an isolated example. See *id.,* at 10–32 (discussing other successful black schools); Walker, Can Institutions Care? Evidence from the Segregated Schooling of African American Children, in Beyond Desegregation, *supra*, at 209–226; see also T. Sowell, Affirmative Action Around the World: An Empirical Study 141–165 (2004). Even after *Brown,* some schools with predominantly black enrollments have achieved outstanding educational results. See, *e.g.,* S. Carter, No Excuses: Lessons from 21 High–Performing, High–Poverty Schools 49–50, 53–56, 71–73, 81–84, 87–88 (2001); A. Thernstrom & S. Thernstrom, No Excuses: Closing the Racial Gap in Learning 43–64 (2003); see also L. Izumi, They Have Overcome: High–Poverty, High–Performing Schools in California (2002) (chronicling exemplary achievement in predominantly Hispanic schools in California). There is also evidence that black students attending historically black colleges achieve better academic results than those attending predominantly white colleges. *Grutter,* 539 U.S., at 364–365, 123 S.Ct. 2325 (THOMAS, J., concurring in part and dissenting in part) (citing sources); see also *Fordice,* 505 U.S., at 748–749, 112 S.Ct. 2727 (THOMAS, J., concurring).

***764** The Seattle School Board itself must believe that racial mixing is not necessary to black achievement. Seattle operates a K–8 "African–American Academy," which has a "nonwhite" enrollment of 99%. See App. in No. 05–908, p. 227a; Reply Brief for Petitioner in No. 05–908, p. 13, n. 13. That school was founded in 1990 as part of the school board's effort to "increase academic achievement."[12] See African American Academy History, online at http://www.seattleschools.org/schools/aaa/history.htm (all Internet materials as visited June 26, 2007, and available in Clerk of Court's case file). According to the school's most recent annual report, "[a]cademic excellence" is its "primary goal." See African American Academy 2006 Annual Report, p. ****2778** 2, online at http://www.seattleschools.org/area/siso/reports/anrep/altern/938.pdf. This racially imbalanced environment has reportedly produced test scores "higher across all grade levels in reading, writing and math." *Ibid.* Contrary to what the dissent would have predicted, see *post,* at 2820 – 2821,

the children in Seattle's African American Academy have shown gains when placed in a "highly segregated" environment.

Given this tenuous relationship between forced racial mixing and improved educational results for black children, the dissent cannot plausibly maintain that an educational element supports the integration interest, let alone makes it compelling.[13] See ***765** *Jenkins,* 515 U.S., at 121–122, 115 S.Ct. 2038 (THOMAS, J., concurring) ("[T]here is no reason to think that black students cannot learn as well when surrounded by members of their own race as when they are in an integrated environment").

Perhaps recognizing as much, the dissent argues that the social science evidence is "strong enough to permit a democratically elected school board reasonably to determine that this interest is a compelling one." *Post,* at 2820 – 2821. This assertion is inexplicable. It is not up to the school boards—the very government entities whose race-based practices we must strictly scrutinize—to determine what interests qualify as compelling under the Fourteenth Amendment to the United States Constitution. Rather, this Court must assess independently the nature of the interest asserted and the evidence to support it in order to determine whether it qualifies as compelling under our precedents. In making such a determination, we have deferred to state authorities only once, see *Grutter,* 539 U.S., at 328–330, 123 S.Ct. 2325, and that deference was prompted by factors uniquely relevant to higher education. *Id.,* at 328, 123 S.Ct. 2325 ("Our holding today is in keeping with our tradition of giving a degree of deference to a university's academic decisions"). The dissent's proposed test—whether sufficient social science evidence supports a government unit's conclusion that the interest it asserts is compelling—calls to mind the rational-basis standard of review the dissent purports not to apply, *post,* at 2819 – 2820. See *Williamson v. Lee Optical of Okla., Inc.,* 348 U.S. 483, 488, 75 S.Ct. 461, 99 L.Ed. 563 (1955) ("It is enough that there is an evil at hand for correction, ***766** and that it might be thought that the particular legislative measure was a rational way to correct it"). Furthermore, it would leave our equal protection jurisprudence at the mercy of elected government officials evaluating the evanescent views of a handful of social scientists. To adopt the dissent's deferential approach ****2779** would be to abdicate our constitutional responsibilities.[14]

3

Finally, the dissent asserts a "democratic element" to the integration interest. It defines the "democratic element" as "an interest in producing an educational environment that reflects the 'pluralistic society' in which our children will live." *Post,* at 2821.[15] Environmental reflection, though, is ***767** just another way to say racial balancing. And "[p]referring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake." *Bakke,* 438 U.S., at 307, 98 S.Ct. 2733 (opinion of Powell, J.). "This the Constitution forbids." *Ibid.; Grutter, supra,* at 329–330, 123 S.Ct. 2325; *Freeman,* 503 U.S., at 494, 112 S.Ct. 1430.

Navigating around that inconvenient authority, the dissent argues that the racial balancing in these plans is not an end in itself but is instead intended to "teac[h] children to engage in the kind of cooperation among Americans of all races that is necessary to make a land of 300 million people one Nation." *Post,* at 2821 – 2822. These "generic lessons in socialization and good citizenship" are too sweeping to qualify as compelling interests. *Grutter,* 539 U.S., at 348, 123 S.Ct. 2325 (SCALIA, J., concurring in part and dissenting in part). And they are not "uniquely relevant" to schools or "uniquely 'teachable' in a formal educational setting." *Id.,* at 347, 123 S.Ct. 2325. Therefore, if governments may constitutionally use racial balancing to achieve these aspirational ends in schools, they may use racial balancing to achieve similar goals at every level—from state-sponsored 4–H clubs, see *Bazemore v. Friday,* 478 U.S. 385, 388–390, 106 S.Ct. 3000, 92 L.Ed.2d 315 (1986) (Brennan, J., concurring in part), to the state civil service, see *Grutter,* 539 U.S., at 347–348, 123 S.Ct. 2325 (opinion of SCALIA, J.).

Moreover, the democratic interest has no durational limit, contrary to *Grutter*'s command. See *id.,* at 342, 123 S.Ct. 2325 (opinion of the Court); see also ****2780** *Croson,* 488 U.S., at 498, 109 S.Ct. 706; *Wygant,* 476 U.S., at 275, 106 S.Ct. 1842 (plurality opinion). In other words, it will always be important for students to learn cooperation among the races. If this interest justifies race-conscious measures today, then logically it will justify race-conscious measures forever. Thus, the

democratic interest, limitless in scope ***768** and "timeless in [its] ability to affect the future," *id.,* at 276, 106 S.Ct. 1842, cannot justify government race-based decisionmaking.[16]

In addition to these defects, the democratic element of the integration interest fails on the dissent's own terms. The dissent again relies upon social science research to support the proposition that state-compelled racial mixing teaches children to accept cooperation and improves racial attitudes and race relations. Here again, though, the dissent overstates the data that supposedly support the interest.

The dissent points to data that indicate that "black and white students in desegregated schools are less racially prejudiced than those in segregated schools." *Post,* at 2821 – 2822 (internal quotation marks omitted). By the dissent's account, improvements in racial attitudes depend upon the increased contact between black and white students thought to occur in more racially balanced schools. There is no guarantee, however, that students of different races in the same school will actually spend time with one another. Schools frequently group students by academic ability as an aid to efficient instruction, but such groupings often result in classrooms with high concentrations of one race or another. See, ***769** *e.g.,* Yonezawa, Wells, & Serna, Choosing Tracks: "Freedom of Choice" in Detracking Schools, 39 Am. Ed. Research J. 37, 38 (2002); Mickelson, Subverting Swann: First- and Second–Generation Segregation in the Charlotte–Mecklenburg Schools, 38 Am. Ed. Research J. 215, 233–234 (2001) (describing this effect in schools in Charlotte, North Carolina). In addition to classroom separation, students of different races within the same school may separate themselves socially. See Hallinan & Williams, Interracial Friendship Choices in Secondary Schools, 54 Am. Sociological Rev. 67, 72–76 (1989); see also Clotfelter, Interracial Contact in High School Extracurricular Activities, 34 Urban Rev. 25, 41–43 (2002). Therefore, even supposing interracial contact leads directly to improvements in racial attitudes and race relations, a program that assigns students of different races to the same schools might not capture those benefits. Simply putting students together under the same roof does not necessarily mean that the students will learn together or even interact.

Furthermore, it is unclear whether increased interracial contact improves racial ****2781** attitudes and relations.[17] One researcher has stated that "the reviews of desegregation and intergroup relations were unable to come to any conclusion about what the probable effects of desegregation were ... [;] ***770** virtually all of the reviewers determined that few, if any, firm conclusions about the impact of desegregation on intergroup relations could be drawn." Schofield, School Desegregation and Intergroup Relations: A Review of the Literature, in 17 Review of Research in Education 335, 356 (G. Grant ed.1991). Some studies have even found that a deterioration in racial attitudes seems to result from racial mixing in schools. See N. St. John, School Desegregation Outcomes for Children 67–68 (1975) ("A glance at [the data] shows that for either race positive findings are less common than negative findings"); Stephan, The Effects of School Desegregation: An Evaluation 30 Years After *Brown*, in 3 Advances in Applied Social Psychology 181, 183–186 (M. Saks & L. Saxe eds.1986). Therefore, it is not nearly as apparent as the dissent suggests that increased interracial exposure automatically leads to improved racial attitudes or race relations.

Given our case law and the paucity of evidence supporting the dissent's belief that these plans improve race relations, no democratic element can support the integration interest.[18]

4

The dissent attempts to buttress the integration interest by claiming that it follows *a fortiori* from the interest this Court recognized as compelling in *Grutter*. *Post,* at 2822. Regardless of the merit of *Grutter,* the compelling interest recognized in that case cannot support these plans. *Grutter* recognized a compelling interest in a law school's attainment of a diverse student body. ***771** 539 U.S., at 328, 123 S.Ct. 2325. This interest was critically dependent upon features unique to higher education: "the expansive freedoms of speech and thought associated with the university environment," the "special niche in our constitutional tradition" occupied by universities, and "[t]he freedom of a university to make its own judgments as to education[,] includ[ing] the selection of its student body." *Id.,* at 329, 123 S.Ct. 2325 (internal quotation marks omitted). None of these features is present in elementary and secondary schools. Those schools do not select their own students, and

education in the elementary and secondary environment generally does not involve ****2782** the free interchange of ideas thought to be an integral part of higher education. See 426 F.3d, at 1208 (Bea, J., dissenting). Extending *Grutter* to this context would require us to cut that holding loose from its theoretical moorings. Thus, only by ignoring *Grutter*'s reasoning can the dissent claim that recognizing a compelling interest in these cases is an *a fortiori* application of *Grutter*.

C

Stripped of the baseless and novel interests the dissent asserts on their behalf, the school boards cannot plausibly maintain that their plans further a compelling interest. As I explained in *Grutter,* only "those measures the State must take to provide a bulwark against anarchy ... or to prevent violence" and "a government's effort to remedy past discrimination for which it is responsible" constitute compelling interests. 539 U.S., at 353, 351–352, 123 S.Ct. 2325 (opinion concurring in part and dissenting in part). Neither of the parties has argued—nor could they—that race-based student assignment is necessary to provide a bulwark against anarchy or to prevent violence. And as I explained above, the school districts have no remedial interest in pursuing these programs. See Part I–B, *supra*. Accordingly, the school boards cannot satisfy strict scrutiny. These plans are unconstitutional.

***772** III

Most of the dissent's criticisms of today's result can be traced to its rejection of the colorblind Constitution. See *post,* at 2815 – 2816. The dissent attempts to marginalize the notion of a colorblind Constitution by consigning it to me and Members of today's plurality.[19] See *ibid.;* see also *post,* at 2832 – 2833. But I am quite comfortable in the company I keep. My view of the Constitution is Justice Harlan's view in *Plessy:* "Our Constitution is color-blind, and neither knows nor tolerates classes among citizens." *Plessy v. Ferguson,* 163 U.S. 537, 559, 16 S.Ct. 1138, 41 L.Ed. 256 (1896) (dissenting opinion). And my view was the rallying cry for the lawyers who litigated *Brown*. See, *e.g.,* Brief for Appellants in Nos. 1, 2, and 4, and for Respondents in No. 10 on Reargument in *Brown v. Board of Education,* O.T.1953, p. 65 ("That the Constitution is color blind is our dedicated belief"); Brief for Appellants in *Brown v. Board of Education,* O.T.1952, No. 8, p. 5 ("The Fourteenth Amendment precludes a state from imposing distinctions or classifications based upon race and color alone");[20] ***773** see also ****2783** In Memoriam: Honorable Thurgood Marshall, Proceedings of the Bar and Officers of the Supreme Court of the United States, p. X (1993) (remarks of Judge Motley) ("Marshall had a 'Bible' to which he turned during his most depressed moments. The 'Bible' would be known in the legal community as the first Mr. Justice Harlan's dissent in *Plessy v. Ferguson,* 163 U.S. 537, 552, 16 S.Ct. 1138, 41 L.Ed. 256 (1896). I do not know of any opinion which buoyed Marshall more in his pre-*Brown* days ...").

The dissent appears to pin its interpretation of the Equal Protection Clause to current societal practice and expectations, deference to local officials, likely practical consequences, and reliance on previous statements from this and other courts. Such a view was ascendant in this Court's jurisprudence for several decades. It first appeared in *Plessy,* where the Court asked whether a state law providing for segregated railway cars was "a reasonable regulation." 163 U.S., at 550, 16 S.Ct. 1138. The Court deferred to local authorities in making its determination, noting that in inquiring into reasonableness "there must necessarily be a large discretion on the part of the legislature." *Ibid.* The Court likewise paid heed to societal practices, local expectations, and practical consequences by looking to "the established usages, customs and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order." *Ibid.* Guided by these principles, the Court concluded: "[W]e cannot say that a law which authorizes or even requires the separation of the two races in public conveyances is unreasonable, or more obnoxious to the Fourteenth Amendment than the acts of Congress requiring separate schools for colored children in the District of Columbia." *Id.,* at 550–551, 16 S.Ct. 1138.

The segregationists in *Brown* embraced the arguments the Court endorsed in *Plessy*. Though *Brown* decisively rejected ***774** those arguments, today's dissent replicates them to a distressing extent. Thus, the dissent argues that "[e]ach plan embodies the results of local experience and community consultation." *Post,* at 2825 – 2826. Similarly, the segregationists made repeated appeals to societal practice and expectation. See, *e.g.,* Brief for Appellees on Reargument in *Briggs v. Elliott,* O.T.1953, No. 2, p. 76 ("[A] State has power to establish a school system which is capable of efficient administration, taking into account local problems and conditions").[21] The dissent argues that "weight [must be ****2784** given] to a local school board's knowledge, expertise, and concerns," *post,* at 2826, and with equal vigor, the segregationists argued for deference ***775** to local authorities. See, *e.g.,* Brief for Kansas on Reargument in *Brown v. Board of Education,* O.T.1953, No. 1, p. 14 ("We advocate only a concept of constitutional law that permits determinations of state and local policy to be made on state and local levels. We defend only the validity of the statute that enables the Topeka Board of Education to determine its own course").[22] The dissent argues that today's decision "threatens to substitute for present calm a disruptive round of race-related litigation," *post,* at 2800 – 2801, and claims that today's decision "risks serious harm to the law and for the Nation," *post,* at 2835. The segregationists also relied upon the likely practical consequences of ending the state-imposed system of racial separation. See, *e.g.,* Brief ***776** for Appellees on Reargument in *Davis v. County School Board,* O.T.1953, No. 4, p. 37 ("Yet a holding that school segregation by race violates the Constitution will result in upheaval in all of those places not now subject to Federal judicial scrutiny. This Court has made many decisions of widespread effect; none would affect more people more directly in more fundamental interests and, in fact, cause more chaos in local government than a reversal of the decision in this case").[23] ****2785** And foreshadowing today's dissent, the segregationists most heavily relied upon judicial precedent. See, *e.g.,* Brief for Appellees on Reargument in *Briggs v. Elliott,* O.T.1953, No. 2, at 59 ("[I]t would be difficult indeed to find a case so favored by precedent as is the case for South Carolina here").[24]

***777** The similarities between the dissent's arguments and the segregationists' arguments do not stop there. Like the dissent, the segregationists repeatedly cautioned the Court to consider practicalities and not to embrace too theoretical a view of the Fourteenth Amendment.[25] And just as ****2786** the dissent ***778** argues that the need for these programs will lessen over time, the segregationists claimed that reliance on segregation was lessening and might eventually end.[26]

What was wrong in 1954 cannot be right today.[27] Whatever else the Court's rejection of the segregationists' arguments ***779** in *Brown* might have established, it certainly made clear that state and local governments cannot take from the Constitution a right to make decisions on the basis of race by adverse possession. The fact that state and local governments had been discriminating on the basis of race for a long time was irrelevant to the *Brown* Court. The fact that racial discrimination was preferable to the relevant communities was irrelevant to the *Brown* Court. And the fact that the state and local governments had relied on statements in this Court's opinions was irrelevant to the *Brown* Court. The same principles guide today's decision. None of the considerations trumpeted by the dissent is relevant to the constitutionality of the school boards' race-based plans because no contextual detail—or collection of contextual details, *post,* at 2800 – 2812—can "provide refuge from the principle that under our Constitution, the government may not make distinctions on the basis of race." *Adarand,* 515 U.S., at 240, 115 S.Ct. 2097 (THOMAS, J., concurring in part and concurring in judgment).[28]

****2787** ***780** In place of the colorblind Constitution, the dissent would permit measures to keep the races together and proscribe measures to keep the races apart.[29] See *post,* at 2815 – 2818. Although no such distinction is apparent in the Fourteenth Amendment, the dissent would constitutionalize today's faddish social theories that embrace that distinction. The Constitution is not that malleable. Even if current social theories favor classroom racial engineering as necessary to "solve the problems at hand," *post,* at 2811, the Constitution enshrines principles independent of social theories. See *Plessy,* 163 U.S., at 559, 16 S.Ct. 1138 (Harlan, J., dissenting) ("The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth and in power. So, I doubt not, it will continue to be for all time .... But in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. ... Our Constitution is color-blind, and neither knows nor tolerates classes among citizens"). Indeed, if our history has taught us anything, it has taught ***781** us to beware of elites bearing racial theories.[30] See, *e.g.,* ****2788** *Dred Scott v. Sandford,* 19 How. 393, 406, 407, 15 L.Ed. 691 (1857) ("[T]hey [members of the "negro African race"] had no rights which the white man was bound to respect"). Can we really be sure that the racial theories that motivated *Dred Scott* and *Plessy* are a relic of the past or that future theories will be ***782** nothing but beneficent and progressive? That is a gamble I am unwilling to take, and it is one the Constitution does not allow.

* * *

The plans before us base school assignment decisions on students' race. Because "[o]ur Constitution is color-blind, and neither knows nor tolerates classes among citizens," such race-based decisionmaking is unconstitutional. *Plessy, supra,* at 559, 16 S.Ct. 1138 (Harlan, J., dissenting). I concur in THE CHIEF JUSTICE's opinion so holding.

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

The Nation's schools strive to teach that our strength comes from people of different races, creeds, and cultures uniting in commitment to the freedom of all. In these cases two school districts in different parts of the country seek to teach that principle by having classrooms that reflect the racial makeup of the surrounding community. That the school districts consider these plans to be necessary should remind us our highest aspirations are yet unfulfilled. But the solutions mandated by these school districts must themselves be lawful. To make race matter now so that it might not matter later may entrench the very prejudices we seek to overcome. In my view the state-mandated racial classifications at issue, official labels proclaiming the race of all persons in a broad class of citizens—elementary school students in one case, high school students in another—are unconstitutional as the cases now come to us.

I agree with THE CHIEF JUSTICE that we have jurisdiction to decide the cases before us and join Parts I and II of the Court's opinion. I also join Parts III–A and III–C for reasons provided below. My views do not allow me to join the balance of the opinion by THE CHIEF JUSTICE, which seems to me to be inconsistent in both its approach and its implications with the history, meaning, and reach of the Equal Protection ***783** Clause. Justice BREYER's dissenting opinion, on the other hand, rests on what in my respectful submission is a misuse and mistaken interpretation of our precedents. This leads it to advance propositions that, in my view, are both erroneous and in fundamental conflict with basic equal protection principles. As a consequence, this separate opinion is necessary to set forth my conclusions in the two cases before the Court.

I

The opinion of the Court and Justice BREYER's dissenting opinion (hereinafter ****2789** dissent) describe in detail the history of integration efforts in Louisville and Seattle. These plans classify individuals by race and allocate benefits and burdens on that basis; and as a result, they are to be subjected to strict scrutiny. See *Johnson v. California,* 543 U.S. 499, 505–506, 125 S.Ct. 1141, 160 L.Ed.2d 949 (2005); *ante,* at 2751 – 2752. The dissent finds that the school districts have identified a compelling interest in increasing diversity, including for the purpose of avoiding racial isolation. See *post,* at 2820 – 2824. The plurality, by contrast, does not acknowledge that the school districts have identified a compelling interest here. See *ante,* at 2755 – 2759. For this reason, among others, I do not join Parts III–B and IV. Diversity, depending on its meaning and definition, is a compelling educational goal a school district may pursue.

It is well established that when a governmental policy is subjected to strict scrutiny, "the government has the burden of proving that racial classifications 'are narrowly tailored measures that further compelling governmental interests.' " *Johnson, supra,* at 505, 125 S.Ct. 1141 (quoting *Adarand Constructors, Inc. v. Peña,* 515 U.S. 200, 227, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995)). "Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics." *Richmond v. J.A. Croson Co.,* 488 U.S. 469, 493, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989) (plurality opinion). And the inquiry ***784** into less restrictive alternatives demanded by the narrow tailoring analysis requires in many cases a thorough understanding of how a plan works. The government bears the burden of justifying its use of individual racial classifications. As part of that burden it must establish, in detail, how decisions based on an individual student's race are made in a challenged governmental program. The Jefferson County Board of Education fails to meet this threshold mandate.

Petitioner Crystal Meredith challenges the district's decision to deny her son Joshua McDonald a requested transfer for his kindergarten enrollment. The district concedes it denied his request "under the guidelines," which is to say, on the basis of Joshua's race. Brief for Respondents in No. 05–915, p. 10; see also App. in No. 05–915, p. 97. Yet the district also maintains that the guidelines do not apply to "kindergartens," Brief for Respondents in No. 05–915, at 4, and it fails to explain the discrepancy. Resort to the record, including the parties' stipulation of facts, further confuses the matter. See App. in No. 05–915, at 43 ("Transfer applications can be denied because of lack of available space or, for students in grades other than Primary 1 (kindergarten), the racial guidelines in the District's current student assignment plan"); *id*., at 29 ("The student assignment plan does not apply to ... students in Primary 1"); see also Stipulation of Facts in No. 3:02–CV–00620–JGH; Doc. 32, Exh. 44, p. 6 (2003–04 Jefferson County Public Schools Elementary Student Assignment Application, Section B) ("Assignment is made to a school for Primary 1 (Kindergarten) through Grade Five as long as racial guidelines are maintained. If the Primary 1 (Kindergarten) placement does not enhance racial balance, a new application must be completed for Primary 2 (Grade One)").

The discrepancy identified is not some simple and straightforward error that touches only upon the peripheries of the district's use of individual racial classifications. To the contrary, Jefferson County in its briefing has explained how and ***785** when it employs these classifications ****2790** only in terms so broad and imprecise that they cannot withstand strict scrutiny. See, *e.g*., Brief for Respondents in No. 05–915, at 4–10. While it acknowledges that racial classifications are used to make certain assignment decisions, it fails to make clear, for example, who makes the decisions; what if any oversight is employed; the precise circumstances in which an assignment decision will or will not be made on the basis of race; or how it is determined which of two similarly situated children will be subjected to a given race-based decision. See *ibid*.*;* see also App. in No. 05–915, at 38, 42 (indicating that decisions are "based on ... the racial guidelines" without further explanation); *id*., at 81 (setting forth the blanket mandate that "[s]chools shall work cooperatively with each other and with central office to ensure that enrollment at all schools [in question] is within the racial guidelines annually and to encourage that the enrollment at all schools progresses toward the midpoint of the guidelines"); *id*., at 43, 76–77, 81–83; *McFarland v. Jefferson Cty. Public Schools,* 330 F.Supp.2d 834, 837–845, 855–862 (W.D.Ky.2004).

When litigation, as here, involves a "complex, comprehensive plan that contains multiple strategies for achieving racially integrated schools," Brief for Respondents in No. 05–915, at 4, these ambiguities become all the more problematic in light of the contradictions and confusions that result. Compare, *e.g*., App. in No. 05–915, at 37 ("Each [Jefferson County] school ... has a designated geographic attendance area, which is called the 'resides area' of the school[, and each] such school is the 'resides school' for those students whose parent's or guardian's residence address is within the school's geographic attendance area"); *id*., at 82 ("All elementary students ... shall be assigned to the school which serves the area in which they reside"); and Brief for Respondents in No. 05–915, at 5 ("There are no selection criteria for admission to [an elementary school student's] resides school, except attainment of the appropriate age and completion of ***786** the previous grade"), with App. in No. 05–915, at 38 ("Decisions to assign students to schools within each cluster are based on available space within the [elementary] schools and the racial guidelines in the District's current student assignment plan"); *id*., at 82 (acknowledging that a student may not be assigned to his or her resides school if it "has reached ... the extremes of the racial guidelines").

One can attempt to identify a construction of Jefferson County's student assignment plan that, at least as a logical matter, complies with these competing propositions; but this does not remedy the underlying problem. Jefferson County fails to make clear to this Court—even in the limited respects implicated by Joshua's initial assignment and transfer denial—whether in fact it relies on racial classifications in a manner narrowly tailored to the interest in question, rather than in the far-reaching, inconsistent, and ad hoc manner that a less forgiving reading of the record would suggest. When a court subjects governmental action to strict scrutiny, it cannot construe ambiguities in favor of the State.

As for the Seattle case, the school district has gone further in describing the methods and criteria used to determine assignment decisions on the basis of individual racial classifications. See, *e.g*., Brief for Respondents in No. 05–908, pp. 5–11. The district, nevertheless, has failed to make an adequate showing in at least one respect. It has failed to explain why, in a district composed of a diversity of races, with fewer than half of the students classified as "white," it has employed the crude racial categories of "white" and ****2791** "non-white" as the basis for its assignment decisions. See, *e.g., id*., at 1–11.

The district has identified its purposes as follows: "(1) to promote the educational benefits of diverse school enrollments; (2) to reduce the potentially harmful effects of racial isolation by allowing students the opportunity to opt out of racially isolated

schools; and (3) to make sure that racially segregated housing patterns did not prevent non-white ***787** students from having equitable access to the most popular over-subscribed schools." *Id*., at 19. Yet the school district does not explain how, in the context of its diverse student population, a blunt distinction between "white" and "non-white" furthers these goals. As the Court explains, "a school with 50 percent Asian–American students and 50 percent white students but no African–American, Native–American, or Latino students would qualify as balanced, while a school with 30 percent Asian–American, 25 percent African–American, 25 percent Latino, and 20 percent white students would not." *Ante,* at 2754 – 2755; see also Brief for United States as *Amicus Curiae* in No. 05–908, pp. 13–14. Far from being narrowly tailored to its purposes, this system threatens to defeat its own ends, and the school district has provided no convincing explanation for its design. Other problems are evident in Seattle's system, but there is no need to address them now. As the district fails to account for the classification system it has chosen, despite what appears to be its ill fit, Seattle has not shown its plan to be narrowly tailored to achieve its own ends; and thus it fails to pass strict scrutiny.

II

Our Nation from the inception has sought to preserve and expand the promise of liberty and equality on which it was founded. Today we enjoy a society that is remarkable in its openness and opportunity. Yet our tradition is to go beyond present achievements, however significant, and to recognize and confront the flaws and injustices that remain. This is especially true when we seek assurance that opportunity is not denied on account of race. The enduring hope is that race should not matter; the reality is that too often it does.

This is by way of preface to my respectful submission that parts of the opinion by THE CHIEF JUSTICE imply an all-too-unyielding insistence that race cannot be a factor in instances when, in my view, it may be taken into account. The plurality opinion is too dismissive of the legitimate interest government ***788** has in ensuring all people have equal opportunity regardless of their race. The plurality's postulate that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race," *ante,* at 2767 – 2768, is not sufficient to decide these cases. Fifty years of experience since *Brown v. Board of Education,* 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954), should teach us that the problem before us defies so easy a solution. School districts can seek to reach *Brown*'s objective of equal educational opportunity. The plurality opinion is at least open to the interpretation that the Constitution requires school districts to ignore the problem of *de facto* resegregation in schooling. I cannot endorse that conclusion. To the extent the plurality opinion suggests the Constitution mandates that state and local school authorities must accept the status quo of racial isolation in schools, it is, in my view, profoundly mistaken.

The statement by Justice Harlan that "[o]ur Constitution is color-blind" was most certainly justified in the context of his dissent in ****2792** *Plessy v. Ferguson,* 163 U.S. 537, 559, 16 S.Ct. 1138, 41 L.Ed. 256 (1896). The Court's decision in that case was a grievous error it took far too long to overrule. *Plessy,* of course, concerned official classification by race applicable to all persons who sought to use railway carriages. And, as an aspiration, Justice Harlan's axiom must command our assent. In the real world, it is regrettable to say, it cannot be a universal constitutional principle.

In the administration of public schools by the state and local authorities it is permissible to consider the racial makeup of schools and to adopt general policies to encourage a diverse student body, one aspect of which is its racial composition. Cf. *Grutter v. Bollinger,* 539 U.S. 306, 123 S.Ct. 2325, 156 L.Ed.2d 304 (2003); *id.,* at 387–388, 123 S.Ct. 2325 (KENNEDY, J., dissenting). If school authorities are concerned that the student-body compositions of certain schools interfere with the objective of offering an equal educational opportunity to all of their students, they are free to devise race-conscious measures to address the problem in a ***789** general way and without treating each student in different fashion solely on the basis of a systematic, individual typing by race.

School boards may pursue the goal of bringing together students of diverse backgrounds and races through other means, including strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of neighborhoods; allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking

enrollments, performance, and other statistics by race. These mechanisms are race conscious but do not lead to different treatment based on a classification that tells each student he or she is to be defined by race, so it is unlikely any of them would demand strict scrutiny to be found permissible. See *Bush v. Vera,* 517 U.S. 952, 958, 116 S.Ct. 1941, 135 L.Ed.2d 248 (1996) (plurality opinion) ("Strict scrutiny does not apply merely because redistricting is performed with consciousness of race .... Electoral district lines are 'facially race neutral,' so a more searching inquiry is necessary before strict scrutiny can be found applicable in redistricting cases than in cases of 'classifications based explicitly on race' " (quoting *Adarand,* 515 U.S., at 213, 115 S.Ct. 2097)). Executive and legislative branches, which for generations now have considered these types of policies and procedures, should be permitted to employ them with candor and with confidence that a constitutional violation does not occur whenever a decisionmaker considers the impact a given approach might have on students of different races. Assigning to each student a personal designation according to a crude system of individual racial classifications is quite a different matter; and the legal analysis changes accordingly.

Each respondent has asserted that its assignment of individual students by race is permissible because there is no other way to avoid racial isolation in the school districts. Yet, as explained, each has failed to provide the support necessary for that proposition. Cf. *Croson,* 488 U.S., at 501, 109 S.Ct. 706 ***790** "The history of racial classifications in this country suggests that blind judicial deference to legislative or executive pronouncements of necessity has no place in equal protection analysis"). And individual racial classifications employed in this manner may be considered legitimate only if they are a last resort to achieve a compelling interest. See *id.,* at 519, 109 S.Ct. 706 (KENNEDY, J., concurring in part and concurring in judgment).

In the cases before us it is noteworthy that the number of students whose assignment depends on express racial classifications is limited. I join Part III–C of the Court's opinion because I agree that in the ****2793** context of these plans, the small number of assignments affected suggests that the schools could have achieved their stated ends through different means. These include the facially race-neutral means set forth above or, if necessary, a more nuanced, individual evaluation of school needs and student characteristics that might include race as a component. The latter approach would be informed by *Grutter,* though of course the criteria relevant to student placement would differ based on the age of the students, the needs of the parents, and the role of the schools.

III

The dissent rests on the assumptions that these sweeping race-based classifications of persons are permitted by existing precedents; that its confident endorsement of race categories for each child in a large segment of the community presents no danger to individual freedom in other, prospective realms of governmental regulation; and that the racial classifications used here cause no hurt or anger of the type the Constitution prevents. Each of these premises is, in my respectful view, incorrect.

A

The dissent's reliance on this Court's precedents to justify the explicit, sweeping, classwide racial classifications at issue ***791** here is a misreading of our authorities that, it appears to me, tends to undermine well-accepted principles needed to guard our freedom. And in his critique of that analysis, I am in many respects in agreement with THE CHIEF JUSTICE. The conclusions he has set forth in Part III–A of the Court's opinion are correct, in my view, because the compelling interests implicated in the cases before us are distinct from the interests the Court has recognized in remedying the effects of past intentional discrimination and in increasing diversity in higher education. See *ante,* at 2752 – 2753. As the Court notes, we recognized the compelling nature of the interest in remedying past intentional discrimination in *Freeman v. Pitts,* 503 U.S.

467, 494, 112 S.Ct. 1430, 118 L.Ed.2d 108 (1992), and of the interest in diversity in higher education in *Grutter*. At the same time, these compelling interests, in my view, do help inform the present inquiry. And to the extent the plurality opinion can be interpreted to foreclose consideration of these interests, I disagree with that reasoning.

As to the dissent, the general conclusions upon which it relies have no principled limit and would result in the broad acceptance of governmental racial classifications in areas far afield from schooling. The dissent's permissive strict scrutiny (which bears more than a passing resemblance to rational-basis review) could invite widespread governmental deployment of racial classifications. There is every reason to think that, if the dissent's rationale were accepted, Congress, assuming an otherwise proper exercise of its spending authority or commerce power, could mandate either the Seattle or the Jefferson County plans nationwide. There seems to be no principled rule, moreover, to limit the dissent's rationale to the context of public schools. The dissent emphasizes local control, see *post,* at 2826 – 2827, the unique history of school desegregation, see *post,* at 2800 – 2801, and the fact that these plans make less use of race than prior plans, see *post,* at 2830 – 2831, but these factors seem more rhetorical than integral to the analytical structure of the opinion.

***792** This brings us to the dissent's reliance on the Court's opinions in *Gratz v. Bollinger,* 539 U.S. 244, 123 S.Ct. 2411, 156 L.Ed.2d 257 (2003), and *Grutter,* 539 U.S. 306, 123 S.Ct. 2325, 156 L.Ed.2d 304. If ****2794** today's dissent said it was adhering to the views expressed in the separate opinions in *Gratz* and *Grutter,* see *Gratz,* 539 U.S., at 281, 123 S.Ct. 2411 (BREYER, J., concurring in judgment); *id.,* at 282, 123 S.Ct. 2411 (STEVENS, J., dissenting); *id.,* at 291, 123 S.Ct. 2411 (SOUTER, J., dissenting); *id.,* at 298, 123 S.Ct. 2411 (GINSBURG, J., dissenting); *Grutter, supra,* at 344, 123 S.Ct. 2325 (GINSBURG, J., concurring), that would be understandable, and likely within the tradition—to be invoked, in my view, in rare instances—that permits us to maintain our own positions in the face of *stare decisis* when fundamental points of doctrine are at stake. See, *e.g., Federal Maritime Comm'n v. South Carolina Ports Authority,* 535 U.S. 743, 770, 122 S.Ct. 1864, 152 L.Ed.2d 962 (2002) (STEVENS, J., dissenting). To say, however, that we must ratify the racial classifications here at issue based on the majority opinions in *Gratz* and *Grutter* is, with all respect, simply baffling.

Gratz involved a system where race was not the entire classification. The procedures in *Gratz* placed much less reliance on race than do the plans at issue here. The issue in *Gratz* arose, moreover, in the context of college admissions where students had other choices and precedent supported the proposition that First Amendment interests give universities particular latitude in defining diversity. See *Regents of Univ. of Cal. v. Bakke,* 438 U.S. 265, 312–314, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978) (opinion of Powell, J.). Even so the race factor was found to be invalid. *Gratz, supra,* at 251, 123 S.Ct. 2411. If *Gratz* is to be the measure, the racial classification systems here are *a fortiori* invalid. If the dissent were to say that college cases are simply not applicable to public school systems in kindergarten through high school, this would seem to me wrong, but at least an arguable distinction. Under no fair reading, though, can the majority opinion in *Gratz* be cited as authority to sustain the racial classifications under consideration here.

***793** The same must be said for the controlling opinion in *Grutter*. There the Court sustained a system that, it found, was flexible enough to take into account "all pertinent elements of diversity," 539 U.S., at 341, 123 S.Ct. 2325 (internal quotation marks omitted), and considered race as only one factor among many, *id*., at 340, 123 S.Ct. 2325. Seattle's plan, by contrast, relies upon a mechanical formula that has denied hundreds of students their preferred schools on the basis of three rigid criteria: placement of siblings, distance from schools, and race. If those students were considered for a whole range of their talents and school needs with race as just one consideration, *Grutter* would have some application. That, though, is not the case. The only support today's dissent can draw from *Grutter* must be found in its various separate opinions, not in the opinion filed for the Court.

B

To uphold these programs the Court is asked to brush aside two concepts of central importance for determining the validity of laws and decrees designed to alleviate the hurt and adverse consequences resulting from race discrimination. The first is the difference between *de jure* and *de facto* segregation; the second, the presumptive invalidity of a State's use of racial

classifications to differentiate its treatment of individuals.

In the immediate aftermath of *Brown* the Court addressed other instances where laws and practices enforced *de jure* segregation. See, *e.g., Loving v. Virginia,* 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967) (marriage); ****2795** *New Orleans City Park Improvement Assn. v. Detiege,* 358 U.S. 54, 79 S.Ct. 99, 3 L.Ed.2d 46 (1958) *(per curiam)* (public parks); *Gayle v. Browder,* 352 U.S. 903, 77 S.Ct. 145, 1 L.Ed.2d 114 (1956) *(per curiam)* (buses); *Holmes v. Atlanta,* 350 U.S. 879, 76 S.Ct. 141, 100 L.Ed. 776 (1955) *(per curiam)* (golf courses); *Mayor and City Council of Baltimore v. Dawson,* 350 U.S. 877, 76 S.Ct. 133, 100 L.Ed. 774 (1955) *(per curiam)* (beaches). But with reference to schools, the effect of the legal wrong proved most difficult to correct. To remedy the wrong, school districts that had been segregated by law had no choice, whether ***794** under court supervision or pursuant to voluntary desegregation efforts, but to resort to extraordinary measures including individual student and teacher assignment to schools based on race. See, *e.g., Swann v. Charlotte–Mecklenburg Bd. of Ed.,* 402 U.S. 1, 8–10, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971); see also *Croson,* 488 U.S., at 519, 109 S.Ct. 706 (KENNEDY, J., concurring in part and concurring in judgment) (noting that racial classifications "may be the only adequate remedy after a judicial determination that a State or its instrumentality has violated the Equal Protection Clause"). So it was, as the dissent observes, see *post,* at 2806 – 2807, that Louisville classified children by race in its school assignment and busing plan in the 1970's.

Our cases recognized a fundamental difference between those school districts that had engaged in *de jure* segregation and those whose segregation was the result of other factors. School districts that had engaged in *de jure* segregation had an affirmative constitutional duty to desegregate; those that were *de facto* segregated did not. Compare *Green v. School Bd. of New Kent Cty.,* 391 U.S. 430, 437–438, 88 S.Ct. 1689, 20 L.Ed.2d 716 (1968), with *Milliken v. Bradley,* 418 U.S. 717, 745, 94 S.Ct. 3112, 41 L.Ed.2d 1069 (1974). The distinctions between *de jure* and *de facto* segregation extended to the remedies available to governmental units in addition to the courts. For example, in *Wygant v. Jackson Bd. of Ed.,* 476 U.S. 267, 274, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986), the plurality noted: "This Court never has held that societal discrimination alone is sufficient to justify a racial classification. Rather, the Court has insisted upon some showing of prior discrimination by the governmental unit involved before allowing limited use of racial classifications in order to remedy such discrimination." The Court's decision in *Croson, supra,* reinforced the difference between the remedies available to redress *de facto* and *de jure* discrimination:

> "To accept [a] claim that past societal discrimination alone can serve as the basis for rigid racial preferences would be to open the door to competing claims for 'remedial relief' for every disadvantaged group. The dream ***795** of a Nation of equal citizens in a society where race is irrelevant to personal opportunity and achievement would be lost in a mosaic of shifting preferences based on inherently unmeasurable claims of past wrongs." *Id.,* at 505–506, 109 S.Ct. 706.

From the standpoint of the victim, it is true, an injury stemming from racial prejudice can hurt as much when the demeaning treatment based on race identity stems from bias masked deep within the social order as when it is imposed by law. The distinction between government and private action, furthermore, can be amorphous both as a historical matter and as a matter of present-day finding of fact. Laws arise from a culture and vice versa. Neither can assign to the other all responsibility for persisting injustices.

Yet, like so many other legal categories that can overlap in some instances, the constitutional distinction between *de jure* and *de facto* segregation has been thought ****2796** to be an important one. It must be conceded its primary function in school cases was to delimit the powers of the Judiciary in the fashioning of remedies. See, *e.g., Milliken, supra,* at 746, 94 S.Ct. 3112. The distinction ought not to be altogether disregarded, however, when we come to that most sensitive of all racial issues, an attempt by the government to treat whole classes of persons differently based on the government's systematic classification of each individual by race. There, too, the distinction serves as a limit on the exercise of a power that reaches to the very verge of constitutional authority. Reduction of an individual to an assigned racial identity for differential treatment is among the most pernicious actions our government can undertake. The allocation of governmental burdens and benefits, contentious under any circumstances, is even more divisive when allocations are made on the basis of individual racial classifications. See, *e.g., Bakke,* 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750; *Adarand,* 515 U.S. 200, 115 S.Ct. 2097, 132 L.Ed.2d 158.

Notwithstanding these concerns, allocation of benefits and burdens through individual racial classifications was found ***796** sometimes permissible in the context of remedies for *de jure* wrong. Where there has been *de jure* segregation, there is a cognizable legal wrong, and the courts and legislatures have broad power to remedy it. The remedy, though, was limited in time and limited to the wrong. The Court has allowed school districts to remedy their prior *de jure* segregation by classifying

individual students based on their race. See *North Carolina Bd. of Ed. v. Swann,* 402 U.S. 43, 45–46, 91 S.Ct. 1284, 28 L.Ed.2d 586 (1971). The limitation of this power to instances where there has been *de jure* segregation serves to confine the nature, extent, and duration of governmental reliance on individual racial classifications.

The cases here were argued upon the assumption, and come to us on the premise, that the discrimination in question did not result from *de jure* actions. And when *de facto* discrimination is at issue our tradition has been that the remedial rules are different. The State must seek alternatives to the classification and differential treatment of individuals by race, at least absent some extraordinary showing not present here.

C

The dissent refers to an opinion filed by Judge Kozinski in one of the cases now before us, and that opinion relied upon an opinion filed by Chief Judge Boudin in a case presenting an issue similar to the one here. See *post,* at 2818 – 2819 (citing 426 F.3d 1162, 1193–1196 (C.A.9 2005) (concurring opinion), in turn citing *Comfort v. Lynn School Comm.,* 418 F.3d 1, 27, 29 (C.A.1 2005) (Boudin, C. J., concurring)). Though this may oversimplify the matter a bit, one of the main concerns underlying those opinions was this: If it is legitimate for school authorities to work to avoid racial isolation in their schools, must they do so only by indirection and general policies? Does the Constitution mandate this inefficient result? Why may the authorities not recognize the problem in candid fashion and solve it altogether through resort to direct assignments based on student racial classifications? So, the argument ***797** proceeds, if race is the problem, then perhaps race is the solution.

The argument ignores the dangers presented by individual classifications, dangers that are not as pressing when the same ends are achieved by more indirect means. When the government classifies an individual by race, it must first define what it means to be of a race. Who exactly ****2797** is white and who is nonwhite? To be forced to live under a state-mandated racial label is inconsistent with the dignity of individuals in our society. And it is a label that an individual is powerless to change. Governmental classifications that command people to march in different directions based on racial typologies can cause a new divisiveness. The practice can lead to corrosive discourse, where race serves not as an element of our diverse heritage but instead as a bargaining chip in the political process. On the other hand race-conscious measures that do not rely on differential treatment based on individual classifications present these problems to a lesser degree.

The idea that if race is the problem, race is the instrument with which to solve it cannot be accepted as an analytical leap forward. And if this is a frustrating duality of the Equal Protection Clause it simply reflects the duality of our history and our attempts to promote freedom in a world that sometimes seems set against it. Under our Constitution the individual, child or adult, can find his own identity, can define her own persona, without state intervention that classifies on the basis of his race or the color of her skin.

* * *

This Nation has a moral and ethical obligation to fulfill its historic commitment to creating an integrated society that ensures equal opportunity for all of its children. A compelling interest exists in avoiding racial isolation, an interest that a school district, in its discretion and expertise, may choose to pursue. Likewise, a district may consider it a ***798** compelling interest to achieve a diverse student population. Race may be one component of that diversity, but other demographic factors, plus special talents and needs, should also be considered. What the government is not permitted to do, absent a showing of necessity not made here, is to classify every student on the basis of race and to assign each of them to schools based on that classification. Crude measures of this sort threaten to reduce children to racial chits valued and traded according to one

school's supply and another's demand.

That statement, to be sure, invites this response: A sense of stigma may already become the fate of those separated out by circumstances beyond their immediate control. But to this the replication must be: Even so, measures other than differential treatment based on racial typing of individuals first must be exhausted.

The decision today should not prevent school districts from continuing the important work of bringing together students of different racial, ethnic, and economic backgrounds. Due to a variety of factors—some influenced by government, some not—neighborhoods in our communities do not reflect the diversity of our Nation as a whole. Those entrusted with directing our public schools can bring to bear the creativity of experts, parents, administrators, and other concerned citizens to find a way to achieve the compelling interests they face without resorting to widespread governmental allocation of benefits and burdens on the basis of racial classifications.

With this explanation I concur in the judgment of the Court.

Justice STEVENS, dissenting.

While I join Justice BREYER's eloquent and unanswerable dissent in its entirety, it is appropriate to add these words.

There is a cruel irony in THE CHIEF JUSTICE's reliance on our decision in ***799** *Brown v. Board of Education,* 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083 1955). The first sentence in the concluding paragraph of his opinion states: "Before ****2798** *Brown,* schoolchildren were told where they could and could not go to school based on the color of their skin." *Ante,* at 2767 – 2768. This sentence reminds me of Anatole France's observation: "[T]he majestic equality of the la[w], ... forbid[s] rich and poor alike to sleep under the bridges, to beg in the streets, and to steal their bread."[1] THE CHIEF JUSTICE fails to note that it was only black schoolchildren who were so ordered; indeed, the history books do not tell stories of white children struggling to attend black schools.[2] In this and other ways, THE CHIEF JUSTICE rewrites the history of one of this Court's most important decisions. Compare *ante,* at 2767 ("history will be heard"), with *Brewer v. Quarterman,* 550 U.S. 286, 275, 127 S.Ct. 1706, 1720, 167 L.Ed.2d 622 (2007) (ROBERTS, C. J., dissenting) ("It is a familiar adage that history is written by the victors").

THE CHIEF JUSTICE rejects the conclusion that the racial classifications at issue here should be viewed differently than others, because they do not impose burdens on one race alone and do not stigmatize or exclude.[3] The only justification for ***800** refusing to acknowledge the obvious importance of that difference is the citation of a few recent opinions—none of which even approached unanimity—grandly proclaiming that all racial classifications must be analyzed under "strict scrutiny." See, *e.g., Adarand Constructors, Inc. v. Peña,* 515 U.S. 200, 227, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995). Even today, two of our wisest federal judges have rejected such a wooden reading of the Equal Protection Clause in the context of school integration. See 426 F.3d 1162, 1193–1196 (C.A.9 2005) (Kozinski, J., concurring); *Comfort v. Lynn School Comm.,* 418 F.3d 1, 27–29 (C.A.1 2005) (Boudin, C. J., concurring). The Court's misuse of the three-tiered approach to equal protection analysis merely reconfirms my own view that there is only one such Clause in the Constitution. See *Craig v. Boren,* 429 U.S. 190, 211, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976) (concurring opinion).[4]

****2799** If we look at cases decided during the interim between *Brown* and *Adarand,* we can see how a rigid adherence to ***801** tiers of scrutiny obscures *Brown*'s clear message. Perhaps the best example is provided by our approval of the decision of the Supreme Judicial Court of Massachusetts in 1967 upholding a state statute mandating racial integration in that State's school system. See *School Comm. of Boston v. Board of Education,* 352 Mass. 693, 227 N.E.2d 729.[5] Rejecting arguments comparable to those that the plurality accepts today,[6] that court noted: "It would be the height of irony if the racial imbalance act, enacted as it was with the laudable purpose of achieving equal educational opportunities, should, by prescribing school pupil allocations based ***802** on race, founder on unsuspected shoals in the Fourteenth Amendment." *Id.,* at 698, 227 N.E.2d, at 733 (footnote omitted).

Invoking our mandatory appellate jurisdiction,[7] the Boston plaintiffs prosecuted an appeal in this Court. Our ruling on the

merits simply stated that the appeal was "dismissed for want of a substantial federal question." *School Comm. of Boston v. Board of Education,* 389 U.S. 572, 88 S.Ct. 692, 19 L.Ed.2d 778 (1968) *(per curiam).* That decision not only expressed our appraisal of the merits of the appeal, but it constitutes a precedent that the Court ****2800** overrules today. The subsequent statements by the unanimous Court in *Swann v. Charlotte–Mecklenburg Bd. of Ed.,* 402 U.S. 1, 16, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971), by then-Justice Rehnquist in chambers in *Bustop, Inc. v. Los Angeles Bd. of Ed.,* 439 U.S. 1380, 1383, 99 S.Ct. 40, 58 L.Ed.2d 88 (1978), and by the host of state–court decisions cited by Justice BREYER, see *post,* at 2813 – 2815,[8] were ***803** fully consistent with that disposition. Unlike today's decision, they were also entirely loyal to *Brown.*

The Court has changed significantly since it decided *School Comm. of Boston* in 1968. It was then more faithful to *Brown* and more respectful of our precedent than it is today. It is my firm conviction that no Member of the Court that I joined in 1975 would have agreed with today's decision.

Justice BREYER, with whom Justice STEVENS, Justice SOUTER, and Justice GINSBURG join, dissenting.

These cases consider the longstanding efforts of two local school boards to integrate their public schools. The school board plans before us resemble many others adopted in the last 50 years by primary and secondary schools throughout the Nation. All of those plans represent local efforts to bring about the kind of racially integrated education that *Brown v. Board of Education,* 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954), long ago promised—efforts that this Court has repeatedly required, permitted, and encouraged local authorities to undertake. This Court has recognized that the public interests at stake in such cases are "compelling." We have approved of "narrowly tailored" plans that are no less race conscious than the plans before us. And we have understood that the Constitution *permits* local communities to adopt desegregation plans even where it does not *require* them to do so.

The plurality pays inadequate attention to this law, to past opinions' rationales, their language, and the contexts in which they arise. As a result, it reverses course and reaches the wrong conclusion. In doing so, it distorts precedent, it misapplies the relevant constitutional principles, it announces legal rules that will obstruct efforts by state and local governments to deal effectively with the growing resegregation of public schools, it threatens to substitute for present calm a disruptive round of race-related litigation, and it undermines *Brown*'s promise of integrated primary and secondary education that local communities have sought ***804** to make a ****2801** reality. This cannot be justified in the name of the Equal Protection Clause.

I

Facts

The historical and factual context in which these cases arise is critical. In *Brown,* this Court held that the government's segregation of schoolchildren by race violates the Constitution's promise of equal protection. The Court emphasized that "education is perhaps the most important function of state and local governments." 347 U.S., at 493, 74 S.Ct. 686. And it thereby set the Nation on a path toward public school integration.

In dozens of subsequent cases, this Court told school districts previously segregated by law what they must do at a minimum to comply with *Brown*'s constitutional holding. The measures required by those cases often included race-conscious practices, such as mandatory busing and race-based restrictions on voluntary transfers. See, *e.g., Columbus Bd. of Ed. v. Penick,* 443 U.S. 449, 455, n. 3, 99 S.Ct. 2941, 61 L.Ed.2d 666 (1979); *Davis v. Board of School Comm'rs of Mobile Cty.,*

402 U.S. 33, 37–38, 91 S.Ct. 1289, 28 L.Ed.2d 577 (1971); *Green v. School Bd. of New Kent Cty.,* 391 U.S. 430, 441–442, 88 S.Ct. 1689, 20 L.Ed.2d 716 (1968).

Beyond those minimum requirements, the Court left much of the determination of how to achieve integration to the judgment of local communities. Thus, in respect to race-conscious desegregation measures that the Constitution *permitted,* but did not *require* (measures similar to those at issue here), this Court unanimously stated:

> "School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. *To do this as an educational policy is within* ***805** *the broad discretionary powers of school authorities*." *Swann v. Charlotte–Mecklenburg Bd. of Ed.,* 402 U.S. 1, 16, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971) (emphasis added).

As a result, different districts—some acting under court decree, some acting in order to avoid threatened lawsuits, some seeking to comply with federal administrative orders, some acting purely voluntarily, some acting after federal courts had dissolved earlier orders—adopted, modified, and experimented with hosts of different kinds of plans, including race-conscious plans, all with a similar objective: greater racial integration of public schools. See F. Welch & A. Light, New Evidence on School Desegregation, p. v (1987) (hereinafter Welch) (prepared for the Commission on Civil Rights) (reviewing a sample of 125 school districts, constituting 20% of national public school enrollment, that had experimented with nearly 300 different plans over 18 years). The techniques that different districts have employed range "from voluntary transfer programs to mandatory reassignment." *Id.,* at 21. And the design of particular plans has been "dictated by both the law and the specific needs of the district." *Ibid*.

Overall these efforts brought about considerable racial integration. More recently, however, progress has stalled. Between 1968 and 1980, the number of black children attending a school where minority children constituted more than half of the school fell from 77% to 63% in the Nation (from 81% to 57% in the South) but then reversed direction by the year 2000, rising from 63% to 72% in the Nation (from 57% ****2802** to 69% in the South). Similarly, between 1968 and 1980, the number of black children attending schools that were more than 90% minority fell from 64% to 33% in the Nation (from 78% to 23% in the South), but that too reversed direction, rising by the year 2000 from 33% to 37% in the Nation (from 23% to 31% in the South). As of 2002, almost 2.4 million students, or over 5% of all public school enrollment, attended schools with a white population of less than 1%. Of these, ***806** 2.3 million were black and Latino students, and only 72,000 were white. Today, more than one in six black children attend a school that is 99%–100% minority. See Appendix A, *infra.* In light of the evident risk of a return to school systems that are in fact (though not in law) resegregated, many school districts have felt a need to maintain or to extend their integration efforts.

The upshot is that myriad school districts operating in myriad circumstances have devised myriad plans, often with race-conscious elements, all for the sake of eradicating earlier school segregation, bringing about integration, or preventing retrogression. Seattle and Louisville are two such districts, and the histories of their present plans set forth typical school integration stories.

I describe those histories at length in order to highlight three important features of these cases. First, the school districts' plans serve "compelling interests" and are "narrowly tailored" on any reasonable definition of those terms. Second, the distinction between *de jure* segregation (caused by school systems) and *de facto* segregation (caused, *e.g.,* by housing patterns or generalized societal discrimination) is meaningless in the present context, thereby dooming the plurality's endeavor to find support for its views in that distinction. Third, real-world efforts to substitute racially diverse for racially segregated schools (however caused) are complex, to the point where the Constitution cannot plausibly be interpreted to rule out categorically all local efforts to use means that are "conscious" of the race of individuals.

In both Seattle and Louisville, the local school districts began with schools that were highly segregated in fact. In both cities, plaintiffs filed lawsuits claiming unconstitutional segregation. In Louisville, a Federal District Court found that school segregation reflected pre-*Brown* state laws separating the races. In Seattle, the plaintiffs alleged that school segregation unconstitutionally reflected not only generalized societal discrimination and residential housing patterns, ***807** but also *school board policies and actions* that had helped to create, maintain, and aggravate racial segregation. In Louisville, a federal court entered a remedial decree. In Seattle, the parties settled after the school district pledged to undertake a desegregation plan. In both cities, the school boards adopted plans designed to achieve integration by bringing about more

racially diverse schools. In each city, the school board modified its plan several times in light of, for example, hostility to busing, the threat of resegregation, and the desirability of introducing greater student choice. And in each city, the school boards' plans have evolved over time in ways that progressively *diminish* the plans' use of explicit race-conscious criteria.

The histories that follow set forth these basic facts. They are based upon numerous sources, which for ease of exposition I have cataloged, along with their corresponding citations, at Appendix B, *infra.*

A

Seattle

1. Segregation, 1945 to 1956. During and just after World War II, significant ****2803** numbers of black Americans began to make Seattle their home. Few black residents lived outside the central section of the city. Most worked at unskilled jobs. Although black students made up about 3% of the total Seattle population in the mid–1950's, nearly all black children attended schools where a majority of the population was minority. Elementary schools in central Seattle were between 60% and 80% black; Garfield, the central district high school, was more than 50% minority; schools outside the central and southeastern sections of Seattle were virtually all white.

2. Preliminary Challenges, 1956 to 1969. In 1956, a memo for the Seattle School Board reported that school segregation reflected not only segregated housing patterns but also school board policies that permitted white students to ***808** transfer out of black schools while restricting the transfer of black students into white schools. In 1958, black parents whose children attended Harrison Elementary School (with a black student population of over 75%) wrote the Seattle board, complaining that the " 'boundaries for the Harrison Elementary School were not set in accordance with the long-established standards of the School District ... but were arbitrarily set with an end to excluding colored children from McGilvra School, which is adjacent to the Harrison school district.' "

In 1963, at the insistence of the National Association for the Advancement of Colored People (NAACP) and other community groups, the school board adopted a new race-based transfer policy. The new policy added an explicitly racial criterion: If a place exists in a school, then, irrespective of other transfer criteria, a white student may transfer to a predominantly black school, and a black student may transfer to a predominantly white school.

At that time, one high school, Garfield, was about two-thirds minority; eight high schools were virtually all white. In 1963, the transfer program's first year, 239 black students and 8 white students transferred. In 1969, about 2,200 (of 10,383 total) of the district's black students and about 400 of the district's white students took advantage of the plan. For the next decade, annual program transfers remained at approximately this level.

3. The NAACP's First Legal Challenge and Seattle's Response, 1966 to 1977. In 1966, the NAACP filed a federal lawsuit against the school board, claiming that the board had "unlawfully and unconstitutionally" "establish[ed]" and "maintain [ed]" a system of "racially segregated public schools." The complaint said that 77% of black public elementary school students in Seattle attended 9 of the city's 86 elementary schools and that 23 of the remaining schools had no black students at all. Similarly, of the 1,461 black students ***809** enrolled in the 12 senior high schools in Seattle, 1,151 (or 78.8%) attended 3 senior high schools, and 900 (61.6%) attended a single school, Garfield.

The complaint charged that the school board had brought about this segregated system in part by "mak[ing] and enforc[ing]" certain "rules and regulations," in part by "drawing ... boundary lines" and "executing school attendance policies" that would

create and maintain "predominantly Negro or non-white schools," and in part by building schools "in such a manner as to restrict the Negro plaintiffs and the class they represent to predominantly Negro or non-white schools." The complaint also charged that the board discriminated in assigning teachers.

The board responded to the lawsuit by introducing a plan that required race-based transfers and mandatory busing. The plan created three new middle schools ****2804** at three school buildings in the predominantly white north end. It then created a "mixed" student body by assigning to those schools students who would otherwise attend predominantly white, or predominantly black, schools elsewhere. It used explicitly racial criteria in making these assignments (*i.e.,* it deliberately assigned to the new middle schools black students, not white students, from the black schools and white students, not black students, from the white schools). And it used busing to transport the students to their new assignments. The plan provoked considerable local opposition. Opponents brought a lawsuit. But eventually a state court found that the mandatory busing was lawful.

In 1976–1977, the plan involved the busing of about 500 middle school students (300 black students and 200 white students). Another 1,200 black students and 400 white students participated in the previously adopted voluntary transfer program. Thus about 2,000 students out of a total district population of about 60,000 students were involved in one or the other transfer program. At that time, about ***810** 20% or 12,000 of the district's students were black. And the board continued to describe 26 of its 112 schools as "segregated."

4. The NAACP's Second Legal Challenge, 1977. In 1977, the NAACP filed another legal complaint, this time with the federal Department of Health, Education, and Welfare's Office for Civil Rights (OCR). The complaint alleged that the Seattle School Board had created or perpetuated unlawful racial segregation through, *e.g.,* certain school-transfer criteria, a construction program that needlessly built new schools in white areas, district line-drawing criteria, the maintenance of inferior facilities at black schools, the use of explicit racial criteria in the assignment of teachers and other staff, and a general pattern of delay in respect to the implementation of promised desegregation efforts.

The OCR and the school board entered into a formal settlement agreement. The agreement required the board to implement what became known as the "Seattle Plan."

5. The Seattle Plan: Mandatory Busing, 1978 to 1988. The board began to implement the Seattle Plan in 1978. This plan labeled "racially imbalanced" any school at which the percentage of black students exceeded by more than 20% the minority population of the school district as a whole. It applied that label to 26 schools, including 4 high schools—Cleveland (72.8% minority), Franklin (76.6% minority), Garfield (78.4% minority), and Rainier Beach (58.9% minority). The plan paired (or "triaded") "imbalanced" black schools with "imbalanced" white schools. It then placed some grades (say, third and fourth grades) at one school building and other grades (say, fifth and sixth grades) at the other school building. And it thereby required, for example, all fourth grade students from the previously black and previously white schools first to attend together what would now be a "mixed" fourth grade at one of the school buildings and then the next year to attend what would now be a "mixed" fifth grade at the other school building.

***811** At the same time, the plan provided that a previous "black" school would remain about 50% black, while a previous "white" school would remain about two-thirds white. It was consequently necessary to decide with some care *which* students would attend the new "mixed" grade. For this purpose, administrators cataloged the racial makeup of each neighborhood housing block. The school district met its percentage goals by assigning to the new ****2805** "mixed" school an appropriate number of "black" housing blocks and "white" housing blocks. At the same time, transport from house to school involved extensive busing, with about half of all students attending a school other than the one closest to their home.

The Seattle Plan achieved the school integration that it sought. Just prior to the plan's implementation, for example, 4 of Seattle's 11 high schools were "imbalanced," *i.e.,* almost exclusively "black" or almost exclusively "white." By 1979, only two were out of "balance." By 1980, only Cleveland remained out of "balance" (as the board defined it) and that by a mere two students.

Nonetheless, the Seattle Plan, due to its busing, provoked serious opposition within the State. See generally *Washington v. Seattle School Dist. No. 1,* 458 U.S. 457, 461–466, 102 S.Ct. 3187, 73 L.Ed.2d 896 (1982). Thus, Washington state voters enacted an initiative that amended state law to require students to be assigned to the schools closest to their homes. *Id.,* at 462, 102 S.Ct. 3187. The Seattle School Board challenged the constitutionality of the initiative. *Id.,* at 464, 102 S.Ct. 3187.

This Court then held that the initiative—which would have prevented the Seattle Plan from taking effect—violated the Fourteenth Amendment. *Id.,* at 470, 102 S.Ct. 3187.

6. Student Choice, 1988 to 1998. By 1988, many white families had left the school district, and many Asian families had moved in. The public school population had fallen from about 100,000 to less than 50,000. The racial makeup of the school population amounted to 43% white, 24% black, and 23% Asian or Pacific Islander, with Hispanics and Native ***812** Americans making up the rest. The cost of busing, the harm that members of all racial communities feared that the Seattle Plan caused, the desire to attract white families back to the public schools, and the interest in providing greater school choice led the board to abandon busing and to substitute a new student assignment policy that resembles the plan now before us.

The new plan permitted each student to choose the school he or she wished to attend, subject to race-based constraints. In respect to high schools, for example, a student was given a list of a subset of schools, carefully selected by the board to balance racial distribution in the district by including neighborhood schools and schools in racially different neighborhoods elsewhere in the city. The student could then choose among those schools, indicating a first choice, and other choices the student found acceptable. In making an assignment to a particular high school, the district would give first preference to a student with a sibling already at the school. It gave second preference to a student whose race differed from a race that was "over-represented" at the school (*i.e.,* a race that accounted for a higher percentage of the school population than of the total district population). It gave third preference to students residing in the neighborhood. It gave fourth preference to students who received child care in the neighborhood. In a typical year, say, 1995, about 20,000 potential high school students participated. About 68% received their first choice. Another 16% received an "acceptable" choice. A further 16% were assigned to a school they had not listed.

7. The Current Plan, 1999 to the Present. In 1996, the school board adopted the present plan, which began in 1999. In doing so, it sought to deemphasize the use of racial criteria and to increase the likelihood that a student would receive an assignment at his first or second choice high school. The district retained a racial tiebreaker ****2806** for oversubscribed schools, which takes effect only if the school's minority or ***813** majority enrollment falls outside of a 30% range centered on the minority/majority population ratio within the district. At the same time, all students were free subsequently to transfer from the school at which they were initially placed to a different school of their choice without regard to race. Thus, at worst, a student would have to spend one year at a high school he did not pick as a first or second choice.

The new plan worked roughly as expected for the two school years during which it was in effect (1999–2000 and 2000–2001). In the 2000–2001 school year, for example, with the racial tiebreaker, the entering ninth grade class at Franklin High School had a 60% minority population; without the racial tiebreaker that same class at Franklin would have had an almost 80% minority population. (We consider only the ninth grade since only students entering that class were subject to the tiebreaker, and because the plan was not in place long enough to change the composition of an entire school.) In the year 2005–2006, by which time the racial tiebreaker had not been used for several years, Franklin's overall minority enrollment had risen to 90%. During the period the tiebreaker applied, it typically affected about 300 students per year. Between 80% and 90% of all students received their first choice assignment; between 89% and 97% received their first or second choice assignment.

Petitioner Parents Involved in Community Schools objected to Seattle's most recent plan under the State and Federal Constitutions. In due course, the Washington Supreme Court, the Federal District Court, and the Court of Appeals for the Ninth Circuit (sitting en banc) rejected the challenge and found Seattle's plan lawful.

B

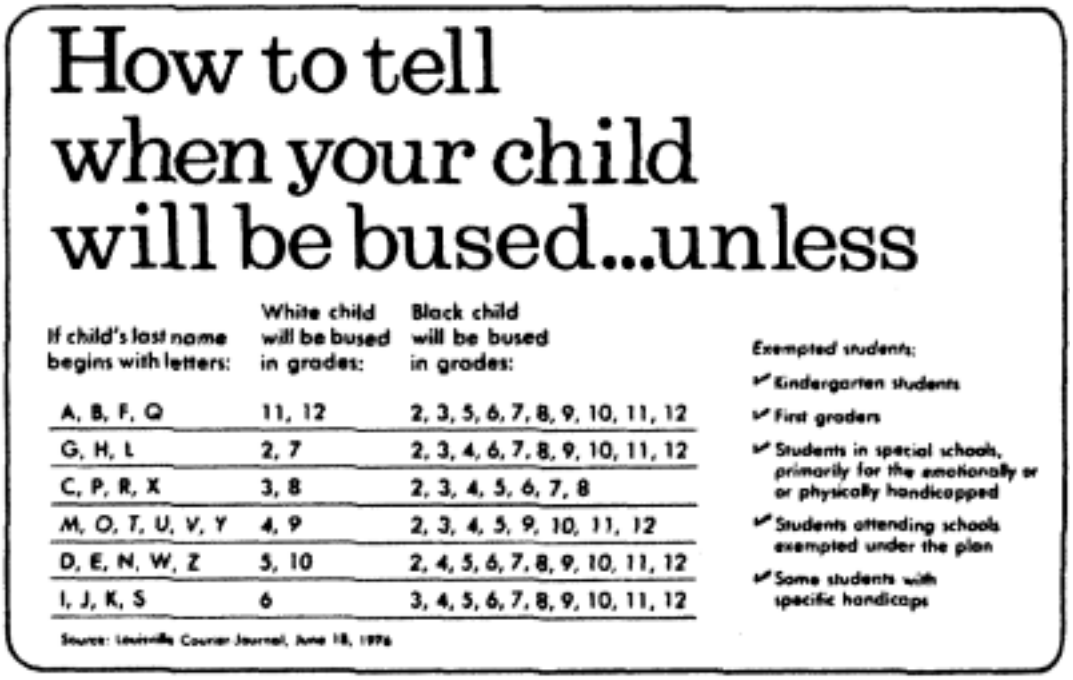
Louisville

1. Before the Lawsuit, 1954 to 1972. In 1956, two years after *Brown* made clear that Kentucky could no longer require racial segregation by law, the Louisville Board of Education ***814** created a geography-based student assignment plan designed to help achieve school integration. At the same time, it adopted an open transfer policy under which approximately 3,000 of Louisville's 46,000 students applied for transfer. By 1972, however, the Louisville School District remained highly segregated. Approximately half the district's public school enrollment was black; about half was white. Fourteen of the district's nineteen nonvocational middle and high schools were close to totally black or totally white. Nineteen of the district's forty-six elementary schools were between 80% and 100% black. Twenty-one elementary schools were between roughly 90% and 100% white.

2. Court–Imposed Guidelines and Busing, 1972 to 1991. In 1972, civil rights groups and parents, claiming unconstitutional segregation, sued the Louisville Board of Education in federal court. The original litigation eventually became a lawsuit against the Jefferson County School System, which in April 1975 absorbed Louisville's schools and combined them with those of the surrounding suburbs. (For ease of exposition, I shall still use "Louisville" to refer to what is now the combined districts.) After preliminary rulings and an eventual victory for the plaintiffs in the Court of Appeals for the Sixth Circuit, the District Court in July 1975 entered an order requiring desegregation.

The order's requirements reflected a (newly enlarged) school district student population of about 135,000, approximately ****2807** 20% of whom were black. The order required the school board to create and to maintain schools with student populations that ranged, for elementary schools, between 12% and 40% black, and for secondary schools (with one exception), between 12.5% and 35% black.

The District Court also adopted a complex desegregation plan designed to achieve the order's targets. The plan required redrawing school attendance zones, closing 12 schools, and busing groups of students, selected by race and the first letter of their last names, to schools outside their immediate ***815** neighborhoods. The plan's initial busing requirements were extensive, involving the busing of 23,000 students and a transportation fleet that had to "operate from early in the morning until late in the evening." For typical students, the plan meant busing for several years (several more years for typical black students than for typical white students). The following notice, published in a Louisville newspaper in 1976, gives a sense of how the district's race-based busing plan operated in practice:



How to tell when your child will be bused...unless

If child's last name begins with letters:	White child will be bused in grades:	Black child will be bused in grades:
A, B, F, Q	11, 12	2, 3, 5, 6, 7, 8, 9, 10, 11, 12
G, H, L	2, 7	2, 3, 4, 6, 7, 8, 9, 10, 11, 12
C, P, R, X	3, 8	2, 3, 4, 5, 6, 7, 8
M, O, T, U, V, Y	4, 9	2, 3, 4, 5, 9, 10, 11, 12
D, E, N, W, Z	5, 10	2, 4, 5, 6, 7, 8, 9, 10, 11, 12
I, J, K, S	6	3, 4, 5, 6, 7, 8, 9, 10, 11, 12

Source: Louisville Courier-Journal, June 18, 1976

Exempted students:
- Kindergarten students
- First graders
- Students in special schools, primarily for the emotionally or physically handicapped
- Students attending schools exempted under the plan
- Some students with specific handicaps

Louisville Courier–Journal, June 18, 1976 (reproduced in J. Wilkinson, From *Brown* to *Bakke:* The Supreme Court and School Integration 1954–1978, p. 176 (1979)).
The District Court monitored implementation of the plan. In 1978, it found that the plan had brought all of Louisville's schools within its " 'guidelines' for racial composition" for "at least a substantial portion of the [previous] three years." It removed the case from its active docket while stating that it expected the board "to continue to implement those portions of the desegregation order which are by their nature of a continuing effect."

***816** By 1984, after several schools had fallen out of compliance with the order's racial percentages due to shifting demographics in the community, the school board revised its desegregation plan. In doing so, the board created a new racial "guideline," namely a "floating range of 10% above and 10% below the countywide average for the different grade levels." The board simultaneously redrew district boundaries so that middle school students could attend the same school for three years and high school students for four years. It added "magnet" programs at two high schools. And it adjusted its alphabet-based system for grouping and busing students. The board estimated ****2808** that its new plan would lead to annual reassignment (with busing) of about 8,500 black students and about 8,000 white students.

3. Student Choice and Project Renaissance, 1991 to 1996. By 1991, the board had concluded that assigning elementary school students to two or more schools during their elementary school years had proved educationally unsound and, if continued, would undermine Kentucky's newly adopted Education Reform Act. It consequently conducted a nearly year-long review of its plan. In doing so, it consulted widely with parents and other members of the local community, using public presentations, public meetings, and various other methods to obtain the public's input. At the conclusion of this review, the board adopted a new plan, called "Project Renaissance," that emphasized student choice.

Project Renaissance again revised the board's racial guidelines. It provided that each elementary school would have a black student population of between 15% and 50%; each middle and high school would have a black population and a white population that fell within a range, the boundaries of which were set at 15% above and 15% below the general student population percentages in the county at that grade level. The plan then drew new geographical school assignment zones designed to satisfy these guidelines; the district could reassign students if particular schools failed to meet ***817** the guidelines and was required to do so if a school repeatedly missed these targets.

In respect to elementary schools, the plan first drew a neighborhood line around each elementary school, and it then drew a second line around groups of elementary schools (called "clusters"). It initially assigned each student to his or her neighborhood school, but it permitted each student freely to transfer between elementary schools within each cluster *provided*

that the transferring student (1) was black if transferring from a predominantly black school to a predominantly white school, or (2) was white if transferring from a predominantly white school to a predominantly black school. Students could also apply to attend magnet elementary schools or programs.

The plan required each middle school student to be assigned to his or her neighborhood school unless the student applied for, and was accepted by, a magnet middle school. The plan provided for "open" high school enrollment. Every 9th or 10th grader could apply to any high school in the system, and the high school would accept applicants according to set criteria—one of which consisted of the need to attain or remain in compliance with the plan's racial guidelines. Finally, the plan created two new magnet schools, one each at the elementary and middle school levels.

4. The Current Plan: Project Renaissance Modified, 1996 to 2003. In 1995 and 1996, the Louisville School Board, with the help of a special "Planning Team," community meetings, and other official and unofficial study groups, monitored the effects of Project Renaissance and considered proposals for improvement. Consequently, in 1996, the board modified Project Renaissance, thereby creating the present plan.

At the time, the district's public school population was approximately 30% black. The plan consequently redrew the racial "guidelines," setting the boundaries at 15% to 50% black for *all* schools. It again redrew school assignment boundaries. And it expanded the transfer opportunities ***818** available to elementary and middle school pupils. The plan forbade transfers, however, if the transfer would lead to a school population outside the guidelines range, *i.e.,* if it would create a school ****2809** where fewer than 15% or more than 50% of the students were black.

The plan also established "Parent Assistance Centers" to help parents and students navigate the school selection and assignment process. It pledged the use of other resources in order to "encourage all schools to achieve an African–American enrollment equivalent to the average district-wide African–American enrollment at the school's respective elementary, middle or high school level." And the plan continued use of magnet schools.

In 1999, several parents brought a lawsuit in federal court attacking the plan's use of racial guidelines at one of the district's magnet schools. They asked the court to dissolve the desegregation order and to hold the use of *magnet* school racial guidelines unconstitutional. The board opposed dissolution, arguing that "the old dual system" had left a "demographic imbalance" that "prevent[ed] dissolution." In 2000, after reviewing the present plan, the District Court dissolved the 1975 order. It wrote that there was "overwhelming evidence of the Board's good faith compliance with the desegregation Decree and its underlying purposes." It added that the Louisville School Board had "treated the ideal of an integrated system as much more than a legal obligation—they consider it a positive, desirable policy and an essential element of any well-rounded public school education."

The court also found that the magnet programs available at the high school in question were "not available at other high schools" in the school district. It consequently held unconstitutional the use of race-based "targets" to govern admission to *magnet schools*. And it ordered the board not to control access to those scarce programs through the use of racial targets.

***819** *5. The Current Lawsuit, 2003 to the Present.* Subsequent to the District Court's dissolution of the desegregation order (in 2000) the board simply continued to implement its 1996 plan as modified to reflect the court's magnet school determination. In 2003, the petitioner now before us, Crystal Meredith, brought this lawsuit challenging the plan's unmodified portions, *i.e.,* those portions that dealt with *ordinary,* not magnet, schools. Both the District Court and the Court of Appeals for the Sixth Circuit rejected Meredith's challenge and held the unmodified aspects of the plan constitutional.

C

The histories I have set forth describe the extensive and ongoing efforts of two school districts to bring about greater racial integration of their public schools. In both cases the efforts were in part remedial. Louisville began its integration efforts in

earnest when a federal court in 1975 entered a school desegregation order. Seattle undertook its integration efforts in response to the filing of a federal lawsuit and as a result of its settlement of a segregation complaint filed with the federal OCR.

The plans in both Louisville and Seattle grow out of these earlier remedial efforts. Both districts faced problems that reflected initial periods of severe racial segregation, followed by such remedial efforts as busing, followed by evidence of resegregation, followed by a need to end busing and encourage the return of, *e.g.,* suburban students through increased student choice. When formulating the plans under review, both districts drew upon their considerable experience with earlier plans, having revised their policies periodically in light of that experience. Both districts rethought their methods over time and explored a wide range of other means, including non-race-conscious policies. Both districts also ****2810** considered elaborate studies and consulted widely within their communities.

***820** Both districts sought greater racial integration for educational and democratic, as well as for remedial, reasons. Both sought to achieve these objectives while preserving their commitment to other educational goals, *e.g.,* district wide commitment to high quality public schools, increased pupil assignment to neighborhood schools, diminished use of busing, greater student choice, reduced risk of white flight, and so forth. Consequently, the present plans expand student choice; they limit the burdens (including busing) that earlier plans had imposed upon students and their families; and they use race-conscious criteria in limited and gradually diminishing ways. In particular, they use race-conscious criteria only to mark the outer bounds of broad population-related ranges.

The histories also make clear the futility of looking simply to whether earlier school segregation was *de jure* or *de facto* in order to draw firm lines separating the constitutionally permissible from the constitutionally forbidden use of "race-conscious" criteria. Justice THOMAS suggests that it will be easy to identify *de jure* segregation because "[i]n most cases, there either will or will not have been a state constitutional amendment, state statute, local ordinance, or local administrative policy explicitly requiring separation of the races." *Ante,* at 2771, n. 4 (concurring opinion). But our precedent has recognized that *de jure* discrimination can be present even in the absence of racially explicit laws. See *Yick Wo v. Hopkins,* 118 U.S. 356, 373–374, 6 S.Ct. 1064, 30 L.Ed. 220 (1886).

No one here disputes that Louisville's segregation was *de jure*. But what about Seattle's? Was it *de facto? De jure?* A mixture? Opinions differed. Or is it that a prior federal court had not adjudicated the matter? Does that make a difference? Is Seattle free on remand to say that its schools were *de jure* segregated, just as in 1956 a memo for the school board admitted? The plurality does not seem confident as to the answer. Compare *ante,* at 2752 (opinion of the Court) ("[T]he Seattle public schools *have not shown* ***821** that they were ever segregated by law" (emphasis added)), with *ante*, at 2761 – 2762 (plurality opinion) (assuming "the Seattle school district was never segregated by law," but seeming to concede that a school district with *de jure* segregation need not be subject to a court order to be allowed to engage in race-based remedial measures).

A court finding of *de jure* segregation cannot be the crucial variable. After all, a number of school districts in the South that the Government or private plaintiffs challenged as segregated *by law* voluntarily desegregated their schools *without a court order*—just as Seattle did. See, *e.g.,* Coleman, Desegregation of the Public Schools in Kentucky—The Second Year After the Supreme Court's Decision, 25 J. Negro Educ. 254, 256, 261 (1956) (40 of Kentucky's 180 school districts began desegregation without court orders); Branton, Little Rock Revisited: Desegregation to Resegregation, 52 J. Negro Educ. 250, 251 (1983) (similar in Arkansas); Bullock & Rodgers, Coercion to Compliance: Southern School Districts and School Desegregation Guidelines, 38 J. Politics 987, 991 (1976) (similar in Georgia); *McDaniel v. Barresi,* 402 U.S. 39, 40, n. 1, 91 S.Ct. 1287, 28 L.Ed.2d 582 (1971) (Clarke County, Georgia). See also Letter from Robert F. Kennedy, Attorney General, to John F. Kennedy, President (Jan. 24, 1963) (hereinafter Kennedy Report), online at http://www.gilderlehrman.org/search/collection_pdfs/05/63/0/05630.pdf (all Internet materials as visited June 26, 2007, and available ****2811** in Clerk of Court's case file) (reporting successful efforts by the Government to induce voluntary desegregation).

Moreover, Louisville's history makes clear that a community under a court order to desegregate might submit a race-conscious remedial plan *before* the court dissolved the order, but with every intention of following that plan even *after* dissolution. How could such a plan be lawful the day before dissolution but then become unlawful the very next day? On what legal ground can the majority rest its contrary view? But see *ante,* at 2752 – 2753, 2755, n. 12.

***822** Are courts really to treat as merely *de facto* segregated those school districts that avoided a federal order by voluntarily

complying with *Brown*'s requirements? See *ante*, at 2752 (opinion of the Court), *ante*, at 2761 – 2762 (plurality opinion). This Court has previously done just the opposite, permitting a race-conscious remedy without any kind of court decree. See *McDaniel, supra,* at 41, 91 S.Ct. 1287. Because the Constitution emphatically does not forbid the use of race-conscious measures by districts in the South that voluntarily desegregated their schools, on what basis does the plurality claim that the law forbids Seattle to do the same? But see *ante,* at 2761.

The histories also indicate the complexity of the tasks and the practical difficulties that local school boards face when they seek to achieve greater racial integration. The boards work in communities where demographic patterns change, where they must meet traditional learning goals, where they must attract and retain effective teachers, where they should (and will) take account of parents' views and maintain *their* commitment to public school education, where they must adapt to court intervention, where they must encourage voluntary student and parent action—where they will find that their own good faith, their knowledge, and their understanding of local circumstances are always necessary but often insufficient to solve the problems at hand.

These facts and circumstances help explain why in this context, as to means, the law often leaves legislatures, city councils, school boards, and voters with a broad range of choice, thereby giving "different communities" the opportunity to "try different solutions to common problems and gravitate toward those that prove most successful or seem to them best to suit their individual needs." *Comfort v. Lynn School Comm.,* 418 F.3d 1, 28 (C.A.1 2005) (Boudin, C. J., concurring) (citing *United States v. Lopez,* 514 U.S. 549, 581, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995) (KENNEDY, J., concurring)), cert. denied, 546 U.S. 1061, 126 S.Ct. 798, 163 L.Ed.2d 627 (2005).

***823** With this factual background in mind, I turn to the legal question: Does the United States Constitution prohibit these school boards from using race-conscious criteria in the limited ways at issue here?

II

The Legal Standard

A longstanding and unbroken line of legal authority tells us that the Equal Protection Clause permits local school boards to use race-conscious criteria to achieve positive race-related goals, even when the Constitution does not compel it. Because of its importance, I shall repeat what this Court said about the matter in *Swann*. Chief Justice Burger, on behalf of a unanimous Court in a case of exceptional importance, wrote:

> "School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a ****2812** pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities." 402 U.S., at 16, 91 S.Ct. 1267.

The statement was not a technical holding in the case. But the Court set forth in *Swann* a basic principle of constitutional law—a principle of law that has found "wide acceptance in the legal culture." *Dickerson v. United States,* 530 U.S. 428, 443, 120 S.Ct. 2326, 147 L.Ed.2d 405 (2000) (internal quotation marks omitted); *Mitchell v. United States,* 526 U.S. 314, 330, 119 S.Ct. 1307, 143 L.Ed.2d 424 (1999); *id.,* at 331, 332, 119 S.Ct. 1307 (SCALIA, J., dissenting) (citing " 'wide acceptance in the legal culture' " as "adequate reason not to overrule" prior cases).

Thus, in *North Carolina Bd. of Ed. v. Swann,* 402 U.S. 43, 45, 91 S.Ct. 1284, 28 L.Ed.2d 586 (1971), this Court, citing *Swann,* restated the point. "[S]chool authorities," the Court said, "have wide discretion ***824** in formulating school policy,

and ... as a matter of educational policy school authorities may well conclude that some kind of racial balance in the schools is desirable quite apart from any constitutional requirements." Then–Justice Rehnquist echoed this view in *Bustop, Inc. v. Los Angeles Bd. of Ed.,* 439 U.S. 1380, 1383, 99 S.Ct. 40, 58 L.Ed.2d 88 (1978) (opinion in chambers), making clear that he too believed that *Swann*'s statement reflected settled law: "While I have the gravest doubts that [a state supreme court] was *required* by the United States Constitution to take the [desegregation] action that it has taken in this case, I have very little doubt that it was *permitted* by that Constitution to take such action." (Emphasis in original.)

These statements nowhere suggest that this freedom is limited to school districts where court-ordered desegregation measures are also in effect. Indeed, in *McDaniel,* a case decided the same day as *Swann,* a group of parents challenged a race-conscious student assignment plan that the Clarke County School Board had *voluntarily* adopted as a remedy without a court order (though under federal agency pressure—pressure Seattle also encountered). The plan required that each elementary school in the district maintain 20% to 40% enrollment of African–American students, corresponding to the racial composition of the district. See *Barresi v. Browne,* 226 Ga. 456, 456–459, 175 S.E.2d 649, 650–651 (1970). This Court upheld the plan, see *McDaniel,* 402 U.S., at 41, 91 S.Ct. 1287, rejecting the parents' argument that "a person may not be *included* or *excluded* solely because he is a Negro or because he is white," Brief for Respondents in *McDaniel,* O.T.1970, No. 420, p. 25.

Federal authorities had claimed—as the NAACP and the OCR did in Seattle—that Clarke County schools were segregated in law, not just in fact. The plurality's claim that Seattle was "never segregated by law" is simply not accurate. Compare *ante,* at 2761 – 2762, with *supra,* at 2748 – 2750. The plurality could validly claim that *no court* ever found that Seattle ***825** schools were segregated in law. But that is also true of the Clarke County schools in *McDaniel*. Unless we believe that the Constitution enforces one legal standard for the South and another for the North, this Court should grant Seattle the permission it granted Clarke County, Georgia. See *McDaniel, supra*, at 41, 91 S.Ct. 1287 ("[S]teps will almost invariably require that students be assigned 'differently because of their race.' ... Any other approach would freeze the status quo that is the very target of all desegregation processes").

****2813** This Court has also held that school districts may be required by federal statute to undertake race-conscious desegregation efforts even when there is no likelihood that *de jure* segregation can be shown. In *Board of Ed. of City School Dist. of New York v. Harris,* 444 U.S. 130, 148–149, 100 S.Ct. 363, 62 L.Ed.2d 275 (1979), the Court concluded that a federal statute required school districts receiving certain federal funds to remedy faculty segregation, even though in this Court's view the racial disparities in the affected schools were purely *de facto* and would not have been actionable under the Equal Protection Clause. Not even the dissenters thought the race-conscious remedial program posed a *constitutional* problem. See *id.,* at 152, 100 S.Ct. 363 (opinion of Stewart, J.). See also, *e.g., Crawford v. Board of Ed. of Los Angeles,* 458 U.S. 527, 535–536, 102 S.Ct. 3211, 73 L.Ed.2d 948 (1982) ("[S]tate courts of California continue to have an obligation under state law to order segregated school districts to use voluntary desegregation techniques, *whether or not there has been a finding of intentional segregation* .... [S]chool districts themselves retain a state-law obligation to take reasonably feasible steps to desegregate, and *they remain free to adopt reassignment and busing plans to effectuate desegregation* " (emphasis added)); *School Comm. of Boston v. Board of Education,* 389 U.S. 572, 88 S.Ct. 692, 19 L.Ed.2d 778 (1968) *(per curiam)* (dismissing for want of a federal question a challenge to a voluntary statewide integration plan using express racial criteria).

Lower state and federal courts had considered the matter settled and uncontroversial even before this Court decided ***826** *Swann*. Indeed, in 1968, the Illinois Supreme Court rejected an equal protection challenge to a race-conscious state law seeking to undo *de facto* segregation:

> "To support [their] claim, the defendants heavily rely on three Federal cases, each of which held, no State law being involved, that a local school board does not have an affirmative constitutional duty to act to alleviate racial imbalance in the schools that it did not cause. However, the question as to whether the constitution requires a local school board, or a State, to act to undo *de facto* school segregation is simply not here concerned. The issue here is whether the constitution permits, rather than prohibits, voluntary State action aimed toward reducing and eventually eliminating *de facto* school segregation.
>
> "State laws or administrative policies, directed toward the reduction and eventual elimination of *de facto* segregation of children in the schools and racial imbalance, have been approved by every high State court which has considered the issue. Similarly, the Federal courts which have considered the issue ... have recognized that voluntary programs of local school authorities designed to alleviate *de facto* segregation and racial imbalance in the schools are not constitutionally forbidden." *Tometz v. Board of Ed., Waukegan School Dist. No. 61,* 39 Ill.2d 593, 597–598, 237 N.E.2d 498, 501 (citing

> decisions from the high courts of Pennsylvania, Massachusetts, New Jersey, California, New York, and Connecticut, and from the Courts of Appeals for the First, Second, Fourth, and Sixth Circuits; citations omitted).

See also, *e.g., Offermann v. Nitkowski,* 378 F.2d 22, 24 (C.A.2 1967); *Deal v. Cincinnati Bd. of Ed.,* 11 Ohio Misc. 184, 369 F.2d 55, 61 (C.A.6 1966), cert. denied, 389 U.S. 847, 88 S.Ct. 39, 19 L.Ed.2d 114 (1967); *Springfield School Comm. v. Barksdale,* 348 F.2d 261, 266 (C.A.1 1965); ***827 **2814** *Pennsylvania Human Relations Comm'n v. Chester School Dist.,* 427 Pa. 157, 164, 233 A.2d 290, 294 (1967); *Booker v. Board of Ed. of Plainfield, Union Cty.,* 45 N.J. 161, 170, 212 A.2d 1, 5 (1965); *Jackson v. Pasadena City School Dist.,* 59 Cal.2d 876, 881–882, 31 Cal.Rptr. 606, 382 P.2d 878, 881–882 (1963).

I quote the Illinois Supreme Court at length to illustrate the prevailing legal assumption at the time *Swann* was decided. In this respect, *Swann* was not a sharp or unexpected departure from prior rulings; it reflected a consensus that had already emerged among state and lower federal courts.

If there were doubts before *Swann* was decided, they did not survive this Court's decision. Numerous state and federal courts explicitly relied upon *Swann*'s guidance for decades to follow. For instance, a Texas appeals court in 1986 rejected a Fourteenth Amendment challenge to a voluntary integration plan by explaining:

> "[T]he absence of a court order to desegregate does not mean that a school board cannot exceed minimum requirements in order to promote school integration. School authorities are traditionally given broad discretionary powers to formulate and implement educational policy and may properly decide to ensure to their students the value of an integrated school experience." *Citizens for Better Ed. v. Goose Creek Consol. Independent School Dist.,* 719 S.W.2d 350, 352–353 (citing *Swann* and *North Carolina Bd. of Ed.*), appeal dism'd for want of substantial federal question, 484 U.S. 804, 108 S.Ct. 49, 98 L.Ed.2d 14 (1987).

Similarly, in *Zaslawsky v. Board of Ed. of Los Angeles City Unified School Dist.,* 610 F.2d 661, 662–664 (1979), the Ninth Circuit rejected a federal constitutional challenge to a school district's use of mandatory faculty transfers to ensure that each school's faculty makeup would fall within 10% of the districtwide racial composition. Like the Texas court, the Ninth Circuit relied upon *Swann* and *North Carolina Bd.* ***828** *of Ed.* to reject the argument that "a race-conscious plan is permissible only when there has been a judicial finding of *de jure* segregation." 610 F.2d, at 663–664. See also, *e.g., Darville v. Dade Cty.School Bd.,* 497 F.2d 1002, 1004–1006 (C.A.5 1974); *State ex rel. Citizens Against Mandatory Bussing v. Brooks,* 80 Wash.2d 121, 128–129, 492 P.2d 536, 541–542 (1972) (en banc), overruled on other grounds, *Cole v. Webster,* 103 Wash.2d 280, 692 P.2d 799 (1984) (en banc); *School Comm. of Springfield v. Board of Ed.,* 362 Mass. 417, 428–429, 287 N.E.2d 438, 447–448 (1972). These decisions illustrate well how lower courts understood and followed *Swann*'s enunciation of the relevant legal principle.

Courts are not alone in accepting as constitutionally valid the legal principle that *Swann* enunciated—*i.e.,* that the government may voluntarily adopt race-conscious measures to improve conditions of race even when it is not under a constitutional obligation to do so. That principle has been accepted by every branch of government and is rooted in the history of the Equal Protection Clause itself. Thus, Congress has enacted numerous race-conscious statutes that illustrate that principle or rely upon its validity. See, *e.g.,* No Child Left Behind Act of 2001, 20 U.S.C. § 6311(b)(2)(C)(v) (2000 ed., Supp. IV); § 1067 *et seq.* (authorizing aid to minority institutions). In fact, without being exhaustive, I have counted 51 federal statutes that use racial classifications. I have counted well over 100 state statutes that similarly employ racial classifications. Presidential administrations for the past half century have used and supported various race-conscious measures. See, *e.g.,* ****2815** Exec. Order No. 10925, 26 Fed.Reg.1977 (1961) (President Kennedy); Exec. Order No. 11246, 30 Fed.Reg. 12319 (1965) (President Johnson); Sugrue, Breaking Through: The Troubled Origins of Affirmative Action in the Workplace, in Color Lines: Affirmative Action, Immigration, and Civil Rights Options for America 31 (J. Skrentny ed.2001) (describing President Nixon's lobbying for affirmative action plans, *e.g.,* the PhiladelphiaPlan); ***829** White, Affirmative Action's Alamo: Gerald Ford Returns to Fight Once More for Michigan, Time, Aug. 23, 1999, p. 48 (reporting on President Ford's support for affirmative action); Schuck, Affirmative Action: Past, Present, and Future, 20 Yale L. & Pol'y Rev. 1, 50 (2002) (describing President Carter's support for affirmation action). And during the same time, hundreds of local school districts have adopted student assignment plans that use race-conscious criteria. See Welch 83–91.

That *Swann*'s legal statement should find such broad acceptance is not surprising. For *Swann* is predicated upon a well-established legal view of the Fourteenth Amendment. That view understands the basic objective of those who wrote the Equal Protection Clause as forbidding practices that lead to racial exclusion. The Amendment sought to bring into American society as full members those whom the Nation had previously held in slavery. See *Slaughter–House Cases,* 16 Wall. 36, 71, 21 L.Ed. 394 (1873) ("[N]o one can fail to be impressed with the one pervading purpose found in [all the Reconstruction

amendments] ... we mean the freedom of the slave race"); *Strauder v. West Virginia,* 100 U.S. 303, 306, 25 L.Ed. 664 (1880) ("[The Fourteenth Amendment] is one of a series of constitutional provisions having a common purpose; namely, securing to a race recently emancipated ... all the civil rights that the superior race enjoy").

There is reason to believe that those who drafted an Amendment with this basic purpose in mind would have understood the legal and practical difference between the use of race-conscious criteria in defiance of that purpose, namely to keep the races apart, and the use of race-conscious criteria to further that purpose, namely to bring the races together. See generally R. Sears, A Utopian Experiment in Kentucky: Integration and Social Equality at Berea, 1866–1904 (1996) (describing federal funding, through the Freedman's Bureau, of race-conscious school integration programs). See also R. Fischer, The Segregation Struggle in Louisiana 1862–77, ***830** p. 51 (1974) (describing the use of race-conscious remedies); Harlan, Desegregation in New Orleans Public Schools During Reconstruction, 67 Am. Hist. Rev. 663, 664 (1962) (same); W. Vaughn, Schools for All: The Blacks & Public Education in the South, 1865–1877, pp. 111–116 (1974) (same). Although the Constitution almost always forbids the former, it is significantly more lenient in respect to the latter. See *Gratz v. Bollinger,* 539 U.S. 244, 301, 123 S.Ct. 2411, 156 L.Ed.2d 257 (2003) (GINSBURG, J., dissenting); *Adarand Constructors, Inc. v. Peña,* 515 U.S. 200, 243, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995) (STEVENS, J., dissenting).

Sometimes Members of this Court have disagreed about the degree of leniency that the Clause affords to programs designed to include. See *Wygant v. Jackson Bd. of Ed.,* 476 U.S. 267, 274, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986); *Fullilove v. Klutznick,* 448 U.S. 448, 507, 100 S.Ct. 2758, 65 L.Ed.2d 902 (1980) (Powell, J., concurring). But I can find no case in which this Court has followed Justice THOMAS' "color-blind" approach. And I have found no case that otherwise repudiated this constitutional asymmetry between that which seeks to *exclude* and that ****2816** which seeks to *include* members of minority races.

What does the plurality say in response? First, it seeks to distinguish *Swann* and other similar cases on the ground that those cases involved remedial plans in response to *judicial findings* of *de jure* segregation. As *McDaniel* and *Harris* show, that is historically untrue. See *supra,* at 2757 – 2759. Many school districts in the South adopted segregation remedies (to which *Swann* clearly applies) without any such federal order, see *supra,* at 2756 – 2757. See also Kennedy Report. Seattle's circumstances are not meaningfully different from those in, say, *McDaniel,* where this Court approved race-conscious remedies. Louisville's plan was created and initially adopted when a compulsory district court order was in place. And, in any event, the histories of Seattle and Louisville make clear that this distinction—between court-ordered and voluntary desegregation—seeks a line that sensibly cannot be drawn.

***831** Second, the plurality downplays the importance of *Swann* and related cases by frequently describing their relevant statements as "dicta." These criticisms, however, miss the main point. *Swann* did not hide its understanding of the law in a corner of an obscure opinion or in a footnote, unread but by experts. It set forth its view prominently in an important opinion joined by all nine Justices, knowing that it would be read and followed throughout the Nation. The basic problem with the plurality's technical "dicta"-based response lies in its overly theoretical approach to case law, an approach that emphasizes rigid distinctions between holdings and dicta in a way that serves to mask the radical nature of today's decision. Law is not an exercise in mathematical logic. And statements of a legal rule set forth in a judicial opinion do not always divide neatly into "holdings" and "dicta." (Consider the legal "status" of Justice Powell's separate opinion in *Regents of Univ. of Cal. v. Bakke,* 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978).) The constitutional principle enunciated in *Swann,* reiterated in subsequent cases, and relied upon over many years, provides, and has widely been thought to provide, authoritative legal guidance. And if the plurality now chooses to reject that principle, it cannot adequately justify its retreat simply by affixing the label "dicta" to reasoning with which it disagrees. Rather, it must explain to the courts and to the Nation *why* it would abandon guidance set forth many years before, guidance that countless others have built upon over time, and which the law has continuously embodied.

Third, a more important response is the plurality's claim that later cases—in particular *Johnson v. California*, 543 U.S. 499, 125 S.Ct. 1141, 160 L.Ed.2d 949 (2005), *Adarand, supra*, and *Grutter v. Bollinger*, 539 U.S. 306, 123 S.Ct. 2325 (2003)—supplanted *Swann*. See *ante,* at 2751 – 2752, 2762 – 2763, n. 16, 2764 – 2765 (citing *Adarand, supra,* at 227, 115 S.Ct. 2097; *Johnson, supra*, at 505, 125 S.Ct. 1141, 160 L.Ed.2d 949; *Grutter, supra* at 326, 123 S.Ct. 2325, 156 L.Ed.2d 304). The plurality says that cases such as *Swann* and the others I have described all "were decided before this Court definitively determined ***832** that 'all racial classifications ... must be analyzed by a reviewing court under strict scrutiny.' " *Ante,* at 2762 – 2763, n. 16 (quoting *Adarand,* 515 U.S., at 227, 115 S.Ct. 2097). This Court in *Adarand* added that "such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests."

Ibid. And the Court repeated this same statement in *Grutter*. See 539 U.S., at 326, 123 S.Ct. 2325.

Several of these cases were significantly more restrictive than *Swann* in respect to the degree of leniency the Fourteenth Amendment grants to programs designed ****2817** to *include* people of all races. See, *e.g., Adarand, supra; Gratz, supra; Grutter, supra*. But that legal circumstance cannot make a critical difference here for two separate reasons.

First, no case—not *Adarand, Gratz, Grutter,* or any other—has ever held that the test of "strict scrutiny" means that all racial classifications—no matter whether they seek to include or exclude—must in practice be treated the same. The Court did not say in *Adarand* or in *Johnson* or in *Grutter* that it was overturning *Swann* or its central constitutional principle.

Indeed, in its more recent opinions, the Court recognized that the "fundamental purpose" of strict scrutiny review is to "take relevant differences" between "fundamentally different situations ... into account." *Adarand,* 515 U.S., at 228, 115 S.Ct. 2097 (internal quotation marks omitted). The Court made clear that "[s]trict scrutiny does not trea[t] dissimilar race-based decisions as though they were equally objectionable." *Ibid* (internal quotation marks omitted). It added that the fact that a law "treats [a person] unequally because of his or her race ... says nothing about the ultimate validity of any particular law." *Id.,* at 229–230, 115 S.Ct. 2097. And the Court, using the very phrase that Justice Marshall had used to describe strict scrutiny's application to any *exclusionary* use of racial criteria, sought to "*dispel the notion* that strict scrutiny" is as likely to condemn *inclusive* uses of "race-conscious" criteria ***833** as it is to invalidate *exclusionary* uses. That is, it is *not* in all circumstances " 'strict in theory, but fatal in fact.' " *Id.,* at 237, 115 S.Ct. 2097 (quoting *Fullilove*, 448 U.S., at 519, 100 S.Ct. 2758 (Marshall, J., concurring in judgment)).

The Court in *Grutter* elaborated:

> "Strict scrutiny is not 'strict in theory, but fatal in fact.' ... Although all governmental uses of race are subject to strict scrutiny, not all are invalidated by it....
>
> "Context matters when reviewing race-based governmental action under the Equal Protection Clause. See *Gomillion v. Lightfoot,* 364 U.S. 339, 343–344 [, 81 S.Ct. 125, 5 L.Ed.2d 110] (1960) (admonishing that, 'in dealing with claims under broad provisions of the Constitution, which derive content by an interpretive process of inclusion and exclusion, it is imperative that generalizations, based on and qualified by the concrete situations that gave rise to them, must not be applied out of context in disregard of variant controlling facts')).... Not every decision influenced by race is equally objectionable, and strict scrutiny is designed to provide a framework for carefully examining the importance and the sincerity of the reasons advanced by the governmental decisionmaker for the use of race in that particular context." 539 U.S., at 326–327, 123 S.Ct. 2325.

The Court's holding in *Grutter* demonstrates that the Court meant what it said, for the Court upheld an elite law school's race-conscious admissions program.

The upshot is that the cases to which the plurality refers, though all applying strict scrutiny, do not treat exclusive and inclusive uses the same. Rather, they apply the strict scrutiny test in a manner that is "fatal in fact" only to racial classifications that harmfully *exclude;* they apply the test in a manner that is *not* fatal in fact to racial classifications that seek to *include*.

The plurality cannot avoid this simple fact. See *ante,* at 2764 – 2766. Today's opinion reveals that the plurality would ***834** rewrite this Court's prior jurisprudence, at least in practical application, transforming the "strict scrutiny" test into a rule that is fatal in fact across the board. In doing so, the plurality parts company from ****2818** this Court's prior cases, and it takes from local government the longstanding legal right to use race-conscious criteria for inclusive purposes in limited ways.

Second, as *Grutter* specified, "[c]ontext matters when reviewing race-based governmental action under the Equal Protection Clause." 539 U.S., at 327, 123 S.Ct. 2325 (citing *Gomillion v. Lightfoot,* 364 U.S. 339, 343–344, 81 S.Ct. 125, 5 L.Ed.2d 110 (1960)). And contexts differ dramatically one from the other. Governmental use of race-based criteria can arise in the context of, for example, census forms, research expenditures for diseases, assignments of police officers patrolling predominantly minority-race neighborhoods, efforts to desegregate racially segregated schools, policies that favor minorities when distributing goods or services in short supply, actions that create majority-minority electoral districts, peremptory strikes that remove potential jurors on the basis of race, and others. Given the significant differences among these contexts, it would be surprising if the law required an identically strict legal test for evaluating the constitutionality of race-based criteria as to each

of them.

Here, the context is one in which school districts seek to advance or to maintain racial integration in primary and secondary schools. It is a context, as *Swann* makes clear, where history has required special administrative remedies. And it is a context in which the school boards' plans simply set race-conscious limits at the outer boundaries of a broad range.

This context is *not* a context that involves the use of race to decide who will receive goods or services that are normally distributed on the basis of merit and which are in short supply. It is not one in which race-conscious limits stigmatize ***835** or exclude; the limits at issue do not pit the races against each other or otherwise significantly exacerbate racial tensions. They do not impose burdens unfairly upon members of one race alone but instead seek benefits for members of all races alike. The context here is one of racial limits that seek, not to keep the races apart, but to bring them together.

The importance of these differences is clear once one compares the present circumstances with other cases where one or more of these negative features are present. See, *e.g., Strauder,* 100 U.S. 303, 25 L.Ed. 664; *Yick Wo,* 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220; *Brown,* 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873; *Loving v. Virginia,* 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967); *Bakke,* 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750; *Batson v. Kentucky,* 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986); *Richmond v. J.A. Croson Co.,* 488 U.S. 469, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989); *Shaw v. Reno,* 509 U.S. 630, 113 S.Ct. 2816, 125 L.Ed.2d 511 (1993); *Adarand*, 515 U.S. 200, 115 S.Ct. 2097, 132 L.Ed.2d 158; *Grutter, supra; Gratz*, 539 U.S. 244, 123 S.Ct. 2411, 156 L.Ed.2d 257; *Johnson*, 543 U.S. 499, 125 S.Ct. 1141, 160 L.Ed.2d 949.

If one examines the context more specifically, one finds that the districts' plans reflect efforts to overcome a history of segregation, embody the results of broad experience and community consultation, seek to expand student choice while reducing the need for mandatory busing, and use race-conscious criteria in highly limited ways that diminish the use of race compared to preceding integration efforts. Compare *Wessmann v. Gittens,* 160 F.3d 790, 809–810 (C.A.1 1998) (Boudin, J., concurring), with *Comfort,* 418 F.3d, at 28–29 (Boudin, C. J., concurring). They do not ****2819** seek to award a scarce commodity on the basis of merit, for they are not magnet schools; rather, by design and in practice, they offer substantially equivalent academic programs and electives. Although some parents or children prefer some schools over others, school popularity has varied significantly over the years. In 2000, for example, Roosevelt was the most popular first choice high school in Seattle; in 2001, Ballard was the most popular; in 2000, West Seattle was one of the least popular; by 2003, it was one of the more popular. See Research, Evaluation and Assessment, Student Information ***836** Services Office, Seattle Public Schools, Data Profile: District Summary December 2005 (hereinafter Data Profile: District Summary December 2005), online at http://www.seattleschools. org/area/siso/disprof/2005/DP05all.pdf. In a word, the school plans under review do not involve the kind of race-based harm that has led this Court, in other contexts, to find the use of race-conscious criteria unconstitutional.

These and related considerations convinced one Ninth Circuit judge in the Seattle case to apply a standard of constitutionality review that is less than "strict," and to conclude that this Court's precedents do not require the contrary. See 426 F.3d 1162, 1193–1194 (2005) (*Parents Involved VII*) (Kozinski, J., concurring) ("That a student is denied the school of his choice may be disappointing, but it carries no racial stigma and says nothing at all about that individual's aptitude or ability"). That judge is not alone. Cf. *Gratz, supra,* at 301, 123 S.Ct. 2411 (GINSBURG, J., dissenting); *Adarand, supra,* at 243, 115 S.Ct. 2097 (STEVENS, J., dissenting); Carter, When Victims Happen To Be Black, 97 Yale L.J. 420, 433–434 (1988).

The view that a more lenient standard than "strict scrutiny" should apply in the present context would not imply abandonment of judicial efforts carefully to determine the need for race-conscious criteria and the criteria's tailoring in light of the need. And the present context requires a court to examine carefully the race-conscious program at issue. In doing so, a reviewing judge must be fully aware of the potential dangers and pitfalls that Justice THOMAS and Justice KENNEDY mention. See *ante,* at 11–12 (THOMAS, J., concurring); *ante,* at 3, 17 (KENNEDY, J., concurring in part and concurring in judgment).

But unlike the plurality, such a judge would also be aware that a legislature or school administrators, ultimately accountable to the electorate, could *nonetheless* properly conclude that a racial classification sometimes serves a purpose important enough to overcome the risks they mention, for ***837** example, helping to end racial isolation or to achieve a diverse student body in public schools. Cf. *ante,* at 2796 – 2797 (opinion of KENNEDY, J.). Where that is so, the judge would carefully examine the program's details to determine whether the use of race-conscious criteria is proportionate to the important ends it serves.

In my view, this contextual approach to scrutiny is altogether fitting. I believe that the law requires application here of a standard of review that is not "strict" in the traditional sense of that word, although it does require the careful review I have just described. See *Gratz, supra,* at 301, 123 S.Ct. 2411 (GINSBURG, J., joined by SOUTER, J., dissenting); *Adarand, supra,* at 242–249, 115 S.Ct. 2097 (STEVENS, J., joined by GINSBURG, J., dissenting); *Parents Involved VII, supra*, at 1193–1194 (Kozinski, J., concurring). Apparently Justice KENNEDY also agrees that strict scrutiny would not apply in respect to certain "race-conscious" school board policies. See *ante,* at 2793 – 2794 ("Executive and legislative branches, which for generations now have considered these types of policies and procedures, ****2820** should be permitted to employ them with candor and with confidence that a constitutional violation does not occur whenever a decisionmaker considers the impact a given approach might have on students of different races").

Nonetheless, in light of *Grutter* and other precedents, see, *e.g., Bakke, supra*, at 290, 98 S.Ct. 2733 (opinion of Powell, J.), I shall adopt the first alternative. I shall apply the version of strict scrutiny that those cases embody. I shall consequently ask whether the school boards in Seattle and Louisville adopted these plans to serve a "compelling governmental interest" and, if so, whether the plans are "narrowly tailored" to achieve that interest. If the plans survive this strict review, they would survive less exacting review *a fortiori*. Hence, I conclude that the plans before us pass both parts of the strict scrutiny test. Consequently I must conclude that the plans here are permitted under the Constitution.

***838** III

Applying the Legal Standard

A

Compelling Interest

The principal interest advanced in these cases to justify the use of race-based criteria goes by various names. Sometimes a court refers to it as an interest in achieving racial "diversity." Other times a court, like the plurality here, refers to it as an interest in racial "balancing." I have used more general terms to signify that interest, describing it, for example, as an interest in promoting or preserving greater racial "integration" of public schools. By this term, I mean the school districts' interest in eliminating school-by-school racial isolation and increasing the degree to which racial mixture characterizes each of the district's schools and each individual student's public school experience.

Regardless of its name, however, the interest at stake possesses three essential elements. First, there is a historical and remedial element: an interest in setting right the consequences of prior conditions of segregation. This refers back to a time when public schools were highly segregated, often as a result of legal or administrative policies that facilitated racial segregation in public schools. It is an interest in continuing to combat the remnants of segregation caused in whole or in part by these school-related policies, which have often affected not only schools, but also housing patterns, employment practices, economic conditions, and social attitudes. It is an interest in maintaining hard-won gains. And it has its roots in preventing what gradually may become the *de facto* resegregation of America's public schools. See Part I, *supra,* at 2801 – 2802; Appendix A, *infra.* See also *ante,* at 2796 – 2797 (opinion of KENNEDY, J.) ("This Nation has a moral and ethical obligation to fulfill its historic commitment to creating an integrated society that ensures equal opportunity for all of its

children").

***839** Second, there is an educational element: an interest in overcoming the adverse educational effects produced by and associated with highly segregated schools. Cf. *Grutter,* 539 U.S., at 345, 123 S.Ct. 2325 (GINSBURG, J., concurring). Studies suggest that children taken from those schools and placed in integrated settings often show positive academic gains. See, *e.g.,* Powell, Living and Learning: Linking Housing and Education, in Pursuit of a Dream Deferred: Linking Housing and Education Policy 15, 35 (J. Powell, G. Kearney, & V. Kay eds.2001) (hereinafter Powell); Hallinan, Diversity Effects on Student Outcomes: Social Science Evidence, 59 Ohio St. L.J. 733, 741–742 (1998) (hereinafter Hallinan).

****2821** Other studies reach different conclusions. See, *e.g.,* D. Armor, Forced Justice (1995). See also *ante,* at 2776 – 2777 (THOMAS, J., concurring). But the evidence supporting an educational interest in racially integrated schools is well established and strong enough to permit a democratically elected school board reasonably to determine that this interest is a compelling one.

Research suggests, for example, that black children from segregated educational environments significantly increase their achievement levels once they are placed in a more integrated setting. Indeed, in Louisville itself, the achievement gap between black and white elementary school students grew substantially smaller (by seven percentage points) after the integration plan was implemented in 1975. See Powell 35. Conversely, to take another example, evidence from a district in Norfolk, Virginia, shows that resegregated schools led to a decline in the achievement test scores of children of all races. *Ibid*.

One commentator, reviewing dozens of studies of the educational benefits of desegregated schooling, found that the studies have provided "remarkably consistent" results, showing that: (1) black students' educational achievement is improved in integrated schools as compared to racially isolated schools, (2) black students' educational achievement is improved ***840** in integrated classes, and (3) the earlier that black students are removed from racial isolation, the better their educational outcomes. See Hallinan 741–742. Multiple studies also indicate that black alumni of integrated schools are more likely to move into occupations traditionally closed to African–Americans, and to earn more money in those fields. See, *e.g.,* Schofield, Review of Research on School Desegregation's Impact on Elementary and Secondary School Students, in Handbook of Research on Multicultural Education 597, 606–607 (J. Banks & C. Banks eds.1995). Cf. W. Bowen & D. Bok, The Shape of the River 118 (1998) (hereinafter Bowen & Bok).

Third, there is a democratic element: an interest in producing an educational environment that reflects the "pluralistic society" in which our children will live. *Swann,* 402 U.S., at 16, 91 S.Ct. 1267. It is an interest in helping our children learn to work and play together with children of different racial backgrounds. It is an interest in teaching children to engage in the kind of cooperation among Americans of all races that is necessary to make a land of 300 million people one Nation.

Again, data support this insight. See, *e.g.,* Hallinan 745; Quillian & Campbell, Beyond Black and White: The Present and Future of Multiracial Friendship Segregation, 68 Am. Sociological Rev. 540, 541 (2003) (hereinafter Quillian & Campbell); Dawkins & Braddock, The Continuing Significance of Desegregation: School Racial Composition and African American Inclusion in American Society, 63 J. Negro Educ. 394, 401–403 (1994) (hereinafter Dawkins & Braddock); Wells & Crain, Perpetuation Theory and the Long–Term Effects of School Desegregation, 64 Rev. Educ. Research 531, 550 (1994) (hereinafter Wells & Crain).

There are again studies that offer contrary conclusions. See, *e.g.,* Schofield, School Desegregation and Intergroup Relations: A Review of the Literature, in 17 Review of Research in Education 335, 356 (G. Grant ed.1991). See also *ante,* at 2780 – 2781 (THOMAS, J., concurring). Again, however, ***841** the evidence supporting a democratic interest in racially integrated schools is firmly established and sufficiently strong to permit a school board to determine, as this Court has itself often found, that this interest is compelling.

****2822** For example, one study documented that "black and white students in desegregated schools are less racially prejudiced than those in segregated schools," and that "interracial contact in desegregated schools leads to an increase in interracial sociability and friendship." Hallinan 745. See also Quillian & Campbell 541. Cf. Bowen & Bok 155. Other studies have found that both black and white students who attend integrated schools are more likely to work in desegregated companies after graduation than students who attended racially isolated schools. Dawkins & Braddock 401–403; Wells & Crain 550. Further research has shown that the desegregation of schools can help bring adult communities together by

reducing segregated housing. Cities that have implemented successful school desegregation plans have witnessed increased interracial contact and neighborhoods that tend to become less racially segregated. Dawkins & Braddock 403. These effects not only reinforce the prior gains of integrated primary and secondary education; they also foresee a time when there is less need to use race-conscious criteria.

Moreover, this Court from *Swann* to *Grutter* has treated these civic effects as an important virtue of racially diverse education. See, *e.g., Swann, supra,* at 16, 91 S.Ct. 1267; *Seattle School Dist. No. 1,* 458 U.S., at 472–473, 102 S.Ct. 3187. In *Grutter,* in the context of law school admissions, we found that these types of interests were, constitutionally speaking, "compelling." See 539 U.S., at 330, 123 S.Ct. 2325 (recognizing that Michigan Law School's race-conscious admissions policy "promotes cross-racial understanding, helps to break down racial stereotypes, and enables [students] to better understand persons of different races," and pointing out that "the skills needed in today's increasingly global marketplace can only be developed through exposure ***842** to widely diverse people, cultures, ideas, and viewpoints" (internal quotation marks omitted; alteration in original)).

In light of this Court's conclusions in *Grutter,* the "compelling" nature of these interests in the context of primary and secondary public education follows here *a fortiori*. Primary and secondary schools are where the education of this Nation's children begins, where each of us begins to absorb those values we carry with us to the end of our days. As Justice Marshall said, "unless our children begin to learn together, there is little hope that our people will ever learn to live together." *Milliken v. Bradley,* 418 U.S. 717, 783, 94 S.Ct. 3112, 41 L.Ed.2d 1069 (1974) (dissenting opinion).

And it was *Brown,* after all, focusing upon primary and secondary schools, not *Sweatt v. Painter,* 339 U.S. 629, 70 S.Ct. 848, 94 L.Ed. 1114 (1950), focusing on law schools, or *McLaurin v. Oklahoma State Regents for Higher Ed.,* 339 U.S. 637, 70 S.Ct. 851, 94 L.Ed. 1149 (1950), focusing on graduate schools, that affected so deeply not only Americans but the world. R. Kluger, Simple Justice: The History of *Brown v. Board of Education* and Black America's Struggle for Equality, p. x (1975) (arguing that perhaps no other Supreme Court case has "affected more directly the minds, hearts, and daily lives of so many Americans"); J. Patterson, *Brown v. Board of Education* p. xxvii (2001) (identifying *Brown* as "the most eagerly awaited and dramatic judicial decision of modern times"). See also *Parents Involved VII,* 426 F.3d, at 1194 (Kozinski, J., concurring); Strauss, Discriminatory Intent and the Taming of *Brown,* 56 U. Chi. L.Rev. 935, 937 (1989) (calling *Brown* "the Supreme Court's greatest anti-discrimination decision"); Brief for United States as *Amicus Curiae* in *Brown,* O.T. ****2823** 1952, No. 8 etc.; Dudziak, *Brown* as a Cold War Case, 91 J. Am. Hist. 32 (2004); A Great Decision, Hindustan Times (New Delhi, May 20, 1954), p. 5; USA Takes Positive Step, West African Pilot (Lagos, May 22, 1954), p. 2 (stating that *Brown* is an acknowledgment that the "United States should set an example for all other nations by taking ***843** the lead in removing from its national life all signs and traces of racial intolerance, arrogance or discrimination"). Hence, I am not surprised that Justice KENNEDY finds that "a district may consider it a compelling interest to achieve a diverse student population," including a *racially* diverse population. *Ante,* at 2796 – 2797.

The compelling interest at issue here, then, includes an effort to eradicate the remnants, not of general "societal discrimination," *ante,* at 2758 (plurality opinion), but of primary and secondary school segregation, see *supra,* at 2803, 2807; it includes an effort to create school environments that provide better educational opportunities for all children; it includes an effort to help create citizens better prepared to know, to understand, and to work with people of all races and backgrounds, thereby furthering the kind of democratic government our Constitution foresees. If an educational interest that combines these three elements is not "compelling," what is?

The majority acknowledges that in prior cases this Court has recognized at least two interests as compelling: an interest in "remedying the effects of past intentional discrimination," and an interest in "diversity in higher education." *Ante,* at 2806, 2807. But the plurality does not convincingly explain why those interests do not constitute a "compelling interest" here. How do the remedial interests here differ in kind from those at issue in the voluntary desegregation efforts that Attorney General Kennedy many years ago described in his letter to the President? *Supra,* at 2810 – 2811. How do the educational and civic interests differ in kind from those that underlie and justify the racial "diversity" that the law school sought in *Grutter,* where this Court found a compelling interest?

The plurality tries to draw a distinction by reference to the well-established conceptual difference between *de jure* segregation ("segregation by state action") and *de facto* segregation ("racial imbalance caused by other factors"). ***844** *Ante,* at 2815. But that distinction concerns what the Constitution *requires* school boards to do, not what it *permits* them to do. Compare, *e.g., Green,* 391 U.S., at 437–438, 88 S.Ct. 1689 ("School boards ... operating state-compelled dual systems" have

an "affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch"), with, *e.g., Milliken, supra*, at 745, 94 S.Ct. 3112 (the Constitution does not impose a duty to desegregate upon districts that have not been "shown to have committed any constitutional violation").

The opinions cited by the plurality to justify its reliance upon the *de jure/de facto* distinction only address what remedial measures a school district may be constitutionally *required* to undertake. See, *e.g., Freeman v. Pitts,* 503 U.S. 467, 495, 112 S.Ct. 1430, 118 L.Ed.2d 108 (1992). As to what is *permitted,* nothing in our equal protection law suggests that a State may right only those wrongs that it committed. No case of this Court has ever relied upon the *de jure/de facto* distinction in order to limit what a school district is voluntarily allowed to do. That is what is at issue here. And *Swann, McDaniel, Crawford*, *North Carolina Bd. of Ed., Harris,* and *Bustop* made one thing clear: significant as the difference between *de* ****2824** *jure* and *de facto* segregation may be to the question of what a school district *must* do, that distinction is not germane to the question of what a school district *may* do.

Nor does any precedent indicate, as the plurality suggests with respect to Louisville, *ante,* at 2815 – 2816, that remedial interests vanish the day after a federal court declares that a district is "unitary." Of course, Louisville adopted those portions of the plan at issue here *before* a court declared Louisville "unitary." Moreover, in *Freeman,* this Court pointed out that in "one sense of the term, vestiges of past segregation by state decree do remain in our society and in our schools. Past wrongs to the black race, wrongs committed by the State and in its name, are a stubborn fact of ***845** history. And stubborn facts of history linger and persist." 503 U.S., at 495, 112 S.Ct. 1430. See also *ante,* at 2807 – 2808 (opinion of KENNEDY, J.). I do not understand why this Court's cases, which rest the significance of a "unitary" finding in part upon the wisdom and desirability of returning schools to local control, should deprive those local officials of legal *permission* to use means they once found necessary to combat persisting injustices.

For his part, Justice THOMAS faults my citation of various studies supporting the view that school districts can find compelling educational and civic interests in integrating their public schools. See *ante,* at 2776 – 2777, 2781 (concurring opinion). He is entitled of course to his own opinion as to which studies he finds convincing—although it bears mention that even the author of some of Justice THOMAS' preferred studies has found *some* evidence linking integrated learning environments to increased academic achievement. Compare *ante,* at 2776 – 2777 (opinion of THOMAS, J.) (citing Armor & Rossell, Desegregation and Resegregation in the Public Schools, in Beyond the Color Line: New Perspectives on Race and Ethnicity in America 219, 239, 251 (A. Thernstrom & S. Thernstrom eds.2002)); Brief for David J. Armor et al. as *Amici Curiae* 29), with Rosen, Perhaps Not All Affirmative Action is Created Equal, N.Y. Times, June 11, 2006, section 4, p. 14 (quoting David Armor as commenting, " 'we did not find the [racial] achievement gap changing *significantly* ' " but acknowledging that he " 'did find a modest association for math but not reading in terms of racial composition and achievement, but there's a big state variation' " (emphasis added)). If we are to insist upon unanimity in the social science literature before finding a compelling interest, we might never find one. I believe only that the Constitution allows democratically elected school boards to make up their own minds as to how best to include people of all races in one America.

***846** B

Narrow Tailoring

I next ask whether the plans before us are "narrowly tailored" to achieve these "compelling" objectives. I shall not accept the school boards' assurances on faith, cf. *Miller v. Johnson,* 515 U.S. 900, 920, 115 S.Ct. 2475, 132 L.Ed.2d 762 (1995), and I shall subject the "tailoring" of their plans to "rigorous judicial review," *Grutter,* 539 U.S., at 388, 123 S.Ct. 2325

(KENNEDY, J., dissenting). Several factors, taken together, nonetheless lead me to conclude that the boards' use of race-conscious criteria in these plans passes even the strictest "tailoring" test.

First, the race-conscious criteria at issue only help set the outer bounds of *broad* ranges. Cf. *id.,* at 390, 123 S.Ct. 2325 (expressing concern about "narrow fluctuation band[s]"). They constitute but one part of plans that depend primarily upon other, nonracial elements. To use race in this way is not to set a forbidden "quota." See *id.,* at 335, 123 S.Ct. 2325 (opinion of the Court) ("Properly understood, a 'quota' ****2825** is a program in which a certain fixed number or proportion of opportunities are 'reserved exclusively for certain minority groups' " (quoting *Croson,* 488 U.S., at 496, 109 S.Ct. 706) (plurality opinion)).

In fact, the defining feature of both plans is greater emphasis upon student choice. In Seattle, for example, in more than 80% of all cases, that choice alone determines which high schools Seattle's ninth graders will attend. After ninth grade, students can decide voluntarily to transfer to a preferred district high school (without any consideration of race-conscious criteria). *Choice,* therefore, is the "predominant factor" in these plans. *Race* is not. See *Grutter, supra,* at 393, 123 S.Ct. 2325 (KENNEDY, J., dissenting) (allowing consideration of race only if it does "not become a predominant factor").

Indeed, the race-conscious ranges at issue in these cases often have no effect, either because the particular school is not oversubscribed in the year in question, or because the ***847** racial makeup of the school falls within the broad range, or because the student is a transfer applicant or has a sibling at the school. In these respects, the broad ranges are less like a quota and more like the kinds of "useful starting points" that this Court has consistently found permissible, even when they set boundaries upon voluntary transfers, and even when they are based upon a community's general population. See, *e.g., North Carolina Bd. of Ed. v. Swann,* 402 U.S., at 46, 91 S.Ct. 1284, 28 L.Ed.2d 586 (no "absolute prohibition against [the] use" of mathematical ratios as a "starting point"); *Swann v. Charlotte–Mecklenburg Bd. of Ed.,* 402 U.S., at 24–25, 91 S.Ct. 1267 (approving the use of a ratio reflecting "the racial composition of the whole school system" as a "useful starting point," but not as an "inflexible requirement"). Cf. *United States v. Montgomery County Bd. of Ed.,* 395 U.S. 225, 232, 89 S.Ct. 1670, 23 L.Ed.2d 263 (1969) (approving a lower court desegregation order that "provided that the [school] board must move toward a goal under which 'in each school the ratio of white to Negro faculty members is substantially the same as it is throughout the system,' " and "immediately" requiring "[t]he ratio of Negro to white teachers" in each school to be equal to "the ratio of Negro to white teachers in ... the system as a whole").

Second, broad-range limits on voluntary school choice plans are less burdensome, and hence more narrowly tailored, see *Grutter, supra,* at 341, 123 S.Ct. 2325, than other race-conscious restrictions this Court has previously approved. See, *e.g., Swann, supra,* at 26–27, 91 S.Ct. 1267; *Montgomery County Bd. of Ed., supra,* at 232, 89 S.Ct. 1670. Indeed, the plans before us are *more narrowly tailored* than the race-conscious admission plans that this Court approved in *Grutter.* Here, race becomes a factor only in a fraction of students' non-merit-based assignments—not in large numbers of students' merit-based applications. Moreover, the effect of applying race-conscious criteria here affects potentially disadvantaged students *less severely,* not more severely, than the criteria at issue in *Grutter.* Disappointed students are not rejected from a ***848** State's flagship graduate program; they simply attend a different one of the district's many public schools, which in aspiration and in fact are substantially equal. Cf. *Wygant,* 476 U.S., at 283, 106 S.Ct. 1842 (plurality opinion). And, in Seattle, the disadvantaged student loses at most one year at the high school of his choice. One will search *Grutter* in vain for similarly persuasive evidence of narrow tailoring as the school districts have presented here.

Third, the manner in which the school boards developed these plans itself reflects "narrow tailoring." Each plan was devised to overcome a history of segregated public ****2826** schools. Each plan embodies the results of local experience and community consultation. Each plan is the product of a process that has sought to enhance student choice, while diminishing the need for mandatory busing. And each plan's use of race-conscious elements is *diminished* compared to the use of race in preceding integration plans.

The school boards' widespread consultation, their experimentation with numerous other plans, indeed, the 40–year history that Part I sets forth, make clear that plans that are less explicitly race-based are unlikely to achieve the boards' "compelling" objectives. The history of each school system reveals highly segregated schools, followed by remedial plans that involved forced busing, followed by efforts to attract or retain students through the use of plans that abandoned busing and replaced it with greater student choice. Both cities once tried to achieve more integrated schools by relying solely upon measures such as redrawn district boundaries, new school building construction, and unrestricted voluntary transfers. In neither city did these prior attempts prove sufficient to achieve the city's integration goals. See Parts I–A and I–B, *supra,* at 2802 – 2809.

Moreover, giving some degree of weight to a local school board's knowledge, expertise, and concerns in these particular matters is not inconsistent with rigorous judicial scrutiny. It simply recognizes that judges are not well suited to act ***849** as school administrators. Indeed, in the context of school desegregation, this Court has repeatedly stressed the importance of acknowledging that local school boards better understand their own communities and have a better knowledge of what in practice will best meet the educational needs of their pupils. See *Milliken,* 418 U.S., at 741–742, 94 S.Ct. 3112 ("No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process"). See also *San Antonio Independent School Dist. v. Rodriguez,* 411 U.S. 1, 49–50, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973) (extolling local control for "the opportunity it offers for participation in the decisionmaking process that determines how ... local tax dollars will be spent. Each locality is free to tailor local programs to local needs. Pluralism also affords some opportunity for experimentation, innovation, and a healthy competition for educational excellence"); *Epperson v. Arkansas,* 393 U.S. 97, 104, 89 S.Ct. 266, 21 L.Ed.2d 228 (1968) ("Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint.... By and large, public education in our Nation is committed to the control of state and local authorities"); *Brown v. Board of Education,* 349 U.S. 294, 299, 75 S.Ct. 753, 99 L.Ed. 1083 (1955) ("Full implementation of these constitutional principles may require solution of varied local school problems. School authorities have the primary responsibility for elucidating, assessing, and solving these problems; courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles").

Experience in Seattle and Louisville is consistent with experience elsewhere. In 1987, the U.S. Commission on Civil Rights studied 125 large school districts seeking integration. It reported that most districts—92 of them, in fact—adopted desegregation policies that combined two or more highly ***850** race-conscious strategies, for example, rezoning or pairing. See Welch 83–91.

****2827** Having looked at dozens of *amicus* briefs, public reports, news stories, and the records in many of this Court's prior cases, which together span 50 years of desegregation history in school districts across the Nation, I have discovered many examples of districts that sought integration through explicitly race-conscious methods, including mandatory busing. Yet, I have found *no* example or model that would permit this Court to say to Seattle and to Louisville: "Here is an instance of a desegregation plan that is likely to achieve your objectives and also makes less use of race-conscious criteria than your plans." And, if the plurality cannot suggest such a model—and it cannot—then it seeks to impose a "narrow tailoring" requirement that in practice would never be met.

Indeed, if there is no such plan, or if such plans are purely imagined, it is understandable why, as the Court notes, *ante,* at 2759 – 2760, Seattle school officials concentrated on diminishing the racial component of their districts' plan, but did not pursue eliminating that element entirely. For the Court now to insist as it does, *ante,* at 2760 – 2761, that these school districts ought to have said so officially is either to ask for the superfluous (if they need only make explicit what is implicit) or to demand the impossible (if they must somehow provide more proof that there is no hypothetical *other* plan that could work as well as theirs). I am not aware of any case in which this Court has read the "narrow tailoring" test to impose such a requirement. Cf. *People Who Care v. Rockford Bd. of Ed. School Dist. No. 205,* 961 F.2d 1335, 1338 (C.A.7 1992) (Easterbrook, J.) ("Would it be necessary to adjudicate the obvious before adopting (or permitting the parties to agree on) a remedy ... ?").

The plurality also points to the school districts' use of numerical goals based upon the racial breakdown of the general school population, and it faults the districts for failing to prove that *no other set of numbers will work*. See ***851** *ante,* at 2755 – 2757. The plurality refers to no case in support of its demand. Nor is it likely to find such a case. After all, this Court has in many cases explicitly permitted districts to use target ratios based upon the district's underlying population. See, *e.g., Swann,* 402 U.S., at 24–25, 91 S.Ct. 1267; *North Carolina Bd. of Ed.,* 402 U.S., at 46, 91 S.Ct. 1284; *Montgomery County Bd. of Ed.,* 395 U.S., at 232, 89 S.Ct. 1670. The reason is obvious: In Seattle, where the overall student population is 41% white, permitting 85% white enrollment at a single school would make it much more likely that other schools would have very few white students, whereas in Jefferson County, with a 60% white enrollment, one school with 85% white students would be less likely to skew enrollments elsewhere.

Moreover, there is research-based evidence supporting, for example, that a ratio no greater than 50% minority—which is Louisville's starting point, and as close as feasible to Seattle's starting point—is helpful in limiting the risk of "white flight."

See Orfield, Metropolitan School Desegregation: Impacts on Metropolitan Society, in Pursuit of a Dream Deferred: Linking Housing and Education Policy 121, 125. Federal law also assumes that a similar target percentage will help avoid detrimental "minority group isolation." See No Child Left Behind Act of 2001, Title V, Part C, 115 Stat. 1806, 20 U.S.C. § 7231 *et seq.* (2000 ed., Supp. IV); 34 CFR §§ 280.2, 280.4 (2006) (implementing regulations). What other numbers are the boards to use as a "starting point"? Are they to spend days, weeks, or months seeking independently to validate the use of ratios that this Court has repeatedly authorized in prior cases? Are they to draw numbers out of thin air? These districts ****2828** have followed this Court's holdings and advice in "tailoring" their plans. That, too, strongly supports the lawfulness of their methods.

Nor could the school districts have accomplished their desired aims (*e.g.,* avoiding forced busing, countering white flight, maintaining racial diversity) by other means. Nothing in the extensive history of desegregation efforts over the ***852** past 50 years gives the districts, or this Court, any reason to believe that another method is possible to accomplish these goals. Nevertheless, Justice KENNEDY suggests that school boards

> "may pursue the goal of bringing together students of diverse backgrounds and races through other means, including strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of neighborhoods; allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance, and other statistics by race." *Ante,* at 2791 – 2792.

But, as to "strategic site selection," Seattle has built one new high school in the last 44 years (and that specialized school serves only 300 students). In fact, six of the Seattle high schools involved in this case were built by the 1920's; the other four were open by the early 1960's. See generally N. Thompson & C. Marr, Building for Learning: Seattle Public School Histories, 1862–2000 (2002). As to "drawing" neighborhood "attendance zones" on a racial basis, Louisville tried it, and it worked only when forced busing was also part of the plan. See *supra,* at 2806 – 2807. As to "allocating resources for special programs," Seattle and Louisville have both experimented with this; indeed, these programs are often referred to as "magnet schools," but the limited desegregation effect of these efforts extends at most to those few schools to which additional resources are granted. In addition, there is no evidence from the experience of these school districts that it will make any meaningful impact. See Brief for Respondents in No. 05–908, p. 42. As to "recruiting faculty" on the basis of race, both cities have tried, but only as one part of a broader program. As to "tracking enrollments, performance, and other statistics by race," tracking *reveals* the problem; it does not cure it.

***853** Justice KENNEDY sets forth two additional concerns related to "narrow tailoring." In respect to Louisville, he says first that officials stated (1) that kindergarten assignments are not subject to the race-conscious guidelines, and (2) that the child at issue here was denied permission to attend the kindergarten he wanted because of those guidelines. Both, he explains, cannot be true. He adds that this confusion illustrates that Louisville's assignment plan (or its explanation of it to this Court) is insufficiently precise in respect to "who makes the decisions," "oversight," "the precise circumstances in which an assignment decision" will be made; and "which of two similarly situated children will be subjected to a given race-based decision." *Ante,* at 2790.

The record suggests, however, that the child in question was not assigned to the school he preferred because he missed the kindergarten application deadline. See App. in No. 05–915, p. 20. After he had enrolled and after the academic year had begun, he then applied to transfer to his preferred school after the kindergarten assignment deadline had passed, *id.,* at 21, possibly causing school officials to treat his late request as an application to transfer to the first grade, in respect to which the guidelines apply. I am not certain just how the remainder of Justice KENNEDY's ****2829** concerns affect the lawfulness of the Louisville program, for they seem to be failures of explanation, not of administration. But Louisville should be able to answer the relevant questions on remand.

Justice KENNEDY's second concern is directly related to the merits of Seattle's plan: Why does Seattle's plan group Asian–Americans, Hispanic–Americans, Native–Americans, and African–Americans together, treating all as similar minorities? *Ante,* at 2790 – 2791. The majority suggests that Seattle's classification system could permit a school to be labeled "diverse" with a 50% Asian–American and 50% white student body, and no African–American students, Hispanic ***854** students, or students of other ethnicity. *Ante,* at 2749 (opinion of Kennedy, J.); *ante,* at 2753 – 2754 (opinion of the Court).

The 50/50 hypothetical has no support in the record here; it is conjured from the imagination. In fact, Seattle apparently began to treat these different minority groups alike in response to the federal Emergency School Aid Act's requirement that it

do so. A. Siqueland, Without A Court Order: The Desegregation of Seattle's Schools 116–117 (1981) (hereinafter Siqueland). See also F. Hanawalt & R. Williams, The History of Desegregation in Seattle Public Schools 1954–1981, p. 31 (1981) (hereinafter Hanawalt); Pub.L. 95–561, Title VI, 92 Stat. 2252 (prescribing percentage enrollment requirements for "minority" students); Siqueland 55 (discussing Department of Health, Education, and Welfare's definition of "minority"). Moreover, maintaining this federally mandated system of classification makes sense insofar as Seattle's experience indicates that the relevant circumstances in respect to each of these different minority groups are roughly similar, *e.g.,* in terms of residential patterns, and call for roughly similar responses. This is confirmed by the fact that Seattle has been able to achieve a desirable degree of diversity without the *greater* emphasis on race that drawing fine lines among minority groups would require. Does the plurality's view of the Equal Protection Clause mean that courts must give no weight to such a board determination? Does it insist upon especially strong evidence supporting inclusion of multiple minority groups in an otherwise lawful government minority-assistance program? If so, its interpretation threatens to produce divisiveness among minority groups that is incompatible with the basic objectives of the Fourteenth Amendment. Regardless, the plurality cannot object that the constitutional defect is the individualized use of race and simultaneously object that not enough account of individuals' race has been taken.

Finally, I recognize that the Court seeks to distinguish *Grutter* from these cases by claiming that *Grutter* arose in ***855** " 'the context of higher education.' " *Ante,* at 2808. But that is not a meaningful legal distinction. I have explained why I do not believe the Constitution could possibly find "compelling" the provision of a racially diverse education for a 23–year–old law student but not for a 13–year–old high school pupil. See *supra,* at 2824 – 2826. And I have explained how the plans before us are more narrowly tailored than those in *Grutter*. See *supra,* at 2824. I add that one cannot find a relevant distinction in the fact that these school districts did not examine the merits of applications "individual[ly]." See *ante,* at 2806 – 2808. The context here does not involve admission by merit; a child's academic, artistic, and athletic "merits" are not at all relevant to the child's placement. These are not affirmative action plans, and hence "individualized scrutiny" is simply beside the point.

The upshot is that these plans' specific features—(1) their limited and historically diminishing use of race, (2) their strong reliance upon other non-race-conscious elements, (3) their history and the manner in which the districts developed and modified their approach, (4) the comparison with ****2830** prior plans, and (5) the lack of reasonably evident alternatives—together show that the districts' plans are "narrowly tailored" to achieve their "compelling" goals. In sum, the districts' race-conscious plans satisfy "strict scrutiny" and are therefore lawful.

IV

Direct Precedent

Two additional precedents more directly related to the plans here at issue reinforce my conclusion. The first consists of the District Court determination in the Louisville case when it dissolved its desegregation order that there was "overwhelming evidence of the Board's good faith compliance with the desegregation Decree and its underlying purposes," indeed that the board had "treated the ideal of an integrated system as much more than a legal obligation—they consider ***856** it a positive, desirable policy and an essential element of any well-rounded public school education." *Hampton v. Jefferson Cty. Bd. of Ed.,* 102 F.Supp.2d 358, 370 (W.D.Ky. 2000) (*Hampton II*). When the court made this determination in 2000, it did so in the context of the Louisville desegregation plan that the board had adopted in 1996. That plan, which took effect before 1996, is the very plan that in all relevant respects is in effect now and is the subject of the present challenge.

No one claims that (the relevant portion of) Louisville's plan was unlawful in 1996 when Louisville adopted it. To the contrary, there is every reason to believe that it represented part of an effort to implement the 1978 desegregation order. But

if the plan was lawful when it was first adopted and if it was lawful the day before the District Court dissolved its order, how can the plurality now suggest that it became *unlawful* the following day? Is it conceivable that the Constitution, implemented through a court desegregation order, could permit (perhaps *require*) the district to make use of a race-conscious plan the day before the order was dissolved and then *forbid* the district to use the identical plan the day after? See *id.,* at 380 ("The very analysis for dissolving desegregation decrees supports continued maintenance of a desegregated system as a compelling state interest"). The Equal Protection Clause is not incoherent. And federal courts would rightly hesitate to find unitary status if the consequences of the ruling were so dramatically disruptive.

Second, *Seattle School Dist. No. 1,* 458 U.S. 457, 102 S.Ct. 3187, 73 L.Ed.2d 896, is directly on point. That case involves the original Seattle Plan, a *more heavily race-conscious predecessor* of the very plan now before us. In *Seattle School Dist. No. 1,* this Court struck down a state referendum that effectively barred implementation of Seattle's desegregation plan and "burden[ed] all future attempts to integrate Washington schools in districts throughout the State." *Id.,* at 462–463, 483, 102 S.Ct. 3187. Because ***857** the referendum would have prohibited the adoption of a school integration plan that involved mandatory busing, and because it would have imposed a special burden on school integration plans (plans that sought to integrate previously segregated schools), the Court found it unconstitutional. *Id*., at 483–487, 102 S.Ct. 3187.

In reaching this conclusion, the Court did not directly address the constitutional merits of the underlying Seattle Plan. But it explicitly cited *Swann*'s statement that the Constitution permitted a local district to adopt such a plan. 458 U.S., at 472, n. 15, 102 S.Ct. 3187. It also cited to Justice Powell's opinion in *Bakke, approving of* the limited use of race-conscious criteria in a university-admissions "affirmative action" case. 458 U.S., at 472, n. 15, 102 S.Ct. 3187. In addition, the Court stated that "[a]ttending an ethnically diverse ****2831** school," *id.,* at 473, 102 S.Ct. 3187, could help prepare "minority children for citizenship in our pluralistic society," hopefully "teaching members of the racial majority to live in harmony and mutual respect with children of minority heritage." *Ibid.* (internal quotation marks omitted).

It is difficult to believe that the Court that held unconstitutional a referendum that would have interfered with the implementation of this plan thought that the integration plan it sought to preserve was itself an *unconstitutional* plan. And if *Seattle School Dist. No. 1* is premised upon the constitutionality of the original Seattle Plan, it is equally premised upon the constitutionality of the present plan, for the present plan *is* the Seattle Plan, modified only insofar as it places even *less* emphasis on race-conscious elements than its predecessors.

It is even more difficult to accept the plurality's contrary view, namely, that the underlying plan was unconstitutional. If that is so, then *all* of Seattle's earlier (even more race-conscious) plans must also have been unconstitutional. That necessary implication of the plurality's position strikes the 13th chime of the clock. How could the plurality adopt a ***858** constitutional standard that would hold unconstitutional large numbers of race-conscious integration plans adopted by numerous school boards over the past 50 years while remaining true to this Court's desegregation precedent?

V

Consequences

The Founders meant the Constitution as a practical document that would transmit its basic values to future generations through principles that remained workable over time. Hence it is important to consider the potential consequences of the plurality's approach, as measured against the Constitution's objectives. To do so provides further reason to believe that the plurality's approach is legally unsound.

For one thing, consider the effect of the plurality's views on the parties before us and on similar school districts throughout the Nation. Will Louisville and all similar school districts have to return to systems like Louisville's initial 1956 plan, which did not consider race at all? See *supra,* at 2806. That initial 1956 plan proved ineffective. Sixteen years into the plan, 14 of 19 middle and high schools remained almost totally white or almost totally black. *Ibid.*

The districts' past and current plans are not unique. They resemble other plans, promulgated by hundreds of local school boards, which have attempted a variety of desegregation methods that have evolved over time in light of experience. A 1987 Civil Rights Commission study of 125 school districts in the Nation demonstrated the breadth and variety of desegregation plans:

> "The [study] documents almost 300 desegregation plans that were implemented between 1961 and 1985. The degree of heterogeneity within these districts is immediately apparent. They are located in every region of the country and range in size from Las Cruces, New Mexico, with barely over 15,000 students attending 23 schools in 1968, to New York City, with more than one ***859** million students in 853 schools. The sample includes districts in urban areas of all sizes, suburbs (*e.g.,* Arlington County, Virginia) and rural areas (*e.g.,* Jefferson Parish, Louisiana, and Raleigh County, West Virginia). It contains 34 countywide districts with central cities (the 11 Florida districts fit this description, plus Clark County, Nevada and ****2832** others) and a small number of consolidated districts (New Castle County, Delaware and Jefferson County, Kentucky).
>
> "The districts also vary in their racial compositions and levels of segregation. Initial plans were implemented in Mobile, Alabama and Mecklenburg County, North Carolina, and in a number of other southern districts in the face of total racial segregation. At the other extreme, Santa Clara, California had a relatively even racial distribution prior to its 1979 desegregation plan. When the 1965 plan was designed for Harford County, Maryland, the district was 92 percent white. Compton, California, on the other hand, became over 99 percent black in the 1980s, while Buffalo, New York had a virtual 50–50 split between white and minority students prior to its 1977 plan.
>
> "It is not surprising to find a large number of different desegregation strategies in a sample with this much variation." Welch 23 (footnote omitted).

A majority of these desegregation techniques explicitly considered a student's race. See *id.,* at 24–28. Transfer plans, for example, allowed students to shift from a school in which they were in the racial majority to a school in which they would be in a racial minority. Some districts, such as Richmond, California, and Buffalo, New York, permitted only "one-way" transfers, in which only black students attending predominantly black schools were permitted to transfer to designated receiver schools. *Id.,* at 25. Fifty-three of the one hundred twenty-five studied districts used transfers as a component of their plans. *Id.,* at 83–91.

***860** At the state level, 46 States and Puerto Rico have adopted policies that encourage or require local school districts to enact interdistrict or intradistrict open choice plans. Eight of those States condition approval of transfers to another school or district on whether the transfer will produce increased racial integration. Eleven other States require local boards to deny transfers that are not in compliance with the local school board's desegregation plans. See Education Commission of the States, StateNotes, Open Enrollment: 50–State Report (2007), online at http:// mb2.ecs.org/reports/Report.aspx?id =268.

Arkansas, for example, provides by statute that "[n]o student may transfer to a nonresident district where the percentage of enrollment for the student's race exceeds that percentage in the student's resident district." Ark.Code Ann. § 6–18–206(f)(1), as amended, 2007 Ark. Gen. Acts no. 552. An Ohio statute provides, in respect to student choice, that each school district must establish "[p]rocedures to ensure that an appropriate racial balance is maintained in the district schools." Ohio Rev.Code Ann. § 3313.98(B)(2)(b)(iii) (Lexis Supp.2006). Ohio adds that a "district may object to the enrollment of a native student in an adjacent or other district in order to maintain an appropriate racial balance." § 3313.98(F)(1)(a).

A Connecticut statute states that its student choice program will seek to "preserve racial and ethnic balance." Conn. Gen.Stat. § 10–266aa(b)(2) (2007). Connecticut law requires each school district to submit racial group population figures to the State Board of Education. § 10–226a. Another Connecticut regulation provides that "[a]ny school in which the Proportion for the School falls outside of a range from 25 percentage points less to 25 percentage points more than the Comparable Proportion for the School District, shall be determined to be racially imbalanced." Conn. Agencies Regs. § 10–226e–3(b) (1999). A "racial imbalance" determination requires the district to submit a plan to correct the ***861** racial imbalance, which plan may include ****2833** "mandatory pupil reassignment." §§ 10–226e–5(a) and (c)(4).

Interpreting that State's Constitution, the Connecticut Supreme Court has held legally inadequate the reliance by a local school district solely upon some of the techniques Justice KENNEDY today recommends (*e.g.,* reallocating resources, etc.). See *Sheff v. O'Neill,* 238 Conn. 1, 678 A.2d 1267 (1996). The State Supreme Court wrote: "Despite the initiatives undertaken by the defendants to alleviate the severe racial and ethnic disparities among school districts, and despite the fact that the defendants did not intend to create or maintain these disparities, the disparities that continue to burden the education of the plaintiffs infringe upon their fundamental state constitutional right to a substantially equal educational opportunity." *Id.,* at 42, 678 A.2d, at 1289.

At a minimum, the plurality's views would threaten a surge of race-based litigation. Hundreds of state and federal statutes and regulations use racial classifications for educational or other purposes. See *supra,* at 2814 – 2815. In many such instances, the contentious force of legal challenges to these classifications, meritorious or not, would displace earlier calm.

The wide variety of different integration plans that school districts use throughout the Nation suggests that the problem of racial segregation in schools, including *de facto* segregation, is difficult to solve. The fact that many such plans have used explicitly racial criteria suggests that such criteria have an important, sometimes necessary, role to play. The fact that the controlling opinion would make a school district's use of such criteria often unlawful (and the plurality's "colorblind" view would make such use always unlawful) suggests that today's opinion will require setting aside the laws of several States and many local communities.

As I have pointed out, *supra,* at 2801 – 2802, *de facto* resegregation is on the rise. See Appendix A, *infra*. It is reasonable ***862** to conclude that such resegregation can create serious educational, social, and civic problems. See *supra,* at 2820 – 2824. Given the conditions in which school boards work to set policy, see *supra,* at 2811 – 2812, they may need all of the means presently at their disposal to combat those problems. Yet the plurality would deprive them of at least one tool that some districts now consider vital—the limited use of broad race-conscious student population ranges.

I use the words "may need" here deliberately. The plurality, or at least those who follow Justice THOMAS' " 'color-blind' " approach, see *ante,* at 2782 – 2783 (concurring opinion); *Grutter,* 539 U.S., at 353–354, 123 S.Ct. 2325 (THOMAS, J., concurring in part and dissenting in part), may feel confident that, to end invidious discrimination, one must end *all* governmental use of race-conscious criteria including those with inclusive objectives. See *ante,* at 2767 – 2768 (plurality opinion); see also *ante,* at 2782 (THOMAS, J., concurring). By way of contrast, I do not claim to know how best to stop harmful discrimination; how best to create a society that includes all Americans; how best to overcome our serious problems of increasing *de facto* segregation, troubled inner-city schooling, and poverty correlated with race. But, as a judge, I do know that the Constitution does not authorize judges to dictate solutions to these problems. Rather, the Constitution creates a democratic political system through which the people themselves must together find answers. And it is for them to debate how best to educate the Nation's children and how best to administer America's schools to achieve that aim. The Court should leave them to their work. And it is for ****2834** them to decide, to quote the plurality's slogan, whether the best "way to stop discrimination on the basis of race is to stop discriminating on the basis of race." *Ante,* at 2821 – 2822. See also *Parents Involved VII,* 426 F.3d, at 1222 (Bea, J., dissenting) ("The way to end racial discrimination is to stop discriminating by race"). That is why the Equal Protection Clause outlaws ***863** invidious discrimination, but does not similarly forbid all use of race-conscious criteria.

Until today, this Court understood the Constitution as affording the people, acting through their elected representatives, freedom to select the use of "race-conscious" criteria from among their available options. See *Adarand*, 515 U.S., at 237, 115 S.Ct. 2097 ("[S]trict scrutiny" in this context is "[not] 'strict in theory, but fatal in fact' " (quoting *Fullilove,* 448 U.S., at 519, 100 S.Ct. 2758 (Marshall, J., concurring in judgment))). Today, however, the Court restricts (and some Members would eliminate) that leeway. I fear the consequences of doing so for the law, for the schools, for the democratic process, and for America's efforts to create, out of its diversity, one Nation.

VI

Conclusions

To show that the school assignment plans here meet the requirements of the Constitution, I have written at exceptional length. But that length is necessary. I cannot refer to the history of the plans in these cases to justify the use of race-conscious criteria without describing that history in full. I cannot rely upon *Swann*'s statement that the use of race-conscious limits is permissible without showing, rather than simply asserting, that the statement represents a constitutional principle firmly rooted in federal and state law. Nor can I explain my disagreement with the Court's holding and the plurality's opinion without offering a detailed account of the arguments they propound and the consequences they risk.

Thus, the opinion's reasoning is long. But its conclusion is short: The plans before us satisfy the requirements of the Equal Protection Clause. And it is the plurality's opinion, not this dissent, that "fails to ground the result it would reach in law." *Ante,* at 2815.

Four basic considerations have led me to this view. *First,* the histories of Louisville and Seattle reveal complex circumstances ***864** and a long tradition of conscientious efforts by local school boards to resist racial segregation in public schools. Segregation at the time of *Brown* gave way to expansive remedies that included busing, which in turn gave rise to fears of white flight and resegregation. For decades now, these school boards have considered and adopted and revised assignment plans that sought to rely less upon race, to emphasize greater student choice, and to improve the conditions of all schools for all students, no matter the color of their skin, no matter where they happen to reside. The plans under review—which are less burdensome, more egalitarian, and more effective than prior plans—continue in that tradition. And their history reveals school district goals whose remedial, educational, and democratic elements are inextricably intertwined each with the others. See Part I, *supra,* at 2801 – 2812.

Second, since this Court's decision in *Brown,* the law has consistently and unequivocally approved of both voluntary and compulsory race-conscious measures to combat segregated schools. The Equal Protection Clause, ratified following the Civil War, has always distinguished in practice between state action that excludes and thereby subordinates racial minorities ****2835** and state action that seeks to bring together people of all races. From *Swann* to *Grutter,* this Court's decisions have emphasized this distinction, recognizing that the fate of race relations in this country depends upon unity among our children, "for unless our children begin to learn together, there is little hope that our people will ever learn to live together." *Milliken,* 418 U.S., at 783, 94 S.Ct. 3112 (Marshall, J., dissenting). See also Sumner, Equality Before the Law: Unconstitutionality of Separate Colored Schools in Massachusetts (Dec. 4, 1849), in 2 The Works of Charles Sumner 327, 371 (1870) ("The law contemplates not only that all shall be taught, but that *all* shall be taught *together*"). See Part II, *supra,* at 2811 – 2820.

***865** *Third,* the plans before us, subjected to rigorous judicial review, are supported by compelling state interests and are narrowly tailored to accomplish those goals. Just as diversity in higher education was deemed compelling in *Grutter,* diversity in public primary and secondary schools—where there is even more to gain—must be, *a fortiori,* a compelling state interest. Even apart from *Grutter,* five Members of this Court agree that "avoiding racial isolation" and "achiev[ing] a diverse student population" remain today compelling interests. *Ante,* at 2796 – 2797 (opinion of KENNEDY, J.). These interests combine remedial, educational, and democratic objectives. For the reasons discussed above, however, I disagree with Justice KENNEDY that Seattle and Louisville have not done enough to demonstrate that their present plans are necessary to continue upon the path set by *Brown*. These plans are *more* "narrowly tailored" than the race-conscious law school admissions criteria at issue in *Grutter.* Hence, their lawfulness follows *a fortiori* from this Court's prior decisions. See Parts III–IV, *supra,* at 2820 – 2831.

Fourth, the plurality's approach risks serious harm to the law and for the Nation. Its view of the law rests either upon a denial of the distinction between exclusionary and inclusive use of race-conscious criteria in the context of the Equal Protection Clause, or upon such a rigid application of its "test" that the distinction loses practical significance. Consequently, the Court's decision today slows down and sets back the work of local school boards to bring about racially diverse schools. See Part V, *supra,* at 2831 – 2834.

Indeed, the consequences of the approach the Court takes today are serious. Yesterday, the plans under review were lawful. Today, they are not. Yesterday, the citizens of this Nation could look for guidance to this Court's unanimous pronouncements concerning desegregation. Today, they cannot. Yesterday, school boards had available to them a ***866** full range of means to combat segregated schools. Today, they do not.

The Court's decision undermines other basic institutional principles as well. What has happened to *stare decisis?* The history of the plans before us, their educational importance, their highly limited use of race—all these and more—make clear that the compelling interest here is stronger than in *Grutter*. The plans here are more narrowly tailored than the law school admissions program there at issue. Hence, applying *Grutter*'s strict test, their lawfulness follows *a fortiori*. To hold to the contrary is to transform that test from "strict" to "fatal in fact"—the very opposite of what *Grutter* said. And what has happened to *Swann?* To *McDaniel?* To *Crawford?* To *Harris?* To *School Committee of Boston?* To *Seattle School Dist. No. 1?* After decades of vibrant life, they would all, under the plurality's logic, be written out of the law.

And what of respect for democratic local decisionmaking by States and school ****2836** boards? For several decades this Court has rested its public school decisions upon *Swann*'s basic view that the Constitution grants local school districts a significant degree of leeway where the inclusive use of race-conscious criteria is at issue. Now localities will have to cope with the difficult problems they face (including resegregation) deprived of one means they may find necessary.

And what of law's concern to diminish and peacefully settle conflict among the Nation's people? Instead of accommodating different good-faith visions of our country and our Constitution, today's holding upsets settled expectations, creates legal uncertainty, and threatens to produce considerable further litigation, aggravating race-related conflict.

And what of the long history and moral vision that the Fourteenth Amendment itself embodies? The plurality cites in support those who argued in *Brown* against segregation, and Justice THOMAS likens the approach that I have taken to that of segregation's defenders. See *ante,* at 2767 –2768 ***867** (plurality opinion) (comparing Jim Crow segregation to Seattle and Louisville's integration polices); *ante,* at 2783 – 2786 (THOMAS, J., concurring). But segregation policies did not simply tell schoolchildren "where they could and could not go to school based on the color of their skin," *ante,* at 2767 – 2768 (plurality opinion); they perpetuated a caste system rooted in the institutions of slavery and 80 years of legalized subordination. The lesson of history, see *ante,* at 2767 (same), is not that efforts to continue racial segregation are constitutionally indistinguishable from efforts to achieve racial integration. Indeed, it is a cruel distortion of history to compare Topeka, Kansas, in the 1950's to Louisville and Seattle in the modern day—to equate the plight of Linda Brown (who was ordered to attend a Jim Crow school) to the circumstances of Joshua McDonald (whose request to transfer to a school closer to home was initially declined). This is not to deny that there is a cost in applying "a state-mandated racial label." *Ante,* at 2797 (KENNEDY, J., concurring in part and concurring in judgment). But that cost does not approach, in degree or in kind, the terrible harms of slavery, the resulting caste system, and 80 years of legal racial segregation.

* * *

Finally, what of the hope and promise of *Brown?* For much of this Nation's history, the races remained divided. It was not long ago that people of different races drank from separate fountains, rode on separate buses, and studied in separate schools. In this Court's finest hour, *Brown v. Board of Education* challenged this history and helped to change it. For *Brown* held out a promise. It was a promise embodied in three Amendments designed to make citizens of slaves. It was the promise of true racial equality—not as a matter of fine words on paper, but as a matter of everyday life in the Nation's cities and schools. It was about the nature of a democracy that must work for all Americans. It ***868** sought one law, one Nation, one people, not simply as a matter of legal principle but in terms of how we actually live.

Not everyone welcomed this Court's decision in *Brown*. Three years after that decision was handed down, the Governor of Arkansas ordered state militia to block the doors of a white schoolhouse so that black children could not enter. The President

of the United States dispatched the 101st Airborne Division to Little Rock, Arkansas, and federal troops were needed to enforce a desegregation decree. See *Cooper v. Aaron,* 358 U.S. 1, 78 S.Ct. 1401, 3 L.Ed.2d 5 (1958). Today, almost 50 years later, attitudes toward race in this ****2837** Nation have changed dramatically. Many parents, white and black alike, want their children to attend schools with children of different races. Indeed, the very school districts that once spurned integration now strive for it. The long history of their efforts reveals the complexities and difficulties they have faced. And in light of those challenges, they have asked us not to take from their hands the instruments they have used to rid their schools of racial segregation, instruments that they believe are needed to overcome the problems of cities divided by race and poverty. The plurality would decline their modest request.

The plurality is wrong to do so. The last half century has witnessed great strides toward racial equality, but we have not yet realized the promise of *Brown*. To invalidate the plans under review is to threaten the promise of *Brown*. The plurality's position, I fear, would break that promise. This is a decision that the Court and the Nation will come to regret.

I must dissent.

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***869** APPENDIXES

A

Resegregation Trends

Percentage of Black Students in 90–100 Percent Nonwhite and Majority Nonwhite Public Schools by Region, 1950–1954 to 2000, Fall Enrollment

Region	1950–1954	1960–1961	1968	1972	1976	1980	1989	1999	2000
Percentage in 90–100% Nonwhite Schools									
Northeast	—	40	42.7	46.9	51.4	48.7	49.8	50.2	51.2
Border	100	59	60.2	54.7	42.5	37.0	33.7	39.7	39.6
South	100	100	77.8	24.7	22.4	23.0	26.0	31.1	30.9
Midwest	53	56	58.0	57.4	51.1	43.6	40.1	45.0	46.3
West	—	27	50.8	42.7	36.3	33.7	26.7	29.9	29.5
U. S.			**64.3**	**38.7**	**35.9**	**33.2**	**33.8**	**37.4**	**37.4**
Percentage in 50–100% Nonwhite Schools									
Northeast	—	62	66.8	69.9	72.5	79.9	75.4	77.5	78.3
Border	100	69	71.6	67.2	60.1	59.2	58.0	64.8	67.0
South	100	100	80.9	55.3	54.9	57.1	59.3	67.3	69.0
Midwest	78	80	77.3	75.3	70.3	69.5	69.4	67.9	73.3
West	—	69	72.2	68.1	67.4	66.8	67.4	76.7	75.3
U. S.			**76.6**	**63.6**	**62.4**	**62.9**	**64.9**	**70.1**	**71.6**

Source: C. Clotfelter, After *Brown:* The Rise and Retreat of School Desegregation 56 (2004) (Table 2.1).

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***870 Changes in the Percentage of White Students in Schools Attended by the Average Black Student by State, 1970–2003 (includes States with 5% or greater enrollment of black students in 1970 and 1980)**

	% White	% White Students in School of Average Black Student				Change		
	2003	1970	1980	1991	2003	1970–1980	1980–1991	1991–2003
Alabama	60	33	38	35	30	5	-3	-5
Arkansas	70	43	47	44	36	4	-3	-8
California	33	26	28	27	22	2	-1	-5
Connecticut	68	44	40	35	32	-4	-5	-3
Delaware	57	47	69	65	49	22	-4	-16
Florida	51	43	51	43	34	8	-8	-9
Georgia	52	35	38	35	30	3	-3	-5
Illinois	57	15	19	20	19	4	1	-1
Indiana	82	32	39	47	41	7	8	-6
Kansas	76	52	59	58	51	7	-1	-7
Kentucky	87	49	74	72	65	25	-2	-7
Louisiana	48	31	33	32	27	2	-1	-5
Maryland	50	30	35	29	23	5	-6	-6
Massachusetts	75	48	50	45	38	2	-5	-7
Michigan	73	22	23	22	22	1	-1	0
Mississippi	47	30	29	30	26	-1	1	-4
Missouri	78	21	34	40	33	13	6	-7
Nebraska	80	33	66	62	49	33	-4	-13
New Jersey	58	32	26	26	25	-6	0	-1
New York	54	29	23	20	18	-6	-3	-2
Nevada	51	56	68	62	38	12	-6	-24
N. Carolina	58	49	54	51	40	5	-3	-11
Ohio	79	28	43	41	32	15	-2	-9
Oklahoma	61	42	58	51	42	16	-7	-9
Pennsylvania	76	28	29	31	30	1	2	-1
S. Carolina	54	41	43	42	39	2	-1	-3
Tennessee	73	29	38	36	32	9	-2	-4
Texas	39	31	35	35	27	4	0	-8
Virginia	61	42	47	46	41	5	-1	-5
Wisconsin	79	26	45	39	29	19	-6	-10

Source: G. Orfield & C. Lee, Racial Transformation and the Changing Nature of Segregation 18 (Jan. 2006) (Table 8), online at http://www.civilrightsproject.harvard.edu/research/deseg/Racial_Transformation.pdf.

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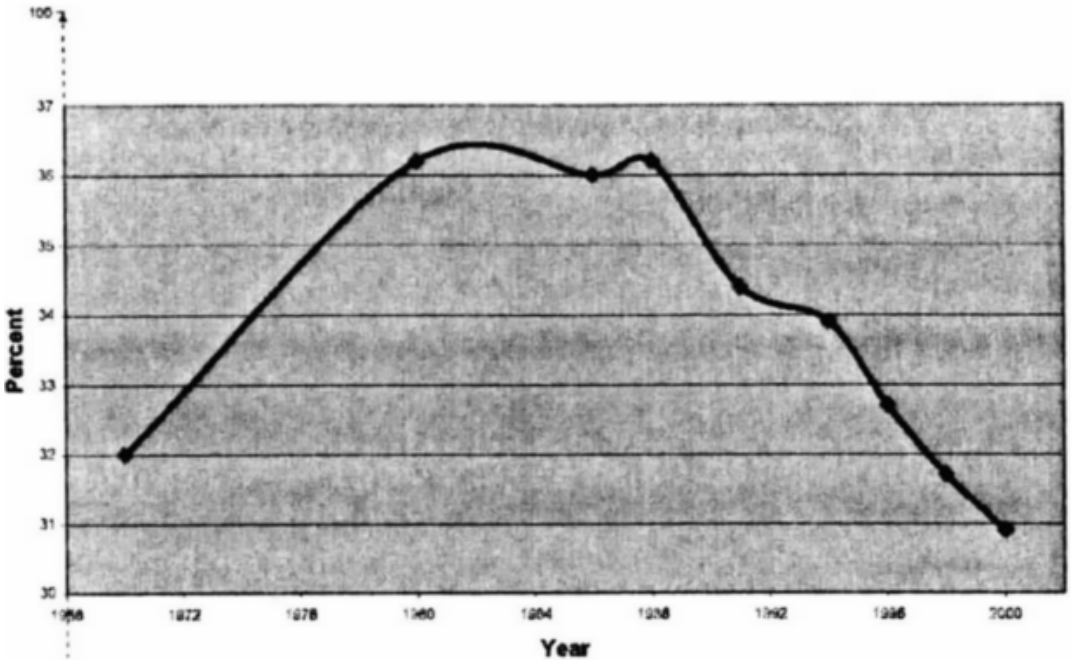
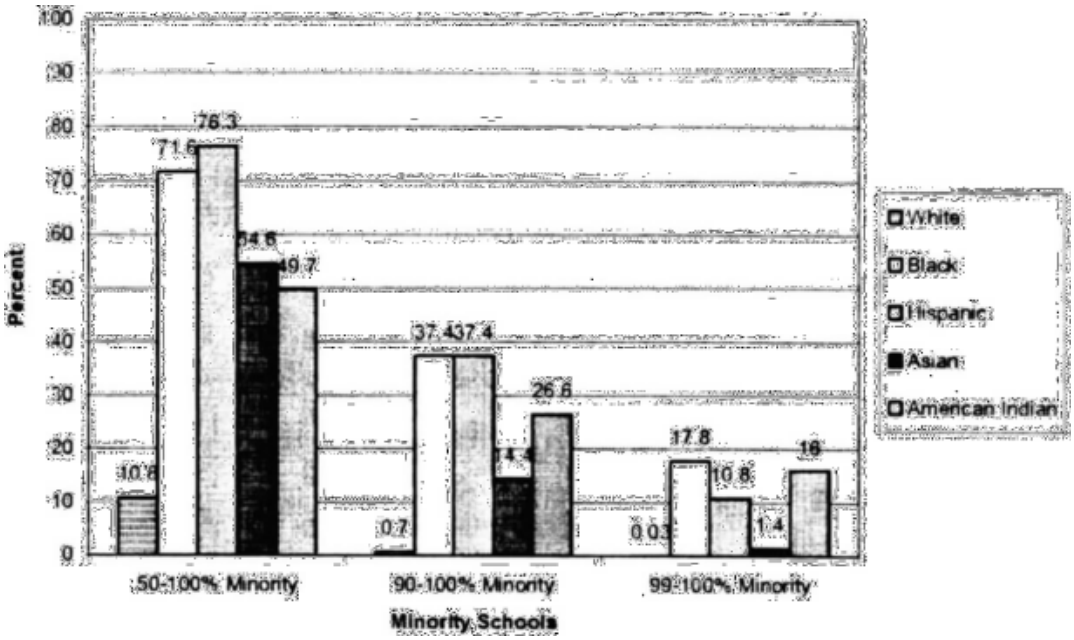
***871 Percentage of White Students in Schools Attended by the Average Black Student, 1968–2000**



Source: Modified from E. Frankenberg, C. Lee, & G. Orfield, A Multiracial Society with Segregated Schools: Are We Losing the Dream?, p. 30, fig. 5 (Jan. 2003), online at http://www.civilrightsproject.harvard.edu/ research / reseg03 /AreWeLosingtheDream.pdf (using U.S. Dept. of Education and National Center for Education Statistics Common Core of Data).

***872 Percentage of Students in Minority Schools by Race, 2000–2001**



Source: *Id.*, at 28, fig. 4.

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Sources for Parts I–A and I–B

Part I–A: Seattle

Section 1. Segregation, 1945 to 1956

¶ 1 C. Schmid & W. McVey, Growth and Distribution of Minority Races in Seattle, Washington, 3, 7–9 (1964); Hanawalt 1–7; Taylor, The Civil Rights Movement in the American West: Black Protest in Seattle, 1960–1970, 80 J. Negro Hist. 1, 2–3 (1995); Siqueland 10; D. Pieroth, Desegregating the Public Schools, Seattle, Washington, 1954–1968, p. 6 (Dissertation Draft 1979).

Section 2. Preliminary Challenges, 1956 to 1969

¶ 1 *Id.,* at 32, 41; Hanawalt 4.

¶ 2 *Id.,* at 11–13.

¶ 3 *Id.,* at 5, 13, 27.

Section 3. The NAACP's First Legal Challenge and Seattle's Response, 1966 to 1977

¶ 1 Complaint in *Adams v. Bottomly,* Civ. No. 6704 (WD Wash., Mar. 18, 1966), pp. 10–11.

¶ 2 *Id.,* at 10, 14–15.

¶ 3 Planning and Evaluation Dept., Seattle Public Schools, The Plan Adopted by the Seattle School Board to Desegregate Fifth, Sixth, Seventh, and Eighth Grade Pupils in the Garfield, Lincoln, and Roosevelt High School Districts by September, 1971, pp. 6, 11 (Nov. 12, 1970) (on file with the University of Washington Library); see generally Siqueland 12–15; Hanawalt 18–20.

¶ 4 Siqueland 5, 7, 21.

Section 4. The NAACP's Second Legal Challenge, 1977

¶ 1 Administrative Complaint in *Seattle Branch, NAACP v. Seattle School Dist. No. 1,* pp. 2–3 (OCR, Apr. 22, 1977) ***874** filed with Court as exhibit in *Seattle School Dist. No. 1,* 458 U.S. 457, 102 S.Ct. 3187, 73 L.Ed.2d 896); see generally Siqueland 23–24.
¶ 2 Memorandum of Agreement between Seattle School District No. 1 of King Cty., Washington, and the OCR (June 9, 1978) (filed with the Court as Exh. A to Kiner Affidavit in *Seattle School Dist. No. 1, supra*).

Section 5. The Seattle Plan: Mandatory Busing, 1978 to 1988

¶ 1 See generally *Seattle School Dist. No. 1, supra,* at 461, 102 S.Ct. 3187; Seattle Public Schools Desegregation Planning Office, Proposed Alternative Desegregation Plans: Options for Eliminating Racial Imbalance by the 1979–80 School Year (1977) (filed with the Court in *Seattle School Dist. No. 1, supra*); Hanawalt 36–38, 40; Siqueland 3, 184, Table 4.

¶ 2 *Id.,* at 151–152; Hanawalt 37–38; *Seattle School Dist. No. 1, supra,* at 461; Motion to Dismiss or Affirm in *Seattle School Dist. No. 1,* O.T. 1981, No. 81–9.

¶ 3 *Seattle School Dist. No. 1, supra,* at 461, 102 S.Ct. 3187; Hanawalt 40.
¶ 4 See generally *Seattle School Dist. No. 1, supra.*

Section 6. Student Choice, 1988 to 1998

¶ 1 L. Kohn, Priority Shift: The Fate of Mandatory Busing for School Desegregation in Seattle and the Nation 27–30, 32 (Mar.1996).

¶ 2 *Id.,* at 32–34.

Section 7. The Current Plan, 1999 to the Present
¶ 1 App. in No. 05–908, p. 84a; Brief for Respondents in No. 05–908, at 5–7; *Parents Involved VII,* 426 F.3d, at 1169–1170.

****2841** ¶ 2 App. in No. 05–908, at 39a–42a; Data Profile: District Summary December 2005; Brief for Respondents in No. 05–908, at 9–10, 47; App. in No. 05–908, at 309a; School Board Report, School Choices and Assignments 2005–2006 School ***875** Year (Apr. 2005), online at http:// www.seattleschools.org/ area/ facilities—plan/ Choice/ 05—06AppsChoicesBoardApril2005final.pdf.

¶ 3 *Parents Involved in Community Schools v. Seattle School Dist. No. 1,* 149 Wash.2d 660, 72 P.3d 151 (2003); 137 F.Supp.2d 1224 (WD Wash.2001); *Parents Involved VII, supra*.

Part I–B: Louisville

Section 1. Before the Lawsuit, 1954 to 1972
¶ 1 *Hampton v. Jefferson Cty. Bd. of Ed.,* 72 F.Supp.2d 753, 756, and nn. 2, 4, 5 (WD Ky.1999) *(Hampton I)*.

Section 2. Court–Imposed Guidelines and Busing, 1972 to 1991

¶ 1 *Id.,* at 757–758, 762; *Newburg Area Council, Inc. v. Board of Ed. of Jefferson Cty.,* 489 F.2d 925 (CA6 1973), vacated

and remanded, 418 U.S. 918, 94 S.Ct. 3208, 3209, 41 L.Ed.2d 1160, reinstated with modifications, 510 F.2d 1358 (CA6 1974) *(per curiam);* Judgment and Findings of Fact and Conclusions of Law in *Newburg Area Council, Inc. v. Board of Ed. of Jefferson Cty.,* Nos. 7045 and 7291 (WD Ky., July 30, 1975).

¶ 2 *Id.,* at 2, 3, and Attachment 1.

¶ 3 *Id.,* at 4–16.

¶ 4 Memorandum Opinion and Order in *Haycraft v. Board of Ed. of Jefferson Cty.,* Nos. 7045 and 7291 (WD Ky., June 16, 1978), pp. 1, 2, 4, 18.

¶ 5 Memorandum Opinion and Order, *Haycraft v. Board of Ed. of Jefferson Cty.,* Nos. 7045 and 7291 (WD Ky., Sept. 24, 1985), p. 3; Memorandum from Donald W. Ingwerson, Superintendent, to the Board of Education, Jefferson County Public School District, pp. 1, 3, 5 (Apr. 4, 1984); Memorandum from Donald W. Ingwerson, Superintendent, to the Board of Education, Jefferson County Public School District, pp. 4–5 (Dec. 19, 1991) (1991 Memorandum).

***876** *Section 3. Student Choice and Project Renaissance, 1991 to 1996*

¶ 1 *Id.,* at 1–4, 7–11 (Stipulated Exh. 72); Brief for Respondents in No. 05–915, p. 12, n. 13.

¶ 2 1991 Memorandum 14–16.

¶ 3 *Id.,* at 11, 14–15.

¶ 4 *Id.,* at 15–16; Memorandum from Stephen W. Daeschner, Superintendent, to the Board of Education, Jefferson County Public School District, p. 2 (Aug. 6, 1996) (1996 Memorandum).

Section 4. The Current Plan: Project Renaissance Modified, 1996 to 2003

¶ 1 *Id.,* at 1–4; Brief for Respondents in No. 05–915, at 12, and n. 13.
¶ 2 1996 Memorandum 4–7, and Attachment 2; *Hampton I, supra,* at 768.
¶ 3 1996 Memorandum 5–8; *Hampton I, supra,* at 768, n. 30.

¶ 4 *Hampton II,* 102 F.Supp.2d, at 359, 363, 370, 377.

¶ 5 *Id.,* at 380–381.

Section 5. The Current Lawsuit, 2003 to the Present

¶ 1 *McFarland v. Jefferson Cty. Public Schools,* 330 F.Supp.2d 834 (W.D.Ky.2004); ****2842** *McFarland v. Jefferson Cty. Public Schools,* 416 F.3d 513 (CA6, 2005) *(per curiam);* Memorandum from Stephen W. Daeschner, Superintendent, to the Board of Education, Jefferson County Public School District, 3–4 (Apr. 2, 2001).

All Citations

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Footnotes

[*] The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

[1] The plan was in effect from 1999–2002, for three school years. This litigation was commenced in July 2000, and the record in the District Court was closed before assignments for the 2001–2002 school year were made. See Brief for Respondents in No. 05–908, p. 9, n. 9. We rely, as did the lower courts, largely on data from the 2000–2001 school year in evaluating the plan. See 426 F.3d

1162, 1169–1171 (C.A.9 2005) (en banc) (*Parents Involved VII*).

2 The racial breakdown of this nonwhite group is approximately 23.8 percent Asian–American, 23.1 percent African–American, 10.3 percent Latino, and 2.8 percent Native–American. See 377 F.3d 949, 1005–1006 (C.A.9 2004) (*Parents Involved VI*) (Graber, J., dissenting).

3 For the 2001–2002 school year, the deviation permitted from the desired racial composition was increased from 10 to 15 percent. App. in No. 05–908, p. 38a. The bulk of the data in the record was collected using the 10 percent band, see n. 1, *supra*.

4 "No State shall ... deny to any person within its jurisdiction the equal protection of the laws." U.S. Const., Amdt. 14, § 1.

5 "No person in the United States shall, on the ground of race ... be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 78 Stat. 252, 42 U.S.C. § 2000d.

6 "The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting." Wash. Rev.Code § 49.60.400(1) (2006).

7 Middle and high school students are designated a single resides school and assigned to that school unless it is at the extremes of the racial guidelines. Students may also apply to a magnet school or program, or, at the high school level, take advantage of an open enrollment plan that allows ninth-grade students to apply for admission to any nonmagnet high school. App. in No. 05–915, pp. 39–41, 82–83.

8 It is not clear why the racial guidelines were even applied to Joshua's transfer application—the guidelines supposedly do not apply at the kindergarten level. *Id.,* at 43. Neither party disputes, however, that Joshua's transfer application was denied under the racial guidelines, and Meredith's objection is not that the guidelines were misapplied but rather that race was used at all.

9 Meredith joined a pending lawsuit filed by several other plaintiffs. See *id.,* at 7–11. The other plaintiffs all challenged assignments to certain specialized schools, and the District Court found these assignments, which are no longer at issue in this case, unconstitutional. *McFarland I,* 330 F.Supp.2d 834, 837, 864 (W.D.Ky.2004).

10 The districts point to dicta in a prior opinion in which the Court suggested that, while not constitutionally mandated, it would be constitutionally permissible for a school district to seek racially balanced schools as a matter of "educational policy." See *Swann v. Charlotte–Mecklenburg Bd. of Ed.,* 402 U.S. 1, 16, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971). The districts also quote with approval an in-chambers opinion in which then-Justice Rehnquist made a suggestion to the same effect. See *Bustop, Inc. v. Los Angeles Bd. of Ed.,* 439 U.S. 1380, 1383, 99 S.Ct. 40, 58 L.Ed.2d 88 (1978). The citations do not carry the significance the districts would ascribe to them. *Swann,* evaluating a school district engaged in court-ordered desegregation, had no occasion to consider whether a district's voluntary adoption of race-based assignments in the absence of a finding of prior *de jure* segregation was constitutionally permissible, an issue that was again expressly reserved in *Washington v. Seattle School Dist. No. 1,* 458 U.S. 457, 472, n. 15, 102 S.Ct. 3187, 73 L.Ed.2d 896 (1982). *Bustop,* addressing in the context of an emergency injunction application a busing plan imposed by the Superior Court of Los Angeles County, is similarly unavailing. Then–Justice Rehnquist, in denying emergency relief, stressed that "equitable consideration[s]" counseled against preliminary relief. 439 U.S., at 1383, 99 S.Ct. 40. The propriety of preliminary relief and resolution of the merits are of course "significantly different" issues. *University of Texas v. Camenisch,*

451 U.S. 390, 393, 101 S.Ct. 1830, 68 L.Ed.2d 175 (1981).

11 The way Seattle classifies its students bears this out. Upon enrolling their child with the district, parents are required to identify their child as a member of a particular racial group. If a parent identifies more than one race on the form, "[t]he application will not be accepted and, if necessary, the enrollment service person taking the application will indicate one box." App. in No. 05–908, at 303a.

12 Jefferson County also argues that it would be incongruous to hold that what was constitutionally required of it one day—race-based assignments pursuant to the desegregation decree—can be constitutionally prohibited the next. But what was constitutionally required of the district prior to 2000 was the elimination of the vestiges of prior segregation—not racial proportionality in its own right. See *Freeman v. Pitts,* 503 U.S. 467, 494–496, 112 S.Ct. 1430, 118 L.Ed.2d 108 (1992). Once those vestiges were eliminated, Jefferson County was on the same footing as any other school district, and its use of race must be justified on other grounds.

13 Data for the Seattle schools in the several years since this litigation was commenced further demonstrate the minimal role that the racial tiebreaker in fact played. At Ballard, in 2005–2006—when no class at the school was subject to the racial tiebreaker—the student body was 14.2 percent Asian–American, 9 percent African–American, 11.7 percent Latino, 62.3 percent Caucasian, and 2.8 percent Native–American. Reply Brief for Petitioner in No. 05–908, p. 7. In 2000–2001, when the racial tiebreaker was last used, Ballard's total enrollment was 17.5 percent Asian–American, 10.8 percent African–American, 10.7 percent Latino, 56.4 percent Caucasian, and 4.6 percent Native–American. App. in No. 05–908, at 283a. Franklin in 2005–2006 was 48.9 percent Asian–American, 33.5 percent African–American, 6.6 percent Latino, 10.2 percent Caucasian, and 0.8 percent Native–American. Reply Brief for Petitioner in No. 05–908, at 7. With the racial tiebreaker in 2000–2001, total enrollment was 36.8 percent Asian–American, 32.2 percent African–American, 5.2 percent Latino, 25.1 percent Caucasian, and 0.7 percent Native–American. App. in No. 05–908, at 284a. Nathan Hale's 2005–2006 enrollment was 17.3 percent Asian–American, 10.7 percent African–American, 8 percent Latino, 61.5 percent Caucasian, and 2.5 percent Native–American. Reply Brief for Petitioner in No. 05–908, at 7. In 2000–2001, with the racial tiebreaker, it was 17.9 percent Asian–American, 13.3 percent African–American, 7 percent Latino, 58.4 percent Caucasian, and 3.4 percent Native–American. App. in No. 05–908, at 286a.

14 In contrast, Seattle's Web site formerly described "emphasizing individualism as opposed to a more collective ideology" as a form of "cultural racism," and currently states that the district has no intention " 'to hold onto unsuccessful concepts such as [a] ... colorblind mentality.' " Harrell, School Web Site Removed: Examples of Racism Sparked Controversy, Seattle Post–Intelligencer, June 2, 2006, pp. B1, B5. Compare *Plessy v. Ferguson,* 163 U.S. 537, 559, 16 S.Ct. 1138, 41 L.Ed. 256 (1896) (Harlan, J., dissenting) ("Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law").

15 Justice BREYER makes much of the fact that in 1978 Seattle "settled" an NAACP complaint alleging illegal segregation with the federal Office for Civil Rights (OCR). See *post,* at 2802, 2804, 2809 – 2810, 2812. The memorandum of agreement between Seattle and OCR, of course, contains no admission by Seattle that such segregation ever existed or was ongoing at the time of the agreement, and simply reflects a "desire to avoid the incovenience [*sic*] and expense of a formal OCR investigation," which OCR was obligated under law to initiate upon the filing of such a complaint. Memorandum of Agreement between Seattle School District No. 1 of King County, Washington, and the OCR, U.S. Dept. of Health, Education, and Welfare 2 (June 9, 1978); see also 45 CFR § 80.7(c) (2006).

16 In fact, all the cases Justice BREYER's dissent cites as evidence of the "prevailing legal assumption," see *post,* at 2813 – 2815, were decided before this Court definitively determined that "all racial classifications ... must be analyzed by a reviewing court under strict scrutiny." *Adarand Constructors, Inc. v. Peña,* 515 U.S. 200, 227, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995). Many proceeded under the now-rejected view that classifications seeking to benefit a disadvantaged racial group should be held to a lesser standard of review. See, *e.g., Springfield School Comm. v. Barksdale,* 348 F.2d 261, 266 (C.A.1 1965). Even if this purported distinction, which Justice STEVENS would adopt, *post,* at 2798, n. 3 (dissenting opinion), had not been already rejected

by this Court, the distinction has no relevance to these cases, in which students of all races are excluded from the schools they wish to attend based solely on the racial classifications. See, *e.g.,* App. in No. 05–908, at 202a (noting that 89 nonwhite students were denied assignment to a particular school by operation of Seattle's racial tiebreaker).

Justice STEVENS's reliance on *School Comm. of Boston v. Board of Ed.,* 352 Mass. 693, 227 N.E.2d 729 (1967), appeal dism'd, 389 U.S. 572, 88 S.Ct. 692, 19 L.Ed.2d 778 (1968) (*per curiam*), *post,* at 2798 – 2800, is inapposite for the same reason that many of the cases cited by Justice BREYER are inapposite; the case involved a Massachusetts law that required school districts to avoid racial imbalance in schools but did not specify how to achieve this goal—and certainly did not require express racial classifications as the means to do so. The law was upheld under rational-basis review, with the state court explicitly rejecting the suggestion—which is now plainly the law—that "racial group classifications bear a far heavier burden of justification." 352 Mass., at 700, 227 N.E.2d, at 734 (internal quotation marks omitted). The passage Justice STEVENS quotes proves our point; all the quoted language says is that the school committee "shall prepare a plan to eliminate imbalance." *Id.,* at 695, 227 N.E.2d, at 731; see *post,* at 2799, n. 5. Nothing in the opinion approves use of racial classifications as the means to address the imbalance. The suggestion that our decision today is somehow inconsistent with our disposition of that appeal is belied by the fact that neither the lower courts, the respondent school districts, nor any of their 51 *amici* saw fit even to cite the case. We raise this fact not to argue that the dismissal should be afforded any different *stare decisis* effect, but rather simply to suggest that perhaps—for the reasons noted above—the dismissal does not mean what Justice STEVENS believes it does.

17 Justice BREYER also tries to downplay the impact of the racial assignments by stating that in Seattle "students can decide voluntarily to transfer to a preferred district high school (without any consideration of race-conscious criteria)." *Post,* at 2824 – 2825. This presumably refers to the district's decision to cease, for 2001–2002 school year assignments, applying the racial tiebreaker to students seeking to transfer to a different school after ninth grade. See App. in No. 05–908, at 137a–139a. There are obvious disincentives for students to transfer to a different school after a full quarter of their high school experience has passed, and the record sheds no light on how transfers to the oversubscribed high schools are handled.

1 In this Court's paradigmatic segregation cases, there was a local ordinance, state statute, or state constitutional provision requiring racial separation. See, *e.g.,* Brief for Petitioners in *Bolling v. Sharpe,* O.T.1952, No. 413, pp. 28–30 (cataloging state laws requiring separation of the races); *id.,* at App. A (listing "Statutory and Constitutional Provisions in the States Where Segregation in Education is Institutionalized").

2 The dissent refers repeatedly and reverently to " 'integration.' " However, outside of the context of remediation for past *de jure* segregation, "integration" is simply racial balancing. See *post,* at 2820. Therefore, the school districts' attempts to further "integrate" are properly thought of as little more than attempts to achieve a particular racial balance.

3 The dissent's assertion that these plans are necessary for the school districts to maintain their "hard-won gains" reveals its conflation of segregation and racial imbalance. *Post,* at 2820 – 2821. For the dissent's purposes, the relevant hard-won gains are the present racial compositions in the individual schools in Seattle and Louisville. However, the actual hard-won gain in these cases is the elimination of the vestiges of the system of state-enforced racial separation that once existed in Louisville. To equate the achievement of a certain statistical mix in several schools with the elimination of the system of systematic *de jure* segregation trivializes the latter accomplishment. Nothing but an interest in classroom aesthetics and a hypersensitivity to elite sensibilities justifies the school districts' racial balancing programs. See Part II–B, *infra*. But "the principle of inherent equality that underlies and infuses our Constitution" required the disestablishment of *de jure* segregation. See *Adarand Constructors, Inc. v. Peña,* 515 U.S. 200, 240, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995) (THOMAS, J., concurring in part and concurring in judgment). Assessed in any objective manner, there is no comparison between the two.

4 The dissent makes much of the supposed difficulty of determining whether prior segregation was *de jure* or *de facto*. See, *e.g., post,* at 2810 – 2811. That determination typically will not be nearly as difficult as the dissent makes it seem. In most cases, there either will or will not have been a state constitutional amendment, state statute, local ordinance, or local administrative policy explicitly requiring separation of the races. See, *e.g.,* n. 1, *supra*. And even if the determination is difficult, it is one the dissent acknowledges must be made to determine what remedies school districts are required to adopt. *Post,* at 2823.

5 This Court's opinion in *McDaniel v. Barresi,* 402 U.S. 39, 91 S.Ct. 1287, 28 L.Ed.2d 582 (1971), fits comfortably within this framework. There, a Georgia school board voluntarily adopted a desegregation plan. At the time of *Brown v. Board of Education,* 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954), Georgia's Constitution required that "[s]eparate schools shall be provided for the white and colored races." Ga. Const., Art. VIII, § 2–6401 (1945). Given that state law had previously required the school board to maintain a dual school system, the county was obligated to take measures to remedy its prior *de jure* segregation. This Court recognized as much in its opinion, which stated that the school board had an "affirmative duty to disestablish the dual school system." *McDaniel, supra,* at 41, 91 S.Ct. 1287.

6 As I have explained elsewhere, the remedies this Court authorized lower courts to compel in early desegregation cases like *Green* and *Swann* were exceptional. See *Missouri v. Jenkins,* 515 U.S. 70, 124–125, 115 S.Ct. 2038, 132 L.Ed.2d 63 (1995) (concurring opinion). Sustained resistance to *Brown* prompted the Court to authorize extraordinary race-conscious remedial measures (like compelled racial mixing) to turn the Constitution's dictate to desegregate into reality. 515 U.S., at 125, 115 S.Ct. 2038 (THOMAS, J., concurring). Even if these measures were appropriate as remedies in the face of widespread resistance to *Brown*'s mandate, they are not forever insulated from constitutional scrutiny. Rather, "such powers should have been temporary and used only to overcome the widespread resistance to the dictates of the Constitution." 515 U.S., at 125, 115 S.Ct. 2038 (THOMAS, J., concurring).

7 Though the dissent cites every manner of complaint, record material, and scholarly article relating to Seattle's race-based student-assignment efforts, *post,* at 2839 – 2841, it cites no law or official policy that required separation of the races in Seattle's schools. Nevertheless, the dissent tries to cast doubt on the historical fact that the Seattle schools were never segregated by law by citing allegations that the National Association for the Advancement of Colored People and other organizations made in court filings to the effect that Seattle's schools were once segregated by law. See *post,* at 2803 – 2805, 2812. These allegations were never proved and were not even made in this case. Indeed, the record before us suggests the contrary. See App. in No. 05–908, pp. 214a, 225a, 257a. Past allegations in another case provide no basis for resolving these cases.

8 Contrary to the dissent's argument, *post,* at 2823 – 2824, the Louisville school district's interest in remedying its past *de jure* segregation did vanish the day the District Court found that Louisville had eliminated the vestiges of its historic *de jure* segregation. See *Hampton v. Jefferson Cty. Bd. of Ed.,* 102 F.Supp.2d 358, 360 (W.D.Ky.2000). If there were further remediation to be done, the District Court could not logically have reached the conclusion that Louisville "ha [d] eliminated the vestiges associated with the former policy of segregation and its pernicious effects." *Ibid.* Because Louisville could use race-based measures only as a remedy for past *de jure* segregation, it is not "incoherent," *post,* at 2830, to say that race-based decisionmaking was allowed to Louisville one day—while it was still remedying—and forbidden to it the next—when remediation was finished. That seemingly odd turnaround is merely a result of the fact that the remediation of *de jure* segregation is a jealously guarded exception to the Equal Protection Clause's general rule against government race-based decisionmaking.

9 The dissent's appeal to *stare decisis, post,* at 2835, is particularly ironic in light of its apparent willingness to depart from these precedents, *post,* at 2819 – 2820.

10 The idea that government racial classifications must be subjected to strict scrutiny did not originate in *Adarand*. As early as *Loving v. Virginia,* 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967), this Court made clear that government action that "rest[s] solely upon distinctions drawn according to race" had to be "subjected to the 'most rigid scrutiny.' " *Id.,* at 11, 87 S.Ct. 1817 (quoting *Korematsu v. United States,* 323 U.S. 214, 216, 65 S.Ct. 193, 89 L.Ed. 194 (1944)); see also *McLaughlin v. Florida,* 379 U.S. 184, 196, 85 S.Ct. 283, 13 L.Ed.2d 222 (1964) (requiring a statute drawing a racial classification to be "necessary, and not merely rationally related, to the accomplishment of a permissible state policy"); *id.,* at 197, 85 S.Ct. 283 (Harlan, J., concurring) ("The necessity test ... should be equally applicable in a case involving state racial discrimination").

11 At least one of the academic articles the dissent cites to support this proposition fails to establish a causal connection between the supposed educational gains realized by black students and racial mixing. See Hallinan, Diversity Effects on Student Outcomes:

Social Science Evidence, 59 Ohio St. L.J. 733 (1998). In the pages following the ones the dissent cites, the author of that article remarks that "the main reason white and minority students perform better academically in majority white schools is likely that these schools provide greater opportunities to learn. In other words, it is not desegregation per se that improves achievement, but rather the learning advantages some desegregated schools provide." *Id.,* at 744. Evidence that race is a good proxy for other factors that might be correlated with educational benefits does not support a compelling interest in the use of race to achieve academic results.

12 Of course, if the Seattle School Board were truly committed to the notion that diversity leads directly to educational benefits, operating a school with such a high "nonwhite" enrollment would be a shocking dereliction of its duty to educate the students enrolled in that school.

13 In fact, the available data from the Seattle school district appear to undercut the dissent's view. A comparison of the test results of the schools in the last year the racial balancing program operated to the results in the 2004–to–2005 school year (in which student assignments were race neutral) does not indicate the decline in black achievement one would expect to find if black achievement were contingent upon a particular racial mix. See Washington State Report Card, online at http://reportcard.ospi.k12.wa.us/summary.aspx?schoolId=1099&OrgType=4&reportLevel=School; http://reportcard.ospi.k12.wa.us/summary.aspx?schoolId=1104&reportLevel=School&orgLinkId=1104&yrs=; http://reportcard.ospi.k12.wa.us/summary.aspx?schoolId=1061&reportLevel=School&orgLinkId=1061&yrs=; http://reportcard.ospi.k12.wa.us/summary.aspx?schoolId=1043&reportLevel=School&orgLinkId=1043&yrs= (showing that reading scores went up, not down, when Seattle's race-based assignment program ended at Sealth High School, Ingraham High School, Garfield High School, and Franklin High School—some of the schools most affected by the plan).

14 The dissent accuses me of "feel[ing] confident that, to end invidious discrimination, one must end *all* governmental use of race-conscious criteria" and chastises me for not deferring to democratically elected majorities. See *post,* at 2833 – 2834. Regardless of what Justice BREYER's goals might be, this Court does not sit to "create a society that includes all Americans" or to solve the problems of "troubled inner–city schooling." *Ibid.* We are not social engineers. The United States Constitution dictates that local governments cannot make decisions on the basis of race. Consequently, regardless of the perceived negative effects of racial imbalance, I will not defer to legislative majorities where the Constitution forbids it.

It should escape no one that behind Justice BREYER's veil of judicial modesty hides an inflated role for the Federal Judiciary. The dissent's approach confers on judges the power to say what sorts of discrimination are benign and which are invidious. Having made that determination (based on no objective measure that I can detect), a judge following the dissent's approach will set the level of scrutiny to achieve the desired result. Only then must the judge defer to a democratic majority. In my view, to defer to one's preferred result is not to defer at all.

15 The notion that a "democratic" interest qualifies as a compelling interest (or constitutes a part of a compelling interest) is proposed for the first time in today's dissent and has little basis in the Constitution or our precedent, which has narrowly restricted the interests that qualify as compelling. See *Grutter v. Bollinger,* 539 U.S. 306, 351–354, 123 S.Ct. 2325, 156 L.Ed.2d 304 (2003) (THOMAS, J., concurring in part and dissenting in part). The Fourteenth Amendment does not enact the dissent's newly minted understanding of liberty. See *Lochner v. New York,* 198 U.S. 45, 75, 25 S.Ct. 539, 49 L.Ed. 937 (1905) (Holmes, J., dissenting) ("The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics").

16 The dissent does not explain how its recognition of an interest in teaching racial understanding and cooperation here is consistent with the Court's rejection of a similar interest in *Wygant*. In *Wygant,* a school district justified its race-based teacher-layoff program in part on the theory that "minority teachers provided 'role models' for minority students and that a racially 'diverse' faculty would improve the education of all students." *Grutter, supra,* at 352, 123 S.Ct. 2325 (opinion of THOMAS, J.) (citing Brief for Respondents, O.T.1985, No. 84–1340, pp. 27–28; *Wygant*, 476 U.S., at 315, 106 S.Ct. 1842 (STEVENS, J., dissenting)). The Court rejected the interests asserted to justify the layoff program as insufficiently compelling. *Id.*, at 275–276, 106 S.Ct. 1842 (plurality opinion); *id.,* at 295, 106 S.Ct. 1842 (White, J., concurring in judgment). If a school district has an interest in teaching racial understanding and cooperation, there is no logical reason why that interest should not extend to the composition of the teaching staff as well as the composition of the student body. The dissent's reliance on this interest is, therefore, inconsistent with

Wygant.

17 Outside the school context, this Court's cases reflect the fact that racial mixing does not always lead to harmony and understanding. In *Johnson v. California,* 543 U.S. 499, 125 S.Ct. 1141, 160 L.Ed.2d 949 (2005), this Court considered a California prison policy that separated inmates racially. *Id.,* at 525–528, 125 S.Ct. 1141 (THOMAS, J., dissenting). That policy was necessary because of "numerous incidents of racial violence." *Id.,* at 502, 125 S.Ct. 1141 (opinion of the Court); *id*., at 532–534, 125 S.Ct. 1141 (THOMAS, J., dissenting). As a result of this Court's insistence on strict scrutiny of that policy, but see *id.,* at 538–547, 125 S.Ct. 1141, inmates in the California prisons were killed. See *Beard v. Banks,* 548 U.S. 521, 536 – 537, 126 S.Ct. 2572, 165 L.Ed.2d 697 (2006) (THOMAS, J., concurring in judgment) (noting that two were killed and hundreds were injured in race rioting subsequent to this Court's decision in *Johnson*).

18 After discussing the "democratic element," the dissent repeats its assertion that the social science evidence supporting that interest is "sufficiently strong to permit a school board to determine ... that this interest is compelling." *Post,* at 2821 – 2822. Again, though, the school boards have no say in deciding whether an interest is compelling. Strict scrutiny of race-based government decisionmaking is more searching than *Chevron*-style administrative review for reasonableness. See *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 845, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).

19 The dissent halfheartedly attacks the historical underpinnings of the colorblind Constitution. *Post,* at 2815 – 2816. I have no quarrel with the proposition that the Fourteenth Amendment sought to bring former slaves into American society as full members. *Post,* at 2815 (citing *Slaughter–House Cases,* 16 Wall. 36, 71–72, 21 L.Ed. 394 (1873)). What the dissent fails to understand, however, is that the colorblind Constitution does not bar the government from taking measures to remedy past state-sponsored discrimination—indeed, it requires that such measures be taken in certain circumstances. See, *e.g.,* Part I–B, *supra.* Race-based government measures during the 1860's and 1870's to remedy *state-enforced slavery* were therefore not inconsistent with the colorblind Constitution.

20 See also Juris. Statement in *Davis v. County School Board,* O.T.1952, No. 191, p. 8 ("[W]e take the unqualified position that the Fourteenth Amendment has totally stripped the state of power to make race and color the basis for governmental action"); Tr. of Oral Arg. in *Brown v. Board of Education,* O.T.1952, No. 8, p. 7 ("We have one fundamental contention which we will seek to develop in the course of this argument, and that contention is that no State has any authority under the equal-protection clause of the Fourteenth Amendment to use race as a factor in affording educational opportunities among its citizens"); Tr. of Oral Arg. in *Briggs v. Elliott* et al., O.T.1953, No. 2 etc., p. 50 ("[T]he state is deprived of any power to make any racial classifications in any governmental field").

21 See also Brief for Appellees in *Davis v. County School Board,* O.T.1952, No. 191, p. 1 ("[T]he Court is asked ... to outlaw the fixed policies of the several States which are based on local social conditions well known to the respective legislatures"); *id.,* at 9 ("For this purpose, Virginia history and present Virginia conditions are important"); Tr. of Oral Arg. in *Davis v. County School Board,* O.T.1952, No. 191, p. 57 ("[T]he historical background that exists, certainly in this Virginia situation, with all the strife and the history that we have shown in this record, shows a basis, a real basis, for the classification that has been made"); *id.,* at 69 (describing the potential abolition of segregation as "contrary to the customs, the traditions and the mores of what we might claim to be a great people, established through generations, who themselves are fiercely and irrevocably dedicated to the preservation of the white and colored races"). Accord, *post,* at 2836 – 2837 ("Today, almost 50 years later, attitudes toward race in this Nation have changed dramatically. Many parents, white and black alike, want their children to attend schools with children of different races. Indeed, the very school districts that once spurned integration now strive for it. The long history of their efforts reveals the complexities and difficulties they have faced"); *post,* at 2811 (emphasizing the importance of "local circumstances" and encouraging different localities to "try different solutions to common problems and gravitate toward those that prove most successful or seem to them best to suit their individual needs" (internal quotation marks omitted)); post, *at 2826 (emphasizing the school districts' "40–year history" during which both school districts have tried numerous approaches "to achieve more integrated schools");* post, *at 2834 ("[T]he histories of Louisville and Seattle reveal complex circumstances and a long tradition of conscientious efforts by local school boards"*).

22 See also Brief for Appellees in *Brown v. Board of Education,* O.T.1952, No. 8, p. 29 (" 'It is universally held, therefore, that each

state shall determine for itself, subject to the observance of the fundamental rights and liberties guaranteed by the federal Constitution, how it shall exercise the police power .... And in no field is this right of the several states more clearly recognized than in that of public education' " (quoting *Briggs v. Elliott,* 98 F.Supp. 529, 532 (E.D.S.C.1951))); Brief for Appellees in *Briggs v. Elliott,* O.T.1952, No. 101, p. 7 ("Local self-government in local affairs is essential to the peace and happiness of each locality and to the strength and stability of our whole federal system. Nowhere is this more profoundly true than in the field of education"); Tr. of Oral Arg. in *Briggs v. Elliott,* O.T.1952, No. 101, pp. 54–55 ("What is the great national and federal policy on this matter? Is it not a fact that the very strength and fiber of our federal system is local self-government in those matters for which local action is competent? Is it not of all the activities of government the one which most nearly approaches the hearts and minds of people, the question of the education of their young? Is it not the height of wisdom that the manner in which that shall be conducted should be left to those most immediately affected by it, and that the wishes of the parents, both white and colored, should be ascertained before their children are forced into what may be an unwelcome contact?"). Accord, *post,* at 2826 ("[L]ocal school boards better understand their own communities and have a better knowledge of what in practice will best meet the educational needs of their pupils"); *post,* at 2835 – 2836 ("[W]hat of respect for democratic local decisionmaking by States and school boards?"); *ibid.* (explaining "that the Constitution grants local school districts a significant degree of leeway").

23 See also Brief for Appellees in Reply to Supp. Brief for the United States on Reargument in *Davis v. County School Board,* O.T.1953, No. 4, p. 17 ("The Court is ... dealing with thousands of local school districts and schools. Is each to be the subject of litigation in the District Courts?"); Brief for Kansas on Reargument in *Brown v. Board of Education,* O.T.1953, No. 1, p. 51 ("The delicate nature of the problem of segregation and the paramount interest of the State of Kansas in preserving the internal peace and tranquility of its people indicates that this is a question which can best be solved on the local level, at least until Congress declares otherwise"). Accord, *post,* at 2833 ("At a minimum, the plurality's views would threaten a surge of race-based litigation. Hundreds of state and federal statutes and regulations use racial classifications for educational or other purposes .... In many such instances, the contentious force of legal challenges to these classifications, meritorious or not, would displace earlier calm"); *post,* at 2835 ("Indeed, the consequences of the approach the Court takes today are serious. Yesterday, the plans under review were lawful. Today, they are not"); *post,* at 2835 – 2836 (predicting "further litigation, aggravating race-related conflict").

24 See also Statement of Appellees Opposing Jurisdiction and Motion to Dismiss or Affirm in *Davis v. County School Board,* O.T.1952, No. 191, p. 5 ("[I]t would be difficult to find from any field of law a legal principle more repeatedly and conclusively decided than the one sought to be raised by appellants"); Brief for Appellees on Reargument in *Davis v. County School Board,* O.T.1953, No. 4, pp. 46–47 ("If this case were to be decided solely on the basis of precedent, this brief could have been much more limited. There is ample precedent in the decisions of this Court to uphold school segregation"); Brief for Petitioners in *Gebhart v. Belton,* O.T.1952, No. 448, p. 27 ("Respondents ask this Court to upset a long established and well settled principle recognized by numerous state Legislatures, and Courts, both state and federal, over a long period of years"); Tr. of Oral Arg. in *Briggs v. Elliott,* et al., O.T.1953, No. 2 etc., at 79 ("But be that doctrine what it may, somewhere, sometime to every principle comes a moment of repose when it has been so often announced, so confidently relied upon, so long continued, that it passes the limits of judicial discretion and disturbance .... We relied on the fact that this Court had not once but seven times, I think it is, pronounced in favor of the separate but equal doctrine. We relied on the fact that the courts of last appeal of some sixteen or eighteen States have passed upon the validity of the separate but equal doctrine vis-a-vis the Fourteenth Amendment. We relied on the fact that Congress has continuously since 1862 segregated its schools in the District of Columbia"); App. D. Brief for Appellees in *Briggs v. Elliott,* O.T.1952, No. 101 (collecting citations of state and federal cases "[w]hich [e]nunciate the [p]rinciple that [s]tate [l]aws [p]roviding for [r]acial [s]egregation in the [p]ublic [s]chools do not [c]onflict with the Fourteenth Amendment"). Accord, *post,* at 2811 – 2812 ("[T]he Court set forth in *Swann* a basic principle of constitutional law—a principle of law that has found wide acceptance in the legal culture" (internal quotation marks omitted)); *post,* at 2813 ("Lower state and federal courts had considered the matter settled and uncontroversial even before this Court decided *Swann* "); *post,* at 2813 – 2814 ("Numerous state and federal courts explicitly relied upon *Swann*'s guidance for decades to follow"); *post,* at 2814 – 2815 (stating "how lower courts understood and followed *Swann*'s enunciation of the relevant legal principle"); *post,* at 2816 ("The constitutional principle enunciated in *Swann,* reiterated in subsequent cases, and relied upon over many years, provides, and has widely been thought to provide, authoritative legal guidance"); *post,* at 2833 ("[T]oday's opinion will require setting aside the laws of several States and many local communities"); *post,* at 2835 – 2836 ("And what has happened to *Swann?* To *McDaniel?* To *Crawford?* To *Harris?* To *School Committee of Boston?* To *Seattle School Dist. No. 1?* After decades of vibrant life, they would all, under the plurality's logic, be written out of the law").

25 Compare Brief for Appellees in *Davis v. County School Board,* O.T.1952, No. 191, at 16–17 (" 'It is by such practical considerations based on experience rather than by theoretical inconsistencies that the question of equal protection is to be answered' " (quoting *Railway Express Agency, Inc. v. New York,* 336 U.S. 106, 110, 69 S.Ct. 463, 93 L.Ed. 533 (1949))); Brief for

Appellees on Reargument in *Davis v. County School Board,* O.T.1953, No. 4, at 76 ("The question is a practical one for them to solve; it is not subject to solution in the theoretical realm of abstract principles"); Tr. of Oral Arg. in *Briggs v. Elliot* et al., O.T.1953, No. 2 etc., at 86 ("[Y]ou cannot talk about this problem just in a vacuum in the manner of a law school discussion"), with *post,* at 2830 – 2831 ("The Founders meant the Constitution as a practical document").

26 Compare Brief for Kansas on Reargument in *Brown v. Board of Education,* O.T.1953, No. 1, at 57 ("[T]he people of Kansas ... are abandoning the policy of segregation whenever local conditions and local attitudes make it feasible"); Brief for Appellees on Reargument in *Davis v. County School Board,* O.T.1953, No. 4, at 76 ("As time passes, it may well be that segregation will end"), with *post,* at 2810 ("[T]hey use race-conscious criteria in limited and gradually diminishing ways"); *post,* at 2826 ("[E]ach plan's use of race-conscious elements is *diminished* compared to the use of race in preceding integration plans"); *post,* at 2829 – 2830 (describing the "historically diminishing use of race" in the school districts).

27 It is no answer to say that these cases can be distinguished from *Brown* because *Brown* involved invidious racial classifications whereas the racial classifications here are benign. See *post,* at 2833–2834. How does one tell when a racial classification is invidious? The segregationists in *Brown* argued that their racial classifications were benign, not invidious. See Tr. of Oral Arg. in *Briggs v. Elliott,* et al., O.T.1953, No. 2 etc., at 83 ("It [South Carolina] is confident of its good faith and intention to produce equality for all of its children of whatever race or color. It is convinced that the happiness, the progress and the welfare of these children is best promoted in segregated schools"); Brief for Appellees on Reargument in *Davis v. County School Board,* O.T.1953, No. 4, at 82–83 ("Our many hours of research and investigation have led only to confirmation of our view that segregation by race in Virginia's public schools at this time not only does not offend the Constitution of the United States but serves to provide a better education for living for the children of both races"); Tr. of Oral Arg. in *Davis v. County School Board,* O.T.1952, No. 191, at 71 ("[T]o make such a transition, would undo what we have been doing, and which we propose to continue to do for the uplift and advancement of the education of both races. It would stop this march of progress, this onward sweep"). It is the height of arrogance for Members of this Court to assert blindly that their motives are better than others.

28 See also *id.,* at 8–9 ("It has been urged that [these state laws and policies] derive validity as a consequence of a long duration supported and made possible by a long line of judicial decisions, including expressions in some of the decisions of this Court. At the same time, it is urged that these laws are valid as a matter of constitutionally permissible social experimentation by the States. On the matter of stare decisis, I submit that the duration of the challenged practice, while it is persuasive, is not controlling .... As a matter of social experimentation, the laws in question must satisfy the requirements of the Constitution. While this Court has permitted the States to legislate or otherwise officially act experimentally in the social and economic fields, it has always recognized and held that this power is subject to the limitations of the Constitution, and that the tests of the Constitution must be met"); Reply Brief for Appellants on Reargument in *Briggs v. Elliott* et al., O.T.1953, No. 2 etc., pp. 18–19 ("The truth of the matter is that this is an attempt to place local mores and customs above the high equalitarian principles of our Government as set forth in our Constitution and particularly the Fourteenth Amendment. This entire contention is tantamount to saying that the vindication and enjoyment of constitutional rights recognized by this Court as present and personal can be postponed whenever such postponement is claimed to be socially desirable").

29 The dissent does not face the complicated questions attending its proposed standard. For example, where does the dissent's principle stop? Can the government force racial mixing against the will of those being mixed? Can the government force black families to relocate to white neighborhoods in the name of bringing the races together? What about historically black colleges, which have "established traditions and programs that might disproportionately appeal to one race or another"? *United States v. Fordice,* 505 U.S. 717, 749, 112 S.Ct. 2727, 120 L.Ed.2d 575 (1992) (THOMAS, J., concurring). The dissent does not and cannot answer these questions because the contours of the distinction it propounds rest entirely in the eye of the beholder.

30 Justice BREYER's good intentions, which I do not doubt, have the shelf life of Justice BREYER's tenure. Unlike the dissenters, I am unwilling to delegate my constitutional responsibilities to local school boards and allow them to experiment with race-based decisionmaking on the assumption that their intentions will forever remain as good as Justice BREYER's. See The Federalist No. 51, p. 349 (J. Cooke ed. 1961) ("If men were angels, no government would be necessary"). Indeed, the racial theories endorsed by the Seattle School Board should cause the dissenters to question whether local school boards should be entrusted with the power to make decisions on the basis of race. The Seattle school district's Website formerly contained the following definition of "cultural

racism": " 'Those aspects of society that overtly and covertly attribute value and normality to white people and whiteness, and devalue, stereotype, and label people of color as "other," different, less than, or render them invisible. Examples of these norms include defining white skin tones as nude or flesh colored, having a future time orientation, emphasizing individualism as opposed to a more collective ideology, defining one form of English as standard....' " See Harrell, School Web Site Removed: Examples of Racism Sparked Controversy, Seattle Post–Intelligencer, June 2, 2006, pp. B1, B5. After the site was removed, the district offered the comforting clarification that the site was not intended " 'to hold onto unsuccessful concepts such as melting pot or colorblind mentality.' " *Ibid.;* see also *ante,* at 2761, n. 14 (plurality opinion).

More recently, the school district sent a delegation of high school students to a "White Privilege Conference." See Equity and Race Relations White Privilege Conference, http://www.seattleschools.org/area/equityand race/whiteprivilegeconference.xml. One conference participant described "white privilege" as "an invisible package of unearned assets which I can count on cashing in each day, but about which I was meant to remain oblivious. White Privilege is like an invisible weightless knapsack of special provisions, maps, passports, codebooks, visas, clothes, tools, and blank checks." See White Privilege Conference, Questions and Answers, http://www.uccs.edu/ wpc/ faqs.htm; see generally Westneat, District's Obsessed with Race, Seattle Times, Apr. 1, 2007, p. B1 (describing racial issues in Seattle schools).

[1] Le Lys Rouge (The Red Lily) 95 (W. Stephens transl. 6th ed.1922).

[2] See, *e.g.,* J. Wilkinson, From *Brown* to *Bakke* 11 (1979) ("Everyone understands that *Brown v. Board of Education* helped deliver the Negro from over three centuries of legal bondage"); Black, The Lawfulness of the Segregation Decisions, 69 Yale L.J. 421, 424–425 (1960) ("History, too, tells us that segregation was imposed on one race by the other race; consent was not invited or required. Segregation in the South grew up and is kept going because and only because the white race has wanted it that way—an incontrovertible fact which in itself hardly consorts with equality").

[3] I have long adhered to the view that a decision to exclude a member of a minority because of his race is fundamentally different from a decision to include a member of a minority for that reason. See, *e.g., Adarand Constructors, Inc. v. Peña,* 515 U.S. 200, 243, 248, n. 6, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995) (STEVENS, J., dissenting); *Wygant v. Jackson Bd. of Ed.,* 476 U.S. 267, 316, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986) (same). This distinction is critically important in the context of education. While the focus of our opinions is often on the benefits that minority schoolchildren receive from an integrated education, see, *e.g., ante,* at 2753 – 2754 (THOMAS, J., concurring), children of *all* races benefit from integrated classrooms and playgrounds, see *Wygant,* 476 U.S., at 316, 106 S.Ct. 1842, 90 L.Ed.2d 260 ("[T]he fact that persons of different races do, indeed, have differently colored skin, may give rise to a belief that there is some significant difference between such persons. The inclusion of minority teachers in the educational process inevitably tends to dispel that illusion whereas their exclusion could only tend to foster it").

[4] THE CHIEF JUSTICE twice cites my dissent in *Fullilove v. Klutznick,* 448 U.S. 448, 100 S.Ct. 2758, 65 L.Ed.2d 902 (1980). See *ante,* at 2752, 2758. In that case, I stressed the importance of confining a remedy for *past* wrongdoing to the members of the injured class. See 448 U.S., at 539, 100 S.Ct. 2758. The present cases, unlike *Fullilove* but like our decision in *Wygant,* 476 U.S. 267, 106 S.Ct. 1842, 90 L.Ed.2d 260, require us to "ask whether the Board[s'] action [s] advanc[e] the public interest in educating children for the *future,*" *id*., at 313, 106 S.Ct. 1842 (STEVENS, J., dissenting) (emphasis added). See *ibid*. ("In my opinion, it is not necessary to find that the Board of Education has been guilty of racial discrimination in the past to support the conclusion that it has a legitimate interest in employing more black teachers in the future"). See also *Adarand,* 515 U.S., at 261–262, 115 S.Ct. 2097 (STEVENS, J., dissenting) ("This program, then, if in part a remedy for past discrimination, is most importantly a forward-looking response to practical problems faced by minority subcontractors").

[5] THE CHIEF JUSTICE states that the Massachusetts racial imbalance Act did not require express classifications. See *ante,* at 2762 – 2763, n. 16. This is incorrect. The Massachusetts Supreme Judicial Court expressly stated:

"The racial imbalance act requires the school committee of every municipality annually to submit statistics showing the percentage of nonwhite pupils in all public schools and in each school. Whenever the board finds that racial imbalance exists in a public school, it shall give written notice to the appropriate school committee, which shall prepare a plan to eliminate imbalance and file a copy with the board. 'The term "racial imbalance" refers to a ratio between nonwhite and other students in public schools which is

sharply out of balance with the racial composition of the society in which nonwhite children study, serve and work. For the purpose of this section, racial imbalance shall be deemed to exist when the per cent of nonwhite students in any public school is in excess of fifty per cent of the total number of students in such school.' " 352 Mass., at 695, 227 N.E.2d, at 731.

6 Compare *ante,* at 2767 ("It was not the inequality of the facilities but the fact of legally separating children on the basis of race on which the Court relied to find a constitutional violation in 1954"), with Juris. Statement in *School Comm. of Boston v. Board of Education,* O.T.1967, No. 759, p. 11 ("It is implicit in *Brown v. Board of Education*[,] 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873[(1954)], that color or race is a constitutionally impermissible standard for the assignment of school children to public schools. We construe *Brown* as endorsing Mr. Justice Harlan's classical statement in *Plessy v. Ferguson,* 163 U.S. 537, 559, 16 S.Ct. 1138, 41 L.Ed. 256 [(1896) (dissenting opinion)]: 'Our Constitution is color-blind, and neither knows nor tolerates classes among citizens' ").

7 In 1968 our mandatory jurisdiction was defined by the provision of the 1948 Judicial Code then codified at 28 U.S.C. § 1257, see 62 Stat. 929; that provision was repealed in 1988, see 102 Stat. 662.

8 For example, prior to our decision in *School Comm. of Boston,* the Illinois Supreme Court had issued an unpublished opinion holding unconstitutional a similar statute aimed at eliminating racial imbalance in public schools. See Juris. Statement in *School Comm. of Boston v. Board of Education,* O.T.1967, No. 759, at 9 ("Unlike the Massachusetts Court, the Illinois Supreme Court has recently held its law to eliminate racial imbalance unconstitutional on the ground that it violated the Equal Protection Clause of the Fourteenth Amendment"); *ibid.,* n. 1. However, shortly after we dismissed the Massachusetts suit for want of a substantial federal question, the Illinois Supreme Court reversed course and upheld its statute in the published decision that Justice BREYER extensively quotes in his dissent. See *Tometz v. Board of Ed., Waukegan City School Dist. No. 61,* 39 Ill.2d 593, 237 N.E.2d 498 (1968). In so doing, the Illinois Supreme Court acted in explicit reliance on our decision in *School Comm. of Boston.* See 39 Ill.2d, at 599–600, 237 N.E.2d, at 502 ("Too, the United States Supreme Court on January 15, 1968, dismissed an appeal in *School Committee of Boston v. Board of Education,* (Mass.1967) 352 Mass. 693, 227 N.E.2d 729, which challenged the statute providing for elimination of racial imbalance in public schools 'for want of a substantial federal question.' 389 U.S. 572, 88 S.Ct. 692, 19 L.Ed.2d 778").

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208 A.D.2d 247
Supreme Court, Appellate Division, Second Department, New York.

The PEOPLE of the State of New York, Appellant,
v.
CYPRESS HILLS CEMETERY, et al., Respondents.

Feb. 6, 1995.

Synopsis
State filed action against cemetery seeking injunction to prevent cemetery from performing burials in ground containing construction or demolition debris. The Supreme Court, Kings County, Huttner, J., entered order denying relief. State appealed. The Supreme Court, Appellate Division, Santucci, J., held that: (1) language of statute prohibiting use of construction and demolition debris for purpose of burying human remains was ambiguous; (2) burials on site containing construction and demolition debris violated statute, even though debris had been covered with 10–12 feet of topsoil; and (3) fact that tests performed on debris under topsoil revealed no hazardous or toxic wastes in excess of regulatory standards did not support creation of topsoil exception under statute.

Order reversed.

Attorneys and Law Firms

****301 *248** Dennis C. Vacco, Atty. Gen., New York City (Pamela A. Mann, Sean Delany, and Robert R. Molic, of counsel), for appellant.

Morrison & DeRoos, New York City (Edward A. Morrison, of counsel), for respondent.

Before BRACKEN, J.P., and LAWRENCE, SANTUCCI and GOLDSTEIN, JJ.

Opinion

SANTUCCI, Justice.

This is a case of statutory construction. The question presented is whether Not–For–Profit Corporation Law § 1510(m) (hereinafter ****302** N–PCL), which provides that no cemetery "shall use construction and demolition debris * * * for the purpose of burying human remains", is violated when a cemetery permits burials on a site which contains such material but only on condition that the site be first covered by 10 to 12 feet of topsoil. We conclude that this question should be answered in the affirmative.

Cypress Hills Cemetery (hereinafter Cypress Hills) was incorporated in or about 1848 as a nonprofit public cemetery corporation. It presently comprises in excess of 200 acres of land on the Brooklyn–Queens border. As a public cemetery corporation, Cypress Hills is subject to the provisions of N–PCL article 15.

In 1985, Cypress Hills embarked on a project to create additional grave plots within its borders using construction and demolition debris. The project was commenced with a contractor working without a written contract. Rather than receive monetary compensation, the contractor was permitted by Cypress Hills to dispose of construction and demolition debris on the grounds of the cemetery. In actuality, the contractor derived his revenue from fill suppliers, who were major road contractors for the City of New York, by finding a place for them to dispose of a byproduct of their work, to wit, landfill

composed of construction and demolition debris. When the project was completed, it resulted in the construction of a 40–foot–high mound to be used for burials, that is now known as Terrace Meadow.

***249** In 1989 Cypress Hills contracted with the same contractor to create several thousand additional new graves by excavating unused roadways within the cemetery and then filling in those areas with construction and demolition debris.

Following the public dedication of these grave sites and the opening by the cemetery of sales to the public, environmental testing took place at the direction of Cypress Hills' officers. The tests showed that the grave sites did not contain any hazardous or toxic wastes and did not pose any significant public health or environmental hazard.

Effective June 28, 1993, N–PCL 1510 was amended by adding a new subdivision (m), which provides in its entirety as follows:

> "No cemetery corporation or religious corporation having charge and control of a cemetery which heretofore has been or which hereafter may be used for burials, shall use construction and demolition debris, as that term is defined in 6 NYCRR 360–1.2, for the purpose of burying human remains" (L.1993, ch. 169, § 2).

Construction and demolition debris is defined by regulations promulgated by the New York State Department of Environmental Conservation (hereinafter the DEC) as:

> "uncontaminated solid waste resulting from the construction, remodeling, repair and demolition of utilities, structures and roads; and uncontaminated solid waste resulting from land clearing. Such waste includes, but is not limited to bricks, concrete and other masonry materials, soil, rock, wood (including painted, treated and coated wood and wood products), land clearing debris, wall coverings, plaster, drywall, plumbing fixtures, nonasbestos insulation, roofing shingles and other roof coverings, asphaltic pavement, glass, plastics that are not sealed in a manner that conceals other wastes, empty buckets 10 gallons or less in size and having no more than one inch of residue remaining on the bottom, electrical wiring and components containing no hazardous liquids, and pipe and metals that are incidental to any of the above" (6 NYCRR 360–1.2[b][38]).

The legislative sponsors of N–PCL 1510(m) explained that its purpose was to ensure purchasers of burial plots "their sacred burial by prohibiting the usage of construction and demolition debris for the burial of human remains", and they pointedly decried the use of such material for burials at Cypress Hills (Introducer's Mem in Support, Bill Jacket, L.1993, ch. 169).

On or about October 20, 1993, the Attorney–General commenced ***250** this action against Cypress Hills and its directors, *inter alia,* for a preliminary and permanent injunction prohibiting them from conducting any unauthorized activities, including continuing to perform burials in violation of N–PCL 1510(m).

****303** The defendants responded to the Attorney–General's complaint with a verified answer dated November 10, 1993, in which they denied the applicability of N–PCL 1510(m) to the activities engaged in by Cypress Hills.

By order to show cause dated November 9, 1993, the Attorney–General moved in the Supreme Court, *inter alia,* for a preliminary injunction prohibiting all burials in graves at Cypress Hills that were to be dug in fill consisting of any construction and demolition debris, and from continuing to sell such graves either directly or through selling agents. In an affidavit in opposition dated November 22, 1993, and supporting materials, the defendant Gerald B. Egan, the President and a director of Cypress Hills, claimed that there was no violation of N–PCL 1510(m) because the construction and demolition debris at the cemetery had been covered with "ten to twelve feet of topsoil".

In a memorandum decision dated November 29, 1993, the Supreme Court explained its conditional grant of the Attorney–General's motion for a preliminary injunction as follows:

> "[I]nsofar as the State seeks * * * [to] prohibi[t] defendants from performing burials on the Terrace Meadows mound or any other sites consisting of construction and demolition debris * * * [they are enjoined from doing so] *unless defendants demonstrate that ten to twelve feet of topsoil covers such construction debris* (and a greater amount where bodies are to be buried 'three-deep'), for all burials to be conducted henceforward" (emphasis supplied).

The Attorney–General appeals from that portion of an order dated January 4, 1994, entered upon the foregoing memorandum decision, as excepted graves that were covered with topsoil from the application of N–PCL 1510(m).

Shortly after the Supreme Court's determination of November 29, 1993, the State discovered that little or no topsoil had actually been placed over the debris-landfill used to create the new gravesites. Nevertheless, in a letter to the Supreme Court dated December 28, 1993, the cemetery asserted that there was no violation of the Supreme Court's directive or of the statute because, as burials were required to be performed in ***251** the future, the defendants planned to remove the construction and demolition debris from each affected grave, place topsoil at the bottom of the grave, and, after the casket was placed in the grave, fill it in with indigenous topsoil.

The Attorney–General subsequently moved by order to show cause dated January 14, 1994, for "further preliminary injunctive relief", contending that the defendants' "plan" violated the plain meaning of N–PCL 1510(m), as well as the January 4, 1994, order of the Supreme Court requiring a uniform covering of topsoil. By order dated February 1, 1994, the Supreme Court denied the motion for further preliminary injunctive relief without explanation, and the Attorney–General also appeals from that order.

In the interpretation of statutes, the purpose of the act and the objectives to be accomplished must be considered. It is the legislative intent that is the great and controlling principle, and the primary consideration of the courts in the construction of statutory provisions is to ascertain and give effect to that intent (*see,* McKinney's Consolidated Laws of N.Y., Book 1, Statutes, § 92[a]; *Niesig v. Team I,* 76 N.Y.2d 363, 369, 559 N.Y.S.2d 493, 558 N.E.2d 1030; *Ferres v. New Rochelle,* 68 N.Y.2d 446, 451, 510 N.Y.S.2d 57, 502 N.E.2d 972; *Matter of Allstate Ins. Co. v. Libow,* 106 A.D.2d 110, 114, 482 N.Y.S.2d 860; *affd* 65 N.Y.2d 807, 493 N.Y.S.2d 128, 482 N.E.2d 923).

In effecting that objective, the courts are first bound to ascertain the legislative intent from a literal reading of the words of the statute (McKinney's Consolidated Laws of N.Y., Book 1, Statutes, § 92[b], § 94; *see, Patrolmen's Benevolent Assn. v. City of New York,* 41 N.Y.2d 205, 208, 391 N.Y.S.2d 544, 359 N.E.2d 1338; *Matter of Allstate Ins. Co. v. Libow, supra,* 106 A.D.2d at 114, 482 N.Y.S.2d 860). Where the legislative intent is clear and unambiguous from the language of the statute, the words used should be construed so as to give effect to their plain meaning (*see, e.g., Matter of State of New York v. Ford Motor Co.,* 74 N.Y.2d 495, 500, 549 N.Y.S.2d 368, 548 N.E.2d 906; ****304** *Finger Lakes Racing Assn. v. New York State Racing & Wagering Bd.,* 45 N.Y.2d 471, 479–480, 410 N.Y.S.2d 268, 382 N.E.2d 1131), and resort to extrinsic evidence, such as the legislative history of the statute, is inappropriate (*see,* McKinney's Consolidated Laws of N.Y., Book 1, Statutes, § 120; *Giblin v. Nassau County Med. Center,* 61 N.Y.2d 67, 74, 471 N.Y.S.2d 863, 459 N.E.2d 856; *Rubin & Sons v. Clay Equip. Corp.,* 184 A.D.2d 168, 170, 591 N.Y.S.2d 596). Only where the legislative intent of a statute cannot be ascertained from a literal reading may the courts go outside the statute in an endeavor to find its true meaning (McKinney's Consolidated Laws of N.Y., Book 1, Statutes, § 92[b]). Such is the situation in the case at bar.

The pertinent language of the amended statute providing ***252** that "[n]o cemetery corporation * * * shall use construction and demolition debris * * * for the purpose of burying human remains" (N–PCL 1510[m]) does not distinguish between (1) the use of such debris in the actual physical act of covering, e.g., being thrown onto, and/or immediately surrounding the coffin in the grave site, and (2) the mere, even passive, existence of such debris anywhere in the grave site, e.g., 10 to 12 feet below the coffin. Because the statute does not make this distinction, certain questions arise. For instance, if the construction and demolition debris exists only 10 to 12 feet below the coffin, may it still be said that it is used in the act or procedure of burying the human remains? Is the whole grave site contaminated by the existence of any construction and demolition debris anywhere within it? The answers to such questions are not readily garnered by a literal reading of the amended statute. Thus, there is a measure of ambiguity inherent in the statute which we are now called upon to interpret.

As noted, where there is ambiguity about the meaning and intent of a statute, it is proper to resort to its legislative history for clarification. In doing so, it becomes clear that the purpose of the statute is to prohibit the burial of human remains in any construction and demolition debris, and that the "topsoil exception" fashioned by Supreme Court defeats the statute's intent of protecting the sanctity of human burials. For example, the New York State Senate Introducer's Memorandum in Support of Senate Bill 5090 and Assembly Bill 5633 (hereinafter S.5090/A.5633) states specifically as follows:

> "This bill would prevent the further exploitation of consumers of burial plots and insure their sacred burial by prohibiting the usage of construction and demolition debris for the burial of human remains" (Introducer's Mem in Support, Bill Jacket, L.1993, ch. 169).

Moreover, in Assembly Sponsor Catherine Nolan's June 21, 1993, letter to Governor Cuomo concerning S.5090/A.5633 she states, *inter alia,* as follows:

> "[C]onstruction and demolition debris is not suitable material to bury human remains. This bill to prohibit the burial of human remains in construction and demolition debris is unfortunately necessary to prevent further the desecration of the dead. This bill would prevent the further exploitation of consumers of burial plots and insure their sacred burial". (Bill Jacket, L.1993, ch. 169).

The June 25, 1993, Memorandum from Executive Deputy Secretary of State, James N. Baldwin, to Honorable Elizabeth D. Moore, Counsel to the Governor, recommending approval of ***253** S.5090 (Mem of Exec. Deputy Secretary of State, Bill Jacket, L.1993, ch. 169), states in relevant part as follows:

> "The bill is a response to the practice of certain cemeteries of using construction and demolition debris as fill in lands given over to the interment of deceased persons. Such debris is not necessarily screened for the presence of toxic materials. Clearly, the loved ones of a deceased person have an interest in the prevention of the use of such materials *on or about* the gravesite.
>
> "[t]his bill * * * *flatly prohibits* the use of construction and demolition debris in cemetery land associated with burials" (emphasis supplied).

The above examples from the legislative history of the amendment, and the legislative history taken as a whole, lead to the conclusion that the legislative intent of N–PCL 1510(m) is to ban the use and/or existence of construction and demolition debris anywhere ****305** and everywhere in the grave site, whether on, in, immediately surrounding, or under the coffin, etc. That is so because the very presence of construction and demolition debris in the burial mound, regardless of its exact location, contaminates the whole site and desecrates the dead, thus defeating the statute's principal purpose.

Furthermore, the topsoil exception to the statute is merely an "artificial construction" conceived by Supreme Court. The court may have created such an exception to make more land available to inner city cemeteries such as Cypress Hills and to help them in alleviating limited space and increased financial problems. However, by creating the exception, the court usurped the power of the Legislature which clearly chose not to include such an exception in the amended statute. Thus, where, as here, the law describes a particular act, thing or person to which it shall apply, the inference must be drawn that "what is omitted or not included was intended to be omitted or excluded" (McKinney's Consolidated Laws of N.Y., Book 1, Statutes, § 240; *see, Matter of Alonzo M. v. New York City Dept. of Probation,* 72 N.Y.2d 662, 665, 536 N.Y.S.2d 26, 532 N.E.2d 1254; *Patrolmen's Benevolent Assn. of New York v. City of NY, supra,* 41 N.Y.2d at 208–209, 391 N.Y.S.2d 544, 359 N.E.2d 1338).

Finally, it should be noted that any environmental problems associated with the burial mound, e.g., subsurface fires, odors, and the venting of gases, are only secondarily alluded to by the sponsors of the bill. These potential dangers were not the main impetus for the bill. Consequently, the fact that certain tests performed at the landfill by environmental agencies ***254** revealed that no hazardous or toxic wastes were contained therein in excess of regulatory standards, and thus that no significant public health or environmental hazards presently existed, is not determinative of the main issue. Rather, since the statute was amended primarily to prevent the desecration of the dead and to insure their sacred burial, the court erred in creating an exception which defeated the legislative intent.

ORDERED that the order dated January 4, 1994, is reversed insofar as appealed from, on the law, and the words "unless a sufficient amount of topsoil, in no event less than ten to twelve feet of topsoil and a greater amount of topsoil in any grave site that has been or will be sold to accommodate three burials in a single grave plot, uniformly covers the construction and demolition debris in Terrace Meadow and any other area where grave sites were constructed using construction and demolition debris" are deleted; and it is further,

ORDERED that the appeal from the order dated February 1, 1994, is dismissed as academic, in light of our determination of the appeal from the order dated January 4, 1994; and it is further,

ORDERED that the plaintiff is awarded one bill of costs.

BRACKEN, J.P., and LAWRENCE and GOLDSTEIN, JJ., concur.

All Citations

208 A.D.2d 247, 622 N.Y.S.2d 300

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111 F.4th 596
United States Court of Appeals, Fifth Circuit.

Honorable Terry PETTEWAY; Honorable Derreck Rose; Honorable Penny Pope, Plaintiffs—Appellees,
v.
GALVESTON COUNTY, Texas; Mark Henry, in his official capacity as Galveston County Judge; Dwight D. Sullivan, in his official capacity as Galveston County Clerk, Defendants—Appellants,
United States of America, Plaintiff—Appellee,
v.
Galveston County, Texas; Galveston County Commissioners Court; Mark Henry, in his official capacity as Galveston County Judge, Defendants—Appellants,
Dickinson Bay Area Branch NAACP; Galveston Branch NAACP; Mainland Branch NAACP; Galveston LULAC Council 151; Edna Courville; Joe A. Compian, Plaintiffs—Appellees,
v.
Galveston County, Texas; Mark Henry, in his official capacity as Galveston County Judge; Dwight D. Sullivan, in his official capacity as Galveston County Clerk, Defendants—Appellants.

No. 23-40582
|
FILED August 1, 2024

Synopsis

Background: Individual plaintiffs, advocacy organizations, and the United States each brought separate actions challenging newly enacted districting plan for county commissioner elections, which, plaintiffs alleged, violated the Fourteenth Amendment, the Fifteenth Amendment, and § 2 of the Voting Rights Act (VRA) by diluting the voting power of county's African American and Latino voters. After consolidating the cases for bench trial, the United States District Court for the Southern District of Texas, Jeffrey V. Brown, J., 698 F.Supp.3d 952, entered judgment that the plan violated the VRA. County appealed. The Court of Appeals, 86 F.4th 214, affirmed. County successfully petitioned for rehearing en banc.

Holdings: The Court of Appeals, en banc, Wilson, Circuit Judge, held that:

section 2 of the VRA does not authorize separately protected minority groups to aggregate their populations for purposes of a vote-dilution claim; overruling *Campos v. City of Baytown*, 840 F.2d 1240, and

section 2 of the VRA does not require political subdivisions to draw precinct lines for the electoral benefit of distinct minority groups that share political preferences but lack the cementing force of race or ethnicity.

Judgment of district court reversed; remanded to district court.

Ho, Circuit Judge, concurred in part, concurred in the judgment, and filed opinion.

Haynes, Circuit Judge, dissented and filed opinion.

Douglas, Circuit Judge, dissented and filed opinion, which Stewart, Graves, Higginson, and Ramirez, Circuit Judges, joined.

***597** Appeal from the United States District Court for the Southern District of Texas USDC Nos. 3:22-CV-117, 3:22-CV-57, 3:22-CV-93, Jeffrey Vincent Brown, U.S. District Judge

Attorneys and Law Firms

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Before Richman, Chief Judge, and Jones, Smith, Barksdale, Stewart, Elrod, Southwick, Haynes, Graves, Higginson, Willett, Ho, Duncan, Engelhardt, Oldham, Wilson, Douglas, and Ramirez, Circuit Judges.

ON PETITION FOR REHEARING EN BANC

Edith H. Jones, Circuit Judge, joined by Richman*, Chief Judge, and Smith, Barksdale, Elrod, Southwick, Willett, Ho†, Duncan, Engelhardt, Oldham, and Wilson, Circuit Judges:

***599** The issue in this *en banc* case is whether Section 2 of the Voting Rights Act authorizes coalitions of racial and language minorities to claim vote dilution in legislative redistricting. In an increasingly multiracial and multi-language polity, the importance of this issue is obvious. We overrule this court's decision in *Campos v. City of Baytown*, 840 F.2d 1240, 1244 (5th Cir. 1988), and its progeny, which allowed such claims to be maintained.

In 2021, the Galveston County Commissioners Court enacted a new districting plan for county commissioner elections. The enacted plan eliminated the county's sole majority-minority precinct, which had existed since 1991. The majority-minority population in that precinct was composed of two distinct minority groups, blacks and Hispanics.

In 2022, three sets of plaintiffs challenged the enacted plan in federal court, claiming that it diluted the votes of a coalition of black and Hispanic voters in violation of Section 2 of the Voting Rights Act. *See* 52 U.S.C. § 10301. The district court conducted a bench trial and rendered judgment in Plaintiffs' favor. In doing so, it applied this court's decision in *Campos v. City of Baytown*, which held that distinct minority groups may aggregate their populations for purposes of vote dilution claims under Section 2. 840 F.2d at 1244. This holding was critical to Plaintiffs' Section 2 claim because neither the black population nor the Hispanic population of Galveston County is large enough on its own to "constitute a majority" in a reasonably configured county commissioner precinct. *See Thornburg v. Gingles*, 478 U.S. 30, 50, 106 S. Ct. 2752, 2766, 92 L.Ed.2d 25 (1986) (describing this first precondition to vote dilution claims under Section 2).[1]

The panel decision affirmed the district court's judgment but called for the *en banc* court to reconsider *Campos*'s holding authorizing what are often called "minority coalition claims." Having vacated the panel opinion for rehearing *en banc*, we conclude that coalition claims do not comport with Section 2's statutory language or with Supreme Court cases interpreting Section 2, particularly *Bartlett v. Strickland*, 556 U.S. 1, 129 S. Ct. 1231, 173 L.Ed.2d 173 (2009). We OVERRULE *Campos*, REVERSE the district court's judgment, and REMAND for further proceedings.

I. Background

A. Factual Background

According to the 2020 census, Galveston County, Texas, has a total population of 350,682. The citizen voting-age population of the county is 58 percent white, 22.5 percent Hispanic, and 12.5 percent black. The Hispanic population is evenly dispersed throughout the county, while the black population is concentrated in the center of the county, i.e., in Texas City, La Marque, Dickinson, Hitchcock, and the city of Galveston.

Galveston County is governed by a county commissioners court, which consists of one county judge, elected county-wide, and four county commissioners elected from single-member precincts. *See* TEX. CONST. art. V, §§ 16, 18(b). The current ***600** county judge is a Republican. Three of the commissioners are also Republicans, and one is a Democrat. One of the Republican commissioners is a black man. The only Democrat, Commissioner Stephen Holmes, is also a black man.

Commissioner Holmes represents Precinct 3. From 1991 to 2021, Precinct 3 was the county's only majority-minority precinct, and its borders encompassed the center of the county. The majority-minority population of Precinct 3 was composed of both black and Hispanic citizens of voting age. As of 2020, blacks and Hispanics together amounted to 58 percent of the precinct's citizen voting-age population.

The county undertook redistricting efforts in 2021 after receiving the 2020 census data. Two redistricting maps, or plans, were proposed during the redistricting process. Map 1, a "minimal change" plan, retained Precinct 3 as a majority-minority precinct, with a 31 percent black and 24 percent Hispanic citizen voting-age population. Map 2, an "optimal change" plan, did not contain a majority-minority precinct and reduced the minority population of Precinct 3 to the lowest of the four precincts. The Commissioners Court voted to enact Map 2. Only Commissioner Holmes voted against the enacted plan.

The Petteway Plaintiffs, the NAACP Plaintiffs, and the United States challenged the enacted plan in federal court. All three sets of plaintiffs claimed that the enacted plan violated Section 2 of the Voting Rights Act by diluting the votes of Galveston County's black and Hispanic voters. The Petteway Plaintiffs and NAACP Plaintiffs also pleaded that the enacted plan was (1) intentionally discriminatory in violation of the Fourteenth and Fifteenth Amendments and (2) racially gerrymandered in violation of the Fourteenth Amendment.

Following a ten-day bench trial, the district court found that the enacted plan violated Section 2 and enjoined Galveston County from using the plan. "[T]he enacted plan," the district court wrote, "illegally dilutes the voting power of Galveston County's Black and Latino voters by dismantling Precinct 3, the county's historic and sole majority-minority commissioners precinct." In reaching this decision, the district court followed *Campos*, 840 F.2d at 1244, which allows distinct minority groups to aggregate their populations when alleging vote dilution under Section 2. The district court declined to reach the intentional discrimination and racial gerrymandering claims brought by the Petteway Plaintiffs and NAACP Plaintiffs because the relief they requested with respect to those claims was no broader than the relief they were entitled to under Section 2. Galveston County appealed.

Following the original appellate panel's recommendation, this court voted to rehear the case *en banc* and subsequently stayed the district court's remedial orders pending resolution of *en banc* proceedings. 86 F.4th 1146 (5th Cir. 2023).

B. Legal Background

Section 2 of the Voting Rights Act provides:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 10303(f)(2) of this title, as provided in subsection (b).
>
> (b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political ***601** processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

52 U.S.C. § 10301.

Subsection (a) of the quoted statute incorporates by reference Section 4(f)(2) of the Voting Rights Act, codified at 52 U.S.C. § 10303(f)(2). That provision prohibits discrimination in voting against "language minorities," which the Act elsewhere defines as "persons who are American Indian, Asian American, Alaskan Natives or of Spanish heritage." *Id.* § 10310(c)(3). The 1975 Amendments to the Voting Rights Act added the protections for language minorities, who were not covered under

the original version of the Act (enacted in 1965). *See* Pub. L. No. 94–73, 89 Stat. 400 (1975).

The 1982 Amendments to the Voting Rights Act added subsection (b) to Section 2. Pub. L. No. 97–205, 96 Stat. 131 (1982). The new subsection was Congress's response to the Supreme Court's controversial decision in *City of Mobile v. Bolden*, which held that proof of discriminatory intent was required for vote dilution claims under both the Fifteenth Amendment and Section 2 as it was then written. 446 U.S. 55, 61–65, 100 S. Ct. 1490, 1496–98, 64 L.Ed.2d 47 (1980). Subsection (b) abrogated *Bolden*'s holding as to Section 2 by adopting the "results test" from the leading pre-*Bolden* vote dilution case, *White v. Regester*, 412 U.S. 755, 766, 93 S. Ct. 2332, 2339, 37 L.Ed.2d 314 (1973). *See* S. Rep. No. 97-417, at 2 (1982).

In 1986, the Supreme Court decided *Thornburg v. Gingles*, which provides the framework for analyzing vote dilution claims under Section 2 today. 478 U.S. 30, 106 S. Ct. 2752, 92 L.Ed.2d 25. The *Gingles* Court specified three preconditions that a minority group must prove to succeed on a vote dilution claim. "First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a [reasonably configured] single-member district." *Id.* at 50, 106 S. Ct. at 2766. "Second, the minority group must be able to show that it is politically cohesive." *Id.* at 51, 106 S. Ct. at 2766. And "[t]hird, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it ... to defeat the minority's preferred candidate." *Id.*, 106 S. Ct. at 2766–67.

If these three preconditions are established, the minority group must then show that, "based on the totality of circumstances," the electoral process is not "equally open" to its members. 52 U.S.C. § 10301(b). This final step of the analysis entails considering several factors, often called the Senate factors because they originated from the Senate Judiciary Committee Report accompanying the 1982 Amendments. *Gingles*, 478 U.S. at 36–37, 106 S. Ct. at 2759 (citing S. Rep. No. 97-417, at 28–29); *see also Brnovich v. Democratic Nat'l Comm.*, 594 U.S. 647, 668–75, 141 S. Ct. 2321, 2338–41, 210 L.Ed.2d 753 (2021).

The primary issue here concerns the first *Gingles* precondition, which requires the minority group to be sufficiently large to constitute a majority in a reasonably ***602** configured single-member district. The Supreme Court has not decided whether distinct minority groups may aggregate their populations to satisfy this requirement. It expressly declined to do so on at least two occasions. *See Growe v. Emison*, 507 U.S. 25, 41, 113 S. Ct. 1075, 1085, 122 L.Ed.2d 388 (1993) ("[a]ssuming (without deciding) that it was permissible for the District Court to combine distinct ethnic and language minority groups for purposes of assessing compliance with § 2," and then holding that the coalition had failed to prove cohesion under the second *Gingles* precondition); *Bartlett v. Strickland*, 556 U.S. 1, 13–14, 129 S. Ct. 1231, 1242–43, 173 L.Ed.2d 173 (2009) (plurality opinion) ("We do not address [coalition claims] here.").

This court first held that distinct minority groups may aggregate their populations under Section 2 in *LULAC v. Midland I.S.D.*, 812 F.2d 1494, 1500–01 (5th Cir. 1987). Judge Higginbotham dissented, disagreeing with the panel's holding on aggregation. *Id.* at 1504. The panel opinion was later vacated on rehearing *en banc*, and the *en banc* court decided the case on different grounds. 829 F.2d 546 (5th Cir. 1987). *Midland I.S.D.* thus no longer serves as the operative precedent on coalition claims in this circuit.

Instead, the operative precedent is *Campos v. City of Baytown*, decided a year later. 840 F.2d 1240 (5th Cir. 1988). In *Campos*, this court upheld a district court's finding that the City of Baytown's at-large election system for city council diluted the votes of a coalition of black and Hispanic voters in violation of Section 2. On the propriety of coalition vote dilution claims under Section 2, the court reasoned only that "[t]here is nothing in the law that prevents the plaintiffs from identifying the protected aggrieved minority to include both Blacks and Hispanics." *Id.* at 1244. It explained that Section 2 protects the voting rights of both racial and language minorities. *Id.* "If, together, they are of such numbers residing geographically so as to constitute a majority in a single member district, they cross the *Gingles* threshold as potentially disadvantaged voters." *Id.* Further, to satisfy the second *Gingles* precondition, there must be proof that the coalition "together votes in a cohesive manner for the minority candidate." *Id.* at 1245. Thus, "if the statistical evidence is that Blacks and Hispanics together vote for the Black or Hispanic candidate, then cohesion is shown." *Id.* Judge Higginbotham, joined by five other judges, dissented from denial of rehearing *en banc* in *Campos*, again disagreeing with the panel's holding on minority coalitions. 849 F.2d 943, 944–46 (5th Cir. 1988).

Five years after *Campos*, this court, sitting *en banc*, decided *LULAC v. Clements*, 999 F.2d 831 (5th Cir. 1993). Judge Higginbotham wrote the opinion for the court, which held that a coalition of black and Hispanic voters who challenged Texas's election system for trial judges failed to prove vote dilution under Section 2. Notably, the *Clements* court did not

"revisit" whether distinct minority groups may aggregate their populations under Section 2. *Id.* at 864. It instead relied on precedent, explaining that "we have treated the issue as a question of fact, allowing aggregation of different minority groups where the evidence suggests that they are politically cohesive." *Id.* A concurring opinion would have decided the case solely on the ground that coalition claims are impermissible. *Id.* at 894–98 (Jones, J., concurring).

Only one other circuit court has thoroughly analyzed the issue before this court today. Sitting *en banc*, the Sixth Circuit created a circuit split by concluding that Section 2 does not authorize minority coalition vote dilution claims. *Nixon v. Kent Cnty.*, 76 F.3d 1381, 1387 (6th Cir. 1996) ***603** ("A textual analysis of § 2 reveals no word or phrase which reasonably supports combining separately protected minorities."). The court's opinion relied heavily on dissenting and concurring opinions from judges of this court in the cases described above.

The Eleventh Circuit reached the opposite conclusion in an earlier opinion that followed, without reasoning, this court's precedent. *See Concerned Citizens of Hardee Cnty. v. Hardee Cnty. Bd. of Comm'rs*, 906 F.2d 524, 526 (11th Cir. 1990) ("Two minority groups (in this case blacks and hispanics) may be a single section 2 minority if they can establish that they behave in a politically cohesive manner." (citing *Campos*, 840 F.2d at 1244, and *Midland I.S.D.*, 812 F.2d at 1500–02)). As a three-judge district court in Georgia recently observed, it would be inaccurate to characterize the Eleventh Circuit's decision as containing a holding that coalition claims are permissible under Section 2, because the court ultimately held against the coalition on other grounds. *Ga. State Conf. of the NAACP v. Georgia*, No. 1:21-cv-05338-ELB-SCJ-SDG, 2023 WL 7093025, at *16 (N.D. Ga. Oct. 26, 2023).

Finally, the Second, Seventh, and Ninth Circuits have resolved cases involving minority coalitions without discussing or deciding whether coalition claims are permissible. *See Pope v. Cnty. of Albany*, 687 F.3d 565, 572 & n.5 (2d Cir. 2012) (affirming denial of preliminary injunction for coalition of black and Hispanic voters because voters failed to show likelihood of success on third *Gingles* precondition); *Bridgeport Coal. for Fair Representation v. City of Bridgeport*, 26 F.3d 271, 278 (2d Cir.) (holding that coalition of black and Hispanic voters were entitled to preliminary injunction), *vacated*, 512 U.S. 1283, 115 S. Ct. 35, 129 L.Ed.2d 931 (1994); *Frank v. Forest Cnty.*, 336 F.3d 570, 575–76 (7th Cir. 2003) (calling coalition claims "problematic," but ultimately rejecting plaintiffs' coalition claim for lack of political cohesion); *Badillo v. City of Stockton*, 956 F.2d 884, 890–91 (9th Cir. 1992) (holding that coalition of black and Hispanic voters lacked evidence of political cohesion). Plaintiffs are wrong to characterize these cases as holding that coalition claims are permissible under Section 2. Opinions that "never squarely addressed [an] issue" and "at most assumed the" answer are not precedential "by way of *stare decisis*." *Brecht v. Abrahamson*, 507 U.S. 619, 631, 113 S. Ct. 1710, 1718, 123 L.Ed.2d 353 (1993).

II. Discussion

After reconsidering *Campos en banc*, this court holds that Section 2 of the Voting Rights Act does not authorize separately protected minority groups to aggregate their populations for purposes of a vote dilution claim. The analysis that leads to this conclusion is divided into five sections. We explain first that minority coalition claims are inconsistent with the text of Section 2. Second, because the statutory text is clear, we need not address the legislative history, but Plaintiffs' argument based on pre-1982 cases involving minority coalitions is meritless in any event. Third, coalition claims are inconsistent with Supreme Court cases rejecting similar "sub-majority" vote dilution claims, especially *Bartlett v. Strickland.* Fourth, other considerations, including the poor track record of coalition claims thus far and their tension with the proviso against proportional representation and with the purposes of the Voting Rights Act, also disfavor continuing to recognize coalition claims. And fifth, stare decisis does not require us to adhere to our erroneous decision in *Campos.*

*604 A. Statutory Text

The text of Section 2 does not authorize coalition claims, either expressly or by implication. "It is well established that 'when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.' " *Lamie v. U.S. Trustee*, 540 U.S. 526, 534, 124 S. Ct. 1023, 1030, 157

L.Ed.2d 1024 (2004) (quoting *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6, 120 S. Ct. 1942, 1947, 147 L.Ed.2d 1 (2000)).

Nowhere does Section 2 indicate that two minority groups may combine forces to pursue a vote dilution claim. On the contrary, the statute identifies the subject of a vote dilution claim as "a class," in the singular, not the plural. Section 2(b)'s results test requires a showing that the electoral processes "are not equally open to participation by members of *a class* of citizens protected by subsection (a) in that *its* members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 51 U.S.C. § 10301(b) (emphasis added). Twice after, the subsection uses the phrase "a protected class." "Had Congress chosen explicitly to protect minority coalitions it could have done so by defining the 'results' test in terms of protected *classes* of citizens. It did not." *Clements*, 999 F.2d at 894 (Jones, J., concurring).

Nor can "a class" be read to encompass two distinct minority groups. "[A] class" under Section 2(b) is defined according to the characteristic that all its members share, and by virtue of which its members are "protected by subsection (a)." The defining characteristics for purposes of Section 2 are race, color, or membership in one of several language minority groups. Section 2(a) makes this clear by tying the statute's protection of voting rights to the particular race, color, or language minority status of individual citizens. As the Sixth Circuit observed in *Nixon*, "The Act protects a citizen's right to vote from infringement because of, or 'on account of,' that *individual's* race or color or membership in a protected language minority."[2] 76 F.3d at 1386 (citing provision now codified at 52 U.S.C. § 10301(a)); *see also* 52 U.S.C. § 10303(f)(2) (prohibiting states and political subdivisions from "deny[ing] or abridg[ing] the right of any citizen of the United States to vote *because he is a member of a language minority group*" (emphasis added)). Two individuals who do not share the same defining characteristic are not members of the same "class"; they are members of two distinct classes, and ***605** their vote dilution claims must be analyzed separately.[3]

This reading of the statute is not mere surmise. The second sentence of Section 2(b) provides, "The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered" when determining whether the electoral process is not equally open to members of the class. 52 U.S.C. § 10301(b). An inquiry into the electoral success of "a protected class" makes sense only if it is restricted to a specific racial or language-minority group. For example, black voters in San Antonio would hardly be persuaded that a vote dilution claim lacked merit simply because whites, a minority in the majority-Hispanic city, were being elected to local office.[4] Nor would Hispanics in Houston see citywide elected black politicians as evidence against any dilution of Hispanic votes. The election of black officials would be an irrelevant "circumstance" in determining whether a state or political subdivision is diluting the strength of Hispanic voters.

Section 2(b)'s use of the phrase "protected class" also supports our interpretation. In discrimination law, this phrase is typically used to acknowledge membership in a particular racial or ethnic group, when racial discrimination is alleged. *See, e.g., Alkhawaldeh v. Dow Chem. Co.*, 851 F.3d 422, 426 (5th Cir. 2017) (describing *prima facie* case of employment discrimination under Title VII as requiring proof that the plaintiff "(1) is a member of a protected class, (2) was qualified for the position that he held, (3) was subject to an adverse employment action, and (4) was treated less favorably than others similarly situated outside of his protected class"). It is membership in the discrete racial or ethnic group that triggers protection and guides analysis of whether the plaintiff has been discriminated against. So too here.

None of Plaintiffs' textual arguments to the contrary is convincing. First, Plaintiffs urge us to read "a class of citizens protected by subsection (a)" to encompass all voters who claim a violation of the right protected by subsection (a), regardless whether they share the same race. This argument relies in part on the last antecedent grammatical rule, "according to which a limiting clause or phrase [here, the phrase 'protected by subsection (a)'] should ordinarily be read as modifying only the noun or phrase that it immediately follows [here, 'citizens' rather than 'class']." *See Barnhart v. Thomas*, 540 U.S. 20, 26, 124 S. Ct. 376, 380, 157 L.Ed.2d 333 (2003). As the Supreme Court has explained, however, "this rule is not an absolute and can assuredly be overcome by other indicia of meaning." *Id.* Section 2 provides other indicia of meaning by using "protected class" as shorthand for "a class of citizens protected by subsection (a)." In the shorthand form, "protected" plainly modifies "class," not "citizens."

***606** Plaintiffs' interpretation also relies in part on Rule 23 of the Federal Rules of Civil Procedure, which governs class actions. The United States contends that the term "class" in Section 2(b) should be read "in Rule 23's sense," to mean "a group of individuals with a common injury and legal position." But Rule 23's sense of class does not transfer neatly to

Section 2. After all, the *object* of Section 2(b) is to determine whether "a protected class" has suffered injury. Defining the class *in terms of* injury begs the question whether the class is "protected by subsection (a)" in the first place. And the answer to that question is determined by the individual characteristic of race, color, or language minority status, not by injury. Moreover, Rule 23 provides a procedural device to a class of persons with legal claims provided by other, underlying substantive law, whereas Section 2(b) is itself a source of that substantive law for members of a protected class.

Next, Plaintiffs invoke the Dictionary Act to argue that "class" should be read as "classes." The Dictionary Act provides, "In determining the meaning of any Act of Congress, unless the context indicates otherwise—words importing the singular include and apply to several persons, parties, or things...." 1 U.S.C. § 1. For reasons identified above, in Section 2 "the context indicates otherwise." It is clear from Section 2(b)'s second sentence (concerning the electoral successes of a protected class), for instance, that "a protected class" encompasses only one class, not multiple racial or language minority classes.

Finally, relying on the Supreme Court's decision in *Chisom v. Roemer*, 501 U.S. 380, 111 S. Ct. 2354, 115 L.Ed.2d 348 (1991), Plaintiffs argue that an expansive interpretation of Section 2 is warranted by the statute's broad remedial purpose. In *Chisom*, the Supreme Court held that Section 2 applies to the election of judges, even though the statute refers only to "representatives." In doing so, the Court observed that the Voting Rights Act was enacted for the broad remedial purpose of eliminating racial discrimination in voting and "should be interpreted in a manner that provides 'the broadest possible scope' in combating" such discrimination. *Id.* at 403, 111 S. Ct. at 2368 (citation omitted).

Chisom does not support Plaintiffs' interpretation of the statute. The Supreme Court recently emphasized that "vague notions of a statute's 'basic purpose' are ... inadequate to overcome the words of its text regarding the *specific* issue under consideration." *Montanile v. Bd. of Trs. of Nat'l Elevator Indus. Health Benefit Plan*, 577 U.S. 136, 150, 136 S. Ct. 651, 661, 193 L.Ed.2d 556 (2016) (quoting *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 261, 113 S. Ct. 2063, 2071, 124 L.Ed.2d 161 (1993)). In this case, *nothing* in the text of Section 2 supports a conclusion that distinct minority groups may aggregate their populations; the text, in fact, supports the opposite conclusion. Nor does anything in the statutory history of Section 2 support aggregation. That distinguishes the interpretative question in this case from the one in *Chisom.* As the Sixth Circuit explained:

> In *Chisom*, it was "undisputed that § 2 applied to judicial elections prior to the 1982 Amendment." ... Unlike *Chisom*, here it is undisputed that the Voting Rights Act has *never* permitted coalition suits by its terms, and that no mention is made of them anywhere in the legislative history.

Nixon, 76 F.3d at 1389 (quoting *Chisom*, 501 U.S. at 390, 111 S. Ct. at 2361).

Congress's silence on the aggregation issue, textually and otherwise, ultimately means that minority vote dilution coalitions are impermissible. *Campos* got things precisely backwards when it held that coalition claims are permissible merely ***607** because Section 2 does not expressly prohibit them. 840 F.2d at 1244. It is Congress's failure to *expressly authorize* coalition claims that is dispositive of the issue. *See Campos*, 849 F.2d at 945 (Higginbotham, J., dissenting from denial of rehearing *en banc*) ("Playing with the structure of local government in an effort to channel political factions is a heady game; we should insist that Congress speak plainly when it would do so."); *see also Bond v. United States*, 572 U.S. 844, 858, 134 S. Ct. 2077, 2089, 189 L.Ed.2d 1 (2014) ("[I]t is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides the usual constitutional balance of federal and state powers." (citation and quotation marks omitted)). That Congress did not even impliedly authorize coalition claims—but instead impliedly prohibited them—underscores the error in *Campos*'s holding.

The statutory text points to only one conclusion, that coalition claims are impermissible.

B. Legislative History

Plaintiffs and Galveston County each contend that the legislative history accompanying the 1975 and 1982 Amendments to the Voting Rights Act favors their respective interpretations of Section 2. The parties' arguments are uniformly weak, "nicely prov[ing] th[e] point" that legislative history "on the whole, [is] more likely to confuse than to clarify." *Conroy v. Aniskoff*, 507 U.S. 511, 519, 113 S. Ct. 1562, 1567, 123 L.Ed.2d 229 (1993) (Scalia, J., concurring) (emphasis removed). Fortunately,

we need not address these arguments at all, because the text of Section 2 is clear. *See Adkins v. Silverman*, 899 F.3d 395, 403 (5th Cir. 2018) ("[W]here a statute's text is clear, courts should not resort to legislative history." (citing *BedRoc Ltd. v. United States*, 541 U.S. 176, 183, 124 S. Ct. 1587, 1593, 158 L.Ed.2d 338 (2004))).

One argument that overlaps with Plaintiffs' legislative history arguments is, however, worth addressing, in part because it received attention during oral argument. Plaintiffs and their Amici contend that the legislative history shows that Congress was aware of cases involving coalition claims and yet chose not to include a single-race requirement. This purportedly demonstrates that Congress intended to authorize coalition claims. *See Nixon*, 76 F.3d at 1395 (Keith, J., dissenting) ("If Congress was thus aware that more than one minority group could be considered to constitute one plaintiff class in determining the availability of Voting Rights Act protection, certainly the absence of an explicit prohibition of minority coalition claims compels a construction of Section 2 which allows them.").

This argument is riddled with distortion and error. The cases on which it is based include *White v. Regester*, 412 U.S. 755, 93 S. Ct. 2332, 37 L.Ed.2d 314 (1973), *Graves v. Barnes*, 408 F. Supp. 1050 (W.D. Tex. 1976), *Wright v. Rockefeller*, 376 U.S. 52, 84 S. Ct. 603, 11 L.Ed.2d 512 (1964), and *United Jewish Organizations of Williamsburgh, Inc. v. Carey*, 430 U.S. 144, 97 S. Ct. 996, 51 L.Ed.2d 229 (1977). Unsurprisingly, none of these cases is cited in the legislative history for the proposition that coalitions of minority voters are protected from vote dilution under Section 2 or under the Constitution. Nor do any of the cases hold that coalition claims are permissible as a statutory or constitutional matter. Nor do any of them involve vote dilution claims under Section 2.

Indeed, *White* did not involve a coalition claim at all. There, the Supreme Court held that one multimember district encompassing Dallas County, Texas, diluted the votes of black voters, and that a *separate* ***608** multimember district encompassing Bexar County diluted the votes of Hispanic voters. 412 U.S. at 765–70, 93 S. Ct. at 2339–41. *Graves*, a continuation of the *White* lawsuit on remand, did involve a coalition claim, under the Fourteenth and Fifteenth Amendments, but it did not address whether such claims are permissible.[5] 408 F. Supp. at 1052. *Wright* also involved a coalition claim, again under the Fourteenth and Fifteenth Amendments, but it too did not address whether such claims are permissible and in fact held *against* the minority coalition. 376 U.S. at 53, 58, 84 S. Ct. at 604, 606. Finally, *Carey* only tangentially involved a coalition of minority voters. The plaintiffs in that case were Hasidic Jews, and only Hasidic Jews; they unsuccessfully challenged the constitutionality of a redistricting plan that had been revised after the Attorney General objected, during Section 5 preclearance, to the original redistricting plan's alleged dilution of the "voting strength of nonwhites (blacks and Puerto Ricans)." 430 U.S. at 149–50, 97 S. Ct. at 1002.

That none of these cases interpreted or even applied Section 2 defeats any statutory stare decisis argument based on Supreme Court precedent.[6] To be sure, the pre-1982 Fourteenth and Fifteenth Amendment cases that Plaintiffs cite are still potentially relevant to interpreting Section 2. Even in the absence of legislative history, "[w]e assume that Congress is aware of existing law when it passes legislation," *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32, 111 S. Ct. 317, 325, 112 L.Ed.2d 275 (1990); and Congress, in 1982, clearly was aware of existing (or pre-existing) voting rights law, since it drew the relevant language of Section 2(b)'s results test from *White*. Yet this helps Plaintiffs very little. None of the pre-1982 cases that Plaintiffs cite decided, as a matter of law, whether coalition claims are permissible. The issue evidently never was presented. "Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Webster v. Fall*, 266 U.S. 507, 511, 45 S. Ct. 148, 149, 69 L.Ed. 411 (1925). Coalition claims were, therefore, not part of the existing body of law with which Congress had to contend in 1982, and the argument that Congress impliedly authorized such claims by failing to include a single-race qualifier in Section 2 is meritless.

C. Supreme Court Precedent

Supreme Court precedent also disfavors Plaintiffs' preferred interpretation of Section 2. As explained above, the first *Gingles* precondition requires proof that the minority group is sufficiently large to constitute a majority in a reasonably configured single-member district. *Gingles*, 478 U.S. at 50, 106 S. Ct. at 2766. On two ***609** occasions, the Supreme Court has rejected Section 2 plaintiffs' attempts to circumvent this requirement, which the Plaintiffs in this case again attempt to circumvent.

In *LULAC v. Perry*, 548 U.S. 399, 126 S. Ct. 2594, 165 L.Ed.2d 609 (2006), the Court held that Section 2 does not require the creation of "influence districts." Influence districts are those in which a minority group cannot elect the candidate of its choice because of its sub-majority numbers, but the group may still play an influential role in the electoral process. The Court held that the ability of members of a minority group to influence an election in a district was insufficient to state a claim for vote dilution under Section 2. "The opportunity 'to elect representatives of their choice,' requires more than the ability to influence the outcome between some candidates, none of whom is their candidate of choice." *Id.* at 445, 126 S. Ct. at 2625 (citing provision now codified at 52 U.S.C. § 10301(b)).

The more important case for present purposes, however, is *Bartlett v. Strickland*, 556 U.S. 1, 129 S. Ct. 1231, 173 L.Ed.2d 173 (2009), which answered a question that the Court had previously reserved, *viz.*, whether Section 2 requires the creation of "crossover districts." *See Perry*, 548 U.S. at 443, 126 S. Ct. at 2624; *Voinovich v. Quilter*, 507 U.S. 146, 154, 113 S. Ct. 1149, 1155, 122 L.Ed.2d 500 (1993). Crossover districts are those in which a minority group makes up less than a majority of the voting-age population but "is large enough to elect the candidate of its choice with help from voters who are members of the majority and who cross over to support the minority's preferred candidate." *Bartlett*, 556 U.S. at 13, 129 S. Ct. at 1242. The *Bartlett* Court held that Section 2 does not require the creation of such districts.

The plurality opinion[7] explained that crossover districts are inconsistent with Section 2 and with the *Gingles* preconditions. Section 2 requires a showing that minorities "have less opportunity than other members of the electorate to ... elect representatives of their choice." *Id.* at 14, 129 S. Ct. at 1243 (quoting provision now codified at 52 U.S.C. § 10301(b)). When, however, a minority group constitutes less than a majority of the citizen voting-age population in a reasonably configured district, it has "no better or worse opportunity to elect a candidate than does any other group of voters with the same relative voting strength." *Id.* The group cannot elect its preferred candidate on its own; it would need assistance from other voters, "*including other racial minorities*, or whites, *or both*." *Id.* (emphases added). "Recognizing a § 2 claim in this circumstance would grant minority voters 'a right to preserve their strength for the purposes of forging an advantageous political alliance' " with voters outside the minority group. *Id.* at 14–15, 129 S. Ct. at 1243 (quoting *Hall v. Virginia*, 385 F.3d 421, 431 (4th Cir. 2004)). But "[n]othing in § 2 grants special protection to a minority group's right to form political coalitions." *Id.* at 15, 129 S. Ct. at 1243 ("[M]inority voters are not immune from the obligation to pull, haul, and trade to find common political ground." (quoting *Johnson v. De Grandy*, 512 U.S. 997, 1020, 114 S. Ct. 2647, 2661, 129 L.Ed.2d 775 (1994))). Indeed, unless the minority group can show that it has the potential to elect a representative ***610** of its *own choice* in a single-member district, "there neither has been a wrong nor can be a remedy" under Section 2. *Id.* (quoting *Growe*, 507 U.S. at 41, 113 S. Ct. at 1084).[8]

The *Bartlett* plurality then expressly reaffirmed the first *Gingles* precondition, which requires proof that the minority group is large enough to constitute a majority in a reasonably configured single-member district. The alternatives proposed by proponents of crossover claims would be unworkable, wrote the plurality, as they "would place courts in the untenable position of predicting many political variables and tying them to race-based assumptions." *Id.* at 17, 129 S. Ct. at 1244. The majority-minority rule established by *Gingles*, by contrast, provides "an objective, numerical test: Do minorities make up more than 50 percent of the voting-age population in the relevant geographic area?" *Id.* at 18, 129 S. Ct. at 1245.[9]

Each of these reasons articulated in *Bartlett* for rejecting crossover claims applies with equal force to coalition claims. First, coalition claims extend Section 2's protection to what are essentially political coalitions of distinct racial groups. *See Midland I.S.D.*, 812 F.2d at 1504 (Higginbotham, J., dissenting) (explaining that minority coalitions are "almost indistinguishable from political minorities as opposed to racial minorities"). But *Bartlett* rejected the argument that Section 2 "grants special protection to a minority group's right to form political coalitions." 556 U.S. at 15, 129 S. Ct. at 1243. As an amicus brief states, "*Bartlett* thus rejected the argument that 'opportunity' under Section 2 includes the opportunity to form a majority with other voters—whether those other voters are 'other racial minorities, whites, or both.' " *See id.* at 14, 129 S. Ct. at 1243. When, as here, a minority group cannot constitute a majority in a single-member district without combining with members of another minority group, Section 2 does not provide protection. "[T]here neither has been a wrong nor can be a remedy." *Growe*, 507 U.S. at 41, 113 S. Ct. at 1084.

In addition, coalition claims pose the same practical problems as crossover claims in determining the existence of the *Gingles* preconditions, especially whether the distinct minority groups are politically cohesive. One need only transpose *Bartlett*'s language to indicate the problems as they apply to the claim in this case:

> What percentage of [black] voters supported [Hispanic]-preferred candidates in the past? How reliable would the

> [coalition] votes be in future elections? What types of candidates have [black] and [Hispanic] voters supported together in the past and will those trends continue? Were past [coalition] votes based on incumbency and did that depend on race? What are the historical turnout rates among [black] and [Hispanic] minority voters and will they stay the same?

Bartlett, 556 U.S. at 17, 129 S. Ct. at 1245. Restricting Section 2's coverage to discrete ***611** minority groups obviates the need to confront these questions, which add judicially unmanageable complexity to the *Gingles* analysis. In fact, contemporary demographics suggest there is no stopping point if minority coalitions may be formed out of any minority racial or language groups. In *Growe*, for instance, the Supreme Court overturned (on other grounds) a remedial district that would have included blacks and "three separately identifiable minority groups." *Growe*, 507 U.S. at 38, 113 S. Ct. at 1083. The factual complexity of coalition claims only increases as the number of minority groups within the coalition increases.

Accordingly, consistent with *Bartlett*, we reject Plaintiffs' attempt to circumvent the majority-minority requirement by forming a political coalition composed of distinct racial groups.

D. Other Observations

Several other observations are not applicable to our statutory construction but are relevant in responding to the dissents and to Plaintiffs' contentions. From an empirical standpoint, when litigated to judgment, coalition claims often fail, especially for lack of political cohesion, as in *Growe*, 507 U.S. at 41, 113 S. Ct. at 1085.[10] This low success rate shows that the questions identified in the above discussion of *Bartlett* have indeed proven difficult to answer affirmatively. Perhaps that is because they are not meant to be answered in vote dilution lawsuits at all. *See Clements*, 999 F.2d at 897 (Jones, J., concurring) (arguing that the low success rate of coalition claims shows the "utter bankruptcy" of the coalition theory and the "factual complexity" of claims premised on that theory).

Plaintiffs attempt to frame the low success rate positively, as evidence that recognizing such claims carries limited real-world consequences. But coalition claims have significant practical consequences for both legislative bodies and the judiciary. As the *Nixon* court observed, legislators seeking in good faith to undertake redistricting will be uncertain how to consider more than one racial minority or language group. 76 F.3d at 1391. Should they aim for one "coalition" district or two separate minority districts? How can their decisions avoid having considerations of race "predominate" in legislative line-drawing? *See, e.g., Cooper v. Harris*, 581 U.S. 285, 292, 137 S. Ct. 1455, 1464, 197 L.Ed.2d 837 (2017); *Shaw v. Hunt*, 517 U.S. 899, 906–07, 116 S. Ct. 1894, 1901, 135 L.Ed.2d 207 (1996).

Moreover, minority coalition suits, even if they fail, are extraordinarily costly and time-consuming for public entities to litigate. To avoid these costs, defendants will often settle or will take preemptive redistricting actions in anticipation of litigation, even though the actions might be legally unsound or unnecessary. The mere availability of the theory of action, then, has real impacts on voters of all races.

Finally, federal courts are ill-suited to resolve minority coalition claims. No legal principle can explain the superiority of one redistricting choice over any other as applied to more than one racial or language minority, nor do Section 2 or *Gingles* speak to such choices. Hence, absent intentional discrimination or racial gerrymandering, courts are incapable of revisiting the legislative redistricting choices under the guise of assessing actionable vote dilution. Such choices are quintessentially political ***612** and, like questions raised by political gerrymandering, are not susceptible of judicial decisionmaking. *Cf. Rucho v. Common Cause*, 588 U.S. 684, 139 S. Ct. 2484, 204 L.Ed.2d 931 (2019). These problems exist only because *Campos* created minority coalition vote dilution claims.

Despite these adverse consequences, Plaintiffs urge this court to continue the "current approach" of allowing coalition claims when there is proof that the distinct minority groups are politically cohesive under the second *Gingles* precondition. The "current approach," however, is indefensible because it "begs the question of statutory construction altogether." *See Clements*, 999 F.2d at 895 (Jones, J., concurring). The statutory question is whether Section 2 *allows* distinct minority groups to aggregate their populations. For reasons identified above, the answer to that question is no, and Plaintiffs cannot prove the first *Gingles* precondition as a result. That they might be able to prove the second precondition is irrelevant.

Second, by providing representation to a statutorily protected minority group despite its sub-majority numbers, coalition

claims may "cross the line from protecting minorities against racial discrimination to the prohibited ... goal of mandating proportional representation." *Id.* at 896 (Jones, J., concurring); *see also Allen v. Milligan*, 599 U.S. 1, 28, 143 S. Ct. 1487, 1509, 216 L.Ed.2d 60 (2023) ("Forcing proportional representation is unlawful and inconsistent with this Court's approach to implementing § 2."). In this case, for instance, Galveston County's black community, comprising only 12.5 percent of the county's citizen voting-age population, would not be able to elect a commissioner of its choice in the absence of a coalition. With the minority coalition, however, the black community is represented by one-fourth (25 percent) of the county commissioners. That exceeds proportional representation.[11]

Finally, the Voting Rights Act implemented the Fifteenth Amendment in order to create equality of access to the vote for black Americans. Section 2 extended the Act by adding, first, language minorities, and then the results test to remedy cases where distinct minorities had been excluded from effective group representation in legislative bodies. By any measure, the Act has accomplished its original purposes with great success. This *en banc* court's decision will in no way imperil such success. Our decision in *Campos*, however, *extended* Section 2 into racial and ethnic territory that extinguishes the line between a group's immutable individual characteristics, which may signal real political cohesiveness, and opportunistic political combinations. It was this aspect of coalition claims that Judge Higginbotham objected to most vehemently from the start. *Midland I.S.D.*, 812 F.2d at 1504 (Higginbotham, J., dissenting). This court will not remain in the forefront of authorizing litigation, not compelled by law or the Supreme Court, whose principal effects are to (a) supplant legislative redistricting by elected representatives with judicial fiat; (b) encourage divisively counting citizens by race and ethnicity; and (c) displace the fundamental principle of democratic rule by the majority with balkanized interests.

***613 E. Stare Decisis**

Plaintiffs invoke stare decisis to support this court's existing precedent. Plaintiffs' arguments do not apply any of the typical stare decisis factors[12] but instead rely on two propositions: (1) that the operative precedent here has more weight because it was decided by this court *en banc*, and (2) that stare decisis is particularly strong when the underlying precedent interprets a statute.

First, the contention that this court's *en banc* decision in *LULAC v. Clements*, 999 F.2d 831 (5th Cir. 1993), is the operative precedent is wrong. Judge Higginbotham, the most vocal opponent of aggregation at the time, wrote the *Clements* decision for the court, which disposed of the minority coalition's Section 2 claims on other grounds. The opinion applied this court's precedent authorizing coalition claims and expressly stated that it would not "revisit" the issue. *Id.* at 864. The concurrence argued that the court "should have" addressed the coalition issue and should have held that Section 2 does not allow aggregation. *Id.* at 894 (Jones, J., concurring). *Clements* cannot, therefore, be said to have issued an *en banc* holding on coalition claims, and the *Campos* panel decision is the operative precedent.

Second, statutory stare decisis is not a compelling barrier to overturning *Campos*. The Supreme Court has recognized that "*stare decisis* carries enhanced force when a decision ... interprets a statute." *Kimble v. Marvel Ent., LLC*, 576 U.S. 446, 456, 135 S. Ct. 2401, 2409, 192 L.Ed.2d 463 (2015). But the justification for applying this rule at the circuit court level is weak, at best. *See* Amy Coney Barrett, *Statutory Stare Decisis in the Courts of Appeals*, 73 Geo. Wash. L. Rev. 317, 318 (2005) ("Whatever the merits of statutory stare decisis in the Supreme Court, the inferior courts have no sound basis for following the Supreme Court's practice."); *see also Planned Parenthood v. Kauffman*, 981 F.3d 347, 369 (5th Cir. 2020) (en banc) (noting that our stare decisis "analysis is not as exacting as that undertaken by the Supreme Court of the United States"). Plaintiffs cite no majority opinion of this court giving enhanced stare decisis effect to prior statutory interpretations. *But see Smallwood v. Ill. Cent. R.R. Co.*, 385 F.3d 568, 587 (5th Cir. 2004) (en banc) (Smith, J., dissenting); *Bhandari v. First Nat'l Bank of Com.*, 829 F.2d 1343, 1353 (5th Cir. 1987) (Higginbotham, J., concurring). "Nor has our en banc court hesitated to" overturn erroneous statutory interpretations. *United States v. Anderson*, 885 F.2d 1248, 1255 (5th Cir. 1989) (en banc). Any hesitation is especially unwarranted here, given the existence of a circuit split on coalition claims. *See id.* at 1255 n.12 ("[C]ongressional silence is not of great significance, given the split in the circuits ....").

In the end, *Campos*'s holding on aggregation is notable for its meager reasoning and for the magnitude of its error. Plaintiffs have offered no persuasive justification for this court to adhere to *Campos*.

III. Conclusion

Galveston County's democratically elected Commissioners Court enacted Map 2. The district court determined that this map was unlawful under Section 2 of the Voting Rights Act and required the commissioners ***614** court to adopt a new one with a minority-majority precinct for the county's black and Hispanic voters. Having reconsidered *Campos*, we hold that this decision was wrong. Section 2 does not require political subdivisions to draw precinct lines for the electoral benefit of distinct minority groups that share political preferences but lack the cementing force of race or ethnicity. *Campos v. City of Baytown*, 840 F.2d 1240 (5th Cir. 1988), and its progeny are OVERRULED.

Accordingly, we REVERSE the judgment of the district court as to the Section 2 claim and REMAND for the district court to consider the intentional discrimination and racial gerrymandering claims brought by the Petteway Plaintiffs and the NAACP Plaintiffs.[13]

James C. Ho, Circuit Judge, concurring in part and concurring in the judgment:

I agree that the text of Section 2 of the Voting Rights Act and governing Supreme Court precedent foreclose vote dilution claims like the ones presented here. I write to briefly explain how I reach that conclusion.

"[T]hree members of the Supreme Court have suggested that courts should not decide vote dilution claims under Section 2 of the Voting Rights Act at all." *Harding v. County of Dallas*, 948 F.3d 302, 316 (5th Cir. 2020) (Ho, J., concurring in part and dissenting in part) (citing *Holder v. Hall*, 512 U.S. 874, 946, 114 S.Ct. 2581, 129 L.Ed.2d 687 (1994) (Thomas, J., joined by Scalia, J., concurring in the judgment), and *Abbott v. Perez*, 585 U.S. 579, 622, 138 S.Ct. 2305, 201 L.Ed.2d 714 (2018) (Thomas, J., joined by Gorsuch, J., concurring)).

That's why there was no majority opinion in *Bartlett v. Strickland*, 556 U.S. 1, 129 S.Ct. 1231, 173 L.Ed.2d 173 (2009). A three-Justice plurality concluded that Section 2 does not require the creation of crossover districts. Justice Thomas, joined by Justice Scalia, concurred only in the judgment, reiterating their longstanding view from *Holder* that Section 2 does not permit *any* vote dilution claim. *Id.* at 26, 129 S. Ct. 1231.

So a majority of the Justices agreed in *Bartlett* that, at a minimum, Section 2 does not require crossover districts. And the plurality's analysis also logically forecloses the coalition district theory presented here, as the en banc majority correctly explains.

Accordingly, the en banc majority is right to overturn our circuit precedent in *Campos v. City of Baytown*, 840 F.2d 1240 (5th Cir. 1988).

* * *

In *Hamilton v. Dallas County*, 79 F.4th 494 (5th Cir. 2023), the en banc court overturned our precedent to bring our circuit in line with Title VII of the Civil Rights Act. Today, the en banc court overturns our precedent to bring our circuit in line with Section 2 of the Voting Rights Act. In *Hamilton*, we concluded that our longstanding precedent construed Title ***615** VII too narrowly. Today, we conclude that our longstanding precedent construes Section 2 too broadly. But whether our precedent unduly narrowed or broadened the reach of a federal statute, our duty is the same. We reconcile our circuit precedent with the governing law, regardless of whose ox is gored.

Haynes, Circuit Judge, dissenting:

I respectfully dissent from the decision to overturn *Campos v. City of Baytown*, 840 F.2d 1240 (5th Cir. 1988). In my view, *Campos* properly concluded that § 2 of the Voting Rights Act allows for a group of minority voters to aggregate their populations to bring a vote dilution claim as long as the minority coalition satisfies the *Gingles*[14] preconditions. *See* 840 F.2d at 1244. The district court in this case found that the plaintiffs satisfied all the *Gingles* preconditions and met their burden to prove a § 2 violation. Because I cannot identify any reversible error of fact or law in the district court's reasoning, I would affirm on the same basis that the district court granted relief to the plaintiffs. Thus, I respectfully dissent from the majority opinion's decision.

Douglas, Circuit Judge, joined by Stewart, Graves, Higginson, and Ramirez, Circuit Judges, dissenting:

Today, the majority finally dismantled the effectiveness of the Voting Rights Act in this circuit, leaving four decades of en banc precedent flattened in its wake.[15] Because the majority reaches an atextual and ahistorical conclusion to overturn our own en banc precedent, I dissent.

I

I begin today by providing what the majority does not: context.

First, I engage in a discussion of the history of the Voting Rights Act ("VRA"). Next, I discuss the development of the law surrounding minority coalition claims. Finally, I detail Galveston County's storied history of voting discrimination. Because the "very essence" of a § 2 claim, as the United States Supreme Court has made clear, is that "social and historical conditions" interact with the electoral process in such a way that the " 'electoral structure operates to minimize or cancel out' minority voters' 'ability to elect their preferred candidates,' " *Allen v. Milligan*, 599 U.S. 1, 17-18, 143 S.Ct. 1487, 216 L.Ed.2d 60 (2023) (quoting *Thornburg v. Gingles*, 478 U.S. 30, 47-48, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986)), we cannot, as the majority does, ignore these conditions as we engage in our analysis.

A

After the emancipation of enslaved peoples, Congress passed and the states ratified the Fifteenth Amendment to enshrine in the United States Constitution the right to vote for all citizens, regardless of race. Despite the sweeping language and lofty goals of the Fifteenth Amendment, it lacked enforcement. To remedy its failure, in 1965, Congress passed the VRA. Unlike the Fifteenth Amendment, the VRA had teeth, and it proved to be an extremely effective method of regulating discriminatory ***616** voting practices employed by the states throughout the 1900s. In the fifty years after the VRA's passage, Congress closely monitored its implementation and courts' interpretations. If the VRA failed to achieve its goals, and if the Supreme Court's interpretation was misaligned with Congress' interpretation, Congress acted through the amendments process.

1

"The right to vote is the essence of a democratic society and 'preservative of all rights.' " *Hopkins v. Watson*, 108 F.4th 371, 392 (5th Cir. 2024) (Dennis, J., dissenting) (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 370, 6 S. Ct. 1064, 30 L.Ed. 220 (1886)). "It has been repeatedly recognized that all qualified voters have a constitutionally protected right to vote, and to have their votes counted." *Reynolds v. Sims*, 377 U.S. 533, 554, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964) (internal citations omitted). And "it is 'as equally unquestionable that the right to have one's vote counted is as open to protection as the right to put a ballot in a box.' " *Id.* This is because "[t]he right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government." *Id.* at 555, 84 S.Ct. 1362. And, as the Supreme Court has stated, "the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Id.* Through the Fifteenth Amendment and the VRA, Congress attempted to address "the subtle, as well as the obvious, state regulations which have the effect of denying citizens their right to vote because of their race." *Allen v. State Bd. of Elecs.*, 393 U.S. 544, 566, 89 S.Ct. 817, 22 L.Ed.2d 1 (1969).

Ratified in 1870, the Fifteenth Amendment provides that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." U.S. Const. amend. XV, § 1. Though "the immediate concern of the Amendment was to guarantee to the emancipated slaves the right to vote, ... the Amendment goes beyond it." *Rice v. Cayetano*, 528 U.S. 495, 512, 120 S.Ct. 1044, 145 L.Ed.2d 1007 (2000). Indeed, in granting protection to all persons, not just members of a particular race, the Amendment was designed "to reaffirm the equality of races at the most basic level"—the right to vote. *Id.* The Supreme Court has eloquently spoken on the importance of the Fifteenth Amendment: "A resolve so absolute required language as simple in command as it was comprehensive in reach. Fundamental in purpose and effect and self-executing in operation, the Amendment prohibits all provisions denying or abridging the voting franchise of any citizen or class of citizens on the basis of race." *Id.*

However, "[t]hough the commitment was clear, the reality remained far from the promise." *Id.* at 513, 120 S.Ct. 1044; *see also Allen*, 599 U.S. at 10, 143 S.Ct. 1487 ("In the century that followed, however, the [Fifteenth] Amendment proved little more than a parchment promise."). "Manipulative devices and practices were soon employed" to disenfranchise voters of color. *Rice*, 528 U.S. at 513, 120 S.Ct. 1044 (collecting references to manipulative devices, including grandfather clauses, procedural hurdles, White primaries, registration challenges, racial gerrymandering, and interpretation tests). These devices essentially "render[ed] the right to vote illusory." *Allen*, 599 U.S. at 10, 143 S.Ct. 1487.

The problems that the Fifteenth Amendment attempted to solve were not unique ***617** to Black Americans. After the Civil War, segregation and Jim Crow laws plagued Black and Latino citizens alike. Unfortunately, and as the Supreme Court has recently recognized, "Congress stood up to little of it; 'the first century of congressional enforcement of the Fifteenth Amendment can only be regarded as a failure.' " *Allen*, 599 U.S. at 10, 143 S.Ct. 1487 (alteration in original) (quoting *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 197, 129 S.Ct. 2504, 174 L.Ed.2d 140 (2009)).

To remedy the "failure" of the Fifteenth Amendment, and spurred by the Civil Rights movement, Congress enacted the VRA in 1965. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 445 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1). The VRA was enacted by Congress as a means of " 'attack[ing] the blight of voting discrimination' across the Nation." *Reno v. Bossier Par. Sch. Bd.*, 520 U.S. 471, 476, 117 S.Ct. 1491, 137 L.Ed.2d 730 (1997); *see also Chisom v. Roemer*, 501 U.S. 380, 403, 111 S.Ct. 2354, 115 L.Ed.2d 348 (1991) ("Congress enacted the Voting Rights Act of 1965 for the broad remedial purpose of 'rid[ding] the country of racial discrimination in voting.' "). In enacting the VRA, "the voluminous legislative history of the Act" illuminates two points. *South Carolina v. Katzenbach*, 383 U.S. 301, 309, 86 S.Ct. 803, 15 L.Ed.2d 769 (1966). "First: Congress felt itself confronted by an insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution." *Id.* And second: "Congress concluded that the unsuccessful remedies which it had prescribed in the past would have to be replaced by sterner and more elaborate measures in order to satisfy the clear commands of the Fifteenth Amendment." *Id.* As such, the Supreme Court has made clear that "the Act should be interpreted in a manner that provides 'the broadest possible scope' in combating racial discrimination." *Chisom*, 501 U.S. at 403, 111 S.Ct. 2354 (quoting *Allen v. State Bd. of Elections*, 393 U.S. 544, 567, 89 S.Ct. 817, 22 L.Ed.2d 1 (1969)).

In particular, § 2 of the VRA "was designed as a means of eradicating voting practices that 'minimize or cancel out the

voting strength and political effectiveness of minority groups.' " *Reno*, 520 U.S. at 479, 117 S.Ct. 1491 (quoting S. Rep. No. 97-417, at 4 (1982)). As initially enacted, "§ 2 closely tracked the language of the Amendment it was adopted to enforce." *Brnovich v. Democratic Nat'l Comm.*, 594 U.S. 647, 656, 141 S.Ct. 2321, 210 L.Ed.2d 753 (2021). Accordingly, § 2 simply read: "No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color." Voting Rights Act § 2 (1965).

Because of its many enforcement mechanisms, the VRA was able to do what the Fifteenth Amendment could not—indeed, "in only sixteen years' time, many considered the VRA 'the most successful civil rights statute in the history of the Nation.' " *Allen*, 599 U.S. at 10, 143 S.Ct. 1487 (quoting S. Rep. No. 97-417, at 111 (1982), *as reprinted in* 1982 U.S.C.C.A.N. 177). Over the next fifty years, Congress substantively amended the VRA four times.

2

In 1975, Congress amended § 2 to include a prohibition against discrimination on the basis of language. *Chisom*, 501 U.S. at 392, 111 S.Ct. 2354. Congress recognized a need to explicitly extend the protections of § 2 to other groups that suffered ***618** from voting discrimination. Congress recognized that, like Black voters, "[l]anguage minority citizens ... must overcome the effects of discrimination as well as efforts to minimize the impact of their political participation." S. Rep. No. 94-295, at 25, 28–29 (1975), *as reprinted in* 1975 U.S.C.C.A.N. 774, 791. That was particularly so in states like Texas, which Congress recognized had a "long history of discriminating against members of [Black and Latino communities] in ways similar to the myriad forms of discrimination practiced against [Black voters] in the South." *Id.* at 25, 28-29.

Also in its 1975 amendments, Congress made clear that where it intended a single group requirement, it was capable of expressly saying so. The amendments prescribed that states and political subdivisions must provide voting materials, including ballots, in non-English languages if a language minority makes up more than five percent of the citizens of voting age. 42 U.S.C. § 1973aa-1b (codified as amended at 52 U.S.C. § 10303(f)(3)). The language of the 1975 Amendments specifically stated that the five percent must be made of "members of a *single* language minority." *Id.* (emphasis added); *cf. Loughrin v. United States*, 573 U.S. 351, 358, 134 S.Ct. 2384, 189 L.Ed.2d 411 (2014) ("When 'Congress includes particular language in one section of a statute but omits it in another' ... this Court 'presumes' that Congress intended a difference in meaning.") (alteration in original).

Moreover, the Senate Report to the 1975 Amendments reveals that Congress explicitly relied on cases involving minority coalition claims as part of the amendment process, signaling its knowledge of courts' practices of accepting minority coalition suits. Congress relied on *Coalition for Education in District One v. Board of Elections of the City of New York*, 495 F.2d 1090, 1091 (2d Cir. 1974) ("*CEDO*"). In that case, the United States Court of Appeals for the Second Circuit affirmed a district court's finding that a school board election was invalid. *Id.* The plaintiffs—a group of Black, Hispanic, and Chinese voters—challenged the validity of the school board election under the Equal Protection Clause of the Fourteenth Amendment and the VRA. *Id.* The district court held, after a bench trial, that various acts of the Board of Elections had a discriminatory impact on the rights of minority voters that could have affected several hundred votes cast in the election. *Id.* As a result, the district court ordered a new election take place. *Id.* The Second Circuit affirmed. *Id.* at 1094.

3

In 1982, Congress amended § 2 of the VRA yet again, resulting, substantively, in today's version of the statute. 42 U.S.C. §

1973 (1982) (codified as amended in 52 U.S.C. § 10301). In large part, the 1982 Amendments were motivated by a series of decisions by the Supreme Court holding that discriminatory *intent*, rather than discriminatory *impact*, was required under § 2 of the VRA. S. Rep. No. 97-417, at 15-16 (1982), *as reprinted in* 1982 U.S.C.C.A.N. 177, 192-93; *see, e.g., Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976) (holding, for the first time, that discriminatory intent was required to successfully state a claim under § 2); *see also Veasey v. Abbott*, 830 F.3d 216, 241 n.31 (5th Cir. 2016) ("Congress amended the Voting Rights Act in 1982 to make it clear that plaintiffs could sue for discriminatory impact after Supreme Court precedent had required the showing of a discriminatory purpose under Section 2."). Also in the 1982 Amendments was the addition of the ***619** language at issue in this case: the reference to a class of citizens in the singular.

Section 2, in its modern form, substantively adopted in 1982, reads as follows:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 10303(f)(2) of this title, as provided in subsection (b).
>
> (b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by *members of a class of citizens protected by subsection (a)* in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which *members of a protected class* have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have *members of a protected class* elected in numbers equal to their proportion in the population.

52 U.S.C. § 10301 (formerly cited as 42 U.S.C. § 1973) (emphasis added).

In crafting those amendments, Congress again relied on several minority coalition suits like *United Jewish Organizations of Williamsburgh, Inc. v. Carey*, 430 U.S. 144, 150 n.5, 97 S.Ct. 996, 51 L.Ed.2d 229 (1977). S. Rep. No. 97-417, at 173. In *Carey*, the Supreme Court noted, and did not question, that "the court below classified Puerto Ricans in New York with blacks as a minority group entitled to the protections of the Voting Rights Act." *Carey*, 430 U.S. at 150 n.5, 97 S.Ct. 996. Congress also relied on *Wright v. Rockefeller*, 376 U.S. 52, 60, 84 S.Ct. 603, 11 L.Ed.2d 512 (1964), wherein the Supreme Court dismissed a minority coalition suit brought pursuant to the Fifteenth Amendment on other grounds, indicating tacit acceptance. S. Rep. No. 97-417, at 132. Though *Wright* pre-dated the VRA, the connection between the Fifteenth Amendment and the VRA indicates the Court's intent to condone minority coalition suits early on. *See also id.* at 10-11, 26 (favorably citing *Jones v. City of Lubbock*, 640 F.2d 777 (5th Cir. 1981), a Fifth Circuit case involving a coalition of Black and Latino voters).

4

Congress again amended the VRA in 1992. The 1992 Amendments stemmed from "the continuing need for language assistance in voting." S. Rep. No. 102-315, at 3 (1992). Congress affirmed that "language minority citizens had been effectively excluded from participation in the electoral process" and stated that "the denial of the right to vote of such minority group citizens is ordinarily directly related to the unequal educational opportunities afforded them, resulting in high illiteracy and low voting participation." *Id.* at 4. To address this need, Congress took three actions: Congress (1) extended the bilingual election requirements to remain in place through 2007; (2) provided additional coverage to Native Americans residing on reservations; and (3) extended "the coverage of the language assistance provisions to counties with more than 10,000 voting-age language minority citizens who otherwise qualify for language assistance." *Id.* at 2.

Not all language minority groups are afforded protection. Congress affirmed in the 1992 Amendments that the four language ***620** minority groups covered by the VRA are "Hispanics, Asian Americans, American Indians and Alaska Natives." *Id.* at 4.

However, Congress explicitly recognized that these groups are not homogenous and themselves account for a wide array of languages. *See id.* at 27. For example, the 1992 Senate Report consistently refers to languages (plural) when discussing lack of access to voting information for Native Americans. *See, e.g., id.* at 9 ("Lack of access to absentee voting information to Native Americans in their native languages is further documented by their experience in the 1984 general election."); *id.* ("In another example, election officials provided little or no information in Native American languages regarding the process for purging names from their jurisdictions' voter registration lists."); *id.* at 14 (discussing costs and noting that "[i]n the case of traditionally unwritten languages, such as most Native American languages, only oral assistance is required"). Likewise, the 1992 Senate Report specifically discusses the fact that the "Asian American" category encompasses, *inter alia*, Chinese, Filipino, Vietnamese, and Japanese voters. *Id.* at 12.

5

Congress most recently amended the VRA in 2006. These Amendments largely addressed the now unconstitutional § 5 (preclearance), rather than § 2. However, it is the amendment process that is important in this instance.

Congress amended § 5 so it would closely track the language of § 2. The 2006 Amendments added § 5(b), which reads:

> Any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting that has the purpose of or will have the effect of diminishing the ability of any citizens of the United States on account of race or color, or in contravention of the guarantees set forth in section 10303(f)(2) of this title, to elect their preferred candidates of choice denies or abridges the right to vote within the meaning of subsection (a) of this section.

52 U.S.C. § 10304(b). In comparison, § 2(a) reads: "No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color." *Id.* § 10301(a).

In adopting § 5(b), which contained nearly the same language as in § 2(a), Congress stated "[v]oting changes that leave a minority group less able to elect a preferred candidate of choice, either directly or *when coalesced with other voters*, cannot be precleared under Section 5." H.R. Rep. No. 109-478, at 71 (2006) (emphasis added). Congress also identified: "Naturally occurring majority-minority districts have long been the historical focus of the Voting Rights Act. They are the districts that would be created if legitimate, neutral principles of drawing district boundaries ... were combined with the existence of a large and compact minority population to draw a district in which *racial minorities* form a majority." S. Rep. No. 109-295, at 21 (2006) (emphasis added).

B

From its earliest interpretation of the VRA, the Supreme Court recognized that its protections were—and should be—broadly interpreted. *Chisom*, 501 U.S. at 403, 111 S.Ct. 2354 ("[The VRA] should be interpreted in a manner that provides 'the broadest possible scope' in combating racial discrimination."); *see also Johnson v. De Grandy*, 512 U.S. 997, 114 S.Ct. 2647, 129 L.Ed.2d 775 (1994) (noting the VRA is ***621** "a statute meant to hasten the waning of racism in American politics"). Consistent with this mandate, the Court has consistently permitted minority coalition claims. *Carey*, 430 U.S. at 150 n.5, 97 S.Ct. 996; *Wright*, 376 U.S. at 60, 84 S.Ct. 603. The circuit courts followed suit—including our own.

In 1986, the Supreme Court clarified the requirements of a § 2 vote dilution claim after the 1982 Amendments in *Thornburg v. Gingles*, 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25. In *Gingles*, the Supreme Court outlined the following three

preconditions that a minority-group-plaintiff must demonstrate: (1) "that it is sufficiently large and geographically compact to constitute a majority in a single-member district"; (2) "that it is politically cohesive"; and (3) "that the white majority votes sufficiently as a bloc to enable it ... usually to defeat the minority's preferred candidate." *Id.* at 50-51, 106 S. Ct. 2752. Next, plaintiffs must show that, under the totality of the circumstances, the political process is not "equally open" to them. The question of whether political processes are "equally open" depends upon a "practical evaluation of the 'past and present reality.' " *Id.* at 75, 106 S. Ct. 2752. As such, "proof that some minority candidates have been elected does not foreclose a § 2 claim." *Id.*

Recently, in *Allen v. Milligan*, the Supreme Court gave further context to the purpose of each *Gingles* precondition:

> Each *Gingles* precondition serves a different purpose. The first, focused on geographical compactness and numerosity, is "needed to establish that the minority has the potential to elect a representative of its own choice in some single-member district." The second, concerning the political cohesiveness of the minority group, shows that a representative of its choice would in fact be elected. The third precondition, focused on racially polarized voting, "establishes that the challenged districting thwarts a distinctive minority vote" at least plausibly on account of race. And finally, the totality of the circumstances inquiry recognizes that application of the *Gingles* factors is "peculiarly dependent upon the facts of each case." Before courts can find a violation of § 2, therefore, they must conduct "an intensely local appraisal" of the electoral mechanism at issue, as well as a "searching practical evaluation of the 'past and present reality.' "

Allen, 599 U.S. at 18-19, 143 S.Ct. 1487. The *Allen* Court also reaffirmed the *Gingles* test:

> *Gingles* has governed our Voting Rights Act jurisprudence since it was decided 37 years ago. Congress has never disturbed our understanding of § 2 as *Gingles* construed it. And we have applied *Gingles* in one § 2 case after another, to different kinds of electoral system and to different jurisdictions in States all over the country.").

The *Gingles* test thus serves as the bedrock requirement charging courts with the responsibility to stop racial vote suppression through gerrymandering. Moreover, the *Gingles* test has provided lower courts with the practical tools to evaluate minority coalition claims brought pursuant to § 2.

We were in fact the first circuit to specifically consider the efficacy of minority coalition claims. In 1987, we correctly decided *League of United Latin American Citizens Council No. 4386 v. Midland Independent School District*, wherein we held that a coalition of Black and Mexican Americans had satisfied the *Gingles* factors in demonstrating that an at-large school board election diluted their votes. 812 F.2d 1494. Neither the district court, nor this court, took issue with the minority ***622** coalition as a basis for § 2. *See id.* at 1495 ("Blacks and Mexican-Americans in Midland, Texas, join hands in this class action to prevent their votes being diluted by an at-large system of voting in the election of trustees to the Board of Trustees for the Midland Independent School District."). Ultimately, the en banc court affirmed the district court's judgment on other grounds. *League of United Latin Am. Citizens Council No. 4386 v. Midland Indep. Sch. Dist.*, 829 F.2d 546, 548 (5th Cir. 1987) (Wisdom, J., and Rubin, J., specifically concurring) (concurring in result and reaffirming their views stated in the panel opinion).

One year later, in *Campos v. City of Baytown*, we made our *Midland* holding explicit. In *Campos*, we affirmed the district court's finding that vote dilution of Black and Mexican American voters had occurred. *Campos*, 840 F.2d at 1250. In doing so, we held "[t]here is nothing in the law that prevents the plaintiffs from identifying the protected aggrieved minority to include both Blacks and Hispanics." *Id.* at 1244. We reasoned:

> Congress itself recognized "that voting discrimination against citizens of language minorities is pervasive and national in scope," 42 U.S.C. § 1973b(f)(1), and similar discrimination against Blacks is well documented. If, together, they are of such numbers residing geographically so as to constitute a majority in a single member district, they cross the *Gingles* threshold as potentially disadvantaged voters.

Id. We also clearly articulated the limiting principle that remains in effect today and prevents a windfall for minority coalitions: Plaintiffs must still prove "that the minorities so identified actually vote together and are impeded in their ability to elect their own candidates by all of the circumstances, including especially the bloc voting of a white majority that usually defeats the candidate of the minority." *Id.* (stating that "a minority group is politically cohesive if it votes together"); *see also Brewer*, 876 F.2d at 454 ("[C]ourts should not hastily assume that cooperation among minority groups in filing a Section 2 complaint will inevitably lead to a finding of political cohesion in their actual electoral practices. While appellants correctly note that statistical evidence is not a *sine qua non* to establishing cohesion, they must still satisfy their burden of proof under Section 2 and *Thornburg*.").

We then affirmed that holding several times over the next decade. *See id.* at 453-54 (reiterating that minority coalitions may be used to satisfy § 2); *Overton*, 871 F.2d 529 (implicitly recognizing the validity of a minority coalition claim). In 1993, we affirmed our *Campos* holding on this very issue en banc in *League of United Latin Am. Citizens, Council 4434 v. Clements*, 999 F.2d at 864 (affirming our *Campos* decision and holding that "[i]f blacks and Hispanics vote cohesively, they are legally a single minority group" under § 2). Indeed, scholarship has recognized that in the Fifth Circuit, minority aggregation is—or rather was—"a guarantee." Kevin Sette, *Are Two Minorities Equal to One?: Minority Coalition Groups and Section 2 of the Voting Rights Act*, 88 Fordham L. Rev. 2693, 2713 (2020).[16]

***623** The United States Court of Appeals for the Sixth Circuit reached a different conclusion. In *Nixon v. Kent County*, the Sixth Circuit, met with hefty dissent, rejected the validity of minority coalition suits, finding they were not "part of Congress' remedial purpose" in enacting the VRA. 76 F.3d 1381, 1393 (6th Cir. 1996). The Sixth Circuit began with its reading of the text of § 2. It reasoned that because § 2 speaks in the singular, using terms such as "a class" or "its members," an analysis of the text of § 2 "reveals no word or phrase which reasonably supports combining separately protected minorities." *Id.* at 1386-87. In reaching this conclusion, the Sixth Circuit relied heavily on dissents from members of this court. *Id.* at 1384 (citing Judge Higginbotham's dissents in *Campos*, 849 F.2d at 945, and *Midland*, 812 F.2d at 1503, and Judge Jones' concurrence in *Clements*, 999 F.2d at 894).

Until today, the Sixth Circuit was an outlier. *All* other circuits that have considered the issue ruled that minority coalition suits may be used to satisfy § 2. *See Pope v. Cnty. of Albany*, 687 F.3d 565 (2d Cir. 2012); *Badillo v. City of Stockton*, 956 F.2d 884 (9th Cir. 1992); *Concerned Citizens v. Hardee Cnty. Bd. of Comm'rs*, 906 F.2d 524 (11th Cir. 1990) (citing *Midland* and *Campos*); *see also Holloway v. City of Va. Beach*, 42 F.4th 266, 293–94 (4th Cir. 2022) (Gregory, C.J., dissenting) (finding that § 2 may be satisfied by minority coalitions, indicating that, though the majority did not reach the issue, certain judges on the Fourth Circuit would join our interpretation). With history in hand, we turn to the facts of this case.

C

Texas has historically discriminated against both Black and Latino voters. And Galveston County is, by all accounts, the embodiment of the conditions which led to § 2's adoption. Because "a page of history is worth a volume of logic," *New York Trust Co. v. Eisner*, 256 U.S. 345, 349, 41 S.Ct. 506, 65 L.Ed. 963 (1921), I detail Galveston County's storied history below.

The early history of Galveston County was characterized by its role as an epicenter of the nation's slave trade. In the nineteenth century, Galveston held the largest slave auction house west of the Mississippi River, where its mayor was an active participant.[17] Galveston's slave trade continued ***624** even after the Civil War.[18] In 1865, Galveston County's enslaved population gave birth to the now federally recognized Juneteenth celebration, a holiday that has been recognized by the Texas Legislature since the 1970s.[19] Juneteenth is now widely known as the day that enslaved people in Texas were finally freed.[20] Of course, the Juneteenth order did not, as a legal matter, emancipate individuals from slavery.[21] That was accomplished via President Lincoln's Preliminary Emancipation Proclamation of 1862 and final proclamation of 1863.[22] But these proclamations were largely ignored or subverted.[23]

If the 1800s were characterized by the slave trade, the 1900s were characterized by a new brand of racism—voter suppression. In the post-Civil War era, "race relations in the county reflected those seen across much of the South, including segregation and Jim Crow laws." Likewise, " 'state-supported practices and laws in a variety of different areas of life' came together to segregate Latinos in Galveston County, a system termed Juan Crow."

Take, for example, the lengths to which Texas went to suppress the non-White vote. In 1902, the Texas Legislature imposed a poll tax on its voters.[24] And in 1923, Texas enacted the Statute of Texas, which allowed only White voters to participate in the Democratic primary election. *Nixon v. Herndon*, 273 U.S. 536, 540, 47 S.Ct. 446, 71 L.Ed. 759 (1927). The Statute of Texas made its way to the Supreme Court in 1927. In *Nixon v. Herndon*, a unanimous Supreme Court struck down the law as

unconstitutional, in violation of the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 540-41, 47 S.Ct. 446. The Court spoke with forcefulness:

> The important question is whether the statute can be sustained. But although we state it as a question the answer does not seem to us open to a doubt. We find it unnecessary to consider the Fifteenth Amendment, because it seems to us hard to imagine a more direct and obvious infringement of the Fourteenth.

Id. The Supreme Court thus upheld the right to vote in Texas primary elections for all. *Id.* at 541, 47 S.Ct. 446.

After *Herndon*, the Texas Legislature promptly enacted a new statute, giving the State Executive Committee of a party the power to prescribe voting qualifications for its members. *Nixon v. Condon*, 286 U.S. 73, 81-82, 52 S.Ct. 484, 76 L.Ed. 984 (1932). And acting under the new statute, the State Executive Committee of the Democratic party adopted a White-only primary election requirement for the 1928 election. *Id.* at 82, 52 S.Ct. 484. After being refused the right to vote again under the party's ***625** rule, the *Herndon* plaintiff sued. *Id.* at 83, 52 S.Ct. 484. The Supreme Court again invalidated the Texas statute, finding that the Committee members are representatives of the state, the members' action was State action, and thus that action was constrained by the Fourteenth Amendment. *Id.* at 89, 52 S.Ct. 484.

The saga of Texas' White-only primary did not end there. The Supreme Court had to, again, address the issue in 1944 in *Smith v. Allwright*, 321 U.S. 649, 64 S.Ct. 757, 88 L.Ed. 987 (1944). Only twenty-two days after the Supreme Court's decision in *Condon*, the Texas Democratic party, in a state convention, adopted its own White-only primary requirement. *Id.* at 656-57, 64 S.Ct. 757. After being denied the ability to vote in the Texas Democratic primary election of 1940 because of this rule, Lonnie E. Smith, a Black citizen of Harris County, Texas, sued. *Id.* at 650-51, 64 S.Ct. 757. In *Smith*, the Supreme Court recounted the collective impact of its jurisprudence in, *inter alia, Herndon* and *Condon*: "It may now be taken as a postulate that the right to vote in such a primary for the nomination of candidates without discrimination by the State, like the right to vote in a general election, is a right secured by the Constitution." *Id.* at 661-62, 64 S.Ct. 757.

The Court further examined whether the party's action in *Smith* violated that right. *Id.* at 663-64, 64 S.Ct. 757. The Supreme Court concluded that it did. *Id.* at 664, 64 S.Ct. 757. The Court found that Texas' specific statutory system made the party "an agency of the state in so far as it determines the participants in a primary election." *Id.* at 663, 64 S.Ct. 757. The Court concluded that the right to vote "is not to be nul[l]ified by a state through casting its electoral process in a form which permits a private organization to practice racial discrimination in the election. Constitutional rights would be of little value if they could be thus indirectly denied." *Id.* The Supreme Court's decision in *Smith* was the culmination of a decades-long, and ultimately unsuccessful, attempt to maintain White-only primary elections in Texas.

In modern history, Galveston County has resisted the Black and Latino vote at every turn. From 1975 to 2013, the years where Galveston County was subject to § 5 preclearance,[25] the County's redistricting process required Attorney General intervention on six occasions.

One such occasion requiring federal intervention was in 2012. In the 2012 redistricting process, the Galveston County majority hired map-makers and business partners Thomas Hofeller and Dale Oldham. Nicknamed "the Michelangelo of the modern gerrymander,"[26] Hofeller was behind a 1980s strategy to increase Republican power in the South through the 1965 VRA.[27] By creating more majority-Black ***626** districts, the strategy sought to concentrate minority voting power into fewer districts, with the goal of making it easier for Republican candidates to win the remaining majority-White districts.[28] Hofeller infamously stated: "Redistricting is like an election in reverse! It's a great event.... Usually the voters get to pick the politicians. In redistricting, the politicians get to pick the voters;" he also called the redistricting process "the only legalized form of vote-stealing left in the United States today."[29]

As confirmed by the district court in its extensive fact-finding after an exhaustive trial, when the 2021 redistricting process came around, the County, no longer constrained by § 5's preclearance, set to work to rid itself of its majority-minority district. Galveston County's governing body is called the "Galveston County Commissioners Court." The Commissioners court is made up of a county judge elected at-large as the presiding officer and four county commissioners elected from single-member precincts. In 2021, Judge Mark Henry was the county judge and had been since 2010. The four commissioners were Darrell Apffel (Precinct 1), Joe Giusti (Precinct 2), Stephen Holmes (Precinct 3), and Ken Clark (Precinct 4).

The majority leaders of Galveston County (consisting of Judge Henry and Commissioners Apffel, Giusti, and Clark) again

hired Dale Oldham. Commissioner Holmes voted against his hiring. "Shortly after engaging Oldham, Judge Henry and the county's general counsel, Paul Ready, contacted Oldham to ask whether the county 'had to draw a majority-minority district,' " to which Oldham replied that the answer depended on the census data. The map ultimately proposed was " 'the visualization of the instructions' Judge Henry provided Oldham,"—a map that resulted in no majority-minority districts in Galveston County. Though the County suggested the goal in redistricting was to create a coastal precinct, "Oldham admitted that it was possible to retain a majority-minority precinct while also creating a coastal precinct."

Appellees sued under the VRA's § 2, alleging Galveston County's new maps impermissibly diluted their voting power. After a ten-day bench trial, the district court found Appellants' actions "fundamentally inconsistent with [§] 2 of the Voting Rights Act." It found Appellants' redistricting to be "egregious," "a textbook example of a racial gerrymander." The district court's 157-page Findings of Fact and Conclusions of Law details just how egregious Galveston County's § 2 violation was.

First, the district court held that the County's Black and Latino communities were both sufficiently large and geographically compact to satisfy that *Gingles* precondition. The district court cited *Clements* for the proposition that "[t]he cohesiveness of minority coalitions is 'treated as a question of fact, allowing aggregation of different minority groups where the evidence suggests that they are politically cohesive." The district court then found that the plaintiffs' illustrative plans demonstrated that the Black and Latino population in Galveston County is compact enough to form a majority of eligible voters in a reasonably configured precinct.

Next, the district court considered the second *Gingles* precondition—whether the plaintiffs are "politically cohesive." ***627** *Gingles*, 478 U.S. at 50-51, 106 S.Ct. 2752; It found that "[t]he undisputed evidence shows that the combined Black and Latino coalition is highly cohesive." Indeed, it found that "over 75% of Black and Latino voters have voted for the same candidates in numerous elections." Accordingly, the district court concluded that "the county's Black and Latino populations act as a coalition and are politically cohesive."

The district court then evaluated the final *Gingles* precondition—whether "the white majority votes sufficiently as a bloc to enable it ... usually to defeat the minority's preferred candidate." *Gingles*, 478 U.S. at 50-51, 106 S.Ct. 2752; The district court found that this condition was met. It is undisputed that certain statistical evidence showed that "more than 85% of Anglos vote cohesively for candidates running in opposition to those supported by more than 85% of Black and Latino voters." The district court also credited the plaintiffs' evidence that "the degree of Anglo bloc voting is sufficient to defeat a minority-preferred candidate in each commissioner precinct in the enacted plan." The district court also found that the minority vote is thwarted "at least plausibly on account of race." And the County failed to present evidence sufficient to dispute this finding.[30] Accordingly, the district court found that each of the *Gingles* preconditions are met.

Finally, the district court evaluated, under the totality of the circumstances, whether the political process is "equally open" to the plaintiffs, a question that depends upon a "practical evaluation of the 'past and present reality.' " *Gingles*, 478 U.S. at 75, 106 S.Ct. 2752. The district court spoke at length about the factors weighing in favor of a finding that § 2 had been violated. Worth noting, the district court considered proportionality. It clarified that "it is the status of the candidate as the *chosen representative of a particular racial group*, not the race of the candidate that is important." Thus, it is irrelevant to the analysis that one of the commissioners is Black, because, as the district court found, "[h]is precinct is predominantly Anglo and several witnesses ... testified that he would not be the candidate of choice of Black and Latino voters."

The district court also considered whether the voices of Black and Latino voters were "shut out of the process altogether." Looking at the totality of the circumstances, the district court found that it was "stunning how completely the county extinguished the Black and Latino communities' voice on its commissioners court during the 2021's redistricting." The district court stated the following:

> Galveston County was created in 1838. From its founding, it would be 133 years before a Latino, Frank Carmona, was elected to commissioners court. And it would be 150 years before a Black, Wayne Johnson, won a seat. Commissioner Johnson's district, old Precinct 3, would continue to elect the minority community's candidate of choice right up until 2021, when Precinct 3 was summarily carved up and wiped off the map. Blacks' and Latinos' commissioner of choice was always a lonely voice on the court, but that commissioner's presence—whether it was Wayne Johnson or Stephen Holmes—meant that "minority voices [were] heard in a meaningful way." Id. The result of 2021's redistricting, ***628** however, has amounted to Black and Latino voters, as a coalition of like-minded citizens with shared concerns, "being shut out of the process altogether." Id.

> This is not a typical redistricting case. What happened here was stark and jarring. The commissioners court transformed Precinct 3 from the precinct with the highest percentage of Black and Latino residents to that with the lowest percentage. The circumstances and effect of the enacted plan were "mean-spirited" and "egregious" given that "there was absolutely no reason to make major changes to Precinct 3."

In conclusion, the district court aptly noted that "although Galveston County is no longer subject to preclearance, the [Appellants] still must comply with the edicts of[§] 2." But Galveston County's redistricting process amounted to "a clear violation of § 2."

I agree. And for the last several decades, so did our precedent. But today, the majority discards that well-established authority.

Now armed with the factual and historical context the majority opinion ignores, we turn to the merits.

II

In my view, this case is a simple one, not only because traditional methods of statutory interpretation compel only one outcome, but critically because Appellants fail to carry their burden of persuasion as to why this court should overturn its precedent articulated in *Clements*, 999 F.2d at 864. Luckily for Appellants, the majority relieves them of this burden.[31]

A

The majority contends that we do not have to reckon with the doctrine of stare decisis because we are merely overturning a panel opinion, which holds no precedential weight for the en banc court.[32] I first clarify that we are, indeed, overturning en banc precedent today. Next, I summarize why there is no grounds to do so.

According to the majority, *Clements* is not the operative precedent because the *Clements* decision "disposed of the minority coalition's Section 2 claims on other grounds." Thus, the majority claims, because the *Clements* decision "applied this court's precedent authorizing coalition claims and expressly stated that it would not 'revisit' the issue," "*Clements* cannot ... be said to have issued an en banc holding on coalition claims," and the *Campos* panel decision is the operative precedent. That is blatantly incorrect.

In *Clements*, the majority recognized that "whether different racial or ethnic minority groups ... may combine to form a single minority group within the meaning of the Voting Rights Act" had raised questions. *Clements*, 999 F.2d at 863-64. However, the majority went on to conclude that "we have treated the issue as a question of fact, allowing aggregation of different minority groups where the evidence suggests that they are political cohesive," and the majority refused to revisit that settled ***629** question again. *Id.* at 864 (citing our decision in *Midland*). To say that the court in *Clements* disposed of the coalition claims on other grounds and thus did not issue an en banc holding on this issue is incorrect. Had a majority of the en banc court, in 1993, wished to reverse the panel's decision in *Midland*, it could have done so. But the *Clements* court did not do that.

Therefore, contrary to the majority's contention, today, this court has overturned four decades of en banc precedent without any consideration of whether such a diversion from stare decisis is appropriate. Now, Appellants must face the hurdle of overturning our en banc precedent head-on. Appellants cannot clear that hurdle.

We are a "strict stare decisis court." *Ballew v. Cont'l Airlines, Inc.*, 668 F.3d 777, 782 (5th Cir. 2012). And pursuant to the doctrine of stare decisis, "[s]etting aside any precedent requires a 'special justification' beyond a bare belief that it was wrong." *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 413, 130 S.Ct. 1431, 176 L.Ed.2d 311 (2010).[33] Here, Appellants have the burden of demonstrating why we should overturn our en banc precedent.[34] But they have come far short of doing so: Appellants did not cite the stare decisis factors, nor did they meaningfully engage in a discussion about stare decisis *at all*; in all their briefs, stare decisis was mentioned only once.[35]

B

Nor is there intervening Supreme Court precedent that casts doubt on the efficacy of coalition claims. The majority relies on the Supreme Court's decision in *Bartlett v. Strickland*, 556 U.S. 1, 129 S.Ct. 1231, 173 L.Ed.2d 173 (2009), for the proposition that "decisions of the Supreme Court over the past two decades have undermined the validity of minority-coalition claims," justifying our revisiting this issue. However, *Bartlett* provides no such support.

In *Bartlett*, the Supreme Court held that crossover districts—districts where "minority voters make up less than a majority of the voting-age population," but where ***630** "the minority population, at least potentially, is large enough to elect the candidate of its choice with help from voters who are members of the majority and who cross over to support the minority's preferred candidate"—cannot be used to satisfy the requirements of a vote dilution claim under § 2. *Bartlett*, 556 U.S. at 13-14, 129 S.Ct. 1231. At issue in *Bartlett* was the drawing of District 18, which encompassed portions of four North Carolina counties. *Id.* at 8, 129 S. Ct. 1231. The district at issue was not a majority-minority district. *Id.* Even so, Black voters in District 18 had "the potential to join with majority [White] voters to elect the minority group's candidate of its choice." *Id.* In sum, District 18's Black citizens did not constitute a majority of voting age citizens, but a sufficient number of White voters were politically aligned with the Black voters and would thus allow the Black voters to elect their preferred candidate. The trial court disagreed. It concluded that "although African-Americans were not a majority of the voting-age population in District 18, the district was a 'de facto' majority-minority district." *Id.* at 9, 129 S. Ct. 1231. This was "because African Americans could get enough support from crossover majority voters to elect the African-Americans' preferred candidate." *Id.* The North Carolina Supreme Court reversed on the grounds that "African-Americans do not 'constitute a numerical majority of citizens of voting age' " within District 18. *Id.*

The United States Supreme Court affirmed that decision. *Id.* at 14, 129 S. Ct. 1231. In so doing, Justice Kennedy's plurality opinion made clear that § 2 "requires a showing that *minorities* 'have less opportunity than other members of the electorate to ... elect representatives of their choice.' " *Id.* at 14, 129 S. Ct. 1231 (emphasis added). It further noted that allowing crossover groups to satisfy § 2 would significantly disrupt the *Gingles* "majority-minority" requirement that had been in place for decades. *Id.* at 20, 129 S. Ct. 1231. The plurality thus concluded that crossover districts cannot be used to satisfy the requirements of § 2. *Id.* Referring to a minority group's right to form coalitions with *White* voters, the Court also stated that "[n]othing in § 2 grants special protection to a minority groups' right to form political coalitions." *Id.* at 15, 129 S. Ct. 1231. The majority here contends this purportedly supports its position that minority coalitions are merely "political coalitions" not protected by § 2 of the VRA.

This conclusion is misguided. For one, the plurality expressly chose *not* to extend its reasoning in *Bartlett* to minority coalitions. *Bartlett*, 556 U.S. at 13-14, 129 S.Ct. 1231 ("But that term risks confusion with coalition-district claims in which two minority groups form a coalition to elect the candidate of the coalition's choice. We do not address that type of coalition district here." (internal citations omitted)). But critically, the similarities between *Bartlett* and this case matter far less than the differences. In crossover districts, *White* voters must vote with the minority population for the group to elect the candidate of its choice. *Bartlett*, 556 U.S. at 13, 129 S.Ct. 1231. White voters are not protected under the VRA and are not plaintiffs in the suit. Minority coalitions by contrast present a different scenario where each individual voter is indeed expressly protected by § 2 (a). Rather than being "political coalitions,"[36] these groups find cohesion in their shared history of disenfranchisement and the VRA's protections resulting therefrom. That difference makes all the ***631** difference. While the majority may believe otherwise, it cannot root its opinion in Supreme Court authority. To the contrary, a reading of Supreme Court

precedent shows that the Court has allowed minority coalition claims on multiple occasions.[37] *Bartlett* does not cast doubt on that reality. Nor does any other intervening decision after *Clements*.[38]

It is clear to me at this juncture that the "only relevant thing that has changed since [*Clements*] is the composition of this Court."[39] *Citizens United v. Fed. Elec. Comm'n*, 558 U.S. 310, 414, 130 S.Ct. 876, 175 L.Ed.2d 753 (2010) (Stevens, J., with whom Ginsburg, Breyer, and Sotomayor, J. join, concurring in part and dissenting in part). This is doubly shown by the fact that "the majority opinion is essentially an amalgamation of resuscitated dissents." *Id.*

Finding no grounds to overturn our well-founded precedent, in my view, our discussion should end here. However, because the majority forges ahead, so do I.

III

Turning to matters of statutory interpretation, the majority contends that because § 2(b) refers to "a class" in the singular, plaintiffs who are members of different protected classes cannot coalesce to form a majority. The majority plucks these two words from the midst of the statute and insists that they constrict its scope. But this conclusion cannot survive basic principles of statutory interpretation and a review of the VRA's extensive legislative history.

"When interpreting a statute, we begin with 'the language of the statute itself.' " *United States v. Orellana*, 405 F.3d 360, 365 (5th Cir. 2005) (quoting *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108, 100 S.Ct. 2051, 64 L.Ed.2d 766 (1980)). "We follow the 'plain and unambiguous meaning of the statutory language,' interpreting undefined terms according to their ordinary and natural meaning and the overall policies and objectives of the statute." *Id.* (quoting *United States v. Kay*, 359 F.3d 738, 742 (5th Cir. 2004)). In so doing, we must consider the basic principles of statutory interpretation outlined in 1 U.S.C. § 1, including that the singular includes the plural. ***632** *Seth B. ex rel. Donald B. v. Orleans Par. Sch. Bd.*, 810 F.3d 961, 975 n.52 (5th Cir. 2016) ("It is a basic rule of statutory construction that the singular includes the plural." *See* Antonin Scalia & Bryan A. Gardner, Reading Law: The Interpretation of Legal Texts 130 (2012) (quoting the rules of construction outlined in 1 U.S.C. § 1)). Moreover, "[w]hether a statutory term is ambiguous ... does not turn solely on dictionary definitions of its component words." *Yates v. United States*, 574 U.S. 528, 537, 135 S.Ct. 1074, 191 L.Ed.2d 64 (2015). "Rather, 'the plainness or ambiguity of statutory language is determined not only by reference to the language itself, but as well by the specific context in which that language is used, and the broader context of the statute as a whole.' " *Id.* (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341, 117 S.Ct. 843, 136 L.Ed.2d 808 (1997)) (alteration in original). "If the statute is ambiguous, we may look to the legislative history or agency interpretations for guidance." *Orellana*, 405 F.3d at 365.

We are additionally guided by the Supreme Court's mandate that "the [VRA] should be interpreted in a manner that provides 'the broadest possible scope' in combating racial discrimination." *Chisom*, 501 U.S. at 403, 111 S.Ct. 2354.

A

The majority contends that, based on the text, § 2(b) clearly prohibits coalition groups. The majority takes issue with the language in § 2(b): "a class of citizens," and "a protected class." The majority contends that "[h]ad Congress chosen explicitly to protect minority coalitions it could have done so by [using the phrase] *classes* of citizens." But this misses the forest for the trees.

To reach its conclusion, the majority must reject well-established methods of statutory interpretation, jumping through hoops to find exceptions. But it need not be so difficult, for the analysis is far simpler than the majority contends: minority coalition claims are permissible under the plain text of the statute.

1

A reading of § 2 and of the VRA as a whole demonstrates that a reading of the term a "class" in the singular does not result in a prohibition of minority coalition claims. I turn first to the "specific context in which th[e] language is used" within § 2 itself. *Robinson*, 519 U.S. at 341, 117 S.Ct. 843.

In § 2, the singular term "a class" is encompassed by the larger phrase, "members of a class of citizens protected by subsection (a)." 52 U.S.C. § 10301.

Consider the last antecedent rule. This method of construction "provides that 'a limiting clause or phrase ... should ordinarily be read as modifying on the noun or phrase that it immediately follows.' " *Lockhart v. United States*, 577 U.S. 347, 351, 136 S.Ct. 958, 194 L.Ed.2d 48 (2016). "The rule reflects the basic intuition that when a modifier appears at the end of a list, it is easier to apply that modifier only to the item directly before it." *Id.* Applied here, the phrase "protected by subsection (a)" modifies the noun "citizens," not the more distant noun "a class." Accordingly, "it is not the singular class that must be composed of a racial or language minority protected under subsection (a) but rather each citizen that makes up the class." Sette, *supra*, at 2727. To hold that the statute requires each citizen to have the same minority status is an improper reading of § 2.

Of course, as the majority points out, "as with any canon of statutory interpretation, the rule of the last antecedent 'is not an absolute and can assuredly be overcome by ***633** other indicia of meaning.' " *Lockhart*, 577 U.S. at 352, 136 S.Ct. 958 (quoting *Barnhart v. Thomas*, 540 U.S. 20, 26, 124 S.Ct. 376, 157 L.Ed.2d 333 (2003)). However, where, as here, the broader context "fortifies the meaning th[e] principle commands," there is no reason to disturb the interpretation urged by the rule. *Id.*

The broader context of § 2 within the VRA confirms the interpretation urged by the last antecedent rule. *Robinson*, 519 U.S. at 341, 117 S.Ct. 843 (terms must be considered in "the broader context of the statute as a whole"). It is "generally presum[ed] that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another." *Intel Corp. Inv. Pol'y Comm. v. Sulyma*, 589 U.S. 178, 140 S. Ct. 768, 777, 206 L.Ed.2d 103 (2020). In 1975, Congress amended the VRA to require that states and political subdivisions provide voting materials, including ballots, in non-English languages if a language minority makes up more than five percent of the citizens of voting age. 42 U.S.C. § 1973aa-1b (*codified as amended in* 52 U.S.C. § 10303(f)(3)). The VRA specifically states that the percentage must be made of "members of a *single* language minority." *Id.* (emphasis added). Had Congress intended to apply the same limiting requirement to § 2, it could have done so. But it never did. And on that basis, we must presume its omission was intentional. *Sulyma*, 140 S. Ct. at 777.

Accordingly, the broader context of § 2 and the VRA illuminates that the term "class," written in the singular but encapsulating the plural, does not prohibit minority coalition claims. *Cf. Bostock v. Clayton Cnty.*, 590 U.S. 644, 669, 140 S.Ct. 1731, 207 L.Ed.2d 218 (2020) ("[T]here [is no] such thing as a 'canon of donut holes,' in which Congress's failure to speak directly to a specific case that falls within a more general statutory rule creates a tacit exception.").

2

And what of the Dictionary Act? When interpreting the U.S. Code, the Dictionary Act provides a starting point. 1 U.S.C. § 1 (2024). The Dictionary Act "tells us to assume 'words importing the singular include and apply to several persons, parties, or things,' unless statutory context indicates otherwise." *Niz-Chavez v. Garland*, 593 U.S. 155, 164, 141 S.Ct. 1474, 209 L.Ed.2d 433 (2021) (quoting 1 U.S.C. § 1). "The Dictionary Act does not transform every use of the singular 'a' into the plural 'several.' " *Id.* "Instead, it tells us ... that a statute using the singular 'a' can apply to multiple persons, parties, or things." *Id.* (holding an act requiring the government to send "a notice" would permit the government to send multiple notices but does not permit the government to send a notice via multiple documents). The Dictionary Act applies in all instances except where the provided definition "seems not to fit," and the context "excus[es] the court from forcing a square peg into a round hole." *Rowland v. Ca. Men's Colony, Unit II Men's Advisory Council*, 506 U.S. 194, 200, 113 S.Ct. 716, 121 L.Ed.2d 656 (1993). In my view, the Dictionary Act tells us that the term "a class" can apply to multiple classes. End of story.

The majority argues that the context indicates otherwise, pointing to the second sentence of § 2(b). That sentence provides, "[t]he extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered" when evaluating the final *Gingles* requirement—whether the electoral process is "equally open" to the plaintiffs. 51 U.S.C. § 10301(b). The majority contends that an inquiry into the electoral success of a protected ***634** class makes sense only if it is restricted to a specific racial or language-minority group. After all, the argument goes, "black voters in San Antonio would hardly be persuaded that a vote dilution claim lacked merit simply because whites, a minority in the majority-Hispanic city, were being elected to local office. Nor would Hispanics in Houston see citywide elected black politicians as evidence against any dilution of Hispanic votes."

The majority's argument represents a misunderstanding of the *Gingles* analysis. By the time plaintiffs reach the question of whether the political process is "equally open," they must have already satisfied the three *Gingles* preconditions, including political cohesiveness and that the majority votes as a bloc. *Gingles*, 478 U.S. at 50-51, 106 S.Ct. 2752. The second sentence of § 2(b) does not even come into play until these preconditions have been satisfied. So, if the final condition *is* reached, political cohesion must already be established. The majority stretches the second sentence of § 2(b) beyond reason. We cannot ignore one of the most "basic rule[s] of statutory construction" on such unconvincing grounds. Scalia & Gardner, *supra*, at 130.

B

The legislative history further supports my interpretation. Though the majority would like the reader to believe that Congress has been silent with respect to minority coalitions, it has not. A review of the VRA's legislative history, as outlined in full above, indicates that the VRA was intended to extend to minority coalitions.

Recall that, in 1975, Congress amended the VRA to make clear it prohibited discrimination "on account of race or color, or in contravention of the guarantees set forth in [§ 1973b](f)(2)," *i.e.*, discrimination against language minority groups. *Chisom*, 501 U.S. at 392, 111 S.Ct. 2354. As one mechanism to accomplish its goal, Congress prescribed that non-English language voting materials were required if a language minority makes up more than five percent of voting-age citizens within a state or subdivision. 42 U.S.C. § 1973aa-1b (*codified as amended in* 52 U.S.C. § 10303(f)(3)). In so doing, Congress enacted language that specifically stated that the five percent must be made of "members of a *single* language minority." *Id.* (emphasis added); *cf. Loughrin*, 573 U.S. at 358, 134 S.Ct. 2384 ("When 'Congress includes particular language in one section of a statute but omits it in another' ... this Court 'presumes' that Congress intended a difference in meaning.") (alteration in original). This is an explicit, non-ambiguous indication that, if Congress wished for specific requirements to apply to the VRA, it would (and did) enact them. Also in 1975, Congress specifically and favorably relied on minority coalition cases in adopting the 1975 Amendments. S. REP. NO. 94-295 (relying on *Graves* and *CEDO*).

The legislative history also reveals that Congress relied on *Carey* and *Wright*—both minority coalition suits—in adopting the 1982 Amendments. S. Rep. No. 97-417, at 132, 173. Also recall that, in 1992, Congress recognized that language minority

groups are, in effect, minority coalitions. Though there is only one category identifying all "Native Americans" as language minorities, Congress obviously understood the category to encompass speakers of many different languages. *See, e.g.*, S. Rep. No. 102-315, at 9 ("Lack of access to absentee voting information to Native Americans in their *native languages* is further documented by their experience in the 1984 general election.") (emphasis added); *id.* ("In another example, election officials provided little or no information in *Native* ***635** *American languages* regarding the process for purging names from their jurisdictions' voter registration lists.") (emphasis added); *id.* at 14 (discussing costs, and noting that "[i]n the case of *traditionally unwritten languages*, such as most *Native American languages*, only oral assistance is required") (emphasis added). Congress recognized the same with the category "Asian Americans," which explicitly encompasses voters with many different language and ethnic backgrounds. *Id.* at 12 (stating that the category encompasses, *inter alia*, Chinese, Filipino, Vietnamese, and Japanese voters).

And in its 2006 Amendments, Congress specifically contemplated that minority groups could "coalesce" or "combine" with other racial minorities to form a majority for the purpose of § 5 of the VRA, which, at the time, was amended to track nearly the same language as § 2. *See* H.R. REP. NO. 109-478, at 71 ("Voting changes that leave a minority group less able to elect a preferred candidate of choice, either directly or *when coalesced with other voters*, cannot be precleared under Section 5.") (emphasis added); *see also* S. REP. NO. 109-295, at 21 ("Naturally occurring majority-minority districts have long been the historical focus of the Voting Rights Act. They are the districts that would be created if legitimate, neutral principles of drawing district boundaries ... were combined with the existence of a large and compact minority population to draw a district in which *racial minorities* form a majority.") (emphasis added). This should be dispositive. But I go on.

C

Let's return to the jurisprudence surrounding the VRA. The right to vote is one of the most highly-regarded constitutional rights. *See Reynolds*, 377 U.S. at 554, 84 S.Ct. 1362. Through the Fifteenth Amendment and the VRA, Congress sought to address "the subtle, as well as the obvious" forms of voting discrimination that plagued the Nation. *Allen*, 393 U.S. at 566, 89 S.Ct. 817. Indicative of Congress' intention to uphold the right to vote for all, the Supreme Court has mandated that the VRA "should be interpreted in a manner that provides 'the broadest possible scope' in combating racial discrimination." *Chisom*, 501 U.S. at 403, 111 S.Ct. 2354. To effectuate its mandate, the Supreme Court gave us *Gingles*, providing a roadmap for determining if the right to vote had been violated via vote dilution. *Gingles*, 478 U.S. at 50-51, 106 S.Ct. 2752.

Now consider the facts of this case. In its lengthy opinion, the district court dutifully applied *Gingles*.[40] As to the second precondition, the district court found that "[t]he statistical analyses from general elections, statistical analyses from primary elections, and non-statistical evidence of cohesion all support the conclusion that Black and Latino voters in Galveston County act as a coalition." In other words, the plaintiff class is "politically cohesive." *Gingles*, 478 U.S. at 50-51, 106 S.Ct. 2752. The district court also found that the third *Gingles* condition was met—"that the white majority votes sufficiently as a bloc to enable it ... usually to defeat the minority's preferred candidate." *Gingles*, 478 U.S. at 50-51, 106 S.Ct. 2752. The court found that "[t]he undisputed evidence shows that Anglo voters in Galveston County vote cohesively and for candidates opposing those supported by a majority of Black and Latino Voters ... at a rate sufficient to defeat the minority-preferred candidate consistently in each of the enacted commissioners-court precincts."

***636** Finally, considering the totality of the circumstances, the district court found that "[t]he plaintiffs have demonstrated that the totality of the circumstances shows that Black and Latino voters in Galveston County have 'less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.' " When evaluating the totality of the circumstances, the district court noted that this was "not a typical redistricting case." Instead, the court noted, "[w]hat happened here was stark and jarring." The district court found "the circumstances and effect of the enacted plan were 'mean-spirited' and 'egregious' given that 'there was absolutely no reason to make major changes to Precinct 3.' "

The facts of this case are precisely the circumstances that the VRA sought to prevent: a "white majority vot[ing] sufficiently

as a bloc to enable it ... usually to defeat the minority's preferred candidate" (*Gingles* precondition three), resulting in the dilution of "politically cohesive" minority class (*Gingles* precondition two). But today, armed with only an atextual reading of § 2, the majority focuses on artificial subdivisions of the injured class, rather than focusing on the actions of Galveston County. To imply, as the majority does, that discrimination is permissible so long as the victims of the discrimination are racially diverse, is not only an absurd conclusion but it is one with grave consequences.

Last, I write briefly to point out the implications of the majority's outcome. Judge Keith lucidly warned the Sixth Circuit of such pitfalls in his eloquent dissent in *Nixon*:

> Perhaps what is most disturbing is that the practical effect of the majority's holding requires the adoption of some sort of racial purity test, so that minority group members can be properly identified and kept in their place. If we are to make these distinctions, where will they end? Must a community that would be considered racially both Black and Hispanic be segregated from other Blacks who are not Hispanic? Should the dwindling numbers of Native Americans be further decimated by a parsing of Navaho from Apache? Must Puerto–Ricans and Dominicans in the same neighborhood be separated based on their separate cultural and historical backgrounds? Perhaps we will return to a time of classifying African–Americans as quadroons and octoroons for the purposes of racial classification.

Nixon, 76 F.3d at 1401-02 (internal citations omitted). The absurdities and judicial complicity in impossible racial classifications of which the dissent warns evinces the majority's unworkable standard.[41] And moreover, it is clearly contrary to the text of § 2 and Congress' intent in adopting and amending the VRA.[42]

***637**
* * *

Because the majority's conclusion is atextual, ahistorical, and it allows the Constitution to "ma[k]e a promise which the Nation cannot keep," I dissent. *Nixon*, 76 F.3d at 1404 (Keith, J., dissenting) (quoting *Jones v. Mayer Co.*, 392 U.S. 409, 443, 88 S.Ct. 2186, 20 L.Ed.2d 1189 (1968)).

All Citations

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Footnotes

[*] Judge Richman joins all but Section II.D.

[†] Judge Ho joins Sections I, II.C., and III only.

[1] Contrary to repeated statements in Judge Douglas's dissent, the issue of intentional discrimination was not part of the district court's Section 2 ruling. The court withheld ruling on that constitutional issue, which we remand for further consideration.

[2] The *Nixon* court also points out that the only place where the Voting Rights Act referenced potential minority group aggregations *rejected* them. *Nixon*, 76 F.3d at 1387 n.7 (citing Section 4(f)(3) of the Voting Rights Act, currently codified at 52 U.S.C. § 10303(f)(3) (providing that foreign language ballots and other voting materials must be furnished only where "citizens of a single language minority" constitute at least 5 percent of the citizen voting age population of a political subdivision)).

I disagree with the dissent's contention that this limit inferentially supports Section 2(b) coalition claims. The provisions have completely different goals. Section 4(f)(3) requires local officials to print ballots in a foreign language *only if* at least 5 percent of the minority are dependent on that language; any other rule would provide no guideline and no limit on the tedious and costly process of printing foreign language ballots. Section 4(f)(3) demonstrates that there may be logical stopping points to accommodate "classes" of voters. Section 2(b), on the other hand, tackles the far more complex political problem of legislative

redistricting, and it models pre-existing non-aggregated case law and non-aggregated civil rights legislation.

3 The lead dissent from the Sixth Circuit's decision in *Nixon* argued that this interpretation imposes a "racial purity test" for Section 2 claims. 76 F.3d at 1401 (Keith, J., dissenting). This is not a credible concern today. *See, e.g., Georgia v. Ashcroft*, 539 U.S. 461, 473 n.1, 123 S. Ct. 2498, 2507 n.1, 156 L.Ed.2d 428 (2003) (recognizing that litigants may rely on the "Any Part Black" metric in defining the class of voters seeking protection under the Voting Rights Act), *superseded by statute on other grounds*, Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 120 Stat. 577; *Robinson v. Ardoin*, 37 F.4th 208, 217 (5th Cir. 2022) ("[T]he district court did not err by using the 'Any Part Black' metric to calculate BVAP [black voting age population].").

4 *Cf. United States v. Brown*, 561 F.3d 420 (5th Cir. 2009) (affirming finding of intentional vote dilution against white voters under Section 2).

5 The three-judge district court in *Graves* reaffirmed its holding in an earlier (vacated) decision that single-member districts were required in Tarrant County, Texas, because multimember districts diluted the votes of black and Hispanic voters there. For the earlier decision, see *Graves v. Barnes*, 378 F. Supp. 640, 644–48 (W.D. Tex. 1974), *vacated sub nom. White v. Regester*, 422 U.S. 935, 95 S. Ct. 2670, 45 L.Ed.2d 662 (1975). The Supreme Court summarily denied an application for stay of the district court's 1976 decision. *See Escalante v. Briscoe*, 424 U.S. 937, 96 S. Ct. 1404, 47 L.Ed.2d 345 (1976). This stay denial by the Supreme Court is minimally informative. *See* Trevor N. McFadden & Vetan Kapoor, *The Precedential Effects of the Supreme Court's Emergency Stays*, 44 Harv. J.L. Pub. Pol'y 827, 849 (2021) ("[D]ecisions by either a single Justice or the full Court to *deny* a stay application cannot have any precedential or persuasive effect.").

6 Statutory stare decisis receives further attention in Section II.E, below.

7 Justice Kennedy's plurality opinion was joined by Chief Justice Roberts and Justice Alito. Justice Thomas, joined by Justice Scalia, concurred in the judgment, arguing, "The text of § 2 of the Voting Rights Act of 1965 does not authorize any vote dilution claim, regardless of the size of the minority population in a given district." *Bartlett*, 556 U.S. at 26, 129 S. Ct. at 1250.

8 Although not pertinent here, the *Bartlett* plurality also observed that allowing crossover claims would be in tension with the third *Gingles* precondition. *Id.* at 16, 129 S. Ct. at 1244 ("It is difficult to see how the majority-bloc-voting requirement could be met in a district where, by definition, white voters join in sufficient numbers with minority voters to elect the minority's preferred candidate.").

9 Following *Bartlett*, the Court held in a Section 5 preclearance case that a three-judge district court "had no basis" for creating "a minority coalition district" if it intended to do so. *Perry v. Perez*, 565 U.S. 388, 399, 132 S. Ct. 934, 944, 181 L.Ed.2d 900 (2012) (citing *Bartlett*, 556 U.S. at 13–15, 129 S. Ct. at 1243–44).

10 Additional cases that rejected coalition claims on substantive grounds include *Overton v. City of Austin*, 871 F.2d 529 (5th Cir. 1989) (per curiam), and *Brewer v. Ham*, 876 F.2d 448 (5th Cir. 1989), from this court; and *Hardee Cnty.*, 906 F.2d 524, *Pope*, 687 F.3d 565, *Frank*, 336 F.3d 570, and *Badillo*, 956 F.2d 884, from other circuit courts.

11 And despite their claims of political cohesion, the geographically dispersed Hispanic population has 22.5 percent of the county's voting age population, yet there is no elected Hispanic commissioner, and Hispanics are severely underrepresented compared with

the black population in Precinct 3 under the proposed Map 1 (31 percent to 24 percent, respectively).

12 *See Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 268, 142 S. Ct. 2228, 2265, 213 L.Ed.2d 545 (2022) (listing five factors for overturning precedential cases: "the nature of their error, the quality of their reasoning, the 'workability' of the rules they imposed on the country, their disruptive effect on other areas of the law, and the absence of concrete reliance").

13 Pertinent considerations on remand will include: (1) the appropriate analytical framework to apply to Plaintiffs' constitutional claims (*cf. Perez v. Abbott*, 253 F. Supp. 3d 864, 942–43 (W.D. Tex. 2017)), and, in particular, (2) whether Plaintiffs can prove that they have been injured, or are entitled to relief, when their claims are premised on a coalition theory (*cf. Hunter v. Underwood*, 471 U.S. 222, 232, 105 S. Ct. 1916, 1922, 85 L.Ed.2d 222 (1985) (requiring proof of both discriminatory impact and discriminatory effect)). We also observe that the Supreme Court recently rejected racial gerrymandering and vote dilution claims in *Alexander v. South Carolina State Conference of the NAACP*, —— U.S. ——, 144 S. Ct. 1221, 218 L.Ed.2d 512 (2024). The majority's opinion includes a helpful discussion on the relationship and distinctions between these claims. *Id.* at 1251–52.

14 *Thornburg v. Gingles*, 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986).

15 *League of United Latin Am. Citizens, Council No. 4434 v. Clements*, 999 F.2d 831, 894 (5th Cir. 1993) (en banc); *Brewer v. Ham*, 876 F.2d 448 (5th Cir. 1989); *Overton v. City of Austin*, 871 F.2d 529 (5th Cir. 1989); *Campos v. City of Baytown*, 840 F.2d 1240 (5th Cir. 1988); *League of United Latin Am. Citizens Council No. 4386 v. Midland Indep. Sch. Dist.*, 812 F.2d 1494, 1503 (5th Cir.), *opinion vacated on reh'g*, 829 F.2d 546 (5th Cir. 1987).

16 *See also* Scotty Schenck, *Why* Bartlett *Is Not the End of Aggregated Minority Group Claims Under the Voting Rights Act*, 70 Duke L. J. 1883 (2021); Ben Boris, *The VRA at a Crossroads: The Ability of Section 2 to Address Discriminatory Districting on the Eve of the 202 Census*, 95 Notre Dame L. Rev. 2093, 2107 (2020) (concluding that "the Fifth Circuit should prevail, and that coalition districts satisfy the first *Gingles* requirement"); Dale E. Ho, *Two Fs for Formalism: Interpretating Section 2 of the Voting Rights Act in Light of Changing Demographics and Electoral Patterns*, 50 Harv. C.r.-C.l. L. Rev. 403, 437 (2015) ("Perhaps, then, these proposed rules—which would subtly increase the political salience of race—are not so much about sound judicial administration, but rather amount to an effort to frustrate § 2's purpose of empowering communities of color to elect their preferred candidates. If that is true, then the formalist interpretations of § 2 described above represent not a simple effort to update the statute in recognition of the growing political power of minority communities, but rather an effort to limit the statute's effectiveness in order to resist that rising tide."); Joanna E. Cuevas Ingram, *The Color of Change: Voting Rights in the 21st Century and the California Voting Rights Act*, 15 Harv. Latino L. Rev. 183, 229 (2012) ("The case law that has been handed down in the wake of seminal cases like *Gingles* and *Bartlett* has confirmed the right of multiracial and multiethnic coalitions to bring a joint claim under Section 2 of the Federal VRA, as long as they can show that they have voted as a cohesive political bloc and that a white majority has done the same, limiting the ability of such minority coalitions to freely elect a candidate of their choosing."); Aylon M. Schulte, *Minority Aggregation Under Section 2 of the Voting Rights Act: Toward Just Representation in Ethnically Diverse Communities*, 1995 U. Ill. Rev. 441 (1995).

17 John Burnett, *The New Juneteenth Holiday Traces Its Roots to Galveston, Texas*, NPR (June 20, 2022, 5:00 AM), https://www.npr.org/2022/06/20/1105911785/the-new-juneteenth-federal-holiday-traces-its-roots-to-galveston-texas#:~:text=The%20city%2C%20which%20was%20the,the%20city's%20major%20slave%20dealer; Brett J. Derbes, *Snydor, John Seabrook (1812-1869)*, Texas State Historical Association (Nov. 17, 2021), https://www.tshaonline.org/handbook/entries/sydnor-john-seabrook.

18 Burnett, *supra* note 3.

19 *Id.*

20 *Id.*

21 Ed Cotham, *Juneteenth: Four Myths and One Great Truth*, The Daily News (June 18, 2014), https://www.galvnews.com/opinion/guest_columns/article_73af8892-f75d-11e3-8626-001a4bcf6878.html.

22 *Id.*

23 *Id.*

24 The state of Texas has resorted to the imposition of a poll tax many times throughout history. Dick Smith, *Texas and the Poll Tax*, 45 SW. Soc. Sci. Q. 167 (1964). Indeed, the first poll tax was adopted as early as 1837. *Id.* However, it was not until 1902 that the poll tax became a prerequisite for one's eligibility to vote. *Id.*

25 Section 5 of the VRA "provided that no change in voting procedures could take effect until it was approved by federal authorities in Washington, D.C.—either the Attorney General or a court of three judges." *Id.* at 537, 133 S.Ct. 2612. "A jurisdiction could obtain such 'preclearance' only by proving that the change had neither 'the purpose nor the effect of denying or abridging the right to vote on account of race or color.' " *Id.* Prior to *Shelby County v. Holder*, 570 U.S. 529, 133 S.Ct. 2612, 186 L.Ed.2d 651 (2013), Galveston County was subject to the preclearance process, and it frequently required federal intervention.

26 Michael Wines, *Thomas Hofeller, Republican Master of Political Maps, Dies at 75*, The New York Times, (Aug. 21, 2018) https://www.nytimes.com/2018/08/21/obituaries/thomas-hofeller-republican-master-of-political-maps-dies-at-75.html.

27 *Id.*

28 *Id.*

29 Miles Parks, *Redistricting Guru's Hard Drives Could Mean Legal, Political Woes for GOP*, NPR, (June 6, 2019, 7:14 PM) https://www.npr.org/2019/06/06/730260511/redistricting-gurus-hard-drives-could-mean-legal-political-woes-for-gop.

30 Of Appellants' coastal precinct argument, the district court determined that "a desire to create a coastal precinct cannot and does not explain or justify why [the map] ... was drawn the way it was—and especially does not explain its obliteration of benchmark Precinct 3."

31 Indeed, the majority has long signaled its belief that the en banc court should "lay to rest the minority coalition theory of vote dilution claims." *Clements*, 999 F.2d at 894 & n. 2 (5th Cir. 1993) (*en banc*) (Jones, J., concurring).

32 To be clear, even when overruling only a panel decision, though the stare decisis analysis is "not as exacting," "[t]hat does not mean that principles underpinning the doctrine of stare decisis have no place in the en banc court's decision." *Planned Parenthood of Greater Tex. Fam. Plan. Health Servs., Inc. v. Kauffman*, 981 F.3d 347, 369 (5th Cir. 2020)

33 The majority's citation to *Planned Parenthood of Greater Texas Family Planning and Preventative Health Services, Inc. v. Kauffman*, 981 F.3d 347, 369 (5th Cir. 2020), for the proposition that our stare decisis analysis is less exacting than that of the Supreme Court is misguided in the context of this case. In *Kauffman*, the en banc court was overturning a panel opinion, not another en banc decision. *Id.* ("That does not mean that principles underpinning the doctrine of stare decisis have no place in the en banc court's decision about whether to overturn or abrogate a *panel's* prior decision. But the analysis is not as exacting as that undertaken by the Supreme Court of the United States in applying the stare decisis doctrine, as it must, in deciding whether to overturn its own precedent.") (emphasis added). But when an en banc court sits to overturn en banc precedent, the situation is much more akin to that of the Supreme Court, where decisions are made by the whole court, rather than "the majority vote of just three circuit judges." *Chambers v. Dist. of Columbia*, 35 F.4th 870, 879 (D.C. Cir. 2022). In the context of the en banc court overturning another en banc decision, especially when that decision involves statutory interpretation, I am convinced that the doctrine of stare decisis is in force to its fullest extent.

34 The majority faults Appellees for failing to apply the typical stare decisis factors. But it is Appellants, not Appellees, who carry the substantial burden of demonstrating why overturning *Clements* is appropriate. *Patterson v. McLean Credit Union*, 491 U.S. 164, 172-73, 109 S.Ct. 2363, 105 L.Ed.2d 132 (1989).

35 Even if they managed more than a single reference to the doctrine, Appellants' case would still fail. After all, we heard essentially the same arguments they make today more than four decades ago in *Clements. Clements*, 999 F.2d at 894-898 (discussing the text, purpose, and the implications of minority coalition claims).

36 The majority argues Plaintiffs are merely attempting to form a "political coalition." Given Galveston County's in-plain-sight political goals, however, the majority's concerns are misplaced.

37 Moreover, the Supreme Court has favorably recognized minority coalition claims numerous times. *See, e.g., Carey*, 430 U.S. at 150 n.5, 97 S.Ct. 996; *Wright*, 376 U.S. at 60, 84 S.Ct. 603.

38 The majority also relies on *LULAC v. Perry*, 548 U.S. 399, 126 S.Ct. 2594, 165 L.Ed.2d 609 (2006), a case discussing "influence districts," purporting that *LULAC* also weighs against minority coalition claims. But this argument is similarly unavailing. As the majority states, *LULAC* pertained to influence districts, where minority groups have "influence" in the election but do not constitute a majority. *Id.* at 445, 126 S. Ct. 2594. Indeed, as the majority states, it is true that § 2 "requires more than the ability to influence the outcome between some candidates, none of whom is their candidate of choice." *Id.* The issue in *LULAC* is, at best, tangentially related to the issue before us today.

Of course, I agree *LULAC* requires minority coalition groups to demonstrate "more than the ability to influence the outcome between some candidates." *Id.* Instead, the coalition must prove it can satisfy each of the *Gingles* conditions—including that the coalition can elect the candidate of its choice. But aside from clarifying this requirement, *LULAC* does not weigh, one way or another, on the question before us.

39 "Today's ruling thus strikes at the vitals of stare decisis, 'the means by which we ensure that the law will not merely change

erratically, but will develop in a principled and intelligible fashion' that 'permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals.' " *Citizens United*, 558 U.S. at 414, 130 S.Ct. 876 (quoting *Vasquez v. Hillery*, 474 U.S. 254, 265, 106 S.Ct. 617, 88 L.Ed.2d 598 (1986)).

40 The first precondition in particular is at issue on appeal.

41 The majority does nothing to dispel this concern. The majority contends only that the "any part Black" metric addresses the issues presented by its new standard, relying on *Georgia v. Ashcroft*, 539 U.S. 461, 473 n.1, 123 S.Ct. 2498, 156 L.Ed.2d 428 (2003). But how exactly? The majority may be addressing Judge Keith's rhetorical note about returning to a time "of classifying African-Americans as quadroons and octoroons," but the majority does not engage at all with Judge Keith's chief concerns about individuals who are multi-racial or multi-lingual. Moreover, the majority's reliance on *Georgia v. Ashcroft* for the proposition that the "any part Black" metric addresses these concerns is misplaced. In a footnote, the Supreme Court in *Ashcroft* uses the "any part Black" metric, but it notes that this metric may have less relevance "if the case involves a comparison of different minority groups." *Id.* This is, of course, the exact situation we are concerned with.

42 Announcing its own concerns, the majority warns that minority coalitions suits, even if unsuccessful, "are extraordinarily costly and time-consuming for public entities to litigate." This litigation resulted from Galveston County's decision to rid itself of a majority-minority district that had existed for decades. Rather than leave well enough alone, Galveston County chose to expend its resources on a map-making process that was riddled with discriminatory intent. In my opinion, we cannot allow the County to absolve itself of liability for its bad faith redistricting on the basis that defending Appellees' claims is costly. In other words, Galveston County brought this upon itself.

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1 Wash.3d 629
Supreme Court of Washington,
En Banc.

Gabriel PORTUGAL, Brandon Paul Morales, Jose Trinidad Corral, and League of United Latin American Citizens, Respondents,
v.
FRANKLIN COUNTY, a Washington municipal entity, Clint Didier, Rodney J. Mullen, Lowell B. Peck, in their official capacities as members of the Franklin County Board of Commissioners, Defendants,
James Gimenez, Appellant.

No. 100999-2
|
Argued May 11, 2023
|
Filed June 15, 2023

Synopsis

Background: Latino voters brought action against county and county board of commissioners, alleging that county's system for electing board members diluted votes of Latino/a voters by cracking the population into different districts in violation of Washington Voting Rights Act (WVRA). After intervenor's motion to intervene was granted and intervenor's motion to dismiss was denied, the Superior Court, Franklin County, Alexander Ekstrom, J., entered a final order approving parties' settlement agreement. Intervenor appealed, and plaintiffs requested attorney fees and costs on appeal against intervenor.

Holdings: The Supreme Court, Yu, J., held that:

voters had standing;

as a matter of first impression, legislature had not implicitly repealed WVRA:

facial equal protection claim triggered rational basis review, not strict scrutiny;

WVRA survived rational basis review on facial equal protection challenge;

plaintiffs were entitled to nongovernmental, prevailing party trial and appellate attorney fees and costs under WVRA; and

Supreme Court would decline to assess nongovernmental prevailing party attorney fees against county commissioner.

Affirmed, request for attorney fees granted, and remanded.

****998** Appeal from Franklin County Superior Court, Docket No: 21-2-50210-4, Honorable Alexander C. Ekstrom, Judge

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Opinion

YU, J.

***632** ¶1—This case presents matters of first impression concerning the interpretation and facial validity of the Washington Voting Rights Act of 2018 (WVRA), ch. 29A.92 RCW.[1] As detailed below, the WVRA protects the rights of Washington voters in local elections. In this case, three Latino[2] voters from ****999** Franklin County alleged that the county's system for electing its board of commissioners violated the WVRA by "dilut[ing] the votes of Latino/a voters." Clerk's Papers (CP) at 1. The plaintiffs (respondents on appeal) ultimately settled with defendants Franklin County and the Franklin County Board of Commissioners. The defendants are not participants on appeal. We are not asked to ***633** review the merits of the plaintiffs' claim or the parties' settlement agreement.

¶2 The issues on appeal were raised by James Gimenez, a Franklin County voter who was allowed to intervene by the trial court. Immediately after his motion to intervene was granted, Gimenez moved to dismiss the plaintiffs' claim, arguing that the plaintiffs do not have standing and that the WVRA is facially invalid. The trial court denied Gimenez's motion to dismiss, and he was not an active participant in the case thereafter. After the trial court entered a final order approving the parties' settlement, Gimenez appealed directly to this court.

¶3 Gimenez's arguments are all based on his view that the WVRA protects some Washington voters but excludes others. The WVRA's protections apply to "a class of voters who are members of a race, color, or language minority group."[3] RCW 29A.92.010(5). Gimenez interprets this language to mean that the WVRA protects only members of " 'race minority groups,' 'color minority groups,' or 'language minority group[s].' " Br. of Appellant at 2 (underlining added) (alteration in original). Based on this interpretation, Gimenez argues that the plaintiffs do not have standing because the WVRA does not protect Latinx voters from Franklin County as a matter of law. Gimenez also argues that the WVRA has been repealed by implication and is facially unconstitutional because it requires local governments to implement electoral systems that favor protected voters and disfavor others on the basis of race.

¶4 Gimenez's arguments cannot succeed because his reading of the statute is incorrect. The WVRA protects *all* Washington voters from discrimination on the basis of race, color, and language minority group. On its face, the WVRA ***634** does not require race-based favoritism in local electoral systems, nor does it trigger strict scrutiny by granting special privileges, abridging voting rights, or otherwise classifying voters on the basis of race. Therefore, we hold that the plaintiffs have standing and that the WVRA is valid and constitutional on its face.[4] We affirm the trial court, grant the plaintiffs' request for attorney fees and costs on appeal against Gimenez, and remand for a determination of fees and costs incurred at the trial court.

OVERVIEW OF THE WVRA

¶5 No Washington appellate court has previously considered the WVRA. To provide context for this case, it is important to begin with an overview of the relevant law and terminology.

A. General provisions

¶6 The WVRA recognizes "that electoral systems that deny race, color, or language minority groups an equal opportunity to elect candidates of their choice are inconsistent with the right to free and equal elections." RCW 29A.92.005 (citing Wash. Const. art. I, § 19, art. VI, § 1; U.S. Const. amends. XIV, XV). However, prior to the WVRA's enactment, Washington law "often prohibited" local governments from making changes to their electoral systems, even in response to changing demographics. *Id.* The legislature found that "in some cases, this has resulted in an improper dilution of voting power," particularly as applied to "minority groups." *Id.*

¶7 To protect the rights of Washington voters in local elections, the legislature ****1000** passed the WVRA in 2018. The WVRA provides that

> no method of electing the governing body of a political subdivision may be imposed or applied in a manner that impairs the ***635** ability of members of a protected class or classes to have an equal opportunity to elect candidates of their choice as a result of the dilution or abridgment of the rights of voters who are members of a protected class or classes.

RCW 29A.92.020. A " '[p]rotected class' means a class of voters who are members of a race, color, or language minority group, as this class is referenced and defined in the federal voting rights act [of 1965 (FVRA)], 52 U.S.C. 10301 et seq." RCW 29A.92.010(5). A " '[p]olitical subdivision' " includes "any county, city, town, school district, fire protection district, port district, or public utility district, but does not include the state." RCW 29A.92.010(4). Small cities, towns, and school districts are exempt from most of the WVRA's provisions. RCW 29A.92.700.

¶8 Two elements must be shown before a political subdivision may be found in violation of the WVRA:

> (a) Elections in the political subdivision exhibit polarized voting[5]; and
>
> (b) Members of a protected class or classes do not have an equal opportunity to elect candidates of their choice as a result of the dilution or abridgment of the rights of members of that protected class or classes.

RCW 29A.92.030(1). There are definitions and guidelines for applying these elements in individual cases. *See* RCW 29A.92.010, .030(2)-(6).

B. Types of prohibited voting discrimination

¶9 The WVRA expressly protects against two types of voting discrimination: "abridgment" and "dilution." RCW 29A.92.020, .030(1)(b). These terms are not statutorily defined, and their meaning is not necessarily obvious. However,

"courts may rely on relevant federal case law for guidance" in interpreting the WVRA. RCW 29A.92.010.

***636** ¶10 Federal cases use "abridgment" as a relatively general term. Practices that "abridge" the right to vote on the basis of race or color have been expressly prohibited by the Fifteenth Amendment since 1870 and by section 2 of the FVRA (Section 2) since 1965. U.S. Const. amend. XV, § 1; *Brnovich v. Democratic Nat'l Comm.*, 594 U.S. ___, 141 S. Ct. 2321, 2331, 210 L. Ed. 2d 753 (2021) (citing 79 Stat. 437). In its current form, Section 2 prohibits electoral systems and practices "which result[U.S.] in a denial or abridgement" of voting rights based on "race," "color," or membership in a "language minority group." 52 U.S.C. §§ 10301(a), 10303(f)(2).

¶11 A Section 2 violation may be found if "the totality of circumstances" show

> that the political processes leading to nomination or election in the [jurisdiction] are not equally open to participation by members of a [protected class] in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.

52 U.S.C. § 10301(b). Thus, "an 'abridgement' of the right to vote" refers to an electoral system or practice that impairs voting rights on the basis of race, color, or language minority group, regardless of whether there was "outright denial of the right" to vote. *Brnovich*, 141 S. Ct. at 2341.

¶12 For example, abridgment may be caused "by the requirement of the payment of a poll tax as a precondition to voting" or by "the discriminatory use of literacy tests." 52 U.S.C. § 10306(a); *Oregon v. Mitchell*, 400 U.S. 112, 132, 91 S. Ct. 260, 27 L. Ed. 2d 272 (1970) (plurality opinion). For many years, Washington State abridged voting rights by imposing an English-language literacy requirement for voter registration, while at the same time "vesting unlimited discretion in state registration officers" to decide whether ****1001** to administer a literacy test before registering any particular individual to vote. 1967 Op. Att'y Gen. No. 21, at ***637** 5; *see* Laws of 1901, ch. 135, § 4; Laws of 1965, ch. 9, § 29.07.070(13).

¶13 In contrast to "abridgment," federal courts use "dilution" as a technical term of art. Dilution is a specific type of abridgment, which arises from the "features of legislative districting plans." *Brnovich*, 141 S. Ct. at 2331. In a dilution claim, the plaintiff alleges that their jurisdiction's districting plan "dilute[s] the ability of particular voters to affect the outcome of elections." *Id.* Federal cases recognize two primary forms of vote dilution.

¶14 First, vote dilution can be caused by the use of "multimember districts and at-large voting schemes,"[6] as opposed to single-member districts and district-based elections.[7] *Thornburg v. Gingles*, 478 U.S. 30, 47, 106 S. Ct. 2752, 92 L. Ed. 2d 25 (1986). At-large elections may " 'minimize or cancel out the voting strength of racial [minorities]' " because "the majority, by virtue of its numerical superiority, will regularly defeat the choices of minority voters." *Id.* at 47-48 (alteration in original) (internal quotation marks omitted) (quoting *Burns v. Richardson*, 384 U.S. 73, 88, 86 S. Ct. 1286, 16 L. Ed. 2d 376 (1966)).

¶15 Second, vote dilution can occur in district-based elections through "the manipulation of district lines." *Voinovich v. Quilter*, 507 U.S. 146, 153, 113 S. Ct. 1149, 122 L. Ed. 2d 500 (1993). This often involves so-called " 'cracking' and 'packing.' " *Gill v. Whitford*, 585 U.S. ___, 138 S. Ct. 1916, 1923, 201 L. Ed. 2d 313 (2018) (quoting record). "Cracking" occurs when a group of voters is split up " 'among multiple districts so that they fall short of a majority in each one.' " *Id.* at 1924 (quoting record). "Packing" occurs when a group of voters is concentrated " 'in a few districts that they win by overwhelming margins,' " thus preventing the group from ***638** electing its preferred candidates in other districts. *Id.* (quoting record).

¶16 Both the WVRA and Section 2 of the FVRA prohibit vote dilution. RCW 29A.92.020; *Brnovich*, 141 S. Ct. at 2333. However, there are significant differences between the two, which affect both the range of available remedies and the elements required for a successful claim.

C. The WVRA recognizes a broader range of redressable claims for vote dilution than those recognized by Section 2 of the FVRA

¶17 Section 2 recognizes only a few potential remedies for vote dilution. Federal courts "have strongly preferred

single-member districts" as the remedy of choice. *Growe v. Emison*, 507 U.S. 25, 40, 113 S. Ct. 1075, 122 L. Ed. 2d 388 (1993). In addition, federal courts may order "the creation of majority-minority[8] districts [if] necessary to remedy a violation of federal law." *Quilter*, 507 U.S. at 156. However, Section 2 does not require other remedies, such as so-called "influence districts"[9] or "crossover district[s]."[10] *Bartlett v. Strickland*, 556 U.S. 1, 13, 129 S. Ct. 1231, 173 L. Ed. 2d 173 (2009) (plurality opinion). Instead, courts adjudicating Section 2 claims are generally limited to ordering single-member districts and, in some cases, majority-minority districts.

****1002** ¶18 Due to these limits on available remedies, a plaintiff asserting a Section 2 vote dilution claim

> must prove three threshold conditions: first, "that [the minority group] is sufficiently large and geographically compact to constitute ***639** a majority in a single-member district"; second, "that [the minority group] is politically cohesive"; and third, "that the ... majority votes sufficiently as a bloc to enable it ... usually to defeat the minority's preferred candidate."

Emison, 507 U.S. at 40 (some alterations in original) (quoting *Gingles*, 478 U.S. at 50-51). These threshold conditions are generally referred to as the "*Gingles* factors" or "*Gingles* requirements."

¶19 As the United States Supreme Court has explained, the *Gingles* factors are necessary in Section 2 vote dilution cases to ensure that the plaintiff has stated a redressable injury. In other words, the *Gingles* factors require the plaintiff to show that their concerns could, at least potentially, be addressed by implementing single-member districts, majority-minority districts, or both:

> The "geographically compact majority" and "minority political cohesion" showings are needed to establish that the minority has the potential to elect a representative of its own choice in some single-member district, [a]nd the "minority political cohesion" and "majority bloc voting" showings are needed to establish that the challenged districting thwarts a distinctive minority vote by submerging it in a larger ... voting population.

Id. (citing *Gingles*, 478 U.S. at 50 n.17, 51). "[O]nly when a party has established the *Gingles* requirements does a court proceed to analyze whether a violation [of Section 2] has occurred based on the totality of the circumstances." *Strickland*, 556 U.S. at 11-12.

¶20 By contrast, the WVRA contemplates a much broader range of available remedies. Similar to Section 2, the WVRA permits courts to order a political subdivision to implement "a district-based election system" and "to draw or redraw district boundaries." RCW 29A.92.110(1). However, unlike Section 2, courts adjudicating WVRA claims are "not limited to" these examples, and any remedy must be "tailor[ed]" to the political subdivision at issue. RCW 29A.92.110(1)-(2).

***640** ¶21 For example, in direct contrast to the FVRA, the WVRA explicitly allows for the creation of a crossover or "coalition"[11] district "that provides the protected class the opportunity to join in a coalition of two or more protected classes to elect candidates of their choice if there is demonstrated political cohesion among the protected classes." RCW 29A.92.110(2). Other potential remedies include, but are not necessarily limited to,

- limited voting, where a voter receives fewer votes than there are candidates to elect;
- cumulative voting, where a voter receives as many votes as there are candidates to elect, but may cast multiple votes for a single candidate; and
- single transferrable or ranked choice voting, where a voter ranks candidates in order of preference, and votes are transferred to lower-ranked candidates who are not elected on first-place votes if a majority is not reached.

Final B. Rep. on Engrossed Substitute S.B. 6002, at 2, 65th Leg., Reg. Sess. (Wash. 2018).

¶22 Thus, on its face, the WVRA permits remedies that Section 2 does not. This does not create a conflict between state and federal law because the states are free to implement remedies that are not *required* pursuant to Section 2, so long as those remedies are not otherwise *prohibited*. *See Strickland*, 556 U.S. at 23 ("Our holding that [Section] 2 does not require crossover districts does not consider the permissibility of such districts as a matter of legislative choice or discretion."); *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 430, 126 S. Ct. 2594, 165 L. Ed. 2d 609 (2006) (*LULAC*) ("To be sure, [Section] 2 ****1003** does not forbid the creation of a noncompact majority-minority district.").

¶23 Because the WVRA contemplates a broader range of remedies than Section 2, a WVRA plaintiff can state a redressable

injury under a broader range of circumstances ***641** than a Section 2 plaintiff. This is reflected in the elements required to prove a WVRA claim.

¶24 Similar to Section 2, the WVRA requires the plaintiff to show that "[e]lections in the political subdivision exhibit polarized voting." RCW 29A.92.030(1)(a). This requirement corresponds to the second and third *Gingles* factors, discussed above: "the minority group must be able to show that it is politically cohesive" and that the "majority [group] votes sufficiently as a bloc to enable it ... usually to defeat the minority's preferred candidate." *Gingles*, 478 U.S. at 51; *see* RCW 29A.92.010(3). The WVRA is also similar to Section 2 in placing the ultimate burden on the plaintiff to prove that "[m]embers of a protected class or classes do not have an equal opportunity to elect candidates of their choice as a result of the dilution or abridgment of the rights of members of that protected class or classes." RCW 29A.92.030(1)(b); *cf.* 52 U.S.C. § 10301(b).

¶25 However, unlike Section 2, the WVRA specifically rejects the first *Gingles* factor as a *threshold* requirement: "The fact that members of a protected class are not geographically compact or concentrated to constitute a majority in a proposed or existing district-based election district shall not preclude a finding of a violation under this chapter." RCW 29A.92.030(2). *Contra Gingles*, 478 U.S. at 50. Instead, the WVRA provides that geographical compactness "may be a factor in determining a *remedy*." RCW 29A.92.030(2) (emphasis added).

¶26 Thus, if the plaintiff in a WVRA case seeks the creation of a so-called "majority-minority" district, they may be required at the remedy stage to show that the minority group is sufficiently geographically compact to constitute a majority in the proposed district—just as a Section 2 plaintiff would need to do at the threshold stage. *Cf. Gingles*, 478 U.S. at 50 & n.17. By contrast, if the plaintiff in a WVRA case seeks only the implementation of a ranked choice voting system for at-large elections, a showing of geographical compactness would be both irrelevant and unnecessary at any stage.

***642** D. Enforcement of the WVRA

¶27 The WVRA includes two mechanisms to promote compliance: voluntary changes by political subdivisions and challenges by local voters.

¶28 A political subdivision may voluntarily "change its electoral system ... to remedy a potential violation" of the WVRA. RCW 29A.92.040(1). If the political subdivision wishes to draw or redraw its election districts, then it must comply with specific criteria. RCW 29A.92.050(3). In addition, before implementing any voluntary changes, "the political subdivision must provide public notice" and "hold at least one public hearing." RCW 29A.92.050(1)(a)-(b).

¶29 Local voters may also "challenge a political subdivision's electoral system" for alleged WVRA violations. RCW 29A.92.060(1). The voter must "first notify the political subdivision," which must work with the voter "in good faith." *Id.*; RCW 29A.92.070(1). If the political subdivision wishes to implement a remedy at this stage, it must "seek a court order acknowledging that the ... remedy complies with RCW 29A.92.020 and was prompted by a plausible violation." RCW 29A.92.070(2). There is "a rebuttable presumption that the court will decline to approve the political subdivision's proposed remedy." *Id.*

¶30 If a political subdivision receives notice of an alleged WVRA violation but fails to implement a court-approved remedy within a specified time frame, then "any voter who resides in [the] political subdivision ... may file an action" in superior court. RCW 29A.92.090(1). Such an action is subject to the WVRA's provisions on venue, time for trial, statute of limitations, and similar issues. *See* RCW 29A.92.090-.100. If the trial court finds that the political subdivision has violated the WVRA, then it "may order appropriate remedies," as discussed above. RCW 29A.92.110(1). Once the political subdivision ****1004** implements a court-approved remedy, it is largely shielded from WVRA challenges for the next four years. *See* RCW 29A.92.070(3), .080(3), .120(1).

***643** ¶31 Since the WVRA was enacted in 2018, several political subdivisions have made changes to their electoral systems. However, this will be the first time that any Washington appellate court addresses the WVRA.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

¶32 This case arises from a voter-initiated challenge to Franklin County's system for electing its three-member board of commissioners. Franklin County is located in southeastern Washington, with its county seat in the city of Pasco. *Find Us*, Franklin County, https://www.franklincountywa.gov/508/Find-Us (last visited June 5, 2023). About 54 percent of the county's total population is "Hispanic or Latino."[12] *QuickFacts, Franklin County, Washington*, U.S. Census Bureau, https://www.census.gov/quickfacts/franklincountywashington (last visited June 5, 2023). "Latino citizens make up over one third, or 34.4%, of Franklin County's citizen voting age population." CP at 5.

A. The plaintiffs notify Franklin County of an alleged WVRA violation and ultimately file suit

¶33 Prior to this case, Franklin County used "a 'hybrid' election system," which combined district-based primaries with at-large general elections:

> [P]otential candidates [ran] in their respective districts and the top two candidates proceed[ed] to the general election. The general election [was] then conducted as an at-large election, in which all voters in the County cast votes to seat a county commissioner in each seat the year that position is up for election.

***644** *Id.* at 1010. In October 2020, counsel for the plaintiffs[13] sent Franklin County a notice alleging that its electoral system violated the WVRA.

¶34 According to the plaintiffs' notice, the county's "at-large general elections for commissioners prevent Latinos from electing a candidate of choice" and "Franklin County has diluted the Latino community's votes by cracking the population into different districts." *Id.* at 116-17. The notice further alleged that "as a result of the County's discriminatory electoral scheme, there are no Latino preferred candidates currently serving on the Franklin County Board of Commissioners, nor has there ever been one elected to serve on the commission." *Id.* at 116.

¶35 Franklin County did not take remedial action within the then applicable six-month time frame. *See* RCW 29A.92.080(1). The plaintiffs subsequently filed a WVRA claim in Franklin County Superior Court against Franklin County and each member of the Franklin County Board of Commissioners (Clint Didier, Rodney J. Mullen, and Lowell B. Peck) in their official capacities.

B. James Gimenez intervenes to defend Franklin County's electoral system

¶36 The procedural history of this litigation is fairly complicated, but many of the details are irrelevant to our review. To briefly summarize, the plaintiffs moved for partial summary judgment on the issue of whether Franklin County's electoral system violated the WVRA. The defendants conceded the WVRA violation because they could not make a contrary argument "in good faith." CP at 170. The trial court granted partial summary judgment and ordered the parties to "work cooperatively together on the development ***645** of the district map." *Id.* at 259. However, this ****1005** order was vacated shortly after it was entered.

¶37 Three days after the trial court granted partial summary judgment, Gimenez moved to intervene to defend Franklin County's existing electoral system, alleging that the plaintiffs lack standing and that the WVRA is facially unconstitutional. One week later, the Franklin County Board of Commissioners adopted a resolution directing the county prosecutor to "seek reconsideration of the order granting Summary Judgement [sic]." *Id.* at 275. As directed, the prosecutor moved to vacate the summary judgment order, asserting that the "Board of Commissioners never authorized or gave direction in an open public meeting to the Franklin County Prosecutor to stipulate to an order granting summary judgment in favor of the Plaintiffs." *Id.* at 318.

¶38 Over the plaintiffs' objections, the trial court granted the defendants' motion to vacate and Gimenez's motion to intervene.

C. The trial court denies Gimenez's motion to dismiss and approves the parties' CR 2A settlement agreement

¶39 After his motion to intervene was granted, Gimenez immediately moved for dismissal pursuant to CR 12(c), arguing that the plaintiffs lack standing and that the WVRA is facially invalid. The trial court denied Gimenez's CR 12(c) motion on its merits.

¶40 The plaintiffs subsequently filed a second motion for partial summary judgment. As they had done in their first motion, the plaintiffs sought a ruling that Franklin County's electoral system violated the WVRA, leaving only "the question of an appropriate remedial map" for trial. *Id.* at 682. The defendants initially opposed summary judgment, but the parties ultimately entered into a CR 2A settlement agreement, "which was ratified by Defendant Commissioners in a Franklin County commissioner meeting." *Id.* at 1288.

***646** ¶41 The settlement agreement allowed Franklin County to use a district map that its board of commissioners had already "approved and adopted" following the 2020 U.S. Census. *Id.* at 1292. However, "[b]eginning with the 2024 election cycle, all future elections for the office of Franklin County Commissioner will be conducted under a single-member district election system for both primary and general elections." *Id.* The plaintiffs also agreed to accept a reduced award of attorney fees and costs from the defendants. Over Gimenez's objection, the trial court approved the parties' CR 2A settlement and dismissed the plaintiffs' claims with prejudice.

¶42 Gimenez appealed directly to this court. The plaintiffs opposed Gimenez's arguments on the merits, but they agreed that direct review was appropriate. We retained the case for a decision on the merits and accepted six amici briefs for filing.[14] We have not received any appellate filings from Franklin County or any member of the Franklin County Board of Commissioners.

ISSUES

¶43 A. Do the plaintiffs have standing to bring a WVRA claim?

¶44 B. Did the legislature repeal the WVRA by implication?

¶45 C. Does the WVRA facially violate the privileges and immunities clause of article I, section 12 of the Washington Constitution?

¶46 D. Does the WVRA facially violate the equal protection clause of the Fourteenth Amendment to the United States Constitution?

***647** ¶47 E. Should we reach the additional issues raised by plaintiffs and amici?

¶48 F. Should we grant the plaintiffs' request for attorney fees and costs?

****1006** ANALYSIS

¶49 Each of Gimenez's arguments is based on his interpretation of the WVRA's definition of a "protected class." He believes

that this definition protects some racial groups, while excluding others. As a result, Gimenez believes that the WVRA requires local governments to implement electoral systems that favor some racial groups, while disfavoring others.

¶50 Statutory interpretation is a matter of law, so our review is de novo. *Woods v. Seattle's Union Gospel Mission*, 197 Wn.2d 231, 238, 481 P.3d 1060 (2021), *cert. denied*, 142 S. Ct. 1094 (2022). We reject Gimenez's interpretation of the WVRA. The plain language of the statute and basic principles of statutory interpretation show that the WVRA protects *all* Washington voters from discrimination on the basis of race, color, and language minority group. Therefore, the plaintiffs in this case have standing and the WVRA has not been repealed by implication.

¶51 Gimenez's constitutional challenges to the WVRA are also subject to de novo review. *Id.* "We presume statutes are constitutional, and the party challenging constitutionality bears the burden of proving otherwise." *Id.* at 239. Because Gimenez makes facial challenges, his arguments "must be rejected unless there is '*no set of circumstances* in which the statute ... can constitutionally be applied.' " *Id.* at 240 (quoting *In re Det. of Turay*, 139 Wn.2d 379, 417 n.27, 986 P.2d 790 (1999)). The WVRA can clearly be applied in a manner that does not violate article I, section 12 because, on its face, the WVRA does not grant any privilege or immunity to any class of citizens.

***648** ¶52 Finally, contrary to Gimenez's view, his federal equal protection claim does not trigger strict scrutiny because the WVRA, on its face, does not "create racial classifications." *Contra* Br. of Appellant at 17. Strict scrutiny could certainly be triggered in an *as-applied* challenge to "districting maps that sort voters on the basis of race" or to some other "race-based sorting of voters." *Wis. Legislature v. Wis. Elections Comm'n*, 595 U.S. ___, 142 S. Ct. 1245, 1248, 212 L. Ed. 2d 251 (2022) (per curiam). However, on its face, the WVRA requires "equal opportunit[ies]" for voters of all races, colors, and language minority groups, not race-based sorting of voters. RCW 29A.92.020.

¶53 Gimenez appears to argue that the WVRA makes "racial classifications" by recognizing the existence of race, color, and language minority groups and prohibiting discrimination on that basis. Br. of Appellant at 17. He also appears to argue that the WVRA *must* favor some racial groups and disfavor others because "[e]lections are quintessentially zero-sum." *Id.* at 53. We cannot agree. If Gimenez's position were correct, then every statute prohibiting racial discrimination or mandating equal voting rights would be subject to facial equal protection challenges triggering strict scrutiny. No authority supports that position. Therefore, we hold that Gimenez's equal protection claim triggers only rational basis review, which the WVRA easily satisfies on its face.

¶54 We grant the plaintiffs' request for attorney fees in part. We award fees and costs incurred at trial and on appeal against Gimenez, and we remand to the trial court for a calculation of the fees and costs incurred at the trial court. However, we decline the plaintiffs' request to assess fees against Commissioner Didier.

A. The plaintiffs have standing

¶55 According to Gimenez, the WVRA's protections simply do not apply to members of a race, color, or language minority group that comprises a numerical majority of the ***649** total population in their local jurisdiction. Slightly over 50 percent of Franklin County's total population is Latinx. Therefore, according to Gimenez, it is impossible for *any* Latinx voter in Franklin County to have standing to bring a WRVA claim, unless they happen to be a member of some other protected class. The trial court rejected Gimenez's interpretation and ruled that the plaintiffs have standing. We affirm.

****1007** 1. The plain statutory language and principles of statutory interpretation show that the WVRA's protections apply to all Washington voters

¶56 The plain meaning of the WVRA applies to all Washington voters. As discussed above, the WVRA prohibits voting discrimination against "members of a protected class or classes." RCW 29A.92.020. A "protected class" is "a class of voters who are members of a race, color, or language minority group." RCW 29A.92.010(5). Everyone can be a member of a race or

races, everyone has a color, and "language minority group" includes ethnic groups that might otherwise be wrongfully excluded—"persons who are American Indian, Asian American, Alaskan Natives or of Spanish heritage."[15] 52 U.S.C. § 10310(c)(3). As a result, every Washington voter is a member of at least one protected class, so every Washington voter is protected by the WVRA.

***650** ¶57 The statute's plain meaning is confirmed by "traditional rules of grammar." *PeaceHealth St. Joseph Med. Ctr. v. Dep't of Revenue*, 196 Wn.2d 1, 8, 468 P.3d 1056 (2020). For instance, "[w]hen evaluating the language of a statute, we apply the last antecedent rule" absent evidence of a contrary legislative intent. *City of Spokane v. Spokane County*, 158 Wn.2d 661, 673, 146 P.3d 893 (2006). The last antecedent rule shows that "minority group" modifies only "language," not "race" or "color." *See id.*; RCW 29A.92.010(5). If the legislature had intended otherwise, then the WVRA would refer to "racial" groups, not "race" groups.

¶58 Principles of statutory interpretation further confirm that the WVRA " 'says what it means and means what it says.' " *City of Seattle v. Long*, 198 Wn.2d 136, 149, 493 P.3d 94 (2021) (quoting *State v. Costich*, 152 Wn.2d 463, 470, 98 P.3d 795 (2004)). Statutory language must be interpreted in "the context of the statute, related provisions, and the statutory scheme as a whole." *Id.* at 148. The WVRA recognizes that voters must have an "*equal* opportunity to elect candidates of their choice." RCW 29A.92.020, .030(1)(b) (emphasis added). Equality would not be possible if the WVRA protected the members of some racial groups and excluded others. Moreover, the WVRA does not say that a political subdivision's electoral system may be challenged by "minorities," "minority voters," "minority groups," or anything similar. Instead, the WVRA allows for a challenge by "*any* voter who resides in a political subdivision where a violation of RCW 29A.92.020 is alleged."[16] RCW 29A.92.090(1) (emphasis added).

¶59 In addition, as the trial court correctly ruled, Gimenez's narrow statutory interpretation is inconsistent with the WVRA's remedial purpose. "Ultimately, in resolving a question of statutory construction, this court will adopt the interpretation which best advances the legislative purpose." *Bennett v. Hardy*, 113 Wn.2d 912, 928, 784 P.2d 1258 (1990). ***651** The stated legislative purpose of the WVRA is to prohibit "electoral systems that deny race, color, or language minority groups an equal opportunity to elect candidates of their choice." RCW 29A.92.005. It would improperly frustrate this purpose to hold that the WVRA's protections are inapplicable to many Washington voters, as Gimenez claims.

****1008** ¶60 Finally, we consider persuasive authority from California and federal courts. The WVRA's definition of a protected class is identical to the definition of a protected class in California's voting rights act. *Compare* RCW 29A.92.010(5), *with* Cal. Elec. Code § 14026(d). In 2006, the California Court of Appeals recognized that this definition "simply gives a cause of action to members of *any* racial or ethnic group that can establish that its members' votes are diluted." *Sanchez v. City of Modesto*, 145 Cal. App. 4th 660, 666, 51 Cal. Rptr. 3d 821 (2006). The WVRA adopted the same definition 12 years later.

¶61 If our legislature intended to enact a different definition of a protected class, it had ample time to change the language. Instead, our legislature adopted California's definition verbatim. Absent "contrary legislative intent, when a state statute is 'taken substantially verbatim' " from another jurisdiction, " 'it carries the same construction.' " *Anfinson v. FedEx Ground Package Sys., Inc.*, 174 Wn.2d 851, 868, 281 P.3d 289 (2012) (internal quotation marks omitted) (quoting *State v. Bobic*, 140 Wn.2d 250, 264, 996 P.2d 610 (2000)). Thus, California's broad interpretation of the definition of a protected class is highly persuasive when interpreting the same language in the WVRA.

¶62 In addition, "courts may rely on relevant federal case law for guidance" when interpreting the WVRA. RCW 29A.92.010. As the California Court of Appeals explained, "In a variety of contexts, the [United States] Supreme Court has held that the term 'race' is expansive and covers all ethnic and racial groups." *Sanchez*, 145 Cal. App. 4th at 684. Notably, the Supreme Court has held that the Fifteenth ***652** Amendment's prohibition on "deny[ing] or abridg[ing] the right to vote on account of race ... grants protection to *all* persons, not just members of a particular race." *Rice v. Cayetano*, 528 U.S. 495, 512, 120 S. Ct. 1044, 145 L. Ed. 2d 1007 (2000) (emphasis added).

¶63 Like the United States Supreme Court, this court has previously refused to apply narrow definitions when deciding whether a person is protected from discrimination on the basis of "race." *See State v. Zamora*, 199 Wn.2d 698, 704 n.6, 512 P.3d 512 (2022) (quoting *Peña-Rodriguez v. Colorado*, 580 U.S. 206, 214, 137 S. Ct. 855, 197 L. Ed. 2d 107 (2017)). We decline to change our approach now. Instead, we apply the plain statutory language and hold that the WVRA's protections apply to all Washington voters.

2. We decline Gimenez's invitation to rewrite the statute

¶64 Gimenez acknowledges that it is both "plausible" and "grammatically permissible" to interpret the WVRA as protecting all Washington voters. Br. of Appellant at 13-14. Nevertheless, he argues that we must restructure and rewrite the statute as follows:

> "U.S.'Protected class' means
>
> (a) a class of voters who are members of a race minority group; or
>
> (b) a class of voters who are members of a color minority group; or
>
> (c) a class of voters who are members of a language minority group, as this class is referenced and defined in the federal voting rights act, 52 U.S.C. 10301 *et seq*."

Id. at 10 (underlining added). "Courts may not 'rewrite unambiguous statutory language under the guise of interpretation.' " *State v. Hawkins*, 200 Wn.2d 477, 492, 519 P.3d 182 (2022) (quoting *Jespersen v. Clark County*, 199 Wn. App. 568, 578, 399 P.3d 1209 (2017)). However, Gimenez argues that this court must judicially rewrite the WVRA. He is incorrect.

***653** ¶65 First, Gimenez points to the WVRA's statement of legislative findings and intent, which appears to use "minority groups" as a shorthand for "race, color, or language minority groups." RCW 29A.92.005. However, there is no indication that this was intended to exclude certain racial groups from the WVRA's protections. Indeed, the stand-alone phrase "minority groups" is not defined (or even used) anywhere else in the WVRA.

¶66 It would be both absurd and contrary to precedent to hold that the statement of legislative findings negates the plain language of the WVRA's operative provisions. "Declarations of intent are not controlling; ****1009** instead, they serve 'only as an important guide in determining the intended effect of the operative sections.'U.S." *State v. Reis*, 183 Wn.2d 197, 212, 351 P.3d 127 (2015) (quoting *Kilian v. Atkinson*, 147 Wn.2d 16, 23, 50 P.3d 638 (2002) (plurality opinion)). The legislature may have found that minority groups would benefit from the WVRA, but that does not mean the legislature intended to exclude everyone else.

¶67 Next, Gimenez appears to argue that the WVRA cannot be intended to protect all racial groups because it is "impossible" for a majority group to experience voting discrimination. Br. of Appellant at 26. According to Gimenez, "if the 'protected class' constitutes a majority of the political subdivision ... it would not lack an equal opportunity to elect candidates of choice due to vote dilution within that subdivision." *Id.* at 25-26 (emphasis omitted).

¶68 In this argument, Gimenez appears to assume that the WVRA recognizes only vote *dilution* claims. To the contrary, as discussed above, the WVRA prohibits both "dilution" and "abridgment" of voting rights on the basis of race, color, or language minority group. RCW 29A.92.020. Abridgment of the right to vote can occur regardless of which racial group is in the majority.

¶69 For instance, abridgment would likely be found if voting registration officials "administered literacy tests to Mexican-American members of the plaintiffs' class more ***654** frequently, more carefully, and more stringently than they have administered them to other persons, including Anglo-Americans whose ability to read and speak English is imperfect or limited." *Mexican-Am. Fed'n-Wash. State v. Naff*, 299 F. Supp. 587, 593 (E.D. Wash. 1969), *judgment vacated sub nom. Jimenez v. Naff*, 400 U.S. 986 (1971); *see also* 1967 Op. Att'y Gen. No. 21. "Indeed, the most egregious examples of Jim Crow era voter suppression—such as poll taxes and literacy tests—were specifically designed to prevent Black majorities from participating in elections." Amicus Br. of State of Wash. at 11-12 (citing Brad Epperly et al., *Rule by Violence, Rule by Law: Lynching, Jim Crow, and the Continuing Evolution of Voter Suppression in the U.S.*, 18 Persps. on Pol. 756, 761-64 (2020)).

¶70 Moreover, it is entirely possible to dilute the voting power of majority groups through the manipulation of district lines.

The United States Supreme Court has already explained how:

> Assume a hypothetical jurisdiction of 1,000 voters divided into 10 districts of 100 each, where members of a minority group make up 40 percent of the voting population and voting is totally polarized along racial lines. With the right geographic dispersion to satisfy the compactness requirement, and with careful manipulation of district lines, the minority voters might be placed in control of as many as 7 of the 10 districts.

Johnson v. De Grandy, 512 U.S. 997, 1016, 114 S. Ct. 2647, 129 L. Ed. 2d 775 (1994). Thus, to the extent that Gimenez believes that the WVRA does not protect majority groups because they do not need the WVRA's protection, he is simply incorrect.

¶71 In sum, the WVRA means exactly what it says. All Washington voters are protected from discrimination on the basis of race, color, or language minority group. That includes the plaintiffs. Therefore, the trial court correctly ruled that the plaintiffs have standing to bring their WVRA claim.

***655** B. The WVRA has not been repealed by implication

¶72 Next, Gimenez argues that the WVRA gives minority groups the exclusive "right to sue to compel redistricting, and require[s] the county to favor the racial group which sued in drawing new district lines." Br. of Appellant at 17-18. He contends that this irreconcilably conflicts with RCW 29A.76.010(4)(d), which provides that when a county engages in periodic redistricting after a census, "[p]opulation data may not be used for purposes of favoring or disfavoring any racial group or political party." Due to this alleged conflict, Gimenez believes that every time RCW 29A.76.010 was amended, the WVRA was implicitly repealed, at least as applied to counties. He is incorrect. The WVRA neither requires nor allows the kind ****1010** of race-based favoritism that RCW 29A.76.010(4)(d) prohibits.

¶73 First, as discussed above, the WVRA's protections apply to all Washington voters, and all Washington voters have standing to bring a WVRA challenge. The WVRA does not compel race-based favoritism; it explicitly requires "an equal opportunity" in local elections for voters of all races, colors, and language minority groups. RCW 29A.92.020.

¶74 Second, contrary to Gimenez's interpretation, a political subdivision cannot be compelled to do *anything* pursuant to the WVRA based on the "single factor" of "racially polarized voting, *i.e.*, the fact that voters of different races tend to vote for different candidates." *Contra* Br. of Appellant at 45. In fact, the plain language of the WVRA provides that a plaintiff must prove *both* that "[e]lections in the political subdivision exhibit polarized voting" *and* that "[m]embers of a protected class or classes do not have an equal opportunity to elect candidates of their choice as a result of the dilution or abridgment of the rights of members of that protected class or classes." RCW 29A.92.030(1)(a)-(b). Thus, the WVRA does not require local governments to favor "race minority 'haves' " at the expense of "race majority 'have-nots.' " *Contra* Reply Br. of Appellant at ***656** 18. The WVRA does not compel local governments to do anything based on *race*. Instead, the WVRA may compel local governments to change their electoral systems to remedy proven *racial discrimination*.

¶75 Gimenez appears to believe that actions to remedy proven racial discrimination are indistinguishable from actions based on race alone. He also argues that the WVRA actually "*forbids* consideration of ... past discrimination" because the WVRA does not require "[p]roof of intent on the part of the voters or elected officials to discriminate against a protected class." Br. of Appellant at 4 (emphasis added); RCW 29A.92.030(5). We disagree. On its face, the WVRA simply codifies the following, indisputable propositions:

¶76 (1) Voters can be "members of a race, color, or language minority group." RCW 29A.92.010(5). Recognizing the existence of race, color, and language minority groups does not, in itself, "create racial classifications." *Contra* Br. of Appellant at 17. *See* U.S. Const. amend. XV; 52 U.S.C. §§ 10301(a), 10303(f)(2).

¶77 (2) "Polarized voting" is possible. RCW 29A.92.010(3). Recognizing the possibility of racially polarized voting is neither novel nor unique to the WVRA. *See generally Gingles*, 478 U.S. 30. Moreover, even where polarized voting is proved to exist, that is not sufficient, by itself, to prove a WVRA violation. RCW 29A.92.030(1).

¶78 (3) A combination of polarized voting and "dilution or abridgment" of voting rights can deprive members of a race, color, or language minority group of an "equal opportunity to elect candidates of their choice" in local elections. RCW 29A.92.030(1)(b); *cf.* U.S. Const. amend. XV; 52 U.S.C. §§ 10301, 10303(f)(2).

¶79 (4) Where a class of voters has been deprived of equal electoral opportunities on the basis of race, color, or language minority group, the law can provide a remedy based on "discriminatory effect alone," even in the absence of discriminatory intent. *Gingles*, 478 U.S. at 35; *see* U.S. Const. amend. XV, § 2; 52 U.S.C. §§ 10301, 10303(f)(2).

***657** ¶80 We hold that the WVRA does not irreconcilably conflict with RCW 29A.76.010(4)(d) because on its face, the WVRA requires equality, not race-based favoritism, in electoral systems. Thus, the legislature has not implicitly repealed the WVRA.

C. The WVRA does not facially violate article I, section 12

¶81 Next, Gimenez argues that the WVRA violates article I, section 12 on its face because "it grants to a specific identified class the right and privilege to have county commissioner boundaries drawn so that members of that identified class—but not the public at large, or members of other definable classes—can elect a 'candidate of choice.' " Br. of Appellant at 52. As detailed above, Gimenez fundamentally misinterprets what ****1011** the WVRA says and does. We therefore reject his article I, section 12 argument.

¶82 " 'For a violation of article I, section 12 to occur, the law ... must confer a privilege to a class of citizens.' " *Madison v. State*, 161 Wn.2d 85, 95, 163 P.3d 757 (2007) (plurality opinion) (quoting *Grant County Fire Prot. Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 812, 83 P.3d 419 (2004)). The WVRA does not confer any privilege to any class of citizens. Instead, the WVRA protects the "*equal* opportunity" of voters of *all* races, colors, and language minority groups "to elect candidates of their choice." RCW 29A.92.020, .030(1)(b) (emphasis added). Therefore, all Washington voters have equal rights to challenge their local governments for alleged WVRA violations. If, in some future case, the WVRA is applied or interpreted in a way that grants privileges to some racial groups while excluding others, then the WVRA will be subject to an as-applied challenge. But on its face, the WVRA simply does not implicate article I, section 12.

D. The WVRA does not facially violate the equal protection clause

¶83 Finally, Gimenez argues that the WVRA facially violates the equal protection clause of the Fourteenth ***658** Amendment because the WVRA cannot survive strict scrutiny. However, as explained above, the WVRA on its face does not classify voters on the basis of race, nor does it deprive anyone of the fundamental right to vote. Instead, the WVRA mandates *equal* voting opportunities for members of every race, color, and language minority group. Therefore, Gimenez's facial equal protection claim triggers rational basis review, not strict scrutiny. *Cf. Madison*, 161 Wn.2d at 103. Rational basis review is satisfied if "there is a rational relationship between" the WVRA "and any legitimate governmental interests." *Id.* at 106.

¶84 To the extent that Gimenez's equal protection argument is based on his misinterpretation of the WVRA, we reject it. The WVRA's mandate for equal voting opportunities is clearly rationally related to the State's legitimate interest in protecting Washington voters from discrimination. "[A] law directing state actors to provide equal protection is (to say the least) facially neutral, and cannot violate the Constitution." *Schuette v. Coal. to Def. Affirmative Action*, 572 U.S. 291, 318, 134 S. Ct. 1623, 188 L. Ed. 2d 613 (2014) (Scalia, J., concurring in the judgment).

¶85 Gimenez further points out, correctly, that Section 2 of the FVRA has a threshold requirement for vote dilution claims that the WVRA does not have. As discussed above, before a federal court will reach the merits of a Section 2 vote dilution claim, a "group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district." *Gingles*, 478 U.S. at 50. By contrast, the WVRA provides that "[t]he fact that members of a protected class are not geographically compact or concentrated to constitute a majority in a proposed or existing district-based election district shall not preclude a finding of a violation under this chapter, but may be a factor in determining

a remedy." RCW 29A.92.030(2).

¶86 Gimenez argues that the WVRA is unconstitutional on its face because "[w]ithout the compactness precondition, the [United States] Supreme Court has made clear, ***659** Section 2 could never" satisfy the equal protection clause. Br. of Appellant at 40-41. However, he does not cite a single case—from any court—that actually says what he claims. Instead, Gimenez relies on cases addressing as-applied challenges to specific redistricting plans based on allegations of racial gerrymandering. *See id.* at 37-50.[17] These ****1012** cases consistently hold that *Section 2* requires a threshold showing of compactness in a vote dilution claim. *E.g.*, *Strickland*, 556 U.S. at 10-16, 20-21; *Emison*, 507 U.S. at 40-41. However, Gimenez cites no case holding that the *equal protection clause* imposes the same requirement in every voting discrimination claim.

¶87 Without a doubt, the WVRA could be applied in an unconstitutional manner, and it is subject to as-applied challenges. However, Gimenez did not bring an as-applied challenge. He brought a facial challenge. As detailed above, the WVRA, on its face, does not require unconstitutional actions.

¶88 Moreover, as amici point out, "entire pages of Gimenez's argument on this point are word-for-word identical" to the briefing from a recent challenge to California's voting rights act. Br. of Law Sch. Clinics Focused on C.R. as Amici Curiae at 14 n.1. *Compare* Br. of Appellant at 37-43, *with* Appellant's Opening Br. at 3-7, 32, *Higginson v. Becerra*, No. 19-55275 (9th Cir. June 17, 2019), *and* Pet. for Writ of Cert. at 4-6, *Higginson v. Becerra*, No. 19-1199 (U.S. Apr. 2, 2020). The Ninth Circuit Court of Appeals rejected the arguments Gimenez makes here and the United States ***660** Supreme Court denied certiorari. *Higginson v. Becerra*, 786 F. App'x 705 (9th Cir. 2019), *cert. denied*, 140 S. Ct. 2807 (2020). Gimenez does not explain why we should reach a different conclusion based on the same arguments.

¶89 Finally, even under federal law, the threshold compactness requirement applies only in the specific context of a vote *dilution* claim. It does not apply to all voting rights cases. As the United States Supreme Court has explained:

> The reason that a minority group making such a [vote dilution] challenge must show, as a threshold matter, that it is sufficiently large and geographically compact to constitute a majority in a single-member district is this: Unless minority voters possess the *potential* to elect representatives in the absence of the challenged structure or practice, they cannot claim to have been injured by that structure or practice.

Gingles, 478 U.S. at 50 n.17.

¶90 The WVRA protects voters from all forms of abridgment, not just dilution. Gimenez does not explain why a group must demonstrate compactness to prove that their voting rights have been abridged by, for instance, the discriminatory administration of literacy tests. *See Mexican-Am. Fed'n*, 299 F. Supp. 587. Thus, even if the equal protection clause does require a threshold compactness inquiry for a vote dilution claim, that would not make the WVRA facially unconstitutional. At most, the WVRA would be unconstitutional as applied in the context of vote dilution claims. Gimenez did not bring an as-applied challenge.

¶91 Gimenez argues that he cannot be required to prove that the WVRA is unconstitutional in all of its potential applications "because it is impossible to explore and describe every possible circumstance" that might arise. Reply Br. of Appellant at 9. However, that is the standard that applies to a facial constitutional challenge in accordance with this court's controlling precedent. *Woods*, 197 Wn.2d at 240. Gimenez does not show that our precedent is "U.S.'incorrect and harmful' " or that its " 'legal underpinnings' " have ***661** changed. *State v. Otton*, 185 Wn.2d 673, 678, 374 P.3d 1108 (2016) (quoting *In re Rts. to Waters of Stranger Creek*, 77 Wn.2d 649, 653, 466 P.2d 508 (1970); *W.G. Clark Constr. Co. v. Pac. Nw. Reg'l Council of Carpenters*, 180 Wn.2d 54, 66, 322 P.3d 1207 (2014)).

¶92 Therefore, because it is impossible for Gimenez to show that the WVRA is unconstitutional in all of its potential applications, his facial equal protection challenge to the WVRA must be rejected.

E. We decline to reach the additional issues raised by the plaintiffs and amici

¶93 As detailed above, each of Gimenez's arguments fails on its merits. We affirm the trial court on that basis alone. We therefore decline to reach the alternative arguments **1013 raised by the plaintiffs and amici concerning RCW 7.24.110 and Gimenez's standing to appeal.[18]

F. We award the plaintiffs' request for attorney fees and costs against Gimenez and remand for a calculation of fees incurred at the trial court

¶94 Finally, the plaintiffs request attorney fees and costs based on the WVRA, as well as the statutes and court rules governing frivolous claims. We need not decide whether Gimenez's claims are frivolous. Instead, we award the plaintiffs' request for fees against Gimenez pursuant to the WVRA.

*662 ¶95 The WVRA allows, but does not require, an award of "reasonable attorneys' fees, all nonattorney fee costs as defined by RCW 4.84.010, and all reasonable expert witness fees" to "the prevailing plaintiff or plaintiffs, other than the state or political subdivision thereof." RCW 29A.92.130(1). Here, the plaintiffs are the prevailing parties, they are not the state or a political subdivision, and Gimenez's appeal forced the plaintiffs to spend an entire year litigating this case *after* Franklin County settled their WVRA claim. We therefore exercise our discretion to award the plaintiffs' request for fees and costs attributable to their litigation against Gimenez.[19]

¶96 The plaintiffs request their appellate attorney fees, as well as "a fee award at trial" for the "time and expense incurred litigating with Gimenez." Br. of Resp'ts at 52 & n.16. The WVRA's fee provision is explicitly discretionary, providing that "the court *may* allow" fees to a prevailing, nongovernmental plaintiff. RCW 29A.92.130(1) (emphasis added). Thus, we grant both trial and appellate fees, but we remand the calculation of trial court fees to the trial court's discretion.

1. The WVRA's fee provision is constitutional

¶97 Gimenez argues that we cannot assess fees against him because "it is unconstitutional to permit a group of lawyers who are funded by another state's government[20] to collect fees from an individual Washington Hispanic citizen because of his exercise of his fundamental right to access the state courts and petition the government." Reply Br. of Appellant at 26. However, he misrepresents the authorities he cites to support this argument.

¶98 Gimenez relies primarily on *663 *Miller v. Bonta*, No. 22cv1446-BEN(JLB), 2022 WL 17811114, 2022 U.S. Dist. LEXIS 228197 (S.D. Cal. 2022) (court order). According to Gimenez, *Miller* considered "a California punitive fee-shifting provision such as this one that Plaintiffs seek to exercise" in this case, and "the California attorney general refused to even defend such a statute." Reply Br. of Appellant at 26. In fact, the statute in *Miller* was nothing like the fee provision in the WVRA.

¶99 The fee-shifting statute in *Miller* "applie[d] only to cases challenging firearm restrictions." 2022 WL 17811114, at *1, 2022 U.S. Dist. LEXIS 228197, at *3. The statute "insulate[d] laws from judicial review by permitting fee awards in favor of the government, tilting the table in the government's favor, and making a plaintiff's attorney jointly and severally liable for fee awards." 2022 WL 17811114, at *1, 2022 U.S. Dist. LEXIS 228197, at *3. The statute also provided that "[a]s a matter of law, a California plaintiff **1014 cannot be a prevailing party." 2022 WL 17811114, at *1, 2022 U.S. Dist. LEXIS 228197, at *3. The WVRA, by contrast, allows prevailing plaintiffs to recover fees, but only if they are *not* the government. RCW 29A.92.130(1). Moreover, the WVRA does not "tilt the table" in favor of any government entity, and it does not automatically make any party's attorney jointly and severally liable for fees. *Miller* simply does not apply here.

¶100 Gimenez also suggests that applying the WVRA's fee provision in this case would violate *Boddie v. Connecticut*, 401 U.S. 371, 91 S. Ct. 780, 28 L. Ed. 2d 113 (1971). *Boddie* struck down "state procedures for the commencement of litigation, including requirements for payment of court fees and costs for service of process, that restrict[ed the appellants'] access to the courts in their effort to bring an action for divorce." *Id.* at 372. The WVRA's prevailing party fee provision applies at the

conclusion of an action, not its commencement. *Boddie* does not apply.

***664** 2. We decline to assess fees against Commissioner Didier

¶101 Finally, the plaintiffs argue that "Commissioner Didier, who is a named party in the suit in their official capacity, should also be held responsible for any fee award where he was in cahoots with Gimenez's action designed to torpedo the WVRA settlement." Br. of Resp'ts at 54-55. We decline to assess fees against Commissioner Didier.

¶102 To be sure, there is significant evidence in the record supporting the plaintiffs' factual allegations. Initially, Commissioner Didier planned to intervene in his personal capacity to challenge the validity of the WVRA. However, after the plaintiffs questioned how a named defendant could also be an intervenor, Gimenez intervened instead. Gimenez has at all times been represented by the same attorney who had originally intended to represent Commissioner Didier in his personal capacity.

¶103 Thus, the plaintiffs may be correct that "Commissioner Didier's involvement in Gimenez's intervention was transparent to all those involved in the matter." *Id.* at 55. Indeed, the trial court's order denying Gimenez's CR 12(c) motion begins by stating, "This matter came before the court for hearing on December 13, 2021 on Intervenor, *Clint Didier's*, Motion for Judgment on the Pleadings." CP at 678 (emphasis added). However, that appears to be a typo, not a finding of fact. The plaintiffs do not cite any trial court findings that Commissioner Didier is the real party behind Gimenez's intervention or appeal.

¶104 This court is not a fact-finding court. Moreover, the plaintiffs settled their claims with the defendants, including Commissioner Didier, and Commissioner Didier has not filed anything on appeal. We therefore decline to assess fees against Commissioner Didier based on the plaintiffs' allegations. We express no opinion as to whether Gimenez may have viable claims against Commissioner Didier or anyone else arising from this litigation.

***665** CONCLUSION

¶105 All of Gimenez's arguments are based on his interpretation of the WVRA's definition of a protected class. His interpretation is incorrect. We therefore affirm the trial court, award attorney fees and costs to the plaintiffs against Gimenez, and remand for a calculation of fees incurred at the trial court.

González, C.J.; Johnson, Madsen, Owens, Stephens, Gordon McCloud, and Montoya-Lewis, JJ.; and Judge, J. Pro Tem., concur.

References Annotated Revised Code of Washington by LexisNexis United States Code Service (USCS) by LexisNexis

All Citations

1 Wash.3d 629, 530 P.3d 994

Footnotes

[1] The legislature amended the WVRA while this appeal was pending, effective January 1, 2024. *See* Laws of 2023, ch. 56, § 14. This opinion does not address those amendments.

2 When referring to the race or ethnicity of specific individuals, this opinion uses the terminology used by that individual. When quoting from another source, this opinion uses the terminology from the source material. Otherwise, this opinion uses gender-neutral terminology.

3 "Language minority group" is a term that is "referenced and defined in the federal voting rights act [of 1965 (FVRA)], 52 U.S.C. 10301 et seq." RCW 29A.92.010(5). The FVRA, in turn, defines "language minority group" as "persons who are American Indian, Asian American, Alaskan Natives or of Spanish heritage." 52 U.S.C. § 10310(c)(3).

4 We decline to reach the plaintiffs' argument that Gimenez failed to comply with RCW 7.24.110 and amici's argument that Gimenez lacks standing to appeal as a matter of right.

5 As discussed further below, "polarized voting" is "a difference ... in the choice of candidates or other electoral choices that are preferred by voters in a protected class, and in the choice of candidates and electoral choices that are preferred by voters in the rest of the electorate." RCW 29A.92.010(3).

6 In an "at-large" election system, "voters of the entire jurisdiction elect the members to the governing body." RCW 29A.92.010(1)(a).

7 In a "district-based" election system, "the candidate must reside within an election district that is a divisible part of the political subdivision and is elected only by voters residing within that election district." RCW 29A.92.010(2).

8 "In majority-minority districts, a minority group composes a numerical, working majority of the voting-age population," thereby creating an opportunity for the minority group to elect its candidate of choice in that district. *Bartlett v. Strickland*, 556 U.S. 1, 13, 129 S. Ct. 1231, 173 L. Ed. 2d 173 (2009) (plurality opinion).

9 In an "influence district[U.S.] ... a minority group can influence the outcome of an election even if its preferred candidate cannot be elected." *Id.*

10 "[I]n a crossover district, the minority population, at least potentially, is large enough to elect the candidate of its choice with help from voters who are members of the majority and who cross over to support the minority's preferred candidate." *Id.*

11 In a coalition district, "two minority groups form a coalition to elect the candidate of the coalition's choice." *Id.*

12 "The [United States] Office of Management and Budget (OMB) requires federal agencies to use a minimum of two ethnicities in collecting and reporting data: Hispanic or Latino and Not Hispanic or Latino. OMB defines 'Hispanic or Latino' as a person of Cuban, Mexican, Puerto Rican, South or Central American, or other Spanish culture or origin regardless of race." CP at 558.

13 The individual plaintiffs are Gabriel Portugal, Brandon Paul Morales, and Jose Trinidad Corral, "Latino registered voters who reside in Franklin County." *Id.* at 2. League of United Latin American Citizens (LULAC) is also a named plaintiff. *Id.* at 3. None

of the parties or amici distinguish between the individual plaintiffs and LULAC.

14 An amicus brief supporting Gimenez was filed by the American Civil Rights Project (ACRP). Amici briefs supporting the plaintiffs were filed by (1) the Civil Rights and Justice Clinic at the University of Washington School of Law and the Election Law Clinic at Harvard Law School, (2) OneAmerica and the Campaign Legal Center, (3) the Fred T. Korematsu Center for Law and Equality and the American Civil Liberties Union of Washington, (4) the Brennan Center for Justice, and (5) the State of Washington.

15 Gimenez and amicus ACRP argue that "Spanish heritage" does not refer to ethnicity but to "those who speak Spanish." Br. of Appellant at 36; *see generally* Br. of ACRP as Amicus Curiae in Supp. of Intervenor Def.-Appellant (Amicus Br. of ACRP). They acknowledge that no case law supports this interpretation. To the contrary, United States Supreme Court precedent has applied the FVRA's protections to Latinx voters. *E.g.*, *LULAC*, 548 U.S. 399 (partial plurality opinion). Nevertheless, Gimenez argues that if "Spanish heritage" refers to ethnicity, then it is "superfluous" because ethnicity is "already captured by the preceding categories" of race and color. Br. of Appellant at 36. However, elsewhere in his briefing, Gimenez questions whether " 'Hispanics' are a race," and amicus argues that they are not. Reply Br. of Appellant at 1 n.1; *see also* Amicus Br. of ACRP at 13-14 n.30. Including Latinx ethnicities within "language minority groups," as other courts have consistently done based on the statute's plain language, forecloses the need for such arguments and, therefore, is not superfluous.

16 It is undisputed that the voter bringing the challenge must be a member of the race, color, or language minority group whose rights they seek to vindicate.

17 Citing *Shaw v. Reno*, 509 U.S. 630, 642-43, 647, 651, 657, 113 S. Ct. 2816, 125 L. Ed. 2d 511 (1993); *Miller v. Johnson*, 515 U.S. 900, 926-28, 115 S. Ct. 2475, 132 L. Ed. 2d 762 (1995); *Georgia v. Ashcroft*, 539 U.S. 461, 491, 123 S. Ct. 2498, 156 L. Ed. 2d 428 (2003) (Kennedy, J., concurring); *Strickland*, 556 U.S. at 10-13, 15-16, 20-21; *Shaw v. Hunt*, 517 U.S. 899, 906-08, 116 S. Ct. 1894, 135 L. Ed. 2d 207 (1996); *Emison*, 507 U.S. at 40-41; *De Grandy*, 512 U.S. at 1016 (majority), 1028-29 (Kennedy, J., concurring in part and concurring in the judgment); *Cooper v. Harris*, 581 U.S. 285, 292, 137 S. Ct. 1455, 197 L. Ed. 2d 837 (2017); *Bethune-Hill v. Va. State Bd. of Elections*, 580 U.S. 178, 189-90, 137 S. Ct. 788, 197 L. Ed. 2d 85 (2017); *LULAC*, 548 U.S. at 446 (plurality portion); *Abrams v. Johnson*, 521 U.S. 74, 85-86, 117 S. Ct. 1925, 138 L. Ed. 2d 285 (1997); *United States v. Hays*, 515 U.S. 737, 744-45, 115 S. Ct. 2431, 132 L. Ed. 2d 635 (1995).

18 The plaintiffs and amici argue that Gimenez's constitutional claims should not be considered on their merits because Gimenez did not serve his pleading on the attorney general pursuant to RCW 7.24.110. It is undisputed that Gimenez did not serve the attorney general before filing his CR 12(c) motion for judgment on the pleadings. Yet, arguably, Gimenez did not file any pleading seeking declaratory judgment that would be subject to RCW 7.24.110. Gimenez attached a *proposed* pleading to his motion to intervene, which included counterclaims for declaratory judgment. However, the trial court's order granting the motion to intervene did not address the proposed pleading, and Gimenez did not subsequently file his proposed pleading as a separate document. Instead, he chose to file a CR 12(c) motion for judgment on the *existing* pleadings—the plaintiffs' amended complaint and the defendants' answer. We decline to interpret RCW 7.24.110 as applied to these specific facts.

19 The plaintiffs were already awarded fees attributable to their litigation with Franklin County and its board of commissioners in the parties' settlement agreement.

20 Some, but not all, of the plaintiffs' attorneys are affiliated with the UCLA (University of California, Los Angeles) Voting Rights Project.

End of Document

120 S.Ct. 1044
Supreme Court of the United States

Harold F. RICE, Petitioner,
v.
Benjamin J. CAYETANO, Governor of Hawaii.

No. 98–818
|
Argued Oct. 6, 1999.
|
Decided Feb. 23, 2000.

Synopsis

Citizen of Hawai'i brought § 1983 action against state officials, challenging eligibility requirement for voting for trustees for Office of Hawaiian Affairs (OHA). The United States District Court of the District of Hawai'i, David A. Ezra, J., 963 F.Supp. 1547, upheld voter qualification. Citizen appealed. The Court of Appeals for the Ninth Circuit, Rymer, Circuit Judge, 146 F.3d 1075, affirmed. Certiorari was granted. The Supreme Court, Justice Kennedy, held that: (1) limiting voters to those persons whose ancestry qualified them as either a "Hawaiian" or "native Hawaiian," as defined by statute, violated Fifteenth Amendment by using ancestry as proxy for race, and thereby enacting a race-based voting qualification; (2) exclusion of non-Hawaiians from voting for OHA trustees was not permissible under cases allowing differential treatment of certain members of Indian tribes; (3) voting qualification was not permissible under cases holding that one-person, one-vote rule did not pertain to certain special purpose districts; and (4) voting qualification was not saved from unconstitutionality on theory that voting restriction merely ensured an alignment of interests between fiduciaries and beneficiaries of a trust.

Reversed.

Justice Breyer filed an opinion concurring in the result, in which Justice Souter joined.

Justice Stevens filed a dissenting opinion, in which Justice Ginsburg joined in part.

Justice Ginsburg filed a dissenting opinion.

****1045 *495** *Syllabus*[*]

The Hawaiian Constitution limits the right to vote for nine trustees chosen in a statewide election. The trustees compose the governing authority of a state agency known as the Office of Hawaiian Affairs, or OHA. The agency administers programs designed for the benefit of two subclasses of Hawaiian citizenry, "Hawaiians" and "native Hawaiians." State law defines "native Hawaiians" as descendants of not less than one-half part of the races inhabiting the islands before 1778, and "Hawaiians"—a larger class that includes "native Hawaiians"—as descendants of the peoples inhabiting the Hawaiian Islands in 1778. The trustees are chosen in a statewide election in which only "Hawaiians" may vote. Petitioner Rice, a Hawaiian citizen without the requisite ancestry to be a "Hawaiian" under state law, applied to vote in OHA trustee elections. When his application was denied, he sued respondent Governor (hereinafter State), claiming, *inter alia,* that the voting exclusion was invalid under the Fourteenth and Fifteenth Amendments. The Federal District Court granted the State summary judgment. Surveying the history of the islands and their people, it determined that Congress and Hawaii have recognized a guardian-ward relationship with the native Hawaiians, which is analogous to the relationship between the United States and Indian tribes. It examined the voting qualifications with the latitude applied to legislation passed pursuant to Congress' power over Indian affairs, see *Morton v. Mancari,* 417 U.S. 535, 94 S.Ct. 2474, 41 L.Ed.2d 290, and found that

the electoral scheme was rationally related to the State's responsibility under its Admission Act to utilize a part of the proceeds from certain public lands for the native Hawaiians' benefit. The Ninth Circuit affirmed, finding that Hawaii "may rationally conclude that Hawaiians, being the group to whom trust obligations run and to whom OHA trustees owe a duty of loyalty, should be the group to decide who the trustees ought to be." 146 F.3d 1075, 1079.

Held: Hawaii's denial of Rice's right to vote in OHA trustee elections violates the Fifteenth Amendment. Pp. 1054–1060.

****1046** (a) The Amendment's purpose and command are set forth in explicit and comprehensive language. The National Government and the States may not deny or abridge the right to vote on account of race. The Amendment reaffirms the equality of races at the most basic level ***496** of the democratic process, the exercise of the voting franchise. It protects all persons, not just members of a particular race. Important precedents give instruction in the instant case. The Amendment was quite sufficient to invalidate a grandfather clause that did not mention race but instead used ancestry in an attempt to confine and restrict the voting franchise, *Guinn v. United States,* 238 U.S. 347, 364–365, 35 S.Ct. 926, 59 L.Ed. 1340; and it sufficed to strike down the white primary systems designed to exclude one racial class (at least) from voting, see, *e.g., Terry v. Adams,* 345 U.S. 461, 469–470, 73 S.Ct. 809, 97 L.Ed. 1152. The voting structure in this case is neither subtle nor indirect; it specifically grants the vote to persons of the defined ancestry and to no others. Ancestry can be a proxy for race. It is that proxy here. For centuries Hawaii was isolated from migration. The inhabitants shared common physical characteristics, and by 1778 they had a common culture. The provisions at issue reflect the State's effort to preserve that commonality to the present day. In interpreting the Reconstruction Era civil rights laws this Court has observed that racial discrimination is that which singles out "identifiable classes of persons ... solely because of their ancestry or ethnic characteristics." *Saint Francis College v. Al—Khazraji,* 481 U.S. 604, 613, 107 S.Ct. 2022, 95 L.Ed.2d 582. The very object of the statutory definition here is to treat the early Hawaiians as a distinct people, commanding their own recognition and respect. The history of the State's definition also demonstrates that the State has used ancestry as a racial definition and for a racial purpose. The drafters of the definitions of "Hawaiian" and "native Hawaiian" emphasized the explicit tie to race. The State's additional argument that the restriction is race neutral because it differentiates even among Polynesian people based on the date of an ancestor's residence in Hawaii is undermined by the classification's express racial purpose and its actual effects. The ancestral inquiry in this case implicates the same grave concerns as a classification specifying a particular race by name, for it demeans a person's dignity and worth to be judged by ancestry instead of by his or her own merit and essential qualities. The State's ancestral inquiry is forbidden by the Fifteenth Amendment for the further reason that using racial classifications is corruptive of the whole legal order democratic elections seek to preserve. The law itself may not become the instrument for generating the prejudice and hostility all too often directed against persons whose particular ancestry is disclosed by their ethnic characteristics and cultural traditions. The State's electoral restriction enacts a race-based voting qualification. Pp. 1054–1057.

(b) The State's three principal defenses of its voting law are rejected. It argues first that the exclusion of non-Hawaiians from voting is permitted under this Court's cases allowing the differential treatment of Indian tribes. However, even if Congress had the authority, delegated ***497** to the State, to treat Hawaiians or native Hawaiians as tribes, Congress may not authorize a State to create a voting scheme of the sort created here. Congress may not authorize a State to establish a voting scheme that limits the electorate for its public officials to a class of tribal Indians to the exclusion of all non-Indian citizens. The elections for OHA trustee are elections of the State, not of a separate quasi sovereign, and they are elections to which the Fifteenth Amendment applies. *Morton v. Mancari, supra,* distinguished. The State's further contention that the limited voting franchise is sustainable under this Court's cases holding that the one-person, one-vote rule does ****1047** not pertain to certain special purpose districts such as water or irrigation districts also fails, for compliance with the one-person, one-vote rule of the Fourteenth Amendment does not excuse compliance with the Fifteenth Amendment. Hawaii's final argument that the voting restriction does no more than ensure an alignment of interests between the fiduciaries and the beneficiaries of a trust founders on its own terms, for it is not clear that the voting classification is symmetric with the beneficiaries of the programs OHA administers. While the bulk of the funds appears to be earmarked for the benefit of "native Hawaiians," the State permits both "native Hawaiians" and "Hawaiians" to vote for trustees. The argument fails on more essential grounds; it rests on the demeaning premise that citizens of a particular race are somehow more qualified than others to vote on certain matters. There is no room under the Amendment for the concept that the right to vote in a particular election can be allocated based on race. Pp. 1057–1060.

146 F.3d 1075, reversed.

KENNEDY, J., delivered the opinion of the Court, in which REHNQUIST, C.J., and O'CONNOR, SCALIA, AND THOMAS, JJ., joined. BREYER, J., filed an opinion concurring in the result, in which SOUTER, J., joined, *post,* p. 1060.

STEVENS, J., filed a dissenting opinion, in which GINSBURG, J., joined as to Part II, *post,* p. 1062. GINSBURG, J., filed a dissenting opinion, *post,* p. 1073.

Attorneys and Law Firms

Theodore B. Olson, Washington, DC, for petitioner.

John G. Roberts, Jr., Washington, DC, for respondent.

***498** Edwin S. Kneedler, Washington, DC, for United States, as amicus curiae, by special leave of the Court.

Opinion

Justice KENNEDY delivered the opinion of the Court.

A citizen of Hawaii comes before us claiming that an explicit, race-based voting qualification has barred him from voting in a statewide election. The Fifteenth Amendment to the Constitution of the United States, binding on the National Government, the States, and their political subdivisions, controls the case.

The Hawaiian Constitution limits the right to vote for nine trustees chosen in a statewide election. The trustees compose ***499** the governing authority of a state agency known as the Office of Hawaiian Affairs, or OHA. Haw. Const., Art. XII, § 5. The agency administers programs designed for the benefit of two subclasses of the Hawaiian citizenry. The smaller class comprises those designated as "native Hawaiians," defined by statute, with certain supplementary language later set out in full, as descendants of not less than one-half part of the races inhabiting the Hawaiian Islands prior to 1778. Haw.Rev.Stat. § 10–2 (1993). The second, larger class of persons benefited by OHA programs is "Hawaiians," defined to be, with refinements contained in the statute we later quote, those persons who are descendants of people inhabiting the Hawaiian Islands in 1778. *Ibid.* The right to vote for trustees is limited to "Hawaiians," the second, larger class of persons, which of course includes the smaller class of "native Hawaiians." Haw. Const., Art. XII, § 5.

Petitioner Rice, a citizen of Hawaii and thus himself a Hawaiian in a well-accepted sense of the term, does not have the requisite ancestry even for the larger class. He is not, then, a "Hawaiian" in terms of the statute; so he may not vote in the trustee election. The issue presented by this case is whether Rice may be so barred. Rejecting the State's arguments that the classification in question is not racial or that, if it is, it is nevertheless valid for other reasons, we hold Hawaii's denial of petitioner's ****1048** right to vote to be a clear violation of the Fifteenth Amendment.

I

When Congress and the State of Hawaii enacted the laws we are about to discuss and review, they made their own assessments of the events which intertwine Hawaii's history with the history of America itself. We will begin with a very brief account of that historical background. Historians and other scholars who write of Hawaii will have a different purpose and more latitude than do we. They may draw judgments either more laudatory or more harsh than the ***500** ones to which we refer. Our more limited role, in the posture of this particular case, is to recount events as understood by the lawmakers, thus ensuring that we accord proper appreciation to their purposes in adopting the policies and laws at issue. The litigants seem to agree that two works in particular are appropriate for our consideration, and we rely in part on those sources. See L. Fuchs, Hawaii Pono: An Ethnic and Political History (1961) (hereinafter Fuchs); 1–3 R. Kuykendall, The Hawaiian Kingdom (1938); (1953); (1967) (hereinafter Kuykendall).

The origins of the first Hawaiian people and the date they reached the islands are not established with certainty, but the usual assumption is that they were Polynesians who voyaged from Tahiti and began to settle the islands around A.D. 750. Fuchs 4; 1 Kuykendall 3; see also G. Daws, Shoal of Time: A History of the Hawaiian Islands xii-xiii (1968) (Marquesas Islands and

Tahiti). When England's Captain Cook made landfall in Hawaii on his expedition in 1778, the Hawaiian people had developed, over the preceding 1,000 years or so, a cultural and political structure of their own. They had well-established traditions and customs and practiced a polytheistic religion. Agriculture and fishing sustained the people, and, though population estimates vary, some modern historians conclude that the population in 1778 was about 200,000–300,000. See Fuchs 4; R. Schmitt, Historical Statistics of Hawaii 7 (1977) (hereinafter Schmitt). The accounts of Hawaiian life often remark upon the people's capacity to find beauty and pleasure in their island existence, but life was not altogether idyllic. In Cook's time the islands were ruled by four different kings, and intra-Hawaiian wars could inflict great loss and suffering. Kings or principal chieftains, as well as high priests, could order the death or sacrifice of any subject. The society was one, however, with its own identity, its own cohesive forces, its own history.

In the years after Cook's voyage many expeditions would follow. A few members of the ships' companies remained on ***501** the islands, some as authorized advisers, others as deserters. Their intermarriage with the inhabitants of Hawaii was not infrequent.

In 1810, the islands were united as one kingdom under the leadership of an admired figure in Hawaiian history, Kamehameha I. It is difficult to say how many settlers from Europe and America were in Hawaii when the King consolidated his power. One historian estimates there were no more than 60 or so settlers at that time. 1 Kuykendall 27. An influx was soon to follow. Beginning about 1820, missionaries arrived, of whom Congregationalists from New England were dominant in the early years. They sought to teach Hawaiians to abandon religious beliefs and customs that were contrary to Christian teachings and practices.

The 1800's are a story of increasing involvement of westerners in the economic and political affairs of the Kingdom. Rights to land became a principal concern, and there was unremitting pressure to allow non-Hawaiians to use and to own land and to be secure in their title. Westerners were not the only ones with pressing concerns, however, for the disposition and ownership of land came to be an unsettled matter among the Hawaiians themselves.

****1049** The status of Hawaiian lands has presented issues of complexity and controversy from at least the rule of Kamehameha I to the present day. We do not attempt to interpret that history, lest our comments be thought to bear upon issues not before us. It suffices to refer to various of the historical conclusions that appear to have been persuasive to Congress and to the State when they enacted the laws soon to be discussed.

When Kamehameha I came to power, he reasserted suzerainty over all lands and provided for control of parts of them by a system described in our own cases as "feudal." *Hawaii Housing Authority v. Midkiff,* 467 U.S. 229, 232, 104 S.Ct. 2321, 81 L.Ed.2d 186 (1984); *Kaiser Aetna v. United States,* 444 U.S. 164, 166, 100 S.Ct. 383, 62 L.Ed.2d 332 (1979). A well-known description of the King's early decrees is contained ***502** in an 1864 opinion of the Supreme Court of the Kingdom of Hawaii. The court, in turn, drew extensively upon an earlier report which recited, in part, as follows:

> " 'When the islands were conquered by Kamehameha I., he followed the example of his predecessors, and divided out the lands among his principal warrior chiefs, retaining, however, a portion in his own hands to be cultivated or managed by his own immediate servants or attendants. Each principal chief divided his lands anew and gave them out to an inferior order of chiefs or persons of rank, by whom they were subdivided again and again after (often) passing through the hands of four, five or six persons from the King down to the lowest class of tenants. All these persons were considered to have rights in the lands, or the productions of them, the proportions of which rights were not clearly defined, although universally acknowledged.... The same rights which the King possessed over the superior landlords and all under them, the several grades of landlords possessed over their inferiors, so that there was a joint ownership of the land, the King really owning the allodium, and the person in whose hands he placed the land, holding it in trust.' " *In re Estate of Kamehameha IV,* 2 Haw. 715, 718–719 (quoting Principles Adopted by the Board of Commissioners to Quiet Land Titles, 2 Stat. Laws 81–82 (Haw. Kingdom 1847)).

Beginning in 1839 and through the next decade, a successive ruler, Kamehameha III, approved a series of decrees and laws designed to accommodate demands for ownership and security of title. In the words of the Hawaiian Supreme Court, "[t]he subject of rights in land was one of daily increasing importance to the newly formed Government, for it was obvious that the internal resources of the country could not be developed until the system of undivided and undefined ownership in land should be abolished." 2 Haw., at 721. ***503** Arrangements were made to confer freehold title in some lands to certain chiefs and other individuals. The King retained vast lands for himself, and directed that other extensive lands be held by the

government, which by 1840 had adopted the first Constitution of the islands. Thus was effected a fundamental and historic division, known as the Great Mahele. In 1850, foreigners, in turn, were given the right of land ownership.

The new policies did not result in wide dispersal of ownership. Though some provisions had been attempted by which tenants could claim lands, these proved ineffective in many instances, and ownership became concentrated. In 1920, the Congress of the United States, in a Report on the bill establishing the Hawaiian Homes Commission, made an assessment of Hawaiian land policy in the following terms:

> "Your committee thus finds that since the institution of private ownership of lands in Hawaii the native Hawaiians, outside of the King and the chiefs, were granted and have held but a very small portion of the lands of the Islands. Under the homestead laws somewhat more ****1050** than a majority of the lands were homesteaded to Hawaiians, but a great many of these lands have been lost through improvidence and inability to finance farming operations. Most frequently, however, the native Hawaiian, with no thought of the future, has obtained the land for a nominal sum, only to turn about and sell it to wealthy interests for a sum more nearly approaching its real value. The Hawaiians are not business men and have shown themselves unable to meet competitive conditions unaided. In the end the speculators are the real beneficiaries of the homestead laws. Thus the tax returns for 1919 show that only 6.23 per centum of the property of the Islands is held by native Hawaiians and this for the most part is lands in the possession of approximately a thousand wealthy Hawaiians, the ***504** descendents of the chiefs." H.R.Rep. No. 839, 66th Cong., 2d Sess., 6 (1920).

While these developments were unfolding, the United States and European powers made constant efforts to protect their interests and to influence Hawaiian political and economic affairs in general. The first "articles of arrangement" between the United States and the Kingdom of Hawaii were signed in 1826, 8 Department of State, Treaties and Other International Agreements of the United States of America 1776–1949, p. 861 (C. Bevans comp.1968), and additional treaties and conventions between the two countries were signed in 1849, 1875, and 1887, see Treaty with the Hawaiian Islands, 9 Stat. 977 (1849) (friendship, commerce, and navigation); Convention between the United States of America and His Majesty the King of the Hawaiian Islands, 19 Stat. 625 (1875) (commercial reciprocity); Supplementary Convention between the United States of America and His Majesty the King of the Hawaiian Islands, 25 Stat. 1399 (1887) (same). The United States was not the only country interested in Hawaii and its affairs, but by the later part of the century the reality of American dominance in trade, settlement, economic expansion, and political influence became apparent.

Tensions intensified between an anti-Western, pro-native bloc in the government on the one hand and western business interests and property owners on the other. The conflicts came to the fore in 1887. Westerners forced the resignation of the Prime Minister of the Kingdom of Hawaii and the adoption of a new Constitution, which, among other things, reduced the power of the monarchy and extended the right to vote to non-Hawaiians. 3 Kuykendall 344–372.

Tensions continued through 1893, when they again peaked, this time in response to an attempt by the then-Hawaiian monarch, Queen Liliuokalani, to promulgate a new constitution restoring monarchical control over the House of Nobles and limiting the franchise to Hawaiian subjects. A so-called ***505** Committee of Safety, a group of professionals and businessmen, with the active assistance of John Stevens, the United States Minister to Hawaii, acting with United States Armed Forces, replaced the monarchy with a provisional government. That government sought annexation by the United States. On December 18 of the same year, President Cleveland, unimpressed and indeed offended by the actions of the American Minister, denounced the role of the American forces and called for restoration of the Hawaiian monarchy. Message of the President to the Senate and House of Representatives, reprinted in H.R.Rep. No. 243, 53d Cong., 2d Sess., 3–15 (1893). The Queen could not resume her former place, however, and, in 1894, the provisional government established the Republic of Hawaii. The Queen abdicated her throne a year later.

In 1898, President McKinley signed a Joint Resolution, sometimes called the Newlands Resolution, to annex the Hawaiian Islands as territory of the United States. 30 Stat. 750. According to the Joint Resolution, the Republic of Hawaii ****1051** ceded all former Crown, government, and public lands to the United States. *Ibid.* The resolution further provided that revenues from the public lands were to be "used solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes." *Ibid.* Two years later the Hawaiian Organic Act established the Territory of Hawaii, asserted United States control over the ceded lands, and put those lands "in the possession, use, and control of the government of the Territory of Hawaii ... until otherwise provided for by Congress." Act of Apr. 30, 1900, ch. 339, § 91, 31 Stat. 159.

In 1993, a century after the intervention by the Committee of Safety, the Congress of the United States reviewed this history, and in particular the role of Minister Stevens. Congress passed a Joint Resolution recounting the events in some detail and offering an apology to the native Hawaiian people. 107 Stat. 1510.

***506** Before we turn to the relevant provisions two other important matters, which affected the demographics of Hawaii, must be recounted. The first is the tragedy inflicted on the early Hawaiian people by the introduction of western diseases and infectious agents. As early as the establishment of the rule of Kamehameha I, it was becoming apparent that the native population had serious vulnerability to diseases borne to the islands by settlers. High mortality figures were experienced in infancy and adulthood, even from common illnesses such as diarrhea, colds, and measles. Fuchs 13; see Schmitt 58. More serious diseases took even greater tolls. In the smallpox epidemic of 1853, thousands of lives were lost. *Ibid.* By 1878, 100 years after Cook's arrival, the native population had been reduced to about 47,500 people. *Id.,* at 25. These mortal illnesses no doubt were an initial cause of the despair, disenchantment, and despondency some commentators later noted in descendents of the early Hawaiian people. See Fuchs 13.

The other important feature of Hawaiian demographics to be noted is the immigration to the islands by people of many different races and cultures. Mostly in response to the demand of the sugar industry for arduous labor in the cane fields, successive immigration waves brought Chinese, Portuguese, Japanese, and Filipinos to Hawaii. Beginning with the immigration of 293 Chinese in 1852, the plantations alone drew to Hawaii, in one estimate, something over 400,000 men, women, and children over the next century. *Id.,* at 24; A. Lind, Hawaii's People 6–7 (4th ed.1980). Each of these ethnic and national groups has had its own history in Hawaii, its own struggles with societal and official discrimination, its own successes, and its own role in creating the present society of the islands. See E. Nordyke, The Peopling of Hawai'i 28–98 (2d ed.1989). The 1990 census figures show the resulting ethnic diversity of the Hawaiian population. U.S. Dept. of Commerce, Bureau of Census, 1990 Census of Population, ***507** Supplementary Reports, Detailed Ancestry Groups for States (Oct. 1992).

With this background we turn to the legislative enactments of direct relevance to the case before us.

II

Not long after the creation of the new Territory, Congress became concerned with the condition of the native Hawaiian people. See H.R.Rep. No. 839, at 2–6; Hearings on the Rehabilitation and Colonization of Hawaiians and Other Proposed Amendments to the Organic Act of the Territory of Hawaii before the House Committee on the Territories, 66th Cong., 2d Sess. (1920). Reciting its purpose to rehabilitate the native Hawaiian population, see H.R.Rep. No. 839, at 1–2, Congress enacted the Hawaiian Homes Commission Act, which set aside about 200,000 acres of the ceded public lands and created a program of loans and long-term leases for the benefit of native Hawaiians. Act of ****1052** July 9, 1921, ch. 42, 42 Stat. 108. The Act defined "native Hawaiian [s]" to include "any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778." *Ibid.*

Hawaii was admitted as the 50th State of the Union in 1959. With admission, the new State agreed to adopt the Hawaiian Homes Commission Act as part of its own Constitution. Pub.L. 86–3, §§ 4, 7, 73 Stat. 5, 7 (Admission Act); see Haw. Const., Art. XII, §§ 1–3. In addition, the United States granted Hawaii title to all public lands and public property within the boundaries of the State, save those which the Federal Government retained for its own use. Admission Act §§ 5(b)-(d), 73 Stat. 5. This grant included the 200,000 acres set aside under the Hawaiian Homes Commission Act and almost 1.2 million additional acres of land. Brief for United States as *Amicus Curiae* 4.

The legislation authorizing the grant recited that these lands, and the proceeds and income they generated, were to ***508** be held "as a public trust" to be "managed and disposed of for one or more of" five purposes:

> "[1] for the support of the public schools and other public educational institutions, [2] for the betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended, [3] for the development of farm and home ownership on as widespread a basis as possible [,][4] for the making of public improvements, and [5] for the provision of lands for public use." Admission Act § 5(f), 73 Stat. 6.

In the first decades following admission, the State apparently continued to administer the lands that had been set aside under the Hawaiian Homes Commission Act for the benefit of native Hawaiians. The income from the balance of the public lands is said to have "by and large flowed to the department of education." Hawaii Senate Journal, Standing Committee Rep. No. 784, pp. 1350, 1351 (1979).

In 1978 Hawaii amended its Constitution to establish the Office of Hawaiian Affairs, Haw. Const., Art. XII, § 5, which has as its mission "[t]he betterment of conditions of native Hawaiians ... [and] Hawaiians," Haw.Rev.Stat. § 10–3 (1993). Members of the 1978 constitutional convention, at which the new amendments were drafted and proposed, set forth the purpose of the proposed agency:

> "Members [of the Committee of the Whole] were impressed by the concept of the Office of Hawaiian Affairs which establishes a public trust entity for the benefit of the people of Hawaiian ancestry. Members foresaw that it will provide Hawaiians the right to determine the priorities which will effectuate the betterment of their condition and welfare and promote the protection and preservation of the Hawaiian race, and that it will unite Hawaiians as a people." 1 Proceedings of the Constitutional Convention of Hawaii of 1978, Committee of the Whole Rep. No. 13, p. 1018 (1980).

***509** Implementing statutes and their later amendments vested OHA with broad authority to administer two categories of funds: a 20 percent share of the revenue from the 1.2 million acres of lands granted to the State pursuant to § 5(b) of the Admission Act, which OHA is to administer "for the betterment of the conditions of native Hawaiians," Haw.Rev.Stat. § 10–13.5 (1993), and any state or federal appropriations or private donations that may be made for the benefit of "native Hawaiians" and/or "Hawaiians," Haw. Const., Art. XII, § 6. See generally Haw.Rev.Stat. §§ 10–1 to 10–16. (The 200,000 acres set aside under the Hawaiian Homes Commission Act are administered by a separate agency. See Haw.Rev.Stat. § 26–17 (1993).) The Hawaiian Legislature has charged OHA with the mission of "[s]erving as the principal public agency ... responsible for the performance, development, and coordination of programs and activities relating ****1053** to native Hawaiians and Hawaiians," "[a]ssessing the policies and practices of other agencies impacting on native Hawaiians and Hawaiians," "conducting advocacy efforts for native Hawaiians and Hawaiians," "[a]pplying for, receiving, and disbursing, grants and donations from all sources for native Hawaiian and Hawaiian programs and services," and "[s]erving as a receptacle for reparations." § 10–3.

OHA is overseen by a nine-member board of trustees, the members of which "shall be Hawaiians" and—presenting the precise issue in this case—shall be "elected by qualified voters who are Hawaiians, as provided by law." Haw. Const., Art. XII, § 5; see Haw.Rev.Stat. §§ 13D–1, 13D–3(b)(1) (1993). The term "Hawaiian" is defined by statute:

> " 'Hawaiian' means any descendant of the aboriginal peoples inhabiting the Hawaiian Islands which exercised sovereignty and subsisted in the Hawaiian Islands in 1778, and which peoples thereafter have continued to reside in Hawaii." § 10–2.

The statute defines "native Hawaiian" as follows:

> ***510** " 'Native Hawaiian' means any descendant of not less than one-half part of the races inhabiting the Hawaiian Islands previous to 1778, as defined by the Hawaiian Homes Commission Act, 1920, as amended; provided that the term identically refers to the descendants of such blood quantum of such aboriginal peoples which exercised sovereignty and subsisted in the Hawaiian Islands in 1778 and which peoples thereafter continued to reside in Hawaii." *Ibid.*

Petitioner Harold Rice is a citizen of Hawaii and a descendant of preannexation residents of the islands. He is not, as we have noted, a descendant of pre–1778 natives, and so he is neither "native Hawaiian" nor "Hawaiian" as defined by the statute. Rice applied in March 1996 to vote in the elections for OHA trustees. To register to vote for the office of trustee he was required to attest: "I am also Hawaiian and desire to register to vote in OHA elections." Affidavit on Application for Voter Registration, Lodging by Petitioner, Tab 2. Rice marked through the words "am also Hawaiian and," then checked the form "yes." The State denied his application.

Rice sued Benjamin Cayetano, the Governor of Hawaii, in the United States District Court for the District of Hawaii. (The Governor was sued in his official capacity, and the Attorney General of Hawaii defends the challenged enactments. We refer to the respondent as "the State.") Rice contested his exclusion from voting in elections for OHA trustees and from voting in a special election relating to native Hawaiian sovereignty which was held in August 1996. After the District Court rejected the latter challenge, see *Rice v. Cayetano,* 941 F.Supp. 1529 (1996) (a decision not before us), the parties moved for summary

judgment on the claim that the Fourteenth and Fifteenth Amendments to the United States Constitution invalidate the law excluding Rice from the OHA trustee elections.

***511** The District Court granted summary judgment to the State. 963 F.Supp. 1547 (D.Haw.1997). Surveying the history of the islands and their people, the District Court determined that Congress and the State of Hawaii have recognized a guardian-ward relationship with the native Hawaiians, which the court found analogous to the relationship between the United States and the Indian tribes. *Id.,* at 1551–1554. On this premise, the court examined the voting qualification with the latitude that we have applied to legislation passed pursuant to Congress' power over Indian affairs. *Id.,* at 1554–1555 (citing *Morton v. Mancari,* 417 U.S. 535, 94 S.Ct. 2474, 41 L.Ed.2d 290 (1974)). Finding that the electoral scheme was "rationally related to the State's responsibility under the Admission Act to utilize a portion of the proceeds from the § 5(b) lands for the betterment of ****1054** Native Hawaiians," the District Court held that the voting restriction did not violate the Constitution's ban on racial classifications. 963 F.Supp., at 1554–1555.

The Court of Appeals affirmed. 146 F.3d 1075 (C.A.9 1998). The court noted that Rice had not challenged the constitutionality of the underlying programs or of OHA itself. *Id.,* at 1079. Considering itself bound to "accept the trusts and their administrative structure as [it found] them, and assume that both are lawful," the court held that Hawaii "may rationally conclude that Hawaiians, being the group to whom trust obligations run and to whom OHA trustees owe a duty of loyalty, should be the group to decide who the trustees ought to be." *Ibid.* The court so held notwithstanding its clear holding that the Hawaii Constitution and implementing statutes "contain a racial classification on their face." *Ibid.*

We granted certiorari, 526 U.S. 1016, 119 S.Ct. 1248, 143 L.Ed.2d 346 (1999), and now reverse.

III

The purpose and command of the Fifteenth Amendment are set forth in language both explicit and comprehensive. ***512** The National Government and the States may not violate a fundamental principle: They may not deny or abridge the right to vote on account of race. Color and previous condition of servitude, too, are forbidden criteria or classifications, though it is unnecessary to consider them in the present case.

Enacted in the wake of the Civil War, the immediate concern of the Amendment was to guarantee to the emancipated slaves the right to vote, lest they be denied the civil and political capacity to protect their new freedom. Vital as its objective remains, the Amendment goes beyond it. Consistent with the design of the Constitution, the Amendment is cast in fundamental terms, terms transcending the particular controversy which was the immediate impetus for its enactment. The Amendment grants protection to all persons, not just members of a particular race.

The design of the Amendment is to reaffirm the equality of races at the most basic level of the democratic process, the exercise of the voting franchise. A resolve so absolute required language as simple in command as it was comprehensive in reach. Fundamental in purpose and effect and self-executing in operation, the Amendment prohibits all provisions denying or abridging the voting franchise of any citizen or class of citizens on the basis of race. "[B]y the inherent power of the Amendment the word white disappeared" from our voting laws, bringing those who had been excluded by reason of race within "the generic grant of suffrage made by the State." *Guinn v. United States,* 238 U.S. 347, 363, 35 S.Ct. 926, 59 L.Ed. 1340 (1915); see also *Neal v. Delaware,* 103 U.S. 370, 389, 26 L.Ed. 567 (1881). The Court has acknowledged the Amendment's mandate of neutrality in straightforward terms: "If citizens of one race having certain qualifications are permitted by law to vote, those of another having the same qualifications must be. Previous to this amendment, there was no constitutional guaranty against this discrimination: now there is." *United States v. Reese,* 92 U.S. 214, 218, 23 L.Ed. 563 (1876).

***513** Though the commitment was clear, the reality remained far from the promise. Manipulative devices and practices were soon employed to deny the vote to blacks. We have cataloged before the "variety and persistence" of these techniques. *South Carolina v. Katzenbach,* 383 U.S. 301, 311–312, 86 S.Ct. 803, 15 L.Ed.2d 769 (1966) (citing, *e.g., Guinn, supra* (grandfather clause); *Myers v. Anderson,* 238 U.S. 368, 35 S.Ct. 932, 59 L.Ed. 1349 (1915) (same); *Lane v. Wilson,* 307 U.S. 268, 59 S.Ct. 872, 83 L.Ed. 1281 (1939) ("procedural hurdles"); *Terry v. Adams,* 345 U.S. 461, 73 S.Ct. 809, 97 L.Ed. 1152 (1953) (white

primary); *Smith v. Allwright,* 321 U.S. 649, 64 S.Ct. 757, 88 L.Ed. 987 (1944) (same); **1055 *United States v. Thomas,* 362 U.S. 58, 80 S.Ct. 612, 4 L.Ed.2d 535 (1960) *(per curiam)* (registration challenges); *Gomillion v. Lightfoot,* 364 U.S. 339, 81 S.Ct. 125, 5 L.Ed.2d 110 (1960) (racial gerrymandering); *Louisiana v. United States,* 380 U.S. 145, 85 S.Ct. 817, 13 L.Ed.2d 709 (1965) ("interpretation tests")). Progress was slow, particularly when litigation had to proceed case by case, district by district, sometimes voter by voter. See 383 U.S., at 313–315, 86 S.Ct. 803.

Important precedents did emerge, however, which give instruction in the case now before us. The Fifteenth Amendment was quite sufficient to invalidate a scheme which did not mention race but instead used ancestry in an attempt to confine and restrict the voting franchise. In 1910, the State of Oklahoma enacted a literacy requirement for voting eligibility, but exempted from that requirement the " 'lineal descendant[s]' " of persons who were " 'on January 1, 1866, or at any time prior thereto, entitled to vote under any form of government, or who at that time resided in some foreign nation.' " *Guinn, supra,* at 357, 35 S.Ct. 926. Those persons whose ancestors were entitled to vote under the State's previous, discriminatory voting laws were thus exempted from the eligibility test. Recognizing that the test served only to perpetuate those old laws and to effect a transparent racial exclusion, the Court invalidated it. 238 U.S., at 364–365, 35 S.Ct. 926.

More subtle, perhaps, than the grandfather device in *Guinn* were the evasions attempted in the white primary cases; but the Fifteenth Amendment, again by its own terms, sufficed to strike down these voting systems, systems designed *514 to exclude one racial class (at least) from voting. See *Terry, supra,* at 469–470, 73 S.Ct. 809; *Allwright, supra,* at 663–666, 64 S.Ct. 757 (overruling *Grovey v. Townsend,* 295 U.S. 45, 55 S.Ct. 622, 79 L.Ed. 1292 (1935)). The Fifteenth Amendment, the Court held, could not be so circumvented: "The Amendment bans racial discrimination in voting by both state and nation. It thus establishes a national policy ... not to be discriminated against as voters in elections to determine public governmental policies or to select public officials, national, state, or local." *Terry, supra,* at 467, 73 S.Ct. 809.

Unlike the cited cases, the voting structure now before us is neither subtle nor indirect. It is specific in granting the vote to persons of defined ancestry and to no others. The State maintains this is not a racial category at all but instead a classification limited to those whose ancestors were in Hawaii at a particular time, regardless of their race. Brief for Respondent 38–40. The State points to theories of certain scholars concluding that some inhabitants of Hawaii as of 1778 may have migrated from the Marquesas Islands and the Pacific Northwest, as well as from Tahiti. *Id.,* at 38–39, and n. 15. Furthermore, the State argues, the restriction in its operation excludes a person whose traceable ancestors were exclusively Polynesian if none of those ancestors resided in Hawaii in 1778; and, on the other hand, the vote would be granted to a person who could trace, say, one sixty-fourth of his or her ancestry to a Hawaiian inhabitant on the pivotal date. *Ibid.* These factors, it is said, mean the restriction is not a racial classification. We reject this line of argument.

Ancestry can be a proxy for race. It is that proxy here. Even if the residents of Hawaii in 1778 had been of more diverse ethnic backgrounds and cultures, it is far from clear that a voting test favoring their descendants would not be a race-based qualification. But that is not this case. For centuries Hawaii was isolated from migration. 1 Kuykendall 3. The inhabitants shared common physical characteristics, *515 and by 1778 they had a common culture. Indeed, the drafters of the statutory definition in question emphasized the "unique culture of the ancient Hawaiians" in explaining their work. Hawaii Senate **1056 Journal, Standing Committee Rep. No. 784, at 1354; see *ibid.* ("Modern scholarship also identified such race of people as culturally distinguishable from other Polynesian peoples"). The provisions before us reflect the State's effort to preserve that commonality of people to the present day. In the interpretation of the Reconstruction era civil rights laws we have observed that "racial discrimination" is that which singles out "identifiable classes of persons ... solely because of their ancestry or ethnic characteristics." *Saint Francis College v. Al—Khazraji,* 481 U.S. 604, 613, 107 S.Ct. 2022, 95 L.Ed.2d 582 (1987). The very object of the statutory definition in question and of its earlier congressional counterpart in the Hawaiian Homes Commission Act is to treat the early Hawaiians as a distinct people, commanding their own recognition and respect. The State, in enacting the legislation before us, has used ancestry as a racial definition and for a racial purpose.

The history of the State's definition demonstrates the point. As we have noted, the statute defines "Hawaiian" as

> "any descendant of the aboriginal peoples inhabiting the Hawaiian Islands which exercised sovereignty and subsisted in the Hawaiian Islands in 1778, and which peoples thereafter have continued to reside in Hawaii." Haw.Rev.Stat. § 10–2 (1993).

A different definition of "Hawaiian" was first promulgated in 1978 as one of the proposed amendments to the State Constitution. As proposed, "Hawaiian" was defined as "any descendant of the races inhabiting the Hawaiian Islands, previous to 1778." 1 Proceedings of the Constitutional Convention of Hawaii of 1978, Committee of the Whole Rep. No. 13,

at 1018. Rejected as not ratified in a valid manner, see *Kahalekai v. Doi,* 60 Haw. 324, 342, 590 P.2d 543, 555 (1979), ***516** the definition was modified and in the end promulgated in statutory form as quoted above. See Hawaii Senate Journal, Standing Committee Rep. No. 784, at 1350, 1353–1354; *id.,* Conf. Comm. Rep. No. 77, at 998. By the drafters' own admission, however, any changes to the language were at most cosmetic. Noting that "[t]he definitions of 'native Hawaiian' and 'Hawaiian' are changed to substitute 'peoples' for 'races,' " the drafters of the revised definition "stress[ed] that this change is non-substantive, and that 'peoples' does mean 'races.' " *Ibid.;* see also *id.,* at 999 ("[T]he word 'peoples' has been substituted for 'races' in the definition of 'Hawaiian'. Again, your Committee wishes to emphasize that this substitution is merely technical, and that 'peoples' does mean 'races' ").

The next definition in Hawaii's compilation of statutes incorporates the new definition of "Hawaiian" and preserves the explicit tie to race:

> " 'Native Hawaiian' means any descendant of not less than one-half part of the races inhabiting the Hawaiian Islands previous to 1778, as defined by the Hawaiian Homes Commission Act, 1920, as amended; provided that the term identically refers to the descendants of such blood quantum of such aboriginal peoples which exercised sovereignty and subsisted in the Hawaiian Islands in 1778 and which peoples thereafter continued to reside in Hawaii." Haw.Rev.Stat. § 10–2 (1993).

This provision makes it clear: "[T]he descendants ... of [the] aboriginal peoples" means "the descendants ... of the races." *Ibid.*

As for the further argument that the restriction differentiates even among Polynesian people and is based simply on the date of an ancestor's residence in Hawaii, this too is insufficient to prove the classification is nonracial in purpose and operation. Simply because a class defined by ancestry does not include all members of the race does not suffice to ***517** make the classification race neutral. Here, the State's argument is undermined by its express ****1057** racial purpose and by its actual effects.

The ancestral inquiry mandated by the State implicates the same grave concerns as a classification specifying a particular race by name. One of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities. An inquiry into ancestral lines is not consistent with respect based on the unique personality each of us possesses, a respect the Constitution itself secures in its concern for persons and citizens.

The ancestral inquiry mandated by the State is forbidden by the Fifteenth Amendment for the further reason that the use of racial classifications is corruptive of the whole legal order democratic elections seek to preserve. The law itself may not become the instrument for generating the prejudice and hostility all too often directed against persons whose particular ancestry is disclosed by their ethnic characteristics and cultural traditions. "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Hirabayashi v. United States,* 320 U.S. 81, 100, 63 S.Ct. 1375, 87 L.Ed. 1774 (1943). Ancestral tracing of this sort achieves its purpose by creating a legal category which employs the same mechanisms, and causes the same injuries, as laws or statutes that use race by name. The State's electoral restriction enacts a race-based voting qualification.

IV

The State offers three principal defenses of its voting law, any of which, it contends, allows it to prevail even if the classification is a racial one under the Fifteenth Amendment. We examine, and reject, each of these arguments.

***518** A

The most far reaching of the State's arguments is that exclusion of non-Hawaiians from voting is permitted under our cases

allowing the differential treatment of certain members of Indian tribes. The decisions of this Court, interpreting the effect of treaties and congressional enactments on the subject, have held that various tribes retained some elements of quasi-sovereign authority, even after cession of their lands to the United States. See *Brendale v. Confederated Tribes and Bands of Yakima Nation,* 492 U.S. 408, 425, 109 S.Ct. 2994, 106 L.Ed.2d 343 (1989) (plurality opinion); *Oliphant v. Suquamish Tribe,* 435 U.S. 191, 208, 98 S.Ct. 1011, 55 L.Ed.2d 209 (1978). The retained tribal authority relates to self-governance. *Brendale, supra,* at 425, 109 S.Ct. 2994 (plurality opinion). In reliance on that theory the Court has sustained a federal provision giving employment preferences to persons of tribal ancestry. *Mancari,* 417 U.S., at 553–555, 94 S.Ct. 2474. The *Mancari* case, and the theory upon which it rests, are invoked by the State to defend its decision to restrict voting for the OHA trustees, who are charged so directly with protecting the interests of native Hawaiians.

If Hawaii's restriction were to be sustained under *Mancari* we would be required to accept some beginning premises not yet established in our case law. Among other postulates, it would be necessary to conclude that Congress, in reciting the purposes for the transfer of lands to the State—and in other enactments such as the Hawaiian Homes Commission Act and the Joint Resolution of 1993—has determined that native Hawaiians have a status like that of Indians in organized tribes, and that it may, and has, delegated to the State a broad authority to preserve that status. These propositions would raise questions of considerable moment and difficulty. It is a matter of some dispute, for instance, whether Congress may treat the native Hawaiians as it does the Indian tribes. Compare Van Dyke, ****1058** The Political Status of the Native Hawaiian People, 17 Yale L. & Pol'y Rev. 95 (1998), with Benjamin, ***519** Equal Protection and the Special Relationship: The Case of Native Hawaiians, 106 Yale L.J. 537 (1996). We can stay far off that difficult terrain, however.

The State's argument fails for a more basic reason. Even were we to take the substantial step of finding authority in Congress, delegated to the State, to treat Hawaiians or native Hawaiians as tribes, Congress may not authorize a State to create a voting scheme of this sort.

Of course, as we have established in a series of cases, Congress may fulfill its treaty obligations and its responsibilities to the Indian tribes by enacting legislation dedicated to their circumstances and needs. See *Washington v. Washington State Commercial Passenger Fishing Vessel Assn.,* 443 U.S. 658, 673, n. 20, 99 S.Ct. 3055, 61 L.Ed.2d 823 (1979) (treaties securing preferential fishing rights); *United States v. Antelope,* 430 U.S. 641, 645–647, 97 S.Ct. 1395, 51 L.Ed.2d 701 (1977) (exclusive federal jurisdiction over crimes committed by Indians in Indian country); *Delaware Tribal Business Comm. v. Weeks,* 430 U.S. 73, 84–85, 97 S.Ct. 911, 51 L.Ed.2d 173 (1977) (distribution of tribal property); *Moe v. Confederated Salish and Kootenai Tribes of Flathead Reservation,* 425 U.S. 463, 479–480, 96 S.Ct. 1634, 48 L.Ed.2d 96 (1976) (Indian immunity from state taxes); *Fisher v. District Court of Sixteenth Judicial Dist. of Montana,* 424 U.S. 382, 390–391, 96 S.Ct. 943, 47 L.Ed.2d 106 (1976) *(per curiam)* (exclusive tribal court jurisdiction over tribal adoptions). As we have observed, "every piece of legislation dealing with Indian tribes and reservations ... single[s] out for special treatment a constituency of tribal Indians." *Mancari, supra,* at 552, 94 S.Ct. 2474.

Mancari, upon which many of the above cases rely, presented the somewhat different issue of a preference in hiring and promoting at the federal Bureau of Indian Affairs (BIA), a preference which favored individuals who were " 'one-fourth or more degree Indian blood and ... member[s] of a Federally-recognized tribe.' " 417 U.S., at 553, n. 24, 94 S.Ct. 2474 (quoting 44 BIAM 335, 3.1 (1972)). Although the classification had a racial component, the Court found it important that the preference was "not directed towards a 'racial' group consisting of 'Indians,' " but rather "only to members of 'federally ***520** recognized' tribes." 417 U.S., at 553, n. 24, 94 S.Ct. 2474. "In this sense," the Court held, "the preference [was] political rather than racial in nature." *Ibid.;* see also *id.,* at 554, 94 S.Ct. 2474 ("The preference, as applied, is granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion"). Because the BIA preference could be "tied rationally to the fulfillment of Congress' unique obligation toward the Indians," and was "reasonable and rationally designed to further Indian self-government," the Court held that it did not offend the Constitution. *Id.,* at 555, 94 S.Ct. 2474. The opinion was careful to note, however, that the case was confined to the authority of the BIA, an agency described as "*sui generis.*" *Id.,* at 554, 94 S.Ct. 2474.

Hawaii would extend the limited exception of *Mancari* to a new and larger dimension. The State contends that "one of the very purposes of OHA—and the challenged voting provision—is to afford Hawaiians a measure of self-governance," and so it fits the model of *Mancari.* Brief for Respondent 34. It does not follow from *Mancari,* however, that Congress may authorize a State to establish a voting scheme that limits the electorate for its public officials to a class of tribal Indians, to the exclusion of all non-Indian citizens.

The tribal elections established by the federal statutes the State cites illuminate its error. See Brief for Respondent 22 (citing, *e.g.,* the Menominee Restoration Act, 25 U.S.C. § 903b, and the Indian Reorganization Act, 25 U.S.C. § 476). If a ****1059** non-Indian lacks a right to vote in tribal elections, it is for the reason that such elections are the internal affair of a quasi sovereign. The OHA elections, by contrast, are the affair of the State of Hawaii. OHA is a state agency, established by the State Constitution, responsible for the administration of state laws and obligations. See Haw. Const., Art. XII, §§ 5–6. The Hawaiian Legislature has declared that OHA exists to serve "as the principal public agency in th[e] ***521** State responsible for the performance, development, and coordination of programs and activities relating to native Hawaiians and Hawaiians." Haw.Rev.Stat. § 10–3(3) (1993); see also Lodging by Petitioner, Tab 6, OHA Annual Report 1993–1994, p. 5 (May 27, 1994) (admitting that "OHA is technically a part of the Hawaii state government," while asserting that "it operates as a semi-autonomous entity"). Foremost among the obligations entrusted to this agency is the administration of a share of the revenues and proceeds from public lands, granted to Hawaii to "be held by said State as a public trust." Admission Act §§ 5(b), (f), 73 Stat. 5, 6; see Haw. Const., Art. XII, § 4.

The delegates to the 1978 constitutional convention explained the position of OHA in the state structure:

> "The committee intends that the Office of Hawaiian Affairs will be independent from the executive branch and all other branches of government although it will assume the status of a state agency. The chairman may be an ex officio member of the governor's cabinet. The status of the Office of Hawaiian Affairs is to be unique and special .... The committee developed this office based on the model of the University of Hawaii. In particular, the committee desired to use this model so that the office could have maximum control over its budget, assets and personnel. The committee felt that it was important to arrange a method whereby the assets of Hawaiians could be kept separate from the rest of the state treasury." 1 Proceedings of the Constitutional Convention of Hawaii of 1978, Standing Committee Rep. No. 59, at 645.

Although it is apparent that OHA has a unique position under state law, it is just as apparent that it remains an arm of the State.

The validity of the voting restriction is the only question before us. As the Court of Appeals did, we assume the validity ***522** of the underlying administrative structure and trusts, without intimating any opinion on that point. Nonetheless, the elections for OHA trustee are elections of the State, not of a separate quasi sovereign, and they are elections to which the Fifteenth Amendment applies. To extend *Mancari* to this context would be to permit a State, by racial classification, to fence out whole classes of its citizens from decisionmaking in critical state affairs. The Fifteenth Amendment forbids this result.

B

Hawaii further contends that the limited voting franchise is sustainable under a series of cases holding that the rule of one person, one vote does not pertain to certain special purpose districts such as water or irrigation districts. See *Ball v. James,* 451 U.S. 355, 101 S.Ct. 1811, 68 L.Ed.2d 150 (1981); *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.,* 410 U.S. 719, 93 S.Ct. 1224, 35 L.Ed.2d 659 (1973). Just as the *Mancari* argument would have involved a significant extension or new application of that case, so too it is far from clear that the *Salyer* line of cases would be at all applicable to statewide elections for an agency with the powers and responsibilities of OHA.

We would not find those cases dispositive in any event, however. The question before us is not the one-person, one-vote requirement of the Fourteenth Amendment, but the race neutrality command of the Fifteenth Amendment. Our special purpose district cases have not suggested that compliance with the one-person, one-vote ****1060** rule of the Fourteenth Amendment somehow excuses compliance with the Fifteenth Amendment. We reject that argument here. We held four decades ago that state authority over the boundaries of political subdivisions, "extensive though it is, is met and overcome by the Fifteenth Amendment to the Constitution." *Gomillion,* 364 U.S., at 345, 81 S.Ct. 125. The Fifteenth Amendment has independent meaning and force. A State may not deny or abridge the right to vote on account of race, and this law does so.

***523** C

Hawaii's final argument is that the voting restriction does no more than ensure an alignment of interests between the fiduciaries and the beneficiaries of a trust. Thus, the contention goes, the restriction is based on beneficiary status rather than race.

As an initial matter, the contention founders on its own terms, for it is not clear that the voting classification is symmetric with the beneficiaries of the programs OHA administers. Although the bulk of the funds for which OHA is responsible appears to be earmarked for the benefit of "native Hawaiians," the State permits both "native Hawaiians" and "Hawaiians" to vote for the office of trustee. The classification thus appears to create, not eliminate, a differential alignment between the identity of OHA trustees and what the State calls beneficiaries.

Hawaii's argument fails on more essential grounds. The State's position rests, in the end, on the demeaning premise that citizens of a particular race are somehow more qualified than others to vote on certain matters. That reasoning attacks the central meaning of the Fifteenth Amendment. The Amendment applies to "any election in which public issues are decided or public officials selected." *Terry,* 345 U.S., at 468, 73 S.Ct. 809. There is no room under the Amendment for the concept that the right to vote in a particular election can be allocated based on race. Race cannot qualify some and disqualify others from full participation in our democracy. All citizens, regardless of race, have an interest in selecting officials who make policies on their behalf, even if those policies will affect some groups more than others. Under the Fifteenth Amendment voters are treated not as members of a distinct race but as members of the whole citizenry. Hawaii may not assume, based on race, that petitioner or any other of its citizens will not cast a principled vote. To accept the position advanced by the State would give rise to the same indignities, and the same resulting tensions and animosities, ***524** the Amendment was designed to eliminate. The voting restriction under review is prohibited by the Fifteenth Amendment.

* * *

When the culture and way of life of a people are all but engulfed by a history beyond their control, their sense of loss may extend down through generations; and their dismay may be shared by many members of the larger community. As the State of Hawaii attempts to address these realities, it must, as always, seek the political consensus that begins with a sense of shared purpose. One of the necessary beginning points is this principle: The Constitution of the United States, too, has become the heritage of all the citizens of Hawaii.

In this case the Fifteenth Amendment invalidates the electoral qualification based on ancestry. The judgment of the Court of Appeals for the Ninth Circuit is reversed.

It is so ordered.

Justice BREYER, with whom Justice SOUTER joins, concurring in the result.

I agree with much of what the Court says and with its result, but I do not agree with the critical rationale that underlies that result. Hawaii seeks to justify its voting scheme by drawing an analogy between ****1061** its Office of Hawaiian Affairs (OHA) and a trust for the benefit of an Indian tribe. The majority does not directly deny the analogy. It instead at one point assumes, at least for argument's sake, that the "revenues and proceeds" at issue are from a " 'public trust.' " *Ante,* at 1059. It also assumes without deciding that the State could "treat Hawaiians or native Hawaiians as tribes." *Ante,* at 1058. Leaving these issues undecided, it holds that the Fifteenth Amendment forbids Hawaii's voting scheme, because the "OHA is a state agency," and thus ***525** election to the OHA board is not "the internal affair of a quasi sovereign," such as an Indian tribe. *Ante,* at 1059.

I see no need, however, to decide this case on the basis of so vague a concept as "quasi sovereign," and I do not subscribe to

the Court's consequently sweeping prohibition. Rather, in my view, we should reject Hawaii's effort to justify its rules through analogy to a trust for an Indian tribe because the record makes clear that (1) there is no "trust" for native Hawaiians here, and (2) OHA's electorate, as defined in the statute, does not sufficiently resemble an Indian tribe.

The majority seems to agree, though it does not decide, that the OHA bears little resemblance to a trust for native Hawaiians. It notes that the Hawaii Constitution uses the word "trust" when referring to the 1.2 million acres of land granted in the Admission Act. *Ante,* at 1052, 1053–1054. But the Admission Act itself makes clear that the 1.2 million acres is to benefit *all* the people of Hawaii. The Act specifies that the land is to be used for the education of, the developments of homes and farms for, the making of public improvements for, and public use by, *all* of Hawaii's citizens, as well as for the betterment of those who are "native." Admission Act § 5(f).

Moreover, OHA funding comes from several different sources. See, *e.g.,* OHA Fiscal 1998 Annual Report 38 (hereinafter Annual Report) ($15 million from the 1.2 million acres of public lands; $11 million from "[d]ividend and interest income"; $3 million from legislative appropriations; $400,000 from federal and other grants). All of OHA's funding is authorized by ordinary state statutes. See, *e.g.,* Haw.Rev.Stat. §§ 10–4, 10–6, 10–13.5 (1993); see also Annual Report 11 ("OHA's fiscal 1998–99 legislative budget was passed as Acts 240 and 115 by the 1997 legislature"). The amounts of funding and funding sources are thus subject to change by ordinary legislation. OHA spends most, but not all, of its money to benefit native Hawaiians in many different ways. See Annual Report (OHA projects support education, housing, ***526** health, culture, economic development, and nonprofit organizations). As the majority makes clear, OHA is simply a special purpose department of Hawaii's state government. *Ante,* at 1058–1059.

As importantly, the statute defines the electorate in a way that is not analogous to membership in an Indian tribe. Native Hawaiians, considered as a group, may be analogous to tribes of other Native Americans. But the statute does not limit the electorate to native Hawaiians. Rather it adds to approximately 80,000 native Hawaiians about 130,000 additional "Hawaiians," defined as including anyone with one ancestor who lived in Hawaii prior to 1778, thereby including individuals who are less than one five-hundredth original Hawaiian (assuming nine generations between 1778 and the present). See Native Hawaiian Data Book 39 (1998). Approximately 10% to 15% of OHA's funds are spent specifically to benefit this latter group, see Annual Report 38, which now constitutes about 60% of the OHA electorate.

I have been unable to find any Native American tribal definition that is so broad. The Alaska Native Claims Settlement Act, for example, defines a "Native" as "a person of one-fourth degree or more Alaska Indian" or one "who is regarded as an Alaska Native by the Native village or ****1062** Native group of which he claims to be a member and whose father or mother is ... regarded as Native by any village or group" (a classification perhaps more likely to reflect real group membership than any blood quantum requirement). 43 U.S.C. § 1602(b). Many tribal constitutions define membership in terms of having had an ancestor whose name appeared on a tribal roll—but in the far less distant past. See, *e.g.,* Constitution of the Choctaw Nation of Oklahoma, Art. II (membership consists of persons on final rolls approved in 1906 and their lineal descendants); Constitution of the Sac and Fox Tribe of Indians of Oklahoma, Art. II (membership consists of persons on official roll of 1937, children since born to two members of the Tribe, and children born to one member ***527** and a nonmember if admitted by the council); Revised Constitution of the Jicarilla Apache Tribe, Art. III (membership consists of persons on official roll of 1968 and children of one member of the Tribe who are at least three-eighths Jicarilla Apache Indian blood); Revised Constitution Mescalero Apache Tribe, Art. IV (membership consists of persons on the official roll of 1936 and children born to at least one enrolled member who are at least one-fourth degree Mescalero Apache blood).

Of course, a Native American tribe has broad authority to define its membership. See *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 72, n. 32, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978). There must, however, be some limit on what is reasonable, at the least when a State (which is not itself a tribe) creates the definition. And to define that membership in terms of 1 possible ancestor out of 500, thereby creating a vast and unknowable body of potential members—leaving some combination of luck and interest to determine which potential members become actual voters—goes well beyond any reasonable limit. It was not a tribe, but rather the State of Hawaii, that created this definition; and, as I have pointed out, it is not like any actual membership classification created by any actual tribe.

These circumstances are sufficient, in my view, to destroy the analogy on which Hawaii's justification must depend. This is not to say that Hawaii's definitions themselves independently violate the Constitution, cf. *post,* at 1066–1068, n. 11 (Justice STEVENS, dissenting); it is only to say that the analogies they here offer are too distant to save a race-based voting definition that in their absence would clearly violate the Fifteenth Amendment. For that reason I agree with the majority's

ultimate conclusion.

Justice STEVENS, with whom Justice GINSBURG joins as to Part II, dissenting.

The Court's holding today rests largely on the repetition of glittering generalities that have little, if any, application ***528** to the compelling history of the State of Hawaii. When that history is held up against the manifest purpose of the Fourteenth and Fifteenth Amendments, and against two centuries of this Court's federal Indian law, it is clear to me that Hawaii's election scheme should be upheld.

I

According to the terms of the federal Act by which Hawaii was admitted to the Union, and to the terms of that State's Constitution and laws, the Office of Hawaiian Affairs (OHA) is charged with managing vast acres of land held in trust for the descendants of the Polynesians who occupied the Hawaiian Islands before the 1778 arrival of Captain Cook. In addition to administering the proceeds from these assets, OHA is responsible for programs providing special benefits for native Hawaiians. Established in 1978 by an amendment to the State Constitution, OHA was intended to advance multiple goals: to carry out the duties of the trust relationship between the islands' indigenous peoples and the Government of the United States; to compensate for past ****1063** wrongs to the ancestors of these peoples; and to help preserve the distinct, indigenous culture that existed for centuries before Cook's arrival. As explained by the senior Senator from Hawaii, Senator Inouye, who is not himself a native Hawaiian but rather (like petitioner) is a member of the majority of Hawaiian voters who supported the 1978 amendments, the amendments reflect "an honest and sincere attempt on the part of the people of Hawai'i to rectify the wrongs of the past, and to put into being the mandate [of] our Federal government—the betterment of the conditions of Native Hawaiians."[1]

***529** Today the Court concludes that Hawaii's method of electing the trustees of OHA violates the Fifteenth Amendment. In reaching that conclusion, the Court has assumed that the programs administered by OHA are valid. That assumption is surely correct. In my judgment, however, the reasons supporting the legitimacy of OHA and its programs in general undermine the basis for the Court's decision holding its trustee election provision invalid. The OHA election provision violates neither the Fourteenth Amendment nor the Fifteenth.

That conclusion is in keeping with three overlapping principles. First, the Federal Government must be, and has been, afforded wide latitude in carrying out its obligations arising from the special relationship it has with the aboriginal peoples, a category that includes the native Hawaiians, whose lands are now a part of the territory of the United States. In addition, there exists in this case the State's own fiduciary responsibility—arising from its establishment of a public trust—for administering assets granted it by the Federal Government in part for the benefit of native Hawaiians. Finally, even if one were to ignore the more than two centuries of Indian law precedent and practice on which this case follows, there is simply no invidious discrimination present in this effort to see that indigenous peoples are compensated for past wrongs, and to preserve a distinct and vibrant culture that is as much a part of this Nation's heritage as any.

II

Throughout our Nation's history, this Court has recognized both the plenary power of Congress over the affairs of Native Americans[2] and the fiduciary character of the special ***530** federal relationship with descendants of those once sovereign peoples.[3] The source of the Federal Government's responsibility toward the Nation's native inhabitants, who were subject to European and then American military conquest, has been explained by this Court in the crudest terms, but they remain instructive nonetheless.

> "These Indian tribes *are* the wards of the nation. They are communities *dependent* on the United States. Dependent largely for their daily food. Dependent for their political rights .... From their very weakness and helplessness, ****1064** so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive and by Congress, and by this court, whenever the question has arisen." *United States v. Kagama,* 118 U.S. 375, 383–384, 6 S.Ct. 1109, 30 L.Ed. 228 (1886) (emphasis in original).

As our cases have consistently recognized, Congress' plenary power over these peoples has been exercised time and again to implement a federal duty to provide native peoples with special " 'care and protection.' "[4] With respect to the Pueblos in New Mexico, for example, "public moneys have been expended in presenting them with farming implements and utensils, and in their civilization and instruction." *United States v. Sandoval,* 231 U.S. 28, 39–40, 34 S.Ct. 1, 58 L.Ed. 107 (1913). Today, the Federal Bureau of Indian Affairs (BIA) administers countless modern programs responding to comparably pragmatic concerns, including health, education, housing, and impoverishment. See Office of the Federal Register, United States Government Manual 1999/2000, pp. 311–312. Federal regulation in this area is not limited to the strictly practical ***531** but has encompassed as well the protection of cultural values; for example, the desecration of Native American graves and other sacred sites led to the passage of the Native American Graves Protection and Repatriation Act, 25 U.S.C. § 3001 *et seq.*

Critically, neither the extent of Congress' sweeping power nor the character of the trust relationship with indigenous peoples has depended on the ancient racial origins of the people, the allotment of tribal lands,[5] the coherence or existence of tribal self-government,[6] or the varying definitions of "Indian" Congress has chosen to adopt.[7] Rather, when it comes to the exercise of Congress' plenary power in Indian affairs, this Court has taken account of the "numerous occasions" on which "legislation that singles out Indians for particular and special treatment" has been upheld, and has concluded that as "long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation ***532** towards the Indians, such legislative judgments will not be disturbed." *Morton v. Mancari,* 417 U.S. 535, 554–555, 94 S.Ct. 2474, 41 L.Ed.2d 290 (1974).

As the history recited by the majority reveals, the grounds for recognizing the existence of federal trust power here are overwhelming. Shortly before its annexation in 1898, the Republic of Hawaii (installed ****1065** by United States merchants in a revolution facilitated by the United States Government) expropriated some 1.8 million acres of land that it then ceded to the United States. In the Organic Act establishing the Territory of Hawaii, Congress provided that those lands should remain under the control of the territorial government "until otherwise provided for by Congress," Act of Apr. 30, 1900, ch. 339, § 91, 31 Stat. 159. By 1921, Congress recognized that the influx of foreign infectious diseases, mass immigration coupled with poor housing and sanitation, hunger, and malnutrition had taken their toll. See *ante,* at 1051. Confronted with the reality that the Hawaiian people had been "frozen out of their lands and driven into the cities," H.R.Rep. No. 839, 66th Cong., 2d Sess., 4 (1920), Congress decided that 27 specific tracts of the lands ceded in 1898, comprising about 203,500 acres, should be used to provide farms and residences for native Hawaiians. Act of July 9, 1921, ch. 42, 42 Stat. 108. Relying on the precedent of previous federal laws granting Indians special rights in public lands, Congress created the Hawaiian Homes Commission to implement its goal of rehabilitating the native people and culture.[8] Hawaii was required to adopt this Act as a condition ***533** of statehood in the Hawaii Statehood Admissions Act (Admissions Act), § 4, 73 Stat. 5. And in an effort to secure the Government's duty to the indigenous peoples, § 5 of the Admissions Act conveyed 1.2 million acres of land to the State to be held in trust "for the betterment of the conditions of native Hawaiians" and certain other public purposes. § 5(f), *id.,* at 1049–1050.

The nature of and motivation for the special relationship between the indigenous peoples and the United States Government was articulated in explicit detail in 1993, when Congress adopted a Joint Resolution containing a formal "apology to Native Hawaiians on behalf of the United States for the overthrow of the Kingdom of Hawaii." 107 Stat. 1510. Among other acknowledgments, the resolution stated that the 1.8 million acres of ceded lands had been obtained "without the consent of or compensation to the Native Hawaiian people of Hawaii or their sovereign government." *Id.,* at 1512.

In the end, however, one need not even rely on this official apology to discern a well-established federal trust relationship with the native Hawaiians. Among the many and varied laws passed by Congress in carrying out its duty to indigenous peoples, more than 150 today expressly include native Hawaiians as part of the class of Native Americans benefited.[9] By classifying native Hawaiians as "Native Americans" for purposes of these statutes, Congress has made clear that native Hawaiians enjoy many of "the same rights and privileges accorded to American Indian, Alaska ***534** Native, Eskimo, and Aleut communities." 42 U.S.C. § 11701(19). See also § 11701(17) ("The authority of the Congress under the United States Constitution to legislate in matters affecting the aboriginal or indigenous peoples of ****1066** the United States includes the authority to legislate in matters affecting the native peoples of ... Hawaii").

While splendidly acknowledging this history—specifically including the series of agreements and enactments the history reveals—the majority fails to recognize its import. The descendants of the native Hawaiians share with the descendants of the Native Americans on the mainland or in the Aleutian Islands not only a history of subjugation at the hands of colonial forces, but also a purposefully created and specialized "guardian-ward" relationship with the Government of the United States. It follows that legislation targeting the native Hawaiians must be evaluated according to the same understanding of equal protection that this Court has long applied to the Indians on the continental United States: that "special treatment ... be tied rationally to the fulfillment of Congress' unique obligation" toward the native peoples. 417 U.S., at 555, 94 S.Ct. 2474.

Declining to confront the rather simple logic of the foregoing, the majority would seemingly reject the OHA voting scheme for a pair of different reasons. First, Congress' trust-based power is confined to dealings with tribes, not with individuals, and no tribe or indigenous sovereign entity is found among the native Hawaiians. *Ante,* at 1057–1059. Second, the elections are "elections of the State," not of a tribe, and upholding this law would be "to permit a State, by racial classification, to fence out whole classes of citizens from decision-making in critical state affairs." *Ante,* at 1058–1059. In my view, neither of these reasons overcomes the otherwise compelling similarity, fully supported by our precedent, between the once subjugated, indigenous peoples of the continental United States and the peoples of the Hawaiian ***535** Islands whose historical sufferings and status parallel those of the continental Native Americans.

Membership in a tribe, the majority suggests, rather than membership in a race or class of descendants, has been the *sine qua non* of governmental power in the realm of Indian law; *Mancari* itself, the majority contends, makes this proposition clear. *Ante,* at 1058. But as scholars have often pointed out, tribal membership cannot be seen as the decisive factor in this Court's opinion upholding the BIA preferences in *Mancari;* the hiring preference at issue in that case not only extended to nontribal member Indians, it also required for eligibility that ethnic Native Americans possess a certain quantum of Indian blood.[10] Indeed, the Federal Government simply has not been limited in its special dealings with the native peoples to laws affecting tribes or tribal Indians alone. See nn. 6, 7, *supra.* In light of this precedent, it is a painful irony indeed to conclude that native Hawaiians are not entitled to special benefits designed to restore a measure of native self-governance because they currently lack any vestigial native government—a possibility of which history and the actions of this Nation have deprived them.[11]

****1067 *536** Of greater concern to the majority is the fact that we are confronted here with a state constitution and legislative enactment—passed by a majority of the entire population of Hawaii—rather than a law passed by Congress or a tribe itself. See, *e.g., ante,* at 1058–1060. But as our own precedent makes clear, this reality does not alter our analysis. As I have explained, OHA and its trustee elections can hardly be characterized simply as an "affair of the State" alone; they are the instruments for implementing the Federal ***537** Government's trust relationship with a once sovereign indigenous people. This Court has held more than once that the federal power to pass laws fulfilling the federal trust relationship with the Indians may be delegated to the States. Most significant is our opinion in *Washington v. Confederated Bands and Tribes of Yakima Nation,* 439 U.S. 463, 500–501, 99 S.Ct. 740, 58 L.Ed.2d 740 (1979), in which we upheld against a Fourteenth Amendment challenge a state law assuming jurisdiction over Indian tribes within a State. While we recognized that States generally do not have the same special relationship with Indians that the Federal Government has, we concluded that because the state law was enacted "in response to a federal measure" intended to achieve the result accomplished by the challenged state law, the state law itself need only " 'rationally further the purpose identified by the State.' " *Id.,* at 500, 99 S.Ct. 740 (quoting *Massachusetts Bd. of Retirement v. Murgia,* 427 U.S. 307, 314, 96 S.Ct. 2562, 49 L.Ed.2d 520 (1976) *(per curiam)*).

The state statutory and constitutional scheme here was without question intended to implement the express desires of the Federal Government. The Admissions Act in § 4 mandated that the provisions of the Hawaiian Homes Commission Act "shall be adopted," with its multiple provisions expressly benefiting native Hawaiians and not others. 73 Stat. 5. More, the Admissions Act required that the proceeds from the lands granted to the State "shall be held by said State as a public trust for ... the betterment of the conditions of native Hawaiians," and that those proceeds "shall be managed and disposed of ... in

such manner as the constitution and laws of said State may provide, and their use for any other object shall constitute a breach of trust for which suit may be brought by the United States." § 5, *id.,* at 6. The terms of the trust were clear, as was the discretion granted to the State to administer the ****1068** trust as the State's laws "may provide." And Congress continues to fund OHA on the understanding that it is thereby furthering the federal trust obligation.

***538** The sole remaining question under *Mancari* and *Yakima* is thus whether the State's scheme "rationally further[s] the purpose identified by the State." Under this standard, as with the BIA preferences in *Mancari,* the OHA voting requirement is certainly reasonably designed to promote "self-government" by the descendants of the indigenous Hawaiians, and to make OHA "more responsive to the needs of its constituent groups." *Mancari,* 417 U.S., at 554, 94 S.Ct. 2474. The OHA statute provides that the agency is to be held "separate" and "independent of the [State] executive branch," Haw.Rev.Stat. § 10–4 (1993); OHA executes a trust, which, by its very character, must be administered for the benefit of Hawaiians and native Hawaiians, §§ 10–2, 10–3(1), 10–13.5; and OHA is to be governed by a board of trustees that will reflect the interests of the trust's native Hawaiian beneficiaries, Haw. Const., Art. XII, § 5 (1993); Haw.Rev.Stat. § 13D–3(b) (1993). OHA is thus "directed to participation by the governed in the governing agency." *Mancari,* 417 U.S., at 554, 94 S.Ct. 2474. In this respect among others, the requirement is "reasonably and directly related to a legitimate, nonracially based goal." *Ibid.*

The foregoing reasons are to me more than sufficient to justify the OHA trust system and trustee election provision under the Fourteenth Amendment.

III

Although the Fifteenth Amendment tests the OHA scheme by a different measure, it is equally clear to me that the trustee election provision violates neither the letter nor the spirit of that Amendment.[12]

***539** Section 1 of the Fifteenth Amendment provides:

> "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." U.S. Const., Amdt. 15.

As the majority itself must tacitly admit, *ante,* at 1055–1056, the terms of the Amendment itself do not here apply. The OHA voter qualification speaks in terms of ancestry and current residence, not of race or color. OHA trustee voters must be "Hawaiian," meaning "any descendant of the aboriginal peoples inhabiting the Hawaiian Islands which exercised sovereignty and subsisted in the Hawaiian Islands in 1778, and which peoples have thereafter continued to reside in Hawaii." Haw.Rev.Stat. § 10–2 (1993). The ability to vote is a function of the lineal *descent* of a modern-day resident of Hawaii, not the blood-based characteristics of that resident, or of the blood-based proximity of that resident to the "peoples" from whom that descendant arises.

The distinction between ancestry and race is more than simply one of plain language. The ability to trace one's ancestry to a particular progenitor at a single distant point in time may convey no information about one's own apparent or acknowledged race today. Neither does it of necessity imply one's own identification ****1069** with a particular race, or the exclusion of any others "*on account of race.*" The terms manifestly carry distinct meanings, and ancestry was not included by the Framers in the Amendment's prohibitions.

Presumably recognizing this distinction, the majority relies on the fact that "[a]ncestry can be a proxy for race." *Ante,* at 1055. That is, of course, true, but it by no means ***540** follows that ancestry is always a proxy for race. Cases in which ancestry served as such a proxy are dramatically different from this one. For example, the literacy requirement at issue in *Guinn v. United States,* 238 U.S. 347, 35 S.Ct. 926, 59 L.Ed. 1340 (1915), relied on such a proxy. As part of a series of blatant efforts to exclude blacks from voting, Oklahoma exempted from its literacy requirement people whose ancestors were entitled to vote prior to the enactment of the Fifteenth Amendment. The *Guinn* scheme patently "served only to perpetuate ... old [racially discriminatory voting] laws and to effect a transparent racial exclusion." *Ante,* at 1055. As in *Guinn,* the voting

laws held invalid under the Fifteenth Amendment in all of the cases cited by the majority were fairly and properly viewed through a specialized lens—a lens honed in specific detail to reveal the realities of time, place, and history behind the voting restrictions being tested.

That lens not only fails to clarify, it fully obscures the realities of this case, virtually the polar opposite of the Fifteenth Amendment cases on which the Court relies. In *Terry v. Adams,* 345 U.S. 461, 73 S.Ct. 809, 97 L.Ed. 1152 (1953), for example, the Court held that the Amendment proscribed the Texas "Jaybird primaries" that used neutral voting qualifications "with a single proviso—Negroes are excluded," *id.,* at 469, 73 S.Ct. 809. Similarly, in *Smith v. Allwright,* 321 U.S. 649, 664, 64 S.Ct. 757, 88 L.Ed. 987 (1944), it was the blatant "discrimination against Negroes" practiced by a political party that was held to be state action within the meaning of the Amendment. Cases such as these that "strike down these voting systems ... designed to exclude one racial class (at least) from voting," *ante,* at 1055, have no application to a system designed to empower politically the remaining members of a class of once sovereign, indigenous people.

Ancestry surely can be a proxy for race, or a pretext for invidious racial discrimination. But it is simply neither proxy nor pretext here. All of the persons who are eligible to vote for the trustees of OHA share two qualifications that no other person old enough to vote possesses: They are beneficiaries ***541** of the public trust created by the State and administered by OHA, and they have at least one ancestor who was a resident of Hawaii in 1778. A trust whose terms provide that the trustees shall be elected by a class including beneficiaries is hardly a novel concept. See 2 A. Scott & W. Fratcher, Law of Trusts § 108.3 (4th ed.1987). The Committee that drafted the voting qualification explained that the trustees here should be elected by the beneficiaries because "people to whom assets belong should have control over them .... The election of the board will enhance representative governance and decision-making accountability and, as a result, strengthen the fiduciary relationship between the board member, as trustee, and the native Hawaiian, as beneficiary."[13] The described purpose of this aspect of the classification thus exists wholly apart from race. It is directly focused on promoting both the delegated federal mandate, and the terms of the State's own trustee responsibilities.

The majority makes much of the fact that the OHA trust—which it assumes is legitimate—should be read as principally intended to benefit the smaller class of ****1070** "native Hawaiians," who are defined as at least one-half descended from a native islander circa 1778, Haw.Rev.Stat. § 10–2 (1993), not the larger class of "Hawaiians," which includes "any descendant" of those aboriginal people who lived in Hawaii in 1778 and "which peoples thereafter have continued to reside in Hawaii," *ibid.* See *ante,* at 1060. It is, after all, the majority notes, the larger class of Hawaiians that enjoys the suffrage right in OHA elections. There is therefore a mismatch in interest alignment between the trust beneficiaries and the trustee electors, the majority contends, and it thus cannot be said that the class of qualified voters here is defined solely by beneficiary status.

***542** While that may or may not be true depending upon the construction of the terms of the trust, there is surely nothing racially invidious about a decision to enlarge the class of eligible voters to include "any descendant" of a 1778 resident of the Islands. The broader category of eligible voters serves quite practically to ensure that, regardless how "dilute" the *race* of native Hawaiians becomes—a phenomenon also described in the majority's lavish historical summary, *ante,* at 1051—there will remain a voting interest whose ancestors were a part of a political, cultural community, and who have inherited through participation and memory the set of traditions the trust seeks to protect. The putative mismatch only underscores the reality that it cannot be purely a racial interest that either the trust or the election provision seeks to secure; the political and cultural interests served are—unlike *racial* survival—shared by both native Hawaiians and Hawaiians.[14]

***543** Even if one refuses to recognize the beneficiary status of OHA trustee voters entirely,[15] it cannot be said that the ancestry-based ****1071** voting qualification here simply stands in the ***544** shoes of a classification that would either privilege or penalize "on account of " race. The OHA voting qualification—part of a statutory scheme put in place by democratic vote of a multiracial majority of all state citizens, including those non-"Hawaiians" who are not entitled to vote in OHA trustee elections—appropriately includes every resident of Hawaii having at least one ancestor who lived in the islands in 1778. That is, among other things, the audience to whom the congressional apology was addressed. Unlike a class including only full-blooded Polynesians—as one would imagine were the class strictly defined in terms of race—the OHA election provision *excludes* all full-blooded Polynesians currently residing in Hawaii who are not descended from a 1778 resident of Hawaii. Conversely, unlike many of the old southern voting schemes in which any potential voter with a "taint" of non-Hawaiian blood would be excluded, the OHA scheme excludes no descendant of a 1778 resident because he or she is also part European, Asian, or African as a matter of race. The classification here is thus both too inclusive and not inclusive enough to fall strictly along racial lines.

At pains then to identify at work here a singularly "racial purpose," *ante,* at 1056, 1057—whatever that might mean, although one might assume the phrase a "proxy" for "racial discrimination"—the majority next posits that "[o]ne of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities." *Ante,* at 1057. That is, of course, true when ancestry is the basis for denying or abridging one's right to vote or to share the blessings of freedom. But it is quite wrong to ignore the relevance of ancestry to claims of ***545** an interest in trust property, or to a shared interest in a proud heritage. There would be nothing demeaning in a law that established a trust to manage Monticello and provided that the descendants of Thomas Jefferson should elect the trustees. Such a law would be equally benign, regardless of whether those descendants happened to be members of the same race.[16]

****1072** In this light, it is easy to understand why the classification here is not "demeaning" at all, *ante,* at 1060, for it is simply not based on the "premise that citizens of a particular race are somehow more qualified than others to vote on certain matters," *ibid.* It is based on the permissible assumption in this context that families with "any" ancestor who lived in Hawaii in 1778, and whose ancestors thereafter continued to live in Hawaii, have a claim to compensation and self-determination that others do not. For the multiracial majority of the citizens of the State of Hawaii to recognize that deep reality is not to demean their own interests but to honor those of others.

It thus becomes clear why the majority is likewise wrong to conclude that the OHA voting scheme is likely to "become the instrument for generating the prejudice and hostility all too often directed against persons whose particular ancestry ***546** is disclosed by their ethnic characteristics and cultural traditions." *Ante,* at 1057. The political and cultural concerns that motivated the nonnative majority of Hawaiian voters to establish OHA reflected an interest in preserving through the self-determination of a particular people ancient traditions that they value. The fact that the voting qualification was established by the entire electorate in the State—the vast majority of which is not native Hawaiian—testifies to their judgment concerning the Court's fear of "prejudice and hostility" against the majority of state residents who are not "Hawaiian," such as petitioner. Our traditional understanding of democracy and voting preferences makes it difficult to conceive that the majority of the State's voting population would have enacted a measure that discriminates against, or in any way represents prejudice and hostility toward, that self-same majority. Indeed, the best insurance against that danger is that the electorate here retains the power to revise its laws.

IV

The Court today ignores the overwhelming differences between the Fifteenth Amendment case law on which it relies and the unique history of the State of Hawaii. The former recalls an age of abject discrimination against an insular minority in the old South; the latter at long last yielded the "political consensus" the majority claims it seeks, *ante,* at 1060—a consensus determined to recognize the special claim to self-determination of the indigenous peoples of Hawaii. This was the considered and correct view of the District Judge for the United States District Court for the District of Hawaii, as well as the three Circuit Judges on the Court of Appeals for the Ninth Circuit.[17] As Judge Rymer explained:

> ***547** "The special election for trustees is not equivalent to a general election, and the vote is not for officials who will perform general governmental functions in either a representative or executive capacity.... Nor does the limitation in these circumstances suggest that voting eligibility was designed to exclude persons who would otherwise be interested in OHA's affairs.... Rather, it reflects the fact that the trustees' fiduciary responsibilities run only to native Hawaiians and Hawaiians and 'a board of trustees chosen from among those who are interested parties would be the best ****1073** way to insure proper management and adherence to the needed fiduciary principles.' " [18] The challenged part of Hawaii law was not contrived to keep non-Hawaiians from voting in general, or in any respect pertinent to their legal interests. Therefore, we cannot say that [petitioner's] right to vote has been denied or abridged in violation of the Fifteenth Amendment.

> " [18] 1 Proceedings of the Constitutional Convention of Hawaii of 1978, Standing Comm. Rep. No. 59 at 644. The Committee reporting on Section 5, establishing OHA, further noted that trustees should be so elected because 'people to whom assets belong should have control over them.... The election of the board will enhance representative governance and decision-making accountability and, as a result, strengthen the fiduciary relationship between the board member, as trustee, and the native Hawaiian, as beneficiary.' *Id."*

146 F.3d 1075, 1081–1082 (C.A.9 1998).

In my judgment, her reasoning is far more persuasive than the wooden approach adopted by the Court today.

Accordingly, I respectfully dissent.

Justice GINSBURG, dissenting.

I dissent essentially for the reasons stated by Justice STEVENS in Part II of his dissenting opinion. *Ante,* at 1063–1068 (relying on established federal authority over Native ***548** Americans). Congress' prerogative to enter into special trust relationships with indigenous peoples, *Morton v. Mancari,* 417 U.S. 535, 94 S.Ct. 2474, 41 L.Ed.2d 290 (1974), as Justice STEVENS cogently explains, is not confined to tribal Indians. In particular, it encompasses native Hawaiians, whom Congress has in numerous statutes reasonably treated as qualifying for the special status long recognized for other once-sovereign indigenous peoples. See *ante,* at 1065–1066 and n. 9 (STEVENS, J., dissenting). That federal trust responsibility, both the Court and Justice STEVENS recognize, has been delegated by Congress to the State of Hawaii. Both the Office of Hawaiian Affairs and the voting scheme here at issue are "tied rationally to the fulfillment" of that obligation. See *Mancari,* 417 U.S., at 555, 94 S.Ct. 2474. No more is needed to demonstrate the validity of the Office and the voting provision under the Fourteenth and Fifteenth Amendments.

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Footnotes

[*] The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282.

[1] App. E to Brief for Hawaii Congressional Delegation as *Amicus Curiae* E–3. In a statement explaining the cultural motivation for the amendments, Senator Akaka pointed out that the "fact that the entire State of Hawaii voted to amend the State Constitution in 1978 to establish the Office of Hawaiian Affairs is significant because it illustrates the recognition of the importance of Hawaiian culture and traditions as the foundation for the *Aloha* spirit." *Id.,* at E–5.

[2] See, *e.g., Alaska v. Native Village of Venetie Tribal Government,* 522 U.S. 520, 531, n. 6, 118 S.Ct. 948, 140 L.Ed.2d 30 (1998); *United States v. Wheeler,* 435 U.S. 313, 319, 98 S.Ct. 1079, 55 L.Ed.2d 303 (1978); *United States v. Antelope,* 430 U.S. 641, 645, 97 S.Ct. 1395, 51 L.Ed.2d 701 (1977); *Morton v. Mancari,* 417 U.S. 535, 551, 94 S.Ct. 2474, 41 L.Ed.2d 290 (1974); *Lone Wolf v. Hitchcock,* 187 U.S. 553, 564–565, 23 S.Ct. 216, 47 L.Ed. 299 (1903); *United States v. Kagama,* 118 U.S. 375, 6 S.Ct. 1109, 30 L.Ed. 228 (1886).

[3] See, *e.g., United States v. Sandoval,* 231 U.S. 28, 34 S.Ct. 1, 58 L.Ed. 107 (1913); *Kagama,* 118 U.S., at 384–385, 6 S.Ct. 1109; *Cherokee Nation v. Georgia,* 5 Pet. 1, 8 L.Ed. 25 (1831).

4 *Sandoval,* 231 U.S., at 45, 34 S.Ct. 1; *Kagama,* 118 U.S., at 384–385, 6 S.Ct. 1109.

5 See, *e.g., United States v. Celestine,* 215 U.S. 278, 286–287, 30 S.Ct. 93, 54 L.Ed. 195 (1909).

6 See *United States v. John,* 437 U.S. 634, 653, 98 S.Ct. 2541, 57 L.Ed.2d 489 (1978) ("Neither the fact that the Choctaws in Mississippi are merely a remnant of a larger group of Indians, long ago removed from Mississippi, nor the fact that federal supervision over them has not been continuous, destroys the federal power to deal with them"); *Delaware Tribal Business Comm. v. Weeks,* 430 U.S. 73, 82, n. 14, 84–85, 97 S.Ct. 911, 51 L.Ed.2d 173 (1977) (whether or not federal statute providing financial benefits to descendants of Delaware Tribe included nontribal Indian beneficiaries, Congress' choice need only be " 'tied rationally to the fulfillment of Congress' unique obligation toward the Indians' " (quoting *Morton v. Mancari,* 417 U.S., at 555, 94 S.Ct. 2474)).

7 See generally F. Cohen, Handbook of Federal Indian Law 19–20 (1982). Compare 25 U.S.C. § 479 ("The term 'Indian' as used in this Act shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood. For the purposes of this Act, Eskimos and other aboriginal peoples of Alaska shall be considered Indians") with § 1603(c)(3) (Indian is any person "considered by the Secretary of the Interior to be an Indian for any purpose").

8 See H.R.Rep. No. 839, 66th Cong., 2d Sess., 4, 11 (1920). Reflecting a compromise between the sponsor of the legislation, who supported special benefits for "all who have Hawaiian blood in their veins," and plantation owners who thought that only "Hawaiians of the pure blood" should qualify, Hawaiian Homes Commission Act: Hearings before the Senate Committee on the Territories, H.R.Rep. No. 13500, 66th Cong., 3d Sess., 14–17 (1920), the statute defined a "native Hawaiian" as "any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778," 42 Stat. 108.

9 See Brief for Hawaiì Congressional Delegation as *Amicus Curiae* 7, and App. A; see also, *e.g.,* American Indian Religious Freedom Act, 42 U.S.C. § 1996 *et seq.;* Native American Programs Act of 1974, 42 U.S.C. §§ 2991–2992; Comprehensive Employment and Training Act, 29 U.S.C. § 872; Drug Abuse Prevention, Treatment, and Rehabilitation Act, 21 U.S.C. § 1177; Cranston–Gonzalez National Affordable Housing Act, § 958, 104 Stat. 4422; Indian Health Care Amendments of 1988, 25 U.S.C. § 1601 *et seq.*

10 See, *e.g.,* Frickey, Adjudication and its Discontents: Coherence and Conciliation in Federal Indian Law, 110 Harv. L.Rev. 1754, 1761–1762 (1997). As is aptly explained, the BIA preference in that case was based on a statute that extended the preference to ethnic Indians—identified by blood quantum—who were not members of federally recognized tribes. 25 U.S.C. § 479. Only the implementing regulation included a mention of tribal membership, but even that regulation required that the tribal member also " 'be one-fourth or more degree Indian blood.' " *Mancari,* 417 U.S., at 553, n. 24, 94 S.Ct. 2474.

11 Justice BREYER suggests that the OHA definition of native Hawaiians (*i.e.,* Hawaiians who may vote under the OHA scheme) is too broad to be "reasonable." *Ante,* at 1062 (opinion concurring in result). This suggestion does not identify a constitutional defect. The issue in this case is *Congress'* power to define who counts as an indigenous person, and *Congress'* power to delegate to States its special duty to persons so defined. (Justice BREYER's interest in *tribal* definitions of membership—and in this Court's holding that tribes' power to define membership is at the core of tribal sovereignty and thus "unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority," *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 56, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978)—is thus inapposite.) Nothing in federal law or in our Indian law jurisprudence suggests that the OHA definition of native is anything but perfectly within that power as delegated. See *supra,* at 1064–1066, and nn. 6–7. Indeed, the OHA voters match precisely the set of people to whom the congressional apology was targeted.

Federal definitions of "Indian" often rely on the ability to trace one's ancestry to a particular group at a particular time. See, *e.g.,*

25 CFR, ch. 1, § 5.1 (1999) (extending BIA hiring preference to "persons of Indian descent who are ... (b) [d]escendants of such [tribal] members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation"); see also n. 7, *supra.* It can hardly be correct that once 1934 is two centuries past, rather than merely 66 years past, this classification will cease to be "reasonable." The singular federal statute defining "native" to which Justice BREYER points, 43 U.S.C. § 1602(b) (including those defined by blood quantum without regard to membership in any group), serves to underscore the point that membership in a "tribal" structure *per se,* see *ante,* at 1061, is not the acid test for the exercise of federal power in this arena. See R. Clinton, N. Newton, & M. Price, American Indian Law 1054–1058 (3d ed.1991) (describing provisions of the Alaska Native Claims Settlement Act creating geographic regions of natives with common heritage and interest, 43 U.S.C. § 1606, requiring those regions to organize a native corporation in order to qualify for settlement benefits, § 1607, and establishing the Alaska Native Fund of federal moneys to be distributed to "enrolled natives," §§ 1604–1605); see also *supra,* at 1066, and n. 10. In the end, what matters is that the determination of indigenous status or "real group membership," *ante,* at 1062 (BREYER, J., concurring in result), is one to be made by Congress—not by this Court.

12 Just as one cannot divorce the Indian law context of this case from an analysis of the OHA scheme under the Fourteenth Amendment, neither can one pretend that this law fits simply within our non-Indian cases under the Fifteenth Amendment. As the preceding discussion of *Mancari* and our other Indian law cases reveals, this Court has never understood laws relating to indigenous peoples simply as legal classifications defined by race. Even where, unlike here, blood quantum requirements are express, this Court has repeatedly acknowledged that an overlapping political interest predominates. It is only by refusing to face this Court's entire body of Indian law, see *ante,* at 1053–1054, that the majority is able to hold that the OHA qualification denies non-"Hawaiians" the right to vote "on account of race."

13 1 Proceedings of the Constitutional Convention of Hawaii of 1978, Standing Committee Rep. No. 59, p. 644.

14 Of course, the majority's concern about the absence of alignment becomes salient only if one assumes that something other than a *Mancari*-like political classification is at stake. As this Court has approached cases involving the relationship among the Federal Government, its delegates, and the indigenous peoples—including countless federal definitions of "classes" of Indians determined by blood quantum, see n. 7, *supra*—any "racial" aspect of the voting qualification here is eclipsed by the political significance of membership in a once-sovereign indigenous class.

Beyond even this, the majority's own historical account makes clear that the inhabitants of the Hawaiian Islands whose descendants constitute the instant class are identified and remain significant as much because of culture as because of race. By the time of Cook's arrival, "the Hawaiian people had developed, over the preceding 1,000 years or so, a cultural and political structure ... well-established traditions and customs and ... a polytheistic religion." *Ante,* at 1048. Prior to 1778, although there "was no private ownership of land," *Hawaii Housing Authority v. Midkiff,* 467 U.S. 229, 232, 104 S.Ct. 2321, 81 L.Ed.2d 186 (1984), the native Hawaiians "lived in a highly organized, self-sufficient, subsistence social system based on communal land tenure with a sophisticated language, culture, and religion," 42 U.S.C. § 11701(4). According to Senator Akaka, their society "was steeped in science [and they] honored their *'aina* (land) and environment, and therefore developed methods of irrigation, agriculture, aquaculture, navigation, medicine, fishing and other forms of subsistence whereby the land and sea were efficiently used without waste or damage. Respect for the environment and for others formed the basis of their culture and tradition.' " App. E to Brief for Hawai'i Congressional Delegation as *Amicus Curiae* E–4. Legends and oral histories passed from one generation to another are reflected in artifacts such as carved images, colorful feathered capes, songs, and dances that survive today. For some, Pele, the God of Fire, still inhabits the crater of Kilauea, and the word of the Kahuna is still law. It is this culture, rather than the Polynesian race, that is uniquely Hawaiian and in need of protection.

15 Justice BREYER's even broader contention that "there is no 'trust' for native Hawaiians here," *ante,* at 1061, appears to make the greater mistake of conflating the public trust established by Hawaii's Constitution and laws, see *supra,* at 1067–1068, with the "trust" relationship between the Federal Government and the indigenous peoples. According to Justice BREYER, the "analogy on which Hawaii's justification must depend," *ante,* at 1062, is "destroy[ed]" in part by the fact that OHA is not a trust (in the former sense of a trust) for native Hawaiians alone. Rather than looking to the terms of the public trust itself for this proposition, Justice BREYER relies on the terms of the land conveyance to Hawaii in part of the Admissions Act. But the portion of the trust administered by OHA does not purport to contain in its corpus all 1.2 million acres of federal trust lands set aside for the benefit of all Hawaiians, including native Hawaiians. By its terms, only "[t]wenty per cent of all revenue derived from the public land trust shall be expended by the office for the betterment of the conditions of native Hawaiians." Haw.Rev.Stat. § 10–13.5 (1993). This

portion appears to coincide precisely with the one-fifth described purpose of the Admissions Act trust lands to better the conditions of native Hawaiians. Admissions Act § 5(f), 73 Stat. 6. Neither the fact that native Hawaiians have a specific, beneficial interest in only 20% of trust revenues, nor the fact that the portion of the trust administered by OHA is supplemented to varying degrees by nontrust moneys, negates the existence of the trust itself.

Moreover, neither the particular terms of the State's public trust nor the particular source of OHA funding "destroys" the centrally relevant trust "analogy" on which Hawaii relies—that of the relationship between the Federal Government and indigenous Indians on this continent, as compared with the relationship between the Federal Government and indigenous Hawaiians in the now United States-owned Hawaiian Islands. That trust relationship—the only trust relevant to the Indian law analogy—includes the power to delegate authority to the States. As we have explained, *supra,* at 1064–1066, the OHA scheme surely satisfies the established standard for testing an exercise of that power.

16 Indeed, "[i]n one form or another, the right to pass on property—to one's family in particular—has been part of the Anglo–American legal system since feudal times." *Hodel v. Irving,* 481 U.S. 704, 716, 107 S.Ct. 2076, 95 L.Ed.2d 668 (1987). Even the most minute fractional interests that can be identified after allotted lands are passed through several generations can receive legal recognition and protection. Thus, we held not long ago that inherited shares of parcels allotted to the Sioux in 1889 could not be taken without compensation even though their value was nominal and it was necessary to use a common denominator of 3,394,923,840,000 to identify the size of the smallest interest. *Id.,* at 713–717. Whether it is wise to provide recompense for all of the descendants of an injured class after several generations have come and gone is a matter of policy, but the fact that their interests were acquired by inheritance rather than by assignment surely has no constitutional significance.

17 Indeed, the record indicates that none of the 20–plus judges on the Ninth Circuit to whom the petition for rehearing en banc was circulated even requested a vote on the petition. App. to Pet. for Cert. 44a.

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15 A.D.2d 739
Supreme Court, Appellate Division, First Department, New York.

Anna ROTHOUSE, Plaintiff-Appellant,
v.
The ASSOCIATION OF LAKE MOHEGAN PARK PROPERTY OWNERS, INC., Defendant-Respondent.

Feb. 6, 1962.

Synopsis

The plaintiff appealed from an order denying her motion for summary judgment. The Supreme Court, Appellate Division, held that fact issues were presented precluding summary judgment.

Order affirmed.

Attorneys and Law Firms

****1013** E. Marx, New York City, for plaintiff-appellant.

P. G. Choulas, Peekskill, for defendant-respondent.

Before ***740** BOTEIN, P. J., and RABIN, McNALLY, STEVENS and STEUER, JJ.

Opinion

PER CURIAM.

***739** Order entered on September 5, 1961, denying plaintiff's motion for summary judgment, unanimously affirmed, with $20 costs and disbursements to the respondent to abide the event. The order appealed from grants a motion made by the defendant for a rehearing of a motion which resulted in the granting of summary judgment in favor of plaintiff. The order also recalls the previous decision, vacates and sets aside the previous order and denies plaintiff's motion for summary judgment. The reason given for such action was the belief of the Court that the granting of such motion for summary judgment in effect constituted a contrary determination to that made by another justice of the same Court who had theretofore denied a motion for injunctive relief. We, of course, are free to resolve *de novo* the question of whether summary judgment should be granted (Walker v. Gerli, 257 App.Div. 249, 12 N.Y.S.2d 942). We conclude that summary judgment should not be granted for there are issues of fact presented requiring a trial. It seems that the original grantor filed not one but two subdivision maps. One was designated Section 1 and the other as Section 2. The area called 'The Common' appears only on the map designated as Section 1. Plaintiff's property is located in Section 2. Whether it was intended that plaintiff's property, located in Section 2, was to be favored with an easement with respect to the use of 'The Common' located in Section 1 is a question that cannot be determined on the papers submitted. It can only be determined after trial. There is nothing in the deed of the original grantor conveying plaintiff's property that makes specific reference to 'The Common' as it does to the right granted to the use of the common dock appearing on the map of Section 2. Of course, this observation should not be construed as a finding that the plaintiff is not entitled to the ****1014** use of the area designated as 'The Common'. We simply hold that the resolution of that question must await trial. Likewise, the nature of the plaintiff's membership in the Association, through which she claims a right to use 'The Common', must be more fully explored before it can be determined whether she has any rights, contractual or otherwise, to the use of that area through such membership.

223 N.Y.S.2d 1012

All Citations

15 A.D.2d 739, 223 N.Y.S.2d 1012

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145 Cal.App.4th 660
Court of Appeal, Fifth District, California.

Enrique SANCHEZ et al., Plaintiffs and Appellants,
v.
CITY OF MODESTO et al., Defendants and Respondents.

No. F048277.
|
Dec. 6, 2006.
|
Review Denied March 21, 2007.
|
Certiorari Denied Oct. 15, 2007.
|
See 128 S.Ct. 438.

Synopsis
Background: Latino voters filed action against city under the California Voting Rights Act (CVRA), alleging that because of racially polarized voting in the city, they are precluded from electing any candidates in the city's at-large city council elections. The Superior Court of Stanislaus County, No. 347903, Roger M. Beauchesne, J., granted city's motion for judgment on the pleadings after ruling that the CVRA was facially invalid under the equal protection clauses of the state and federal Constitutions. Voters appealed.

Holdings: The Court of Appeal, Wiseman, J., held that:

CVRA is race-neutral;

city had third-party standing to maintain equal protection challenge to CVRA;

city failed to show that CVRA was facially invalid;

all persons have standing under CVRA to sue for race-based vote dilution; and

CVRA is not subject to strict scrutiny under equal protection.

Reversed and remanded.

Attorneys and Law Firms

****825**Heller Ehrman, George H. Brown, Warrington S. Parker, III, Peter E. Gratzinger, Nicholas S. Campins, Stephen A. Tuggy, and Ronald A. Valenzuela, Los Angeles; Lawyers' Committee for Civil Rights, Robert Rubin and Nicholas Espiritu; Seattle University School of Law, Joaquin G. Avila, for Plaintiffs and Appellants.

Bill Lockyer, Attorney General, Louis R. Mauro, Assistant Attorney General, Christopher E. Krueger and Douglas J. Woods, Deputy Attorneys General, for State of California as Amicus Curiae on behalf of Plaintiffs and Appellants.

Kathay Feng, Los Angeles, for California Common Cause and FairVote as Amici Curiae on behalf of Plaintiffs and Appellants.

Alan Smith, City Attorney; Hogan and Hartson, Los Angeles, John W. Borkowski, Joseph G. Krauss, Nichelle Billips, Chhaya Malik, and Monica Sahaf, for City of Watsonville as Amici Curiae on behalf of Plaintiffs and Appellants.

Howrey, LLP, John E. McDermott, Los Angeles; Richard Rudnansky, Interim City Attorney (Modesto), Roland R. Stevens, Assistant City Attorney, for Defendants and Respondents.

Gilbert Trujillo, City Attorney, for City of Santa Maria as Amici Curiae on behalf of Defendants and Respondents.

Patrick Whitnell for League of California Cities as Amici Curiae on behalf of Defendants and Respondents.

***665OPINION**

WISEMAN, J.

The trial court granted the defense's motion for judgment on the pleadings after ruling that the California Voting Rights Act of 2001 was facially invalid under the equal protection clauses of the state and federal Constitutions. It entered judgment against plaintiff Latino voters, who allege that, because of racially polarized voting in Modesto, they are precluded from electing any candidates in the city's at-large city council elections. No evidence has been presented in support of or in opposition to this claim. Rather, at a preliminary stage of the litigation, the trial court struck down the CVRA, ruling that any possible application would necessarily involve unconstitutional racial discrimination. As we will explain, Modesto's arguments do not support disposing of the Legislature's act in this summary manner.

Courts make two kinds of decisions about the constitutionality of laws: decisions about whether a law is invalid on its face and in all of its conceivable applications (called "facial" invalidity), and about whether a particular application of a law is invalid (called "as-applied" invalidity). In this case, the City of Modesto attempted to show that the CVRA is unconstitutional because it is facially invalid. Modesto's arguments cannot establish facial invalidity. The city may, however, use similar arguments to attempt to show *as-applied***826** invalidity later if liability is proven and a specific application or remedy is considered that warrants the attempt. For example, if the court entertains a remedy that uses race, such as a district-based election system in which race is a factor in establishing district boundaries, defendants may again assert the meaty constitutional issues they have raised here. In doing so, at that time they can ask the court to decide whether the particular application or remedy is discriminatory.

***666** Why do Modesto's arguments fail to show that the CVRA is facially unconstitutional? Modesto takes the position that the CVRA is unconstitutional because it uses "race" to identify the polarized voting that causes vote dilution and prevents groups from electing candidates. Modesto claims that this use of race constitutes reverse racial discrimination and is a form of unconstitutional affirmative action benefiting only certain racial groups. However, this is not an accurate characterization of what the CVRA requires. The CVRA is raceneutral. It does not favor any race over others or allocate burdens or benefits to any groups on the basis of race. It simply gives a cause of action to members of *any* racial or ethnic group that can establish that its members' votes are diluted though the combination of racially polarized voting and an at-large election system—like the election system used in Modesto. In this respect, it is similar to other long-standing statutes that create causes of action for racial discrimination, such as the federal Civil Rights Act or California's Fair Employment and Housing Act.

The reality in California is that no racial group forms a majority.[1] As a result, *any* racial group can experience the kind of vote dilution the CVRA was designed to combat, including Whites. Just as non-Whites in majority-White cities may have a cause

of action under the CVRA, so may Whites in majority-non-White cities. Both demographic situations exist in California, even within our own San Joaquin Valley, and the CVRA applies to each in exactly the same way.

The trial court also found facially unconstitutional the portion of the CVRA that allows attorney fees to be awarded to prevailing plaintiffs. The trial court reached this issue even though it was moot—plaintiffs never had an opportunity to seek attorney fees, since they lost—and the city only briefed the issue after the trial court asked it to do so. Further, in reaching its decision, the court focused on an improbable set of hypothetical facts. The asserted invalidity of a single hypothetical application is not a proper basis for finding the fee clause invalid on its face.

The judgment is reversed and the case is remanded to the trial court.

FACTUAL AND PROCEDURAL HISTORIES

Plaintiffs are Latino voters who reside in Modesto. They filed a complaint in Superior Court on June 3, 2004, alleging that, because of racially polarized voting, the city's at-large method of electing city council members diluted ***667** their votes. The complaint named as defendants the City of Modesto, the city clerk, the mayor, and each member of the city council.

According to the complaint, in Modesto's at-large election system, candidates for city council run for individual seats to ****827** which numbers are arbitrarily assigned and for each of which all the city's voters may vote. To win, a candidate must receive a majority of the votes cast for the seat for which he or she has chosen to run. A runoff between the top two vote-getters for a seat occurs if no candidate receives a majority. The complaint alleges that this system, combined with a pattern of racially polarized voting, regularly prevented Latino voters from electing any candidates of their choice or influencing city government. Although Latinos were 25.6 percent of the city's population of 200,000, only one Latino had been elected to the city council since 1911.

The complaint alleged one cause of action, a violation of the CVRA (Elec.Code, §§ 14025–14032),[2] and prayed for the imposition of a district-based system as a remedy. The CVRA provides a private right of action to members of a protected class where, because of "dilution or the abridgement of the rights of voters," an at-large election system "impairs the ability of a protected class to elect candidates of its choice or its ability to influence the outcome of an election...." (§§ 14027, 14032.) To prove a violation, plaintiffs must show racially polarized voting. They do not need to show that members of a protected class live in a geographically compact area or demonstrate an intent to discriminate on the part of voters or officials. (§ 14028.)

Some background on federal voting rights law is helpful to provide context for the CVRA. Like the CVRA, section 2 of the Federal Voting Rights Act (FVRA) (42 U.S.C. § 1973) creates liability for vote dilution. A violation of the FVRA is established if "the political processes leading to nomination or election in [a] State or political subdivision [of a state] are not equally open to participation by members of a [protected] class ... in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." (42 U.S.C. § 1973(b).) Amendments to the FVRA passed by Congress in 1982 made it clear that intentional discrimination by officials is not required to show a violation. (*Shaw v. Reno* (1993) 509 U.S. 630, 641, 113 S.Ct. 2816, 125 L.Ed.2d 511(*Shaw*);*Thornburg v. Gingles* (1986) 478 U.S. 30, 35, 106 S.Ct. 2752, 92 L.Ed.2d 25(*Gingles*).) Later, after noting that it has "long recognized" that at-large elections and multi-member districts can " ' "minimize or cancel out the voting strength" ' " of minorities (*Gingles, supra,* at p. 47, 106 S.Ct. 2752), the Supreme Court delineated the elements of a vote-dilution ***668** violation under the FVRA:

> "First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district.... Second, the minority group must be able to show that it is politically cohesive.... Third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it ... usually to defeat the minority's preferred candidate." (*Gingles, supra,* 478 U.S. at pp. 50–51, 106 S.Ct. 2752 (fn. omitted).)

Section 2 of the FVRA does not allow states to use race however they want to in remedying vote dilution. In fact, the Supreme Court has recognized constitutional limitations on race-based districting plans adopted by state and local governments attempting to avoid section 2 liability. For example, in *Shaw, supra,* 509 U.S. 630, 113 S.Ct. 2816, 125 L.Ed.2d 511, the court considered a new district map for the State of North Carolina, created by the ****828** state legislature after the results of the 1990 census gave the state a right to an additional member of the House of Representatives. The new districting plan included two majority-Black districts. The plaintiffs claimed the plan constituted an unconstitutional racial gerrymander. (*Id.* at pp. 633–634, 641, 113 S.Ct. 2816.) Among the justifications the state offered for the plan was that the two majority-Black districts were needed to avoid liability for vote dilution under section 2 of the FVRA. (*Shaw, supra,* at p. 655, 113 S.Ct. 2816.) Reversing the trial court's order dismissing the case, the Supreme Court held that the plaintiffs had stated a valid claim for relief under the equal protection clause of the Fourteenth Amendment. (*Shaw, supra,* at pp. 637–639, 642, 113 S.Ct. 2816.) It stated that, because the majority-Black districts' shapes were so bizarre, they could not "rationally ... be understood as anything other than an effort to separate voters into different districts on the basis of race," and the redistricting plan should be subjected by the trial court to strict scrutiny, just like "other state laws that classify citizens by race." (*Id.* at pp. 644, 649, 113 S.Ct. 2816.)

Later cases explained that a finding that race was the "predominant" factor in creating a district—to which other factors were "subordinated"—is what triggers strict scrutiny. (*Bush v. Vera* (1996) 517 U.S. 952, 958–959, 116 S.Ct. 1941, 135 L.Ed.2d 248 (plur. opn. of O'Connor, J.) (*Vera*).) *Shaw* and its progeny therefore stand for the following proposition: While state and local governments are commanded not to permit racial vote dilution that violates section 2 of the FVRA, they are also forbidden to use race as the predominant factor in a redistricting scheme designed to avoid a violation unless that use of race passes strict scrutiny. The court has assumed without deciding that race-conscious measures undertaken to avoid section 2 liability pass strict scrutiny if those measures use race no more than is reasonably necessary to achieve section 2 compliance. (*Vera, supra,* 517 U.S. at pp. 976–979, 116 S.Ct. 1941.)

***669** The legislative history of the CVRA indicates that the California Legislature wanted to provide a broader cause of action for vote dilution than was provided for by federal law. Specifically, the Legislature wanted to eliminate the *Gingles* requirement that, to establish *liability* for dilution under section 2 of the FVRA, plaintiffs must show that a compact majority-minority district is possible. That said, the bill that ultimately became the CVRA did intend to allow geographical compactness to be a consideration at the *remedy* stage. A bill analysis prepared by staff for the Assembly Committee on Judiciary reflects this fact:

> "This bill would allow a showing of dilution or abridgement of minority voting rights by showing the first two *Thornburg* [*v. Gingles, supra,* 478 U.S. 30, 106 S.Ct. 2752] requirements without an additional showing of geographical compactness.... This bill recognizes that geographical concentration is an appropriate question at the *remedy* stage. However, geographical compactness would not appear to be an important factor in assessing whether the voting rights of a minority group have been diluted or abridged by an at-large election system. Thus, this bill puts the voting rights horse (the discrimination issue) back where it sensibly belongs in front of the cart (what type of remedy is appropriate once racially polarized voting has been shown)." (Assem. Com. on Judiciary, Analysis of Sen. Bill No. 976 (2001–2002 Reg. Sess.) as amended Apr. 9, 2002, p. 3 (italics added).)

****829** Another point emphasized in the legislative history is California's lack of a racial majority group. The Assembly Judiciary Committee analysis says "[t]he author states that [the bill] 'addresses the problem of racial block voting,' which is particularly harmful to a state like California due to its diversity.... In California, we face a unique situation where we are all minorities. We need statutes to ensure that our electoral system is fair and open. This measure gives us a tool to move us in that direction...." (Assem. Com. on Judiciary, Analysis of Sen. Bill No. 976 (2001–2002 Reg. Sess.) as amended Apr. 9, 2002, p. 2.)

The bill ultimately became sections 14025 to 14032 of the Elections Code. Here is a synopsis of those provisions:

- Section 14027 sets forth the prohibited government conduct:

> "An at-large method of election may not be imposed or applied in a manner that impairs the ability of a protected class to elect candidates of its choice or its ability to influence the outcome of an election, as a result of the dilution or the abridgement of the rights of voters who are members of a protected class, as defined pursuant to Section 14026."

● A protected class is a class of voters "who are members of a race, color or language minority group, as this class is referenced and defined in the federal Voting Rights Act (42 U.S.C. Sec. 1973 et seq.)." (§ 14026, subd. (d).)

***670** ● Section 14032 gives a right of action to voters in protected classes.

● Section 14028 lists facts relevant to proving a violation: The dilution or abridgement described in section 14027 is established by showing racially polarized voting. (§ 14028, subd. (a).) Circumstances to be considered in determining whether there is racially polarized voting are described. (§ 14028, subd. (b).) Lack of geographical concentration of protected class members and lack of discriminatory intent by the government are not factors in determining liability. (§ 14028, subds. (c), (d).) Certain other probative factors are included. (§ 14028, subd. (e).)

● The court shall "implement appropriate remedies, including the imposition of district-based elections," if it finds liability. (§ 14029.)

● Prevailing plaintiffs shall be awarded attorney fees. Prevailing defendants can recover only costs, and then only if the action was frivolous. (§ 14030.)

According to plaintiffs, the CVRA enlarges the potential for relief beyond that available under the FVRA in a number of ways, of which the elimination of the geographically compact majority-minority district requirement as an element of liability is only the beginning. First, freed of that requirement, a court could craft a remedy involving a crossover or coalition district. A crossover district is one in which, although members of the plaintiffs' group do not constitute a majority, that group can elect candidates of its choice by joining forces with dissident members of the racial majority who also live in the district. A coalition district is similar, except that members of the plaintiffs' group join forces with members of another racial minority group.

Second, a court could impose a remedy not involving districts at all, relying instead on one of several alternative at-large voting systems. In one of these, called cumulative voting, each voter has as many votes as there are open seats and may distribute them among several candidates or give them all to one candidate. In a cumulative voting system, a politically cohesive but geographically dispersed minority ****830** group can elect a single candidate by giving all its votes to that candidate, although it would be unable to elect any candidates in a conventional winner-take-all at-large system and could not form a majority in any feasible district in a district system.

Defendants in this case filed a motion for judgment on the pleadings, arguing that the CVRA was facially invalid under the equal protection clause of the Fourteenth Amendment and article I, section 7 (i.e., the equal protection provision) of the California Constitution. In response to a request by the trial court, defendants filed a supplemental brief arguing that the ***671** CVRA's attorney-fee provision also violated article XVI, section 6, of the California Constitution, which prohibits gifts of public funds. The trial court agreed with defendants on both points. It granted the motion and entered a judgment of dismissal.

DISCUSSION

The standard of review for an order granting judgment on the pleadings is the same as that for an order sustaining a general demurrer: We treat as admitted all material facts properly pleaded, give the complaint's factual allegations a liberal construction, and determine de novo whether the complaint states a cause of action under any legal theory. (*DiPirro v. American Isuzu Motors, Inc.* (2004) 119 Cal.App.4th 966, 972, 14 Cal.Rptr.3d 787.) We may rely on any applicable legal theory in affirming or reversing because we " 'review the trial court's disposition of the matter, not its reasons for the disposition.' " (*Burnett v. Chimney Sweep* (2004) 123 Cal.App.4th 1057, 1065, 20 Cal.Rptr.3d 562.)

Where reasonably possible, we are obliged to adopt an interpretation of a statute that renders it constitutional in preference to an interpretation that renders it unconstitutional. (*Palermo v. Stockton Theatres, Inc.* (1948) 32 Cal.2d 53, 60, 195 P.2d 1;*Martin v. Santa Clara Unified School Dist.* (2002) 102 Cal.App.4th 241, 254, 125 Cal.Rptr.2d 337.) Even judicial

reformation of a statute is preferable to invalidation where reformation would better serve the intent of the Legislature. (*Kopp v. Fair Pol. Practices Com.* (1995) 11 Cal.4th 607, 660–661, 47 Cal.Rptr.2d 108, 905 P.2d 1248.) Principles of judicial self-restraint similarly require us to avoid deciding a case on constitutional grounds unless absolutely necessary; nonconstitutional grounds must be relied on if they are available. (*People v. Pantoja* (2004) 122 Cal.App.4th 1, 10, 18 Cal.Rptr.3d 492.)

I. City's standing to challenge statute

As a threshold issue, plaintiffs contend that defendants are not entitled to bring their constitutional challenge to the CVRA. We disagree. Plaintiffs rely on a settled line of cases barring cities from mounting equal protection challenges to state statutes, but a second line of cases establishes an exception, into which this case falls. In light of our conclusion that defendants' equal protection challenge fails on its merits, we could decide this appeal without reaching the standing issue. We choose to address it, however, because the equal protection issue will likely arise on remand if the case reaches the remedy stage, and the standing question will surface again.

Defendants moved to strike the footnote in plaintiffs' reply brief in which standing was first raised and argued that we should not address it. We ***672** disagree because standing can be raised at any time. (*Payne v. Anaheim Memorial Medical Center, Inc.* (2005) 130 Cal.App.4th 729, 745, 30 Cal.Rptr.3d 230;****831***Marshall v. Pasadena Unified School Dist.* (2004) 119 Cal.App.4th 1241, 1251, 15 Cal.Rptr.3d 344;*People v. Leung* (1992) 5 Cal.App.4th 482, 490, fn. 2, 7 Cal.Rptr.2d 290.) The issue of standing here does not come up in the traditional context, as we shall explain; however, it is sufficiently similar to warrant application of the rule that it may be raised at any time.

Further, defendants have had two opportunities to brief the issue. They did so first in their motion to strike the footnote, where they requested leave to submit additional briefing, and included a supplemental brief as a section of their motion. This request is granted and the supplemental discussion in the motion is deemed filed. Defendants also submitted a supplemental brief on the issue in response to our briefing letter dated June 30, 2006. For these reasons, defendants cannot legitimately claim to be prejudiced by any lack of opportunity to inform the court of their position. We hold that addressing the issue is appropriate and deny the motion to strike.[3] We now turn to the merits.

Plaintiffs invoke the "well-established rule that subordinate political entities, as 'creatures' of the state, may not challenge state action as violating the entities' rights under the due process or equal protection clauses of the Fourteenth Amendment or under the contract clause of the federal Constitution." (*Star–Kist Foods, Inc. v. County of Los Angeles* (1986) 42 Cal.3d 1, 6, 227 Cal.Rptr. 391, 719 P.2d 987(*Star–Kist*).) The concept of standing at issue here is not the usual one limiting the rights of plaintiffs, but a special one pertaining to cities and counties attempting, as plaintiffs or defendants, to challenge state laws:

> "The term 'standing' in this context refers not to traditional notions of a plaintiff's entitlement to seek judicial resolution of a dispute, but to a narrower, more specific inquiry focused upon the internal political organization of the state: whether counties and municipalities may invoke the federal Constitution to challenge a state law which they are otherwise duty-bound to enforce." (*Star–Kist, supra,* 42 Cal.3d at pp. 5–6, 227 Cal.Rptr. 391, 719 P.2d 987, fn. omitted.)

The rule against city and county standing in cases of this kind derives from the United States Supreme Court's holdings in *Williams v. Mayor* (1933) 289 U.S. 36, 40, 53 S.Ct. 431, 77 L.Ed. 1015(*Williams*) and a number of earlier cases. In *Williams,* the Maryland Legislature exempted a railroad from local taxes. (*Id.* at pp. 37–38, 53 S.Ct. 431.) The railroad was in the hands of a receiver ***673** appointed by a federal district court. Two cities filed claims in the receivership proceedings in the district court seeking taxes due. They challenged the tax-exemption statute under the equal protection clause of the Fourteenth Amendment. (*Williams, supra,* 289 U.S. at pp. 39–40, 53 S.Ct. 431.) The Supreme Court reversed a lower court decision invalidating the statute. Its explanation of this holding is simply: "A municipal corporation, created by a state for the better ordering of government, has no privileges or immunities under the federal constitution which it may invoke in opposition to the will of its creator." (*Id.* at p. 40, 53 S.Ct. 431.) The court cited several of its own earlier cases, none of which explained the rule in any greater detail. (See, e.g., *Newark v. New Jersey* (1923) 262 U.S. 192, 196, 43 S.Ct. 539, 67 L.Ed. 943 [city not entitled to raise 14th Amend. equal protection challenge to ****832** state's imposition of water use fee]; *Trenton v. New Jersey* (1923) 262 U.S. 182, 185–188, 192, 43 S.Ct. 534, 67 L.Ed. 937 [city not entitled to challenge same fee under due process

clause of 14th Amend. or under contract clause of art. I, § 10, of the U.S. Const.].)

California courts have applied the rule in a variety of contexts. (*Mallon v. City of Long Beach* (1955) 44 Cal.2d 199, 209, 282 P.2d 481 [city cannot rely on contract clause to obtain invalidation of state statute allegedly impairing preexisting contract between city and state]; *City of Burbank v. Burbank–Glendale–Pasadena Airport Authority* (1999) 72 Cal.App.4th 366, 380, 85 Cal.Rptr.2d 28 [airport authority, as political subdivision of state, had no standing to challenge under due process clause of 14th Amend. state statute allowing city to review authority's development plans]; *Board of Supervisors v. McMahon* (1990) 219 Cal.App.3d 286, 296–297, 268 Cal.Rptr. 219(*McMahon*) [county had no power to challenge under due process clause of 14th Amend. a state law requiring it to contribute county funds for welfare payments]; *City of Los Angeles v. City of Artesia* (1977) 73 Cal.App.3d 450, 457, 140 Cal.Rptr. 684 [City and County of Los Angeles could not seek invalidation under due process clause of 14th Amend. or contract clause of retroactive application of state law limiting amount counties could charge Lakewood Plan cities for police protection].) The Ninth Circuit in California has applied the rule as well. (*City of South Lake Tahoe v. California Tahoe* (9th Cir.1980) 625 F.2d 231, 233–234 [city lacked standing to challenge under 14th Amend. a planning agency's land use rules promulgated pursuant to state statute].)

The California Supreme Court has held that the no-standing rule does not apply to a political subdivision's claim that a state statute encroaches on the power of Congress to regulate interstate commerce under the commerce clause of the United States Constitution. (*Star–Kist, supra,* 42 Cal.3d at pp. 4, 8–9, 227 Cal.Rptr. 391, 719 P.2d 987.) It relied in part on federal cases holding that the no-standing rule also does not apply to challenges based on the supremacy clause of the United States Constitution. (*Id.* at p. 8, 227 Cal.Rptr. 391, 719 P.2d 987.) The court did not, however, disturb the ***674** doctrine with respect to the equal protection and due process clauses of the Fourteenth Amendment and the contract clause, the areas in which it traditionally has been applied. (*Id.* at pp. 5–6, 227 Cal.Rptr. 391, 719 P.2d 987.)

A second line of cases establishes an exception to the no-standing rule for situations in which the claim of a city or county is best understood as a practical means of asserting the individual rights of its citizens. The first of these cases, *Drum v. Fresno County Dept. of Public Works* (1983) 144 Cal.App.3d 777, 192 Cal.Rptr. 782(*Drum*), involved a county's due-process challenge to its own inadequate notice to a building project's neighbors of a zoning-variance hearing. The county approved a request for a variance to enable a homeowner to build a garage. The notices of the variance hearing received by the neighbors described the garage. Later, the owner decided to add a second story with living quarters to the garage and requested a permit for the new design. The county issued the permit. When construction began, neighbors complained that they had not been informed about the second story. The county reversed its decision to issue the permit and issued a stop-work order. In the ensuing litigation between the owner and county, the county argued that the permit it issued for a two-story garage was invalid because it was not within the scope of the variance ****833** of which the neighbors had received notice; the neighbors' due process rights had therefore been violated. (*Id.* at pp. 779–781, 782, 192 Cal.Rptr. 782.) We agreed with this position, rejecting the owner's argument that the county was not entitled to assert individual citizens' due process rights:

> "It would serve no legitimate interest to hold that appellant may not invoke lack of notice to its citizens in order to enjoin construction of respondents' building. Surely it should be able to invoke its own requirements of notice in order to preserve the public interest in preserving community patterns established by zoning laws." (*Drum, supra,* 144 Cal.App.3d at pp. 784–785, 192 Cal.Rptr. 782.)

Admittedly, *Drum* did not involve a local government's challenge to a state law and dealt with statutory rather than constitutional due process rights. (*Drum, supra,* 144 Cal.App.3d at p. 783, 192 Cal.Rptr. 782.) It did not discuss or cite any of the no-standing cases we mention above. But the next case in the line, *Selinger v. City Council* (1989) 216 Cal.App.3d 259, 264 Cal.Rptr. 499(*Selinger*), relied on *Drum,* among other authorities, in expressly asserting an exception to the no-standing rule.

In *Selinger,* a subdivision developer obtained a writ of mandate from the superior court requiring a city to acknowledge that his subdivision map was deemed approved by operation of law—because one year had elapsed without city action on his application—under the Permit Streamlining Act, a state statute. (*Selinger, supra,* 216 Cal.App.3d at p. 263, 264 Cal.Rptr. 499.) Among other things, the city argued that the Permit Streamlining Act violated ***675** adjacent landowners' right to due process of law by allowing a development plan to be automatically approved without notice and a hearing. (*Id.* at p. 270, 264 Cal.Rptr. 499.) The Court of Appeal agreed, rejecting the developer's argument that the city lacked standing to contest the validity of the statute. The court noted the no-standing rule as stated in *Star–Kist, supra,* 42 Cal.3d at page 6, 227 Cal.Rptr. 391, 719 P.2d 987, but it cited *Drum, supra,* 144 Cal.App.3d 777, 192 Cal.Rptr. 782 in support of making an exception. (*Selinger, supra,* 216 Cal.App.3d at pp. 270, 271, 264 Cal.Rptr. 499.)

More powerfully, the court relied on the Supreme Court's doctrine of third-party standing as set forth in *Singleton v. Wulff* (1976) 428 U.S. 106, 96 S.Ct. 2868, 49 L.Ed.2d 826. In that case, the Supreme Court explained that constitutional rights usually must be asserted by the person to whom they belong, but that a litigant may assert them on behalf of a third party under exceptional circumstances. (*Id.* at p. 114, 96 S.Ct. 2868.) In addition to the requirement that the litigant must sustain an injury of its own, two factual elements are relevant in determining whether the litigant should be allowed to assert a third party's rights. One tests whether the litigant and third party are related closely enough to ensure that the litigant's interest in asserting the right is genuine and its advocacy will be effective:

> "The first [element] is the relationship of the litigant to the person whose right he seeks to assert. If the enjoyment of the right is inextricably bound up with the activity the litigant wishes to pursue, the court at least can be sure that its construction of the right is not unnecessary in the sense that the right's enjoyment will be unaffected by the outcome of the suit. Furthermore, the relationship between the litigant and the third party may be such that the former is fully, or very nearly, as effective a proponent of the right as the latter." (*Singleton v.* ****834** *Wulff, supra,* 428 U.S. at pp. 114–115, 96 S.Ct. 2868.)

The second element concerns the reasons why the third party is not asserting or cannot assert the right in question for itself:

> "The other factual element to which the Court has looked is the ability of the third party to assert his own right. Even where the relationship is close, the reasons for requiring persons to assert their own rights will generally still apply. If there is some genuine obstacle to such assertion, however, the third party's absence from court loses its tendency to suggest that his right is not truly at stake, or truly important to him, and the party who is in court becomes by default the right's best available proponent." (*Singleton v. Wulff, supra,* 428 U.S. at pp. 115–116, 96 S.Ct. 2868.)

In *Selinger,* the Court of Appeal thought the two elements supported the city's standing. Local citizens' right to notice and a hearing was "inextricably bound up" with the city's interest in reviewing and conditioning subdivision applications on its own timetable based on local needs. (*Selinger, supra,* 216 Cal.App.3d at p. 271, 264 Cal.Rptr. 499.) Also, there was a high obstacle to local citizens' ***676** ability to litigate their rights: Without notice, adjacent landowners would be likely to miss the 90–day statutory deadline for legal challenges to the approval of subdivision maps. (*Ibid.*)

The Court of Appeal applied the exception to the no-standing rule again in *Central Delta Water Agency v. State Water Resources Control Bd.* (1993) 17 Cal.App.4th 621, 21 Cal.Rptr.2d 453(*Central Delta Water*). Two local water agencies sued the State Water Resources Control Board, mounting an equal-protection challenge to discharge fees imposed on them under a state statute and regulations. (*Id.* at pp. 627–629, 630, 21 Cal.Rptr.2d 453.) The Court of Appeal rejected the defendant's claim that, as political subdivisions, the agencies lacked standing to challenge the statute and regulations. It stated that the equal protection rights of the agencies' constituent water users were inextricably bound up with the agencies' duty to supply water. (*Id.* at pp. 630–631, 21 Cal.Rptr.2d 453.) The court did not explain what obstacles prevented the constituents from suing on their own behalf.

We believe these courts have reasoned correctly in establishing an exception to the no-standing rule for those situations in which the usual standards for third-party standing are satisfied. As previously mentioned, we acknowledge that there was no challenge to a state statute in *Drum,* and therefore the principle that a political subdivision cannot challenge the will of its creator was not implicated. Consequently, the citation of *Drum* by the *Selinger* court was a stretch. But the reasoning stated in *Selinger* and applied in *Central Delta Water* is sound. Although a local government has no equal protection rights of its own to assert against the state, there is no reason why it cannot act as a mouthpiece for its citizens, who unquestionably have those rights, where the third-party-standing doctrine would allow it.

We recognize that the third-party-standing doctrine is the key to the exception; that the doctrine is addressed to the standing of plaintiffs to sue in federal court; and that we deal here neither with the standing of plaintiffs nor with federal court. The doctrine is a sound basis for the exception in spite of these omissions. The point of the no-standing rule is to prevent local governments, whether as plaintiffs or defendants, from using certain provisions of the federal Constitution to obtain invalidation of laws passed by their ****835** creator, the state. This notion has no application where the truly interested parties—citizens or constituents of the local government entity—undisputedly do have standing and the entity merely asserts rights on their behalf.

This case falls into the exception to the no-standing rule established in these cases. As the Supreme Court explained in *Shaw, supra,* 509 U.S. 630, 113 S.Ct. 2816, 125 L.Ed.2d 511, the constitutional interest at stake in an equal-protection challenge to race-related changes in a voting system arises from the fact that changes of that ***677** kind may "reinforce ... racial

stereotypes and threaten ... to undermine our system of representative democracy by signaling to elected officials that they represent a particular racial group rather than their constituency as a whole." (*Id.* at p. 650, 113 S.Ct. 2816.) Individual voters are entitled to assert this interest through litigation testing state laws, as they did in *Shaw.* The city's assertion of equal protection rights in this case is best understood as a means of asserting those rights on behalf of its citizens.

The requirements of third-party standing are satisfied here. First, the relationship between the city and individual citizens or voters is of the appropriate kind. The city's vigorous litigation up to this point has shown its zealousness in asserting the claimed right. Plaintiffs' complaint has informed us that city voters rejected district-based elections by a large margin in a referendum in 2001, so the city likely is acting with substantial constituent support for its position. A cross-complaint filed by the individual defendants, seeking a judgment declaring the CVRA unconstitutional, shows that at least those individuals want to have the city pursue the matter on their behalf. Finally, the claimed equal-protection interest of individual citizens is "inextricably bound up" (*Singleton v. Wulff, supra,* 428 U.S. at p. 114, 96 S.Ct. 2868) with the city's interest in continuing its present election system.

Second, there are genuine obstacles to citizens asserting their own rights. It is not clear how a lawsuit could be structured to enable citizens to mount the facial challenge made by the city. Prior to any change in the city's voting system, whom would these citizens sue, and for what? Making citizens wait until after some remedy is ordered or adopted would involve other obstacles, including the possibility that elections could be held under the remedy before the litigation is concluded. Even after adoption of a change in the system, an individual voter's stake in the matter would be small in relation to the economic burdens of litigation, and this could be a substantial deterrent. (See *Powers v. Ohio* (1991) 499 U.S. 400, 415, 111 S.Ct. 1364, 113 L.Ed.2d 411 [venire person dismissed in criminal case for racially discriminatory reason has little incentive to pursue costly litigation to vindicate his or her equal protection rights, so criminal defendant must be permitted to assert those rights].) While these obstacles would not make it impossible for individual voters to sue the city if some alteration in its voting system is adopted, a showing of impossibility is not required. (See *Singleton v. Wulff, supra,* 428 U.S. at p. 116, fn. 6, 96 S.Ct. 2868 [dis. opn. argued that third parties must face insuperable obstacles; maj. replied that "our cases do not go that far"].)

For these reasons, we reject plaintiffs' contention that defendants are not entitled to assert an equal protection challenge to the CVRA. The city is entitled to do so on behalf of its citizens.

678 ***II. Equal protection***

A. Principles

We begin our examination of defendants' equal-protection claim with a brief review ****836** of the basic constitutional principles at issue. Federal and California equal-protection standards are not the same for all purposes. (See *Warden v. State Bar* (1999) 21 Cal.4th 628, 652–653, 88 Cal.Rptr.2d 283, 982 P.2d 154 (dis. opn. of Kennard, J.); *Butt v. State of California* (1992) 4 Cal.4th 668, 683, 685, 15 Cal.Rptr.2d 480, 842 P.2d 1240.) Here, however, the parties' briefs rely on federal case law and do not claim that any different standards apply to these facts under the state Constitution. We will, therefore, focus on principles developed in federal cases.

1. Suspect classifications, fundamental rights, strict scrutiny, and rational-basis review

A state's use of a classification is subject to strict scrutiny under the equal protection clause of the Fourteenth Amendment if it is a suspect classification or if it burdens a fundamental right. (*Plyler v. Doe* (1982) 457 U.S. 202, 216–218 & fns. 14 & 15, 102 S.Ct. 2382, 72 L.Ed.2d 786.) Otherwise, the classification is subject only to rational-basis review. (*Vacco v. Quill* (1997) 521 U.S. 793, 799, 117 S.Ct. 2293, 138 L.Ed.2d 834.) Race is a suspect classification (*Johnson v. California* (2005) 543 U.S.

499, 505, 125 S.Ct. 1141, 160 L.Ed.2d 949(*Johnson*)), and the right to vote is a fundamental right (*Kramer v. Union School District* (1969) 395 U.S. 621, 626–628, 89 S.Ct. 1886, 23 L.Ed.2d 583) for equal protection purposes.

A law subject to strict scrutiny is upheld only if it is *narrowly tailored* to promote a *compelling* governmental interest. (*Johnson, supra,* 543 U.S. at p. 505, 125 S.Ct. 1141.) Under rational-basis review, by contrast, a law need only bear a *rational relationship* to a *legitimate* governmental interest. (*Vacco v. Quill, supra,* 521 U.S. at p. 799, 117 S.Ct. 2293.) (The third level of review—intermediate scrutiny, which applies to sex discrimination—is not at issue in this case.)

2. Facial invalidity standard

Defendants' challenge claims that the statute is facially invalid. In *United States v. Salerno* (1987) 481 U.S. 739, 745, 107 S.Ct. 2095, 95 L.Ed.2d 697(*Salerno*), the Supreme Court stated that "[a] facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." The court explained that the fact the federal Bail Reform Act, subject in that case to a substantive due-process ***679** challenge, "might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid, since we have not recognized an 'overbreadth' doctrine outside the limited context of the First Amendment." (*Ibid.*)

Defendants assert that the *Salerno* standard does not apply here because *Salerno* was not cited in certain cases involving affirmative action laws (see, e.g., *Richmond v. J.A. Croson Co.* (1989) 488 U.S. 469, 109 S.Ct. 706, 102 L.Ed.2d 854 [municipal ordinance establishing affirmative action program for city contracting]); laws creating specific election districts (see, e.g., *Shaw, supra,* 509 U.S. 630, 113 S.Ct. 2816, 125 L.Ed.2d 511 [bizarrely shaped congressional district boundaries designed to create majority-Black districts]); and laws involving explicit use of racial segregation (see, e.g., *Johnson, supra,* 543 U.S. 499, 125 S.Ct. 1141, 160 L.Ed.2d 949 [racial segregation of prisoners during initial evaluation]). Various justices of the Supreme Court, not amounting in any instance to a majority, have taken differing positions on the scope and applicability of the *Salerno* doctrine. ****837**(*Chicago v. Morales* (1999) 527 U.S. 41, 55, fn. 22, 119 S.Ct. 1849, 144 L.Ed.2d 67 (conc. opn. of Stevens, J., joined by Souter, J. and Ginsburg, J.) [*Salerno* formulation is dictum and need not be followed, especially by state courts]; *id.* at pp. 77–80 & fns. 1–3, 119 S.Ct. 1849 (dis. opn. of Scalia, J.) [*Salerno* states the correct standard for all cases but First Amendment overbreadth challenges].)

The only cases of which we are aware where it has been definitively stated that a facial challenge could succeed on a showing falling short of the *Salerno* standard, however, are those where the overbreadth of a law violated the First Amendment by chilling protected speech (*Salerno, supra,* 481 U.S. at p. 745, 107 S.Ct. 2095) and where a law imposed an undue burden on the right to have an abortion (*Planned Parenthood of Southern Arizona v. Lawall* (9th Cir.1999) 180 F.3d 1022, 1026 [asserting that in *Planned Parenthood of Southeastern Pa. v. Casey* (1992) 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674, U.S. Supreme Court overruled *Salerno* in context of facial challenges to abortion restrictions]). Outside these areas, California courts apply a *Salerno*-type approach to facial constitutional challenges in general. (See, e.g., *East Bay Asian Local Development Corp. v. State of California* (2000) 24 Cal.4th 693, 709, 102 Cal.Rptr.2d 280, 13 P.3d 1122;*California Teachers Assn. v. State of California* (1999) 20 Cal.4th 327, 338, 84 Cal.Rptr.2d 425, 975 P.2d 622;*Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1084, 40 Cal.Rptr.2d 402, 892 P.2d 1145.) We agree there is no warrant for refusing to apply *Salerno* outside the First Amendment overbreadth and abortion areas until a majority of the Supreme Court gives clear direction to do so. (*Hotel & Motel Ass'n of Oakland v. City of Oakland* (9th Cir.2003) 344 F.3d 959, 972.) Consequently, we hold that the *Salerno* standard for facial invalidation applies here, and defendants can succeed in their facial challenge only by showing that the CVRA can be validly applied under no circumstances.

****680B. Analysis***

With this background, the two basic reasons for rejecting defendants' challenge to the CVRA are easy to state. First, because the statute is nondiscriminatory, it is subject only to rational-basis review, not strict scrutiny; and it passes rational-basis

review. Second, although the *Shaw–Vera* line of cases reveals the potential for unconstitutional applications of the statute, that potential does not show there can be no valid applications and therefore cannot establish that the statute is facially invalid. We consider these two reasons in turn.

1. The CVRA is nondiscriminatory, not subject to strict scrutiny, and passes rational basis review

Like the FVRA, the CVRA involves race and voting, but, also like the FVRA, it does not allocate benefits or burdens on the basis of race or any other suspect classification and does not burden anyone's right to vote. Like the FVRA, the CVRA confers on voters of any race a right to sue for an appropriate alteration in voting conditions when racial vote dilution exists.

The CVRA vote-dilution cause of action differs from the FVRA version in important ways, specifically, that the need to prove the possibility of creating a geographically compact majority-minority district is eliminated. The differences do not introduce a racial classification or a burden on the right to vote, however. Therefore, the facial terms of the statute are not subject to strict scrutiny. Only rational-basis review applies, and the CVRA readily passes it. Curing vote dilution is a legitimate government interest and creation ****838** of a private right of action like that in the CVRA is rationally related to it. Major portions of defendants' briefs are devoted to showing that the CVRA fails strict scrutiny. We need not address these points because strict scrutiny does not apply.

a. The CVRA is not a law that imposes a racial classification on individuals and then uses it to confer a burden or benefit on all

Defendants argue that strict scrutiny applies here because it applies to any statute that refers to race or calls for any sort of race-conscious remedy or other action, even if it does not affect different races in different ways. They rely on cases like *Loving v. Virginia* (1967) 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010(*Loving*) and *Johnson, supra,* 543 U.S. 499, 125 S.Ct. 1141, 160 L.Ed.2d 949, which applied strict scrutiny to state laws that employed racial classifications but burdened persons of different races equally. In *Loving,* the Supreme Court invalidated a state law forbidding persons of different races to marry one another. The law ***681** was subject to strict scrutiny even though its burden was generally distributed. (*Loving, supra,* 388 U.S. at p. 8, 87 S.Ct. 1817.) In *Johnson,* a policy of segregating state prison inmates by race during an initial evaluation period was held to be subject to strict scrutiny even though all prisoners were equally affected by it. (*Johnson, supra,* 543 U.S. at p. 506, 125 S.Ct. 1141.)

What those cases hold is that a law classifying individuals by race and then imposing some kind of burden or benefit on the basis of the classification is subject to strict scrutiny even if persons of all races bear the burden or receive the benefit equally. In *Johnson,* for instance, the court rejected the state's argument that "strict scrutiny should not apply because all prisoners are 'equally' segregated." (*Johnson, supra,* 543 U.S. at p. 506, 125 S.Ct. 1141.) It stated that this argument "ignores our repeated command that 'racial classifications receive close scrutiny even when they may be said to burden or benefit the races equally.' " (*Ibid.*)

What the cases do not hold is that a statute is automatically subject to strict scrutiny because it involves race consciousness even though it does not discriminate among individuals by race and does not impose any burden or confer any benefit on any particular racial group or groups. The CVRA confers on members of any racial group a cause of action to seek redress for a race-based harm, vote dilution. The creation of that kind of liability does not constitute the imposition of a burden or conferral of a benefit on the basis of a racial classification. If the CVRA were subject to strict scrutiny because of its reference to race, so would every law be that creates liability for race-based harm, including the FVRA, the federal Civil Rights Act, and California's Fair Employment and Housing Act.

Defendants argue that these antidiscrimination laws are, in fact, subject to strict scrutiny, but cite no cases subjecting them to it. Lacking that authority, they instead cite lower court cases subjecting federal antidiscrimination laws to analysis under the congruence and proportionality test of *City of Boerne v. Flores* (1997) 521 U.S. 507, 117 S.Ct. 2157, 138 L.Ed.2d

624(*Boerne*), which they describe as "obviously very similar to strict scrutiny." For example, the court of appeals subjected a provision of Title VII of the federal Civil Rights Act to a *Boerne* analysis in *In re Employment Discrimination Litigation* (11th Cir.1999) 198 F.3d 1305, 1319–1324.

This argument does not work. The *Boerne* test has nothing to do with strict ****839** scrutiny. It has nothing in particular to do with the equal protection clause. It is about the source of constitutional power for Congress' enactment of certain types of statutes, not the constitutional right of individuals to be free from discrimination.

***682** Briefly, the question presented in *Boerne* was whether Congress had authority under section 5 of the Fourteenth Amendment (the amendment's enforcement clause) to enact by statute a standard for protecting the free exercise of religion that was far more stringent than the standard the Supreme Court established under the free exercise clause of the First Amendment in an earlier case. Congress claimed the action was within its power under section 5 of the Fourteenth Amendment to enforce the due process clause of the Fourteenth Amendment, which in turn incorporated the First Amendment and its free exercise clause. (*Boerne, supra,* 521 U.S. at pp. 512–517, 117 S.Ct. 2157.) The court held that Congress lacked this authority because the standard Congress adopted was not congruent and proportional to the scope of the First Amendment right as the court itself had earlier defined it. (*Id.* at pp. 519–520, 532, 117 S.Ct. 2157.)

From this summary, it can be seen that the fact that an antidiscrimination law like Title VII has been subjected by some courts to a *Boerne* analysis does not even remotely imply that laws of that kind violate individuals' rights against discrimination unless they pass strict scrutiny. Defendants go so far as to imply that the only reason strict scrutiny has never been applied to federal antidiscrimination laws is that the *Boerne* test applies to those laws instead; strict scrutiny is the test appropriate for state legislation while *Boerne* applies in federal law. This cannot be true. Strict scrutiny applies to all racially discriminatory laws. It does not apply to antidiscrimination laws because, like CVRA, they are not racially discriminatory.

Defendants argue that the "sky will not fall" if strict scrutiny is applied to antidiscrimination laws. It will not fall because those laws, unlike the CVRA, generally impose liability only upon a showing of intentional discrimination, and for that reason the laws would likely be upheld under strict scrutiny. This argument collapses as soon as it is applied to the FVRA. As noted above, section 2 of the FVRA does not require a showing of intentional discrimination. No court has ever suggested, to our knowledge, that strict scrutiny applies to section 2 of the FVRA and that it would fail for this reason.

Also unhelpful to defendants is the argument that *Shaw* and *Vera* stand for the proposition that strict scrutiny can be triggered by an anti-vote-dilution law even though it does not burden the rights of the White plaintiffs. Responding to Justice Souter's dissenting view in *Shaw* that race-based districting should not trigger strict scrutiny unless another race's voting strength is harmed, the *Shaw* majority explained that "reapportionment legislation that cannot be understood as anything other than an effort to classify and separate voters by race injures voters in other ways. It reinforces racial stereotypes and threatens to undermine our system of representative democracy by signaling to elected officials that they represent a particular ***683** racial group rather than their constituency as a whole." (*Shaw, supra,* 509 U.S. at p. 650, 113 S.Ct. 2816.) Similarly, in *Vera,* the plurality responded to a dissenting comment by Justice Souter—that race-based, dilution-combating districts do not harm any class of voters—by referring to "harmful and divisive stereotypes" that the use of race may foster even if it does not involve any voting-related ****840** harm to the plaintiffs. (*Vera, supra,* 517 U.S. at pp. 983–984, 116 S.Ct. 1941.)

Contrary to defendants' view, these statements do not mean the CVRA is subject to strict scrutiny even though it does not confer benefits or impose burdens on any particular racial group and does not burden anyone's right to vote. They only mean that districting plans that use race as the predominant line-drawing factor—and therefore amount to segregation of voters by race—are subject to strict scrutiny. A court might wish to impose that kind of districting plan as a CVRA remedy. Even so, as we will explain, applications of the statute not involving that type of remedy are readily conceivable, so this potential problem is not a basis for a *facial* challenge.

b. The CVRA does not deny anyone standing on the basis of membership in any group

So far we have only addressed the main thrust of defendants' argument in support of applying strict scrutiny: that the statute's reference to race is itself a racial classification. We turn next to a series of related minor arguments. The first of these is based

on the trial court's view that the statute is racially discriminatory on its face because its definition of "protected class" excludes some racial or ethnic groups. The CVRA defines a protected class as persons "who are members of a race, color or language minority group, as this class is referenced and defined in the federal Voting Rights Act (42 U.S.C. Sec. 1973 et seq.)." (§ 14026, subd. (d).)

The trial court took issue with the inclusion of "language minority group" in this definition. Its objection is based on an error made in reviewing the federal standard that the CVRA incorporates. Its order quoted Title 42 United States Code section 1973b(f)(1), a provision stating congressional findings on the deleterious effects of English-only elections. The provision states that "voting discrimination against citizens of language minorities is pervasive" and that "[s]uch minority citizens are from environments in which the dominant language is other than English." The trial court believed this was the federal statutory definition of "language minority group" to which the CVRA refers. On that basis, it concluded that the CVRA denies standing to English speakers. Then the trial court quoted 28 Code of Federal Regulations part 51.2 (2003), which states that "language minority group" means "persons who are American Indian, Asian American, Alaskan Natives, or of Spanish heritage." The court believed this further restricted the meaning of the term, ***684** so as to exclude, for example, speakers of Polish or Portuguese. These restrictions, the court ruled, denied standing to ethnic groups that speak the purportedly excluded languages. That, in turn, triggered strict scrutiny, which the statute failed.

In reality, the regulation the court referred to merely restated the *actual* federal statutory definition of "language minority group," which is found at Title 42 United States Code section 1973***l***(c)(3): "The term 'language minorities' or 'language minority group' means persons who are American Indian, Asian American, Alaskan Natives or of Spanish heritage." This provision uses and defines the precise phrase ("language minority group") contained in the CVRA. The only logical conclusion is that this is the definition the Legislature intended to incorporate. There is no reason to think it also meant to include the language from Title 42 United States Code section 1973b(f)(1) about "environments in which the dominant language is other than English," which does not use the phrase "language ****841** minority group" and which states a congressional finding, not a definition.

Consequently, despite its name, the classification "language minority group" does not define any group in terms of language, and the trial court relied on a mistaken understanding of the statute. The term simply identifies four specific racial or ethnic groups as belonging to a protected class. The definition refers to these as racial or ethnic groups ("persons who are American Indian," etc.), not in terms of their language. As plaintiffs explain, the category "language minority group" was added to the FVRA in 1975 for the purpose of ensuring that courts would not mistakenly exclude American Indians, Asian Americans, Alaskan Natives, and Hispanics from coverage under the statute, even though each group was already included in the category "race." (See Sen.Rep. No. 94–925, 1st Sess. (1975), reprinted in 1975 U.S.Code Cong. & Admin. News, pp. 774, 814 ["The Department of Justice and the United States Commission on Civil Rights have both expressed the position that all persons defined in this title as 'language minorities' are members of a 'race or color' group...."].)

The four language minority groups are, therefore, on the same footing as Whites, persons of Polish or Portuguese ancestry, or any other racial or ethnic group. In a variety of contexts, the Supreme Court has held that the term "race" is expansive and covers all ethnic and racial groups. (*Rice v. Cayetano* (2000) 528 U.S. 495, 512, 120 S.Ct. 1044, 145 L.Ed.2d 1007 [15th Amendment's prohibition on abridgment of right to vote on account of race "grants protection to all persons, not just members of a particular race"]; *Saint Francis College v. Al–Khazraji* (1987) 481 U.S. 604, 610, 613, 107 S.Ct. 2022, 95 L.Ed.2d 582 [prohibition of racial discrimination in 42 U.S.C. § 1981 protects all persons from discrimination based on their ***685** "ancestry or ethnic characteristics"; court is "quite sure" White people are protected]; *McDonald v. Santa Fe Trail Transp. Co.* (1976) 427 U.S. 273, 280, 96 S.Ct. 2574, 49 L.Ed.2d 493 [prohibition on discrimination because of race in Title VII applies to Whites and non-Whites alike].) The inclusion of "language minority groups," as defined by the statute, only reinforces the proposition that American Indians, Asian Americans, Alaskan Natives, and Hispanics are among the racial or ethnic groups that can constitute a protected class. It does not deny standing to anyone.

The trial court cited *Polish American Congress v. City of Chicago* (N.D.Ill.2002) 211 F.Supp.2d 1098 for the proposition that "the federal courts have interpreted the definition of protected class under 42 U.S.C. [section] 1973 so as to exclude Polish speakers from those having standing to sue," but that is not what that case held. The court simply stated that Polish–Americans were not one of the four groups included in the statutory definition of "language minority group." (*Polish American Congress v. City of Chicago, supra,* at p. 1107.) The court did not consider whether Polish–Americans had standing under the FVRA as a "race" and the plaintiffs apparently did not argue that they did. A case is not authority for a proposition it did not consider. (*City and County of San Francisco v. Sainez* (2000) 77 Cal.App.4th 1302, 1318, 92

Cal.Rptr.2d 418.)

The trial court's view would likely justify strict scrutiny and facial invalidation if it represented a correct reading of the statute, but it does not. Even if it were a *plausible* reading of the statute, it would be both possible and necessary under the constitutional avoidance doctrine to construe it as we have: All persons have standing under the CVRA to sue for race- ****842** based vote dilution because all persons are members of a race.

c. The CVRA is not an affirmative action law

Defendants characterize the CVRA as an affirmative action statute and rely on affirmative action cases to argue that it is subject to strict scrutiny. The CVRA is not an affirmative action statute because, unlike affirmative action laws the Supreme Court has struck down, it does not identify any races for conferral of preferences. In *Gratz v. Bollinger* (2003) 539 U.S. 244, 123 S.Ct. 2411, 156 L.Ed.2d 257, for instance, the Supreme Court applied strict scrutiny and struck down a university's affirmative action admission program. The program conferred 20 points, on a scale of 1 to 150, on applicants belonging to a specified set of racial groups. This advantage could increase a low waitlist score to an automatic admit score. (*Id.* at pp. 251, 255, 123 S.Ct. 2411). In *Richmond v. J.A. Croson Co., supra,* 488 U.S. 469, 109 S.Ct. 706, 102 L.Ed.2d 854, the court applied strict scrutiny and struck down a city's program of affirmative action in government contracting. The program commanded that 30 percent of the ***686** money spent on city building contracts be paid to subcontracting firms owned by members of a specified set of racial groups. (*Id.* at pp. 477–478, 511, 109 S.Ct. 706.) The CVRA does nothing similar. We cannot subject the CVRA to strict scrutiny on the ground that affirmative action programs are subject to strict scrutiny.

d. The CVRA does not burden the fundamental right to vote

As we have said, strict scrutiny under the equal protection clause can be triggered by a classification used to burden a fundamental right, and voting is treated as a fundamental right in this context. Separately from their racial discrimination argument, defendants contend that the CVRA is subject to strict scrutiny because it "impos[es] liability on the basis of voting...." This is not correct. It is true that the CVRA requires a showing of racially polarized voting as an element of liability, but that does not mean any person or group of people is held liable for voting or for how they voted. The liability is that of the government entity that maintains the voting system, and it is imposed because of dilution of the plaintiffs' votes.

A prime example of a violation of the equal protection clause through a burden on the right to vote is malapportioned districts, i.e., those that violate the one-person, one-vote rule by having unequal populations. (*Reynolds v. Sims* (1964) 377 U.S. 533, 568, 84 S.Ct. 1362, 12 L.Ed.2d 506.) The CVRA involves nothing similar. Cases reviewing districts created predominantly on the basis of race presumably are another example, even though the opinions in those cases focus on the suspect racial classification rather than on the fundamental right to vote. However, the possibility of some court imposing an unconstitutional remedy under the CVRA in some cases is not, as we have said, a basis for *facial* invalidation.

e. The CVRA does not burden any First Amendment right

Defendants also argue that the CVRA is subject to strict scrutiny because it burdens fundamental rights protected by the First Amendment:

> "Voter preferences that underlie racially polarized voting, moreover, are political views protected against infringement by the First Amendment. The votes themselves are expressions of political preferences about candidates and ballot measures. Bloc voting, then, represents a coalition of political interests ****843** that lie close to the core of the freedom of political association."

Defendants may be correct in arguing that racially polarized voting constitutes political expression protected by the First Amendment. But the CVRA does not burden anyone's right to engage in racially polarized voting. It only makes racially polarized voting part of the predicate for a government ***687** entity's liability for racial vote dilution. In doing so, it is comparable to the FVRA. The *effect* of racially polarized voting—election of monoracial city councils and the like—may be and is intended to be reduced by the application of the CVRA. But no voter has a right to a voting system that chronically and systematically brings about that effect. We do not understand defendants to argue the contrary.

f. The fact that the CVRA addresses a racial issue does not show that the Legislature acted with an invidious purpose

A facially neutral law is subject to strict scrutiny if it was adopted for a racially discriminatory purpose. (*Miller v. Johnson* (1995) 515 U.S. 900, 913, 115 S.Ct. 2475, 132 L.Ed.2d 762.) Defendants argue that, even if the CVRA is facially neutral, it is subject to strict scrutiny because it was "enacted *solely* for racial purposes, i.e., to remedy racial bloc voting in at-large" voting systems. Defendants contend that plaintiffs admit this by "assert[ing] that the [CVRA] is an antidiscrimination statute intended to remedy" racially polarized voting.

This is incorrect for essentially the same reason that defendants are mistaken in claiming that the statute is subject to strict scrutiny because it contains a facial reference to race. A legislature's intent to remedy a race-related harm constitutes a racially discriminatory purpose no more than its use of the word "race" in an antidiscrimination statute renders the statute racially discriminatory. An intent to remedy a race-related harm may well be combined with an improper use of race, as in an affirmative action program that uses race in an improper way. The CVRA does not, however, have the latter component. Upon a finding of liability, it calls only for "appropriate remedies" (§ 14029), not for any particular, let alone any improper, use of race.

g. Differences between the CVRA and the FVRA do not automatically render the CVRA unconstitutional

Defendants devote almost half of the argument portion of their brief to attempting to show that the CVRA contains "dramatic departures from the FVRA" which amount to an "extraordinary expansion of federal law." To the extent that this may be intended as an independent argument that the CVRA is unconstitutional, it is without merit. There is no rule that a state legislature can never extend civil rights beyond what Congress has provided. State law may, of course, be preempted by federal law if inconsistent with it, but defendants have not made a preemption argument. To the extent that this discussion may be intended to make the narrower point that the CVRA is not ***688** narrowly tailored to effectuate a compelling government interest—i.e., that it fails strict scrutiny—we will disregard it, since we hold that strict scrutiny does not apply.

2. Potential unconstitutional applications cannot show facial invalidity

Defendants' arguments are partially based on Supreme Court cases that struck down specific redistricting plans drawn up partly to avoid racial vote dilution that ****844** might violate section 2 of the FVRA. Because those cases only address specific actions taken by states to cure racial vote dilution (i.e., the creation of particular districts), their impact here relates only to the validity of specific applications of the CVRA—applications that at this point are hypothetical. Under the facial-invalidity standard set forth in *Salerno, supra,* 481 U.S. at page 745, 107 S.Ct. 2095, therefore, the cases cannot establish that the CVRA is facially invalid. (To be sure, defendants contend that none of their arguments are addressed to mere remedies issues and that all are instead addressed to the criteria for liability under the CVRA and prove that those criteria are subject to strict scrutiny. As explained earlier, they are not subject to strict scrutiny.)

Shaw, supra, 509 U.S. 630, 113 S.Ct. 2816, 125 L.Ed.2d 511, was the first in this line of cases. It held, as mentioned earlier,

that a redistricting plan was subject to strict scrutiny because it could not rationally be understood as anything but an effort to separate voters on the basis of race. The plurality opinion in *Vera* made a similar point. There is no doubt that any district-based remedy the trial court might impose using race as a factor in drawing district lines would be subject to analysis under the *Shaw–Vera* line of cases. In reviewing a district-based remedy, it would be necessary to determine whether race was the predominant factor used in drawing the district lines. If it was, the plan would be subject to strict scrutiny.

It is equally apparent that this does not mean the CVRA must pass strict scrutiny in order to withstand a facial challenge. Whether one potential remedy under a statute would be subject to strict scrutiny if imposed is not the test for facial invalidity of the statute. Defendants' argument, to be successful, would have to be not only that unconstitutional remedies are consistent with the CVRA, but that they are mandated by it. They are not.

III. Gift of public funds

Although no fee motion was ever made, the trial court found the CVRA's attorney-fee provision to be invalid. That provision states as follows:

> "In any action to enforce Section 14027 and Section 14028, the court shall allow the prevailing plaintiff party, other than the state or political subdivision thereof, ***689** a reasonable attorney's fee consistent with the standards established in *Serrano v. Priest* (1977) 20 Cal.3d 25, 48–49[, 141 Cal.Rptr. 315, 569 P.2d 1303], and litigation expenses including, but not limited to, expert witness fees and expenses as part of the costs. Prevailing defendant parties shall not recover any costs, unless the court finds the action to be frivolous, unreasonable, or without foundation." (§ 14030.)

Relying on *Jordan v. Department of Motor Vehicles* (2002) 100 Cal.App.4th 431, 450–451, 123 Cal.Rptr.2d 122(*Jordan*), the trial court ruled that this section violated article XVI, section 6, of the California Constitution, which forbids the Legislature to "make any gift or authorize the making of any gift, of any public money or thing of value to any individual, municipal or other corporation...." The court interpreted *Jordan* to mean that "[a] lawsuit against a public entity which results in no change whatever in the status quo ante serves no public purpose, and does not constitute a valid claim against the public for attorney fee and cost purposes."

The court then applied this purported rule to a hypothetical:

> "If a California city has at large city council election plus one (1) voter of Alaskan native ancestry who repeatedly runs for the council and always gets just ****845** one vote (his own) and files suit under the California Voting Rights Act, he would be a prevailing party under the Act though no remedy is possible, and so be entitled to attorney fees and expenses. Defendants contend, and Plaintiffs do not dispute, that a local government cannot be required to carve an electoral district for an impossibly small number of voters (such as this hypothetical's one Alaskan native). [Citations.] While it is doubtful this hypothetical city could be sued every day under the Act in this situation, it could probably be sued every election cycle, and have to pay attorney fees over and over for a situation it cannot remedy or avoid."

The court violated two rules of constitutional decisionmaking in invalidating the section. First, a court should not decide constitutional questions unless required to do so. (*People v. Pantoja, supra,* 122 Cal.App.4th at p. 10, 18 Cal.Rptr.3d 492.) Here, no party moved for attorney fees, so the validity of the fee statute was not at issue. The court should not have addressed or answered the question.

Second, the court's ability to think of a single hypothetical in which the application of a statute would violate a constitutional provision is not grounds for facial invalidation. Facial invalidation is justified only where the statute could be validly applied under *no* circumstances. (*East Bay Asian Local Development Corp. v. State of California, supra,* 24 Cal.4th at p. 709, 102 Cal.Rptr.2d 280, 13 P.3d 1122.) Circumstances in which the objection the court raises would not be present are easy to imagine. If, on remand, the court finds liability *in this case* but is unable to formulate a permissible remedy *in this case,* then the court will ***690** have an opportunity to decide whether the application of section 14030 would be unconstitutional *in this case.* It has not had that opportunity yet. We express no opinion here on whether a fee award would be barred under those circumstances since doing so is premature.

IV. Issues on remand

The parties have raised several issues in this appeal that the trial court never decided and that we need not decide now. We repeat them here for convenience:

- What elements must be proved to establish liability under the CVRA?
- Is the court precluded from employing crossover or coalition districts (i.e., districts in which the plaintiffs' protected class does not comprise a majority of voters) as a remedy?
- Is the court precluded from employing any alternative at-large voting system as a remedy?
- Does the particular remedy under contemplation by the court, if any, conform to the Supreme Court's vote-dilution-remedy cases?

The court's answers to these questions will determine the scope of relief, if any, available to plaintiffs. The logical limit in one direction would be a conclusion that plaintiffs can obtain under the CVRA only the same relief that they could have obtained under the FVRA. The logical limit in the other direction would be the conclusion that, upon proof of racially polarized voting, plaintiffs will be entitled to the most appropriate remedy, among the remedies we have discussed, that does not result in unconstitutionally drawn districts under the Supreme Court's rulings.

DISPOSITION

The judgment is reversed and the case remanded to the trial court for further proceedings. Plaintiffs shall recover their costs on appeal.

****846** Defendants' motion to strike, filed February 10, 2006, is denied. The request for leave to submit supplemental briefing included in the motion to strike is granted and the supplemental brief incorporated in the motion is deemed filed.

***691** The following requests are granted: Motion of Appellants Requesting Judicial Notice (filed September 15, 2005); Supplemental Motion of Appellants Requesting Judicial Notice (filed January 31, 2006); Second Motion of Respondents Requesting Judicial Notice (filed February 6, 2006); Request for Judicial Notice contained in defendants' Answer to Brief of Amici Curiae Common Cause and FairVote (filed March 22, 2006); Third Motion of Respondents Requesting Judicial Notice (filed July 20, 2006).

HARRIS, Acting P.J., and CORNELL, J., concur.

All Citations

145 Cal.App.4th 660, 51 Cal.Rptr.3d 821, 06 Cal. Daily Op. Serv. 11,187

Footnotes

[1] We take judicial notice of this fact, which was revealed by the 2000 census. (See < http://factfinder.census.gov/servlet/QTTable?_bm =y&-qr_

name=DEC_2000_SF1_U_DP1&-geo_id=04000US06&-ds_name=DEC_2000_SF1_U&-_ lang =en&-_sse=on> [census table reporting non-Hispanic Whites as 46.7 percent of state population].)

2 Subsequent statutory references are to the Elections Code unless otherwise noted.

3 In addition to the motion to strike and request for leave to submit supplemental briefing, a number of requests for judicial notice are pending. These requests, which we list in the Disposition, are granted.

16 N.Y.2d 94
Court of Appeals of New York.

Douglas W. SEAMAN et al., Respondents,
v.
Walter FEDOURICH et al., Constituting the Common Council of the City ofBinghamton, et al., Appellants, and Marion A. Nelson et al., Individually andas Councilmen of the City of Binghamton, Intervenors-Respondents.

July 9, 1965.

Synopsis
Case involving validity of districting plan for common council of City of Binghamton. The Supreme Court, Extraordinary Term, Broome County, Robert W. Sloan, J., 46 Misc.2d 289, 258 N.Y.S.2d 1008, declared that Local Law, No. 1 of 1965 of the City of Binghamton is unconstitutional. On appeal, the Supreme Court, Appellate Division, Third Department, 23 A.D.2d 968, 970, 259 N.Y.S.2d 1021, affirmed and gave permission for an appeal. The Court of Appeals, Fuld, J., held that the districting plan is invalid for lack of substantial equality of population among the districts.

Affirmed.

Attorneys and Law Firms

*****446 **779 *95** John V. Romagnoli, Corp. Counsel (Peter A. Daniels, Binghamton, of counsel), for appellants.

Willard E. Pierce, Jr., Binghamton, for respondents.

***96** Stuart M. Pearis, Binghamton, for intervenors-respondents.

Opinion

***97** FULD, Judge.

On this appeal, here by permission of the Appellate Division, we deal with the validity of a districting plan for an elective legislative body below the state level.[1]

****780 *98** In January of this year, the plaintiffs, residents and qualified voters of the City of Binghamton, instituted an action against the several defendants, constituting the Common Council of that city, seeking to have the existing districting plan of that 13-member body declared unconstitutional on the ground that it offended against the equal protection clauses of the Federal and State Constitutions (U.S.Const., 14th Amdit.; N.Y.S.Const., art. I, s 11). Following the commencement of the action, the Mayor of Binghamton was added as a party defendant and four of the councilmen, all members of the political party with minority representation on that body, originally named as defendants were permitted to intervene and serve their own papers in support of the plaintiffs' position. The remaining defendants moved to dismiss the action, pursuant to CPLR 3211(a), primarily on the ground that the court lacked jurisdiction of the subject matter of the action because, in their words, 'the federal courts have exclusive jurisdiction' of such cases. The plaintiffs countered by requesting that the motion be treated as one for summary judgment (CPLR 3211(c)) and that such relief be granted in their favor.

Justice SLOAN at Special Term concluded that no triable issue of fact existed and directed summary judgment for the

plaintiffs. In so doing, ***447 he declared that 'the present scheme * * * deprives each of the plaintiffs of his right to equal representation in violation of the Fourteenth Amendment of the Federal Constitution, and Article I, s 11 of the the Constitution of the State of New York'. (45 Misc.2d 940, 943-944, 258 N.Y.S.2d 152, 156.) The court also announced that it would retain jurisdiction of the action in order that it might thereafter entertain 'an application by any of the parties for a review of any * * * plan adopted by local law'. (45 Misc.2d, at p. 944, 258 N.Y.S.2d, at p. 156.) No appeal was taken from that determination.

Following a public hearing in April, the Binghamton Common Council passed Local Law No. 1 of 1965, adopting a new districting plan. Approved by the defendant Mayor, it was thereafter filed with the Broome County Board of Elections for the purpose of being submitted, pursuant to section 23 of the Municipal Home Rule Law, Consol.Laws, c. 36-a, to a referendum. However, before the date set for such submission, Justice SLOAN, upon *99 application of the plaintiffs and the intervening defendants, held that the proposed districting plan still failed to meet constitutional requirements. The Appellate Division affirmed without opinion and, as indicated, granted the defendants leave to appeal to this court.

As presently constituted, the Binghamton Common Council in made up of 13 members. Each is elected by the inhabitants of one of the city's 13 'wards' and has the power to cast one vote, of equal weight with the others, on matters coming before the Council. According to the latest United States census, that of 1960, the population of the wards varies from 542 in the 9th ward to 11,426 in the 4th ward. In fact, on the basis of the existing scheme, it is possible for 7 councilmen those from the 2d, 13th and 7th through 11th wards representing less than 27% of the population of the city to enact laws opposed by and, by the same token, to defeat legislation **781 favored by members representing over 73% of Binghamton's citizens.[2]

By the terms of Local Law No. 1 of 1965, enacted after Special Term's decision invalidating the existing plan, it was proposed that the Council ***448 be reduced from 13 to 7 members, each to be elected from one of seven 'districts', the boundaries of which would follow those of the former 'wards' with certain of the less populous wards simply being incorporated into the new and larger districts. The population of each of the new districts *100 again, as indicated by the 1960 census varies from 7,863 in the 6th district to 15,808 in the 7th district.[3]

The defendants attempt to justify the new plan by proffering and relying upon population figures based not on the 1960 census but on their own surveys and estimates which, it is to be noted, reduce somewhat the discrepancies between the various districts:

District	Population
1	9,615
2	10,501
3	10,600
4	11,588
5	9,640
6	8,640
7	12,003

These estimates, employed by the Council in drafting the new plan, were arrived at, first, by 'up-dating' the 1960 census

figures, by taking into account, in the defendants' words, 'various factors which affect the population (of Binghamton) such as movement of people, downtown urban renewal, extensive highway construction, and future available areas for expansion, all based on proper statistical projection of known facts', and, second, by excluding the 3,217 persons (included by the census) who are patients in the Binghamton State Hospital located within the new 7th district.

Reasoning that '(r)esidents in or at the Binghamton State Hospital are a part of the population and may not be eliminated from * * * proposed Councilmanic District No. 7' and that '(t)he approximations of increase and decrease of population by reason of population movement and other factors are ***101** at best estimates and are not to be accepted in lieu of the Federal census' (46 Misc.2d 289, 291, 258 N.Y.S.2d 1008), Justice SLOAN at Special Term rejected the defendants' population figures and, *****449** looking to the data supplied by the 1960 census, concluded that the Local Law did not meet constitutional requirements.

The present action was, of course, prompted by recent Supreme Court cases holding that the equal protection clause of the Fourteenth Amendment requires that representation in both houses of a state's legislature be substantially proportionate to the number of people represented under the ****782** principle of 'one person, one vote.'[4] There can be little doubt, and it is not disputed by the defendants, that that principle is applicable to elective legislative bodies exercising general governmental powers as the municipal level (cf. Reynolds v. Sims, 377 U.S. 533, 575, 84 S.Ct. 1362, 12 L.Ed.2d 506; Gomillion v. Lightfoot, 364 U.S. 339, 81 S.Ct. 125, 5 L.Ed.2d 110), and such as been the conclusion reached by several courts called upon to consider the question.[5]

It is axiomatic that local governmental units are creations of, and exercise only those powers delegated to them by, the State (N.Y.Const., art. IX, ss 1, 2; Municipal Home Rule Law, ss 10, 11) and, certainly, if the latter may exercise its legislative powers only in a body constituted on a population basis, any general elective municipal organ to which it delegates certain of its powers must, by a parity of reasoning, be subjected to the ***102** same constitutional requirement. Viewed in another way, if, as seems evident, the thrust of the Supreme Court's decisions is that it is inherent within the concept of 'equal protection' that a person has a substantial right to be heard and to participate, through his elected representatives, in the business of government on an equal basis with all other individuals, no reason or justification exists for differentiating, so far as that right is concerned, between the general governmental business carried on in the highest legislative organs of the State and that conducted, by virtue of a delegation of authority, in municipal law-making bodies. (See, generally, *****450** Weinstein, The Effect of the Federal Reapportionment Decisions on Counties and Other Forms of Municipal Government, 65 Col.L.Rev. 21.)

Nor can there be any question that the courts of New York, obliged as they are to uphold the Federal Constitution as well as this State's Constitution whose equal protection clause, we have said, is as broad in its overage as that of the Fourteenth Amendment (see Dorsey v. Stuyvesant Town Corp., 299 N.Y. 512, 530, 544, 87 N.E.2d 541, 548, 556, 14 A.L.R.2d 133) are vested with jurisdiction of actions brought to vindicate the right to equal representation. (See Matter of Orans, 15 N.Y.2d 339, 258 N.Y.S.2d 825, 206 N.E.2d 854; Maryland Committee for Fair Representation v. Tawes, 377 U.S. 656, 674, 84 S.Ct. 1429, 12 L.Ed.2d 575.)

This brings us to that aspect of the decision below invalidating Binghamton's Local Law No. 1 of 1965.

The 'overriding objective' of any legislative apportionment (or districting) plan, the Supreme Court has made clear, 'must be substantial equlity of population ****783** among the various districts, so that the vote of any citizen is approximately equal in weight to that of any other citizen'. (Reynolds v. Sims, 377 U.S. 533, 579, 84 S.Ct. 1362, 1390, supra.) In light of this objective, 'the proper judicial approach' in evaluating the constitutional validity of any particular plan, the court went on to say in a companion case to Reynolds, 'is to ascertain whether, under the particular circumstances existing' in the individual locality whose legislative scheme is in issue, 'there has been a faithful adherence to a plan of population-based representation, with such minor deviations only as may occur in recognizing certain factors that are free from any taint of arbitrariness or discrimination'. (Roman v. Sincock, 377 U.S. 695, 710, 84 S.Ct. 1449, 1458). Judged in these terms, the Binghamton plan now before us may not withstand attack.

***103** Even accepting the defendants' own population figures (i. e., those used by the Council in adopting the Local Law and arrived at by 'up-dating' the 1960 census and excluding from district No. 7 the patients at the State Hospital), significant population discrepancies exist between certain of the seven councilmanic districts. For instance, although each district is

allotted but one representative and, thus, one vote on the Council, district No. 7 (population: 12,003) includes nearly 50% more people than district No. 6 (population: 8,640), and almost as serious discrepancies exist between district No. 1 (population: 9,615) or district No. 5 (population: 9,640) and district No. 4 (population: 11,588) or district No. 7.

Manifestly, then, Local Law No. 1, far from representing, to cull from the opinion in the Roman case (377 U.S. 695, 710, 84 S.Ct. 1449, 1458, supra), 'a faithful adherence to a plan of population-based representation' ***451 , perpetuates a denial of the right of many of Binghamton's citizens to equal protection of the law in their representation on the Common Council. Not only do the defendants' population figures demonstrate that the revised districting scheme entails more than a 'minor deviation' from the 'one person, one vote' principle but no special considerations or factors are called to our attention to rationally explain the patent discrepancies. On the contrary, Binghamton's relatively small population 75,941, according to the 1960 census and rather compact geographic area suggest that the task of redistricting its Common Council, so as to assure to its citizens a closer approximation to equality of representation than that provided by Local Law No. 1, is a responsibility which may be met without great difficulty. To paraphrase what we said in Matter of Sherrill v. O'Brien, 188 N.Y. 185, 210, 81 N.E. 124, 132, no possible legitimate purpose for the exercise of discretion to create districts unequal in population has been shown.
The disparties of population among the concilmanic districts created by the Local Law are, to some extent, more acute when the numerical size of those units is gauged by the 1960 census figures. To take but one example, district No. 7 (population: 15,808), under those calculations, contains over 100% more people than district No. 6 (population: 7,863). In our opinion, the courts below correctly held that (1) the lates official census is to be employed in determining population for districting purposes *104 and (2) the patients at the State Hospital are properly to be included (as they are in the 1960 Federal census) as part of the population of the district wherein that hospital is located.

A municipality may not devise its own method of calculating population as a basis for deriving a districting plan for its elective lawmaking body where the State has, by Constitution or statute, mandated that population be determined in a prescribed manner.[6] In our view, New York **784 has adopted such a prescription. For instance, this State's Constitution (art. III, s 4) markes the latest Federal census 'controlling as to the number of inhabitants in the state or any part thereof' for purposes of State legislative apportionment, and numerous statutes likewise make that census the determinant whenever 'population' is a factor to be taken into account.[7] Particularly significant is section 11 of the Optional City Government ***452 Law (L.1914, ch. 444, repealed L.1939, ch. 765 but 'frozen' as to city governments, such as Binghamton, adopted under its authority) which, in effect, requires that 'the latest state census or United States census, whichever shall be later', be employed to determine 'the number of inhabitants of a city' whenever such inquiry is pertinent to laws passed by the city's legislative body.

Although, admittedly, no constitutional or legislative provision specifically deals with 'population' as it relates to local apportionment or districting, the declared policy is readily apparent and reason dictates that the most recent official census be employed in this area as well. Reliance upon such a source will assure periodic, impartial population date on the basis of which an apportionment or districting plan may be initially developed and thereafter regularly revised.

*105 All that need be said about the patients at the State Hospital is that, in the light of current state policy, the action of the defendants in excluding them from their districting plan without any investigation of relevant factors such as, for instance, where they had previously lived and where they had voted in the past is arbitrary and discriminatory. The Federal census, as indicated, includes these patients as residents of Binghamton's present 12th ward, now within the new 7th district, and no sound reason has been suggested for denying them representation on the city's Common Council. On the contrary, it seems undisputed that many of the patients are from the Binghamton area and that many were voluntarily admitted to the hospital (Mental Hygiene Law, Consol.Laws, c. 27, s 70, subd. 1, par. (a)) and, not having been judicially declared incompetent, are actually entitled to vote (Election Law, Consol.Laws, c. 17, s 152, subd. 6). Therefore, the treat these patients, as the defendants have, as if they did not exist is to depart, improperly, from the concept of population-based legislative representation. (See Davis v. Mann, 377 U.S. 678, 691, 84 S.Ct. 1441, 12 L.Ed.2d 609 (relating to exclusion of military personal).)

The order appealed from should be affirmed, without costs.

DESMOND, C. J., and DYE, VAN VOORHIS, BURKE, SCILEPPI and BERGAN, JJ., concur.

Order affirmed.

All Citations

16 N.Y.2d 94, 209 N.E.2d 778, 262 N.Y.S.2d 444

Footnotes

1 While the case has been referred to by the parties as one involving 'apportionment', it deals, strictly speaking, with an issue of 'districting'. 'Apportionment and districting', it has been said by the Citizens' Committee on Reapportionment, 'must be differentiated. Apportionment is the process by which legislative seats are distributed units entitled to representation; districting is the establishment of the precise georgraphical boundaries of each such unit or constituency.' (New York Citizens' Committee on Reapportionment, Report to Governor Nelson A. Rockefeller (Dec. 1, 1964), p. 25; see, also, Silva, The Population Base for Apportionment of the New York Legislature, 32 Fordham L.Rev. 1, 3.) Of course, constitutional requirements must be met whether apportionment or districting is at issue. (See, e. g., Weight v. Rockefeller, 376 U.S. 52, 84 S.Ct. 603, 11 L.Ed. 512; WMCA, Inc. v. Lomenzo, 238 F.Supp. 916 (U.S.Dist.Ct., S.D.N.Y.).)

2 The following table shows the population of each existing ward:

Ward	Population
1	9,999
2	4,016
3	6,515
4	11,426
5	9,013
6	7,863
7	3,658
8	1,064

9	542
10	2,051
11	3,986
12	10,817
13	4,991

[3] The following table shows the population of each proposed district:

New District	Old Ward	Population
1	1	9,999
2	7,8,9,10,11	11,301
3	2,3	10,531
4	4	11,426
5	5	9,013
6	6	7,863
7	12,13	15,808

[4] See Reynolds v. Sims, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506; WMCA, Inc. v. Lomenzo, 377 U.S. 633, 84 S.Ct. 1418, 12 L.Ed.2d 568; Maryland Committee for Fair Representation v. Tawes, 377 U.S. 656, 84 S.Ct. 1429, 12 L.Ed.2d 595; Davis v. Mann, 377 U.S. 678, 84 S.Ct. 1441, 12 L.Ed.2d 609; Roman v. Sincock, 377 U.S. 695, 84 S.Ct. 1449, 12 L.Ed.2d 620; Lucas v. Forty-Fourth General Assembly of State of Colorado, 377 U.S. 713, 84 S.Ct. 1459, 12 L.Ed.2d 632.

[5] See Matter of Goldstein v. Rockefeller, 45 Misc.2d 778, 257 N.Y.S.2d 994 (County Board of Supervisors); State ex rel. Sonneborn v. Sylvester, 26 Wis.2d 43, 132 N.W.2d 249 (same); Bianchi v. Griffing, 238 F.Supp. 997 (U.S.Dist.Ct., E.D.N.Y.) (same); Damon v. Lauderdale County Election Comrs., National Municipal League, Court Decisions on Legislative Apportionment, vol. 13, p. 139 (Civil Action No. 1197-E, U.S.Dist.Ct., S.D.Miss., Oct. 21, 1964) (same); Brouwer v. Bronkema, National Municipal League, Court Decisions on Legislative Apportionment, vol. 13, p. 81 (Case No. 1855, Cir.Ct., Kent County, Mich., Sept. 11, 1964) (same); McMillan v. Wagner, 239 F.Supp. 32, U.S.Dist.Ct., S.D.N.Y., March 22, 1965 (City Board of Estimate); Ellis v. Mayor & City Council of Baltimore, 234 F.Supp. 945 (U.S.Dist.Ct., D.Md.) (City Council). (See, also, Weinstein, The Effect of the Federal Reapportionment Decisions on Counties and Other Forms of Municipal Government, 65 Col.L.Rev. 21, 23-31.)

[6] The method prescribed for determining population may not, of course, be utilized as a subterfuge for circumventing equal voting power standards. (Cf. WMCA, Inc. v. Lomenzo, 238 F.Supp. 916, 924-925 (U.S.Dist.Ct., S.D.N.Y.); see, also, Weinstein, The Effect of the Federal Reapportionment Decisions on Counties and Other Forms of Municipal Government, 65 Col.L.Rev. 21, 24, n. 12.) We do not reach the question whether the method relied upon in devising Local Law No. 1 if such method were authorized by the State violated the equal protection clause of the Federal or State Constitution.

[7] See, e. g., Alternative County Government Law, Consol.Laws, c. 11-B, s 4, subd. 8; General Construction Law, Consol.Laws, c. 22, s 37-b, subd. 1; Village Law, Consol.Laws, c. 64, s 4-400, subd. 1; Former Village Home Rule Law, Consol.Laws, c. 76a, s 2, subd. 1; Alcoholic Beverage Control Law, Consol.Laws, c. 3-B, s 3, subd. 23; see, also, CPLR 4530, subd. (b); 2 McQuillin, Municipal Corporations (3d ed. 1949), s 4.76.

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116 S.Ct. 1894
Supreme Court of the United States

Ruth O. SHAW, et al., Appellants,
v.
James B. HUNT, Jr., Governor of North Carolina, et al.
James Arthur POPE, et al., Appellants,
v.
James B. HUNT, Jr., Governor of North Carolina, et al.

Nos. 94–923, 94–924.
|
Argued Dec. 5, 1995.
|
Decided June 13, 1996.

Synopsis

North Carolina residents brought action against the United States Attorney General, Assistant Attorney General, and various state officials and agencies challenging congressional redistricting plan as containing impermissible racial gerrymandering. A three-judge panel of the United States District Court for the Eastern District of North Carolina dismissed action, 808 F.Supp. 461, and appeal was taken. The United States Supreme Court, 509 U.S. 630, 113 S.Ct. 2816, 125 L.Ed.2d 511, reversed and remanded. On remand, the District Court, James Dickson Phillips, Jr., Senior Circuit Judge, joined by W. Earl Britt, J., 861 F.Supp. 408, held that districting plan was narrowly tailored to serve compelling interests. Appeal was taken, and the Supreme Court, Chief Justice Rehnquist, held that: (1) voters who lived in allegedly gerrymandered district had standing to challenge that part of redistricting scheme which defined district in which they resided; (2) voters who did not reside in district which they challenged and did not provide evidence they were assigned to district on basis of race lacked standing; and (3) districting plan was not narrowly tailored to serve compelling state interest and violated equal protection clause.

Reversed.

Justice Stevens filed a dissenting opinion which Justices Ginsburg and Breyer joined in part.

Justice Souter filed a dissenting opinion in which Justices Ginsburg and Breyer joined.

****1897 *899** *Syllabus*[*]

Earlier in this suit, in *Shaw v. Reno,* 509 U.S. 630, 113 S.Ct. 2816, 125 L.Ed.2d 511, this Court held that appellants, whose complaint alleged that North Carolina had deliberately segregated voters by race when it created two bizarre-looking majority-black congressional districts, Districts 1 and 12, had stated a claim for relief under the Equal Protection Clause of the Fourteenth Amendment. The Court remanded for further consideration by the District Court, which held that, although the North Carolina redistricting plan did classify voters by race, the classification survived strict scrutiny, and therefore was constitutional, because it was narrowly tailored to further the State's compelling interests in complying with §§ 2 and 5 of the Voting Rights Act of 1965.

Held:

1. Only the two appellants who live in District 12 have standing to continue this lawsuit, and only with respect to that district. The remaining appellants, who do not reside ****1898** in either of the challenged districts and have not provided specific evidence that they personally were assigned to their voting districts on the basis of race, lack standing. See *United States v. Hays,* 515 U.S. 737, 115 S.Ct. 2431, 132 L.Ed.2d 635. P. 1900.

2. The North Carolina plan violates the Equal Protection Clause because the State's reapportionment scheme is not narrowly tailored to serve a compelling state interest. Pp. 1900–1907.

(a) Strict scrutiny applies when race is the "predominant" consideration in drawing district lines such that "the legislature subordinates race-neutral districting principles ... to racial considerations." *Miller v. Johnson,* 515 U.S. 900, 916, 115 S.Ct. 2475, 2488, 132 L.Ed.2d 762. The District Court's finding that the North Carolina General Assembly "deliberately drew" District 12 so that it would have an effective voting majority of black citizens, when read in the light of the evidence as to the district's shape and demographics and the legislature's objective, comports with the *Miller* standard. In order to justify its redistricting plan, therefore, the State must show not only that the plan was in pursuit of a compelling ***900** state interest, but also that it was narrowly tailored to achieve that interest. *Id.,* at 920, 115 S.Ct., at 2490. Pp. 1900–1902.

(b) None of the three separate "compelling interests" to which appellees point suffices to sustain District 12. First, the District Court found that the State's claimed interest in eradicating the effects of past discrimination did not actually precipitate the use of race in the redistricting plan, and the record does not establish that that finding was clearly erroneous. Second, the asserted interest in complying with § 5 of the Voting Rights Act did not justify redistricting here, since creating an additional majority-black district, as urged by the Justice Department before it granted preclearance, was not required under a correct reading of § 5. See *Miller,* 515 U.S., at 921, 115 S.Ct., at 2491. This Court again rejects the Department's expansive reading of § 5 and of its own authority thereunder as requiring States to maximize the number of majority-minority districts wherever possible. See, *e.g., id.,* at 925, 115 S.Ct., at 2493. Third, District 12, as drawn, is not a remedy narrowly tailored to the State's professed interest in avoiding liability under § 2 of the Act, which, *inter alia,* prohibits dilution of the voting strength of members of a minority group. District 12 could not remedy any potential § 2 violation, since the minority group must be shown to be "geographically compact" to establish § 2 liability, see, *e.g., Thornburg v. Gingles,* 478 U.S. 30, 50, 106 S.Ct. 2752, 2766, 92 L.Ed.2d 25, and it cannot reasonably be suggested that District 12 contains a "geographically compact" population of any race. Appellees are singularly unpersuasive when they argue that a majority-minority district may be drawn anywhere if there is a strong basis in evidence for concluding that a § 2 violation exists somewhere in the State. A district so drawn could not avoid § 2 liability, which targets vote-dilution injury to individuals in a particular area, not to the minority as a group. Just as in *Miller,* this Court does not here reach the question whether compliance with the Act, on its own, can be a compelling state interest under the proper circumstances. Pp. 1902–1907.

861 F.Supp. 408 (E.D.N.C.1994), reversed.

REHNQUIST, C.J., delivered the opinion of the Court, in which O'CONNOR, SCALIA, KENNEDY, and THOMAS, JJ., joined. STEVENS, J., filed a dissenting opinion, in which GINSBURG and BREYER, JJ., joined as to Parts II, III, IV, and V., *post,* p. 1907. SOUTER, J., filed a dissenting statement, in which GINSBURG and BREYER, JJ., joined, *post,* p. 1923.

Attorneys and Law Firms

Robinson O. Everett, Chapel Hill, NC, for appellants Shaw, et al.

***901** Thomas A. Farr, Raleigh, NC, for appellants Pope, et al.

Opinion

****1899** Chief Justice REHNQUIST delivered the opinion of the Court.

This suit is here for a second time. In *Shaw v. Reno,* 509 U.S. 630, 113 S.Ct. 2816, 125 L.Ed.2d 511 (1993) *(Shaw I),* we held that plaintiffs whose complaint alleged that the deliberate segregation of voters into separate and bizarre-looking districts on the basis of race stated a claim for relief under the Equal Protection Clause of the Fourteenth Amendment. We remanded the case for further consideration by the District Court. That court held that the North Carolina redistricting plan did classify ***902** voters by race, but that the classification survived strict scrutiny and therefore did not offend the Constitution. We now hold that the North Carolina plan does violate the Equal Protection Clause because the State's reapportionment scheme is not

narrowly tailored to serve a compelling state interest.

The facts are set out in detail in our prior opinion, and we shall only summarize them here. After the 1990 census, North Carolina's congressional delegation increased from 11 to 12 members. The State General Assembly adopted a reapportionment plan, Chapter 601, that included one majority-black district, District 1, located in the northeastern region of the State. 1991 N.C. Sess. Laws, ch. 601. The legislature then submitted the plan to the Attorney General of the United States for preclearance under § 5 of the Voting Rights Act of 1965, 79 Stat. 439, as amended, 42 U.S.C. § 1973c (1988 ed.). The Assistant Attorney General for Civil Rights, acting on the Attorney General's behalf, objected to the proposed plan because it failed "to give effect to black and Native American voting strength" in "the south-central to southeastern part of the state" and opined that the State's reasons for not creating a second majority-minority district appeared "to be pretextual." App. 151–153. Duly chastened, the legislature revised its districting scheme to include a second majority-black district. 1991 N.C. Extra Sess. Laws, ch. 7. The new plan, Chapter 7, located the minority district, District 12, in the north-central or Piedmont region, not in the south-central or southeastern region identified in the Justice Department's objection letter. The Attorney General nonetheless precleared the revised plan.

By anyone's measure, the boundary lines of Districts 1 and 12 are unconventional. A map portrays the districts' deviance far better than words, see the Appendix to the opinion of the Court in *Shaw I, supra,* but our prior opinion describes them as follows:

> ***903** "The first of the two majority-black districts ... is somewhat hook shaped. Centered in the northeast portion of the State, it moves southward until it tapers to a narrow band; then, with finger-like extensions, it reaches far into the southern-most part of the State near the South Carolina border....
>
> "The second majority-black district, District 12, is even more unusually shaped. It is approximately 160 miles long and, for much of its length, no wider than the [Interstate]–85 corridor. It winds in snake-like fashion through tobacco country, financial centers, and manufacturing areas 'until it gobbles in enough enclaves of black neighborhoods.' " *Shaw I, supra,* at 635–636, 113 S.Ct., at 2820–2821 (citation omitted).

Five North Carolinians commenced the present action in the United States District Court for the Eastern District of North Carolina against various state officials.[1] Following our reversal of the District Court's dismissal of their complaint in *Shaw I,* the District Court allowed a number of individuals to intervene, 11 on behalf of the plaintiffs and 22 for the defendants. After a 6–day trial, the District Court unanimously found "that the Plan's lines were deliberately drawn to produce one or more districts of a certain racial composition." 861 F.Supp. 408, 417, 473–474 (1994). A majority of the court held that the plan was constitutional, nonetheless, because it was narrowly tailored to further the State's compelling interests in ****1900** complying with §§ 2 and 5 of the Voting Rights Act, 42 U.S.C. §§ 1973, 1973c. 861 F.Supp., at 474. The dissenting judge disagreed with that portion of the judgment. We noted probable jurisdiction. 515 U.S. 1172, 115 S.Ct. 2639, 132 L.Ed.2d 878 (1995).

***904** As a preliminary matter, appellees challenge appellants' standing to continue this lawsuit. In *United States v. Hays,* 515 U.S. 737, 115 S.Ct. 2431, 132 L.Ed.2d 635 (1995), we recognized that a plaintiff who resides in a district which is the subject of a racial-gerrymander claim has standing to challenge the legislation which created that district, but that a plaintiff from outside that district lacks standing absent specific evidence that he personally has been subjected to a racial classification. Two appellants, Ruth Shaw and Melvin Shimm, live in District 12 and thus have standing to challenge that part of Chapter 7 which defines District 12. See *Miller v. Johnson,* 515 U.S. 900, 909, 115 S.Ct. 2475, 2485, 132 L.Ed.2d 762 (1995). The remaining appellants do not reside in District 1, however, and they have not provided specific evidence that they personally were assigned to their voting districts on the basis of race. Therefore, we conclude that only Shaw and Shimm have standing and only with respect to District 12.[2]

We explained in *Miller v. Johnson* that a racially gerrymandered districting scheme, like all laws that classify citizens on the basis of race, is constitutionally suspect. *Id.,* at 904–905, 115 S.Ct., at 2482–2483; see also *Shaw I,* 509 U.S., at 657, 113 S.Ct., at 2832; *Adarand Constructors, Inc. v. Peña,* 515 U.S. 200, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995). This is true whether or not the reason for the racial classification is benignor ***905** the purpose remedial. *Shaw I, supra,* at 642–643, 653, 113 S.Ct., at 2824, 2830; *Adarand, supra,* at 228–229, 115 S.Ct., at 2113–2114. Applying traditional equal protection principles in the voting-rights context is "a most delicate task," *Miller, supra,* at 905, 115 S.Ct., at 2483, however, because a legislature may be conscious of the voters' races without using race as a basis for assigning voters to districts. *Shaw I, supra,*

at 645–646, 113 S.Ct., at 2826; *Miller,* 515 U.S., at 916, 115 S.Ct. at 2488. The constitutional wrong occurs when race becomes the "dominant and controlling" consideration. *Id.,* at 911, 915–916, 115 S.Ct., at 2486, 2488.

The plaintiff bears the burden of proving the race-based motive and may do so either through "circumstantial evidence of a district's shape and demographics" or through "more direct evidence going to legislative purpose." *Id.,* at 916, 115 S.Ct., at 2488. After a detailed account of the process that led to enactment of the challenged plan, the District Court found that the General Assembly of North Carolina "deliberately drew" District 12 so that it would have an effective voting majority of black citizens. 861 F.Supp., at 473.

Appellees urge upon us their view that this finding is not phrased in the same language that we used in our opinion in *Miller v. Johnson, supra,* where we said that a plaintiff must show "that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district." *Id.,* at 916, 115 S.Ct., at 2488.

The District Court, of course, did not have the benefit of our opinion in *Miller* at the time it wrote its opinion. While it would have been preferable for the court to have analyzed the case in terms of the standard ****1901** laid down in *Miller,* that was not possible. This circumstance has no consequence here because we think that the District Court's findings, read in the light of the evidence that it had before it, comport with the *Miller* standard.

First, the District Court had evidence of the district's shape and demographics. The court observed "the obvious fact" that the district's shape is "highly irregular and geographically ***906** non-compact by any objective standard that can be conceived." 861 F.Supp., at 469. In fact, the serpentine district has been dubbed the least geographically compact district in the Nation. App. 332.

The District Court also had direct evidence of the legislature's objective. The State's submission for preclearance expressly acknowledged that Chapter 7's "*overriding* purpose was to comply with the dictates of the Attorney General's December 18, 1991 letter and to create two congressional districts with effective black voting majorities." App. 162 (emphasis added). This admission was confirmed by Gerry Cohen, the plan's principal draftsman, who testified that creating two majority-black districts was the "principal reason" for Districts 1 and 12. *Id.,* at 675; Tr. 514. Indeed, appellees in their first appearance before the District Court "formally concede[d] that the state legislature deliberately created the two districts in a way to assure black-voter majorities," *Shaw v. Barr,* 808 F.Supp. 461, 470 (E.D.N.C.1992), and that concession again was credited by the District Court on remand, 861 F.Supp., at 473–474. See also *Shaw I, supra,* at 666, 113 S.Ct., at 2838 (White, J., dissenting) ("The State has made no mystery of its intent, which was to respond to the Attorney General's objections by improving the minority group's prospects of electing a candidate of its choice" (citation omitted)). Here, as in *Miller,* "we fail to see how the District Court could have reached any conclusion other than that race was the predominant factor in drawing [the challenged district]." *Miller, supra,* at 918, 115 S.Ct., at 2489.

In his dissent, Justice STEVENS argues that strict scrutiny does not apply where a State "respects" or "compl[ies] with traditional districting principles." *Post,* at 1913 ("[R]ace-based districting which respects traditional districting principles does not give rise to constitutional suspicion"), *post,* at 1913 ("*Miller* demonstrates that although States may avoid strict scrutiny by complying with traditional districting principles ... "). That, however, is not the ***907** standard announced and applied in *Miller,*[3] where we held that strict scrutiny applies when race is the "predominant" consideration in drawing the district lines such that "the legislature subordinate[s] traditional race-neutral districting principles ... to racial considerations." *Miller, supra,* at 916, 115 S.Ct., at 2488. (Justice STEVENS articulates the correct standard in his dissent, *post,* at 1913, but he fails to properly apply it.) The *Miller* standard is quite different from the one that Justice STEVENS advances, as an examination of the dissent's reasoning demonstrates. The dissent explains that "two race-neutral, traditional districting criteria" were at work in determining the shape and placement of District 12, and from this suggests that strict scrutiny should not apply. *Post,* at 1915–1917. We do not quarrel with the dissent's claims that, in shaping District 12, the State effectuated its interest in creating one rural and one urban district, and that partisan politicking was actively at work in the districting process. That the legislature addressed these interests does not in any way refute the fact that race was the legislature's predominant consideration. Race was the criterion that, in the State's view, could not be compromised; respecting communities of interest and protecting Democratic incumbents came into ****1902** play only after the race-based decision had been made.

Racial classifications are antithetical to the Fourteenth Amendment, whose "central purpose" was "to eliminate racial discrimination emanating from official sources in the States." *McLaughlin v. Florida,* 379 U.S. 184, 192, 85 S.Ct. 283, 288,

13 L.Ed.2d 222 (1964); ***908** *Richmond v. J.A. Croson Co.,* 488 U.S. 469, 491, 109 S.Ct. 706, 720, 102 L.Ed.2d 854 (1989) (opinion of O'CONNOR, J.) ("[T]he Framers of the Fourteenth Amendment ... desired to place clear limits on the States' use of race as a criterion for legislative action, and to have the federal courts enforce those limitations"). While appreciating that a racial classification causes "fundamental injury" to the "individual rights of a person," *Goodman v. Lukens Steel Co.,* 482 U.S. 656, 661, 107 S.Ct. 2617, 2621, 96 L.Ed.2d 572 (1987), we have recognized that, under certain circumstances, drawing racial distinctions is permissible where a governmental body is pursuing a "compelling state interest." A State, however, is constrained in how it may pursue that end: "[T]he means chosen to accomplish the State's asserted purpose must be specifically and narrowly framed to accomplish that purpose." *Wygant v. Jackson Bd. of Ed.,* 476 U.S. 267, 280, 106 S.Ct. 1842, 1850, 90 L.Ed.2d 260 (1986) (opinion of Powell, J.). North Carolina, therefore, must show not only that its redistricting plan was in pursuit of a compelling state interest, but also that "its districting legislation is narrowly tailored to achieve [that] compelling interest." *Miller,* 515 U.S., at 920, 115 S.Ct., at 2490.

Appellees point to three separate compelling interests to sustain District 12: to eradicate the effects of past and present discrimination; to comply with § 5 of the Voting Rights Act; and to comply with § 2 of that Act. We address each in turn.[4]

***909** A State's interest in remedying the effects of past or present racial discrimination may in the proper case justify a government's use of racial distinctions. *Croson,* 488 U.S., at 498–506, 109 S.Ct., at 724–728. For that interest to rise to the level of a compelling state interest, it must satisfy two conditions. First, the discrimination must be " 'identified discrimination.' " *Id.,* at 499, 500, 505, 507, 509, 109 S.Ct., at 724–725, 725, 728, 729, 730. "While the States and their subdivisions may take remedial action when they possess evidence" of past or present discrimination, "they must identify that discrimination, public or private, with some specificity before they may use race-conscious relief." *Id.,* at 504, 109 S.Ct., at 727. A generalized assertion of past discrimination ****1903** in a particular industry or region is not adequate because it "provides no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy." *Id.,* at 498, 109 S.Ct., at 724 (opinion of O'CONNOR, J.). Accordingly, an effort to alleviate the ***910** effects of societal discrimination is not a compelling interest. *Wygant, supra,* at 274–275, 276, 288, 106 S.Ct., at 1847–1848, 1848, 1854.[5] Second, the institution that makes the racial distinction must have had a "strong basis in evidence" to conclude that remedial action was necessary, "*before* it embarks on an affirmative-action program," 476 U.S., at 277, 106 S.Ct., at 1848 (plurality opinion) (emphasis added).

In this suit, the District Court found that an interest in ameliorating past discrimination did not actually precipitate the use of race in the redistricting plan. While some legislators invoked the State's history of discrimination as an argument for creating a second majority-black district, the court found that these members did not have enough voting power to have caused the creation of the second district on that basis alone. 861 F.Supp., at 471.

Appellees, to support their claim that the plan was drawn to remedy past discrimination, rely on passages from two reports prepared for this litigation by a historian and a social scientist. Brief for Appellees Gingles et al. 40–44, citing H. Watson, Race and Politics in North Carolina, 1865–1994, App. 610–624 (excerpts), and J. Kousser, After 120 Years: Redistricting and Racial Discrimination in North Carolina, *id.,* at 602–609 (excerpts). Obviously these reports, both dated March 1994, were not before the General Assembly when it enacted Chapter 7. And there is little to suggest that the legislature considered the historical events and social-science data that the reports recount, beyond what individual members may have recalled from personal experience. We certainly cannot say on the basis of these reports that the District Court's findings on this point were clearly erroneous.

***911** Appellees devote most of their efforts to arguing that the race-based redistricting was constitutionally justified by the State's duty to comply with the Voting Rights Act. The District Court agreed and held that compliance with §§ 2 and 5 of the Act could be, and in this suit was, a compelling state interest. 861 F.Supp., at 437. In *Miller,* we expressly left open the question whether under the proper circumstances compliance with the Voting Rights Act, on its own, could be a compelling interest. *Miller,* 515 U.S., at 921, 115 S.Ct., at 2490–2491 ("[w]hether or not in some cases compliance with the Voting Rights Act, standing alone, can provide a compelling interest independent of any interest in remedying past discrimination ... "). Here once again we do not reach that question because we find that creating an additional majority-black district was not required under a correct reading of § 5 and that District 12, as drawn, is not a remedy narrowly tailored to the State's professed interest in avoiding § 2 liability.

With respect to § 5 of the Voting Rights Act, we believe our decision in *Miller* forecloses the argument, adopted by the District Court, that failure to engage in the race-based districting would have violated that section. In *Miller,* we considered

an equal protection challenge to Georgia's Eleventh Congressional District. As appellees do here, Georgia contended that its redistricting plan was necessary to meet the Justice Department's preclearance demands. The Justice Department had interposed an objection to a prior plan that created only two majority-minority districts. We held that the challenged congressional plan was not required by a correct reading of § 5 and therefore compliance with that law could not justify race-based districting. *Id.,* at 921, 115 S.Ct., at 2491 ("[C]ompliance with federal antidiscrimination laws cannot justify race-based districting where the challenged district was not reasonably necessary under a constitutional reading and application of those laws").

****1904 *912** We believe the same conclusion must be drawn here. North Carolina's first plan, Chapter 601, indisputably was ameliorative, having created the first majority-black district in recent history. Thus, that plan, " 'even if [it] fall[s] short of what might be accomplished in terms of increasing minority representation,' " " 'cannot violate § 5 unless the new apportionment itself so discriminates on the basis of race or color as to violate the Constitution.' " *Id.,* at 924, 115 S.Ct., at 2492, quoting Days, Section 5 and the Role of the Justice Department, in B. Grofman & C. Davidson, Controversies in Minority Voting 56 (1992), and *Beer v. United States,* 425 U.S. 130, 141, 96 S.Ct. 1357, 1363–1364, 47 L.Ed.2d 629 (1976).

As in *Miller,* the United States relies on the purpose prong of § 5 to explain the Department's preclearance objections, alleging that North Carolina, for pretextual reasons, did not create a second majority-minority district. Brief for United States as *Amicus Curiae* 24. We again find the Government's position "insupportable." *Miller, supra,* at 924, 115 S.Ct., at 2492. The General Assembly, in its submission filed with Chapter 601, explained why it did not create a second minority district; among its goals were "to keep precincts whole, to avoid dividing counties into more than two districts, and to give black voters a fair amount of influence by creating at least one district that was majority black in voter registration and by creating a substantial number of other districts in which black voters would exercise a significant influence over the choice of congressmen." App. 142. The submission also explained in detail the disadvantages of other proposed plans. See, *e.g., id.,* at 139, 140, 143 (Balmer Congress 6.2 Plan's "[s]econd 'minority' district did not have effective minority voting majority" because it "depended on the cohesion of black and Native American voters, and no such pattern was evident" and "this plan dramatically decreased black influence" in four other districts). A memorandum, sent to the Department of Justice on behalf of the legislators in charge of the redistricting process, provided still further reasons for the State's decision not to draw two minority districts as ***913** urged by various interested parties. App. 94–138; 861 F.Supp., at 480–481, n. 9 (Voorhees, C. J., dissenting). We have recognized that a "State's policy of adhering to other districting principles instead of creating as many majority-minority districts as possible does not support an inference that the plan 'so discriminates on the basis of race or color as to violate the Constitution,' and thus cannot provide any basis under § 5 for the Justice Department's objection." *Miller, supra,* at 924, 115 S.Ct., at 2492 (citations omitted).

It appears that the Justice Department was pursuing in North Carolina the same policy of maximizing the number of majority-black districts that it pursued in Georgia. See *Miller, supra,* at 924–925, and n., 115 S.Ct., at 2492–2493, and n.). The two States underwent the preclearance processes during the same time period and the objection letters they received from the Civil Rights Division were substantially alike. App. in *Miller v. Johnson,* O.T.1994, No. 94–631, pp. 99–107. A North Carolina legislator recalled being told by the Assistant Attorney General that "you have twenty-two percent black people in this State, you must have as close to twenty-two percent black Congressmen, or black Congressional Districts in this State." App. 201. See also Deposition of Senator Dennis Winner, *id.,* at 698. We explained in *Miller* that this maximization policy is not properly grounded in § 5 and the Department's authority thereunder. 515 U.S., at 925, 115 S.Ct., at 2493 ("In utilizing § 5 to require States to create majority-minority districts wherever possible, the Department of Justice expanded its authority under the statute beyond what Congress intended and we have upheld"). We again reject the Department's expansive interpretation of § 5. *Id.,* at 926–927, 115 S.Ct., at 2493. Cf. *Johnson v. De Grandy,* 512 U.S. 997, 1017, 114 S.Ct. 2647, 2660, 129 L.Ed.2d 775 (1994) ("Failure to maximize cannot be the measure of § 2").[6]

****1905 *914** With respect to § 2, appellees contend, and the District Court found, that failure to enact a plan with a second majority-black district would have left the State vulnerable to a lawsuit under this section. Our precedent establishes that a plaintiff may allege a § 2 violation in a single-member district if the manipulation of districting lines fragments politically cohesive minority voters among several districts or packs them into one district or a small number of districts, and thereby dilutes the voting strength of members of the minority population. *Id.,* at 1007, 114 S.Ct., at 2655. To prevail on such a claim, a plaintiff must prove that the minority group "is sufficiently large and geographically compact to constitute a majority in a single-member district"; that the minority group "is politically cohesive"; and that "the white majority votes sufficiently as a bloc to enable it ... usually to defeat the minority's preferred candidate." *Thornburg v. Gingles,* 478 U.S. 30, 50–51, 106 S.Ct. 2752, 2766–67, 92 L.Ed.2d 25 (1986); *Growe v. Emison,* 507 U.S. 25, 113 S.Ct. 1075, 122 L.Ed.2d 388 (1993) (recognizing

that the three *Gingles* preconditions would apply to a § 2 challenge to a single-member district). A court must also consider all other relevant circumstances and must ultimately find based on the totality of those circumstances that members of a protected class "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b). See *De Grandy, supra,* at 1010–1012, 114 S.Ct., at 1056–1057.

***915** We assume, *arguendo,* for the purpose of resolving this suit, that compliance with § 2 could be a compelling interest, and we likewise assume, *arguendo,* that the General Assembly believed a second majority-minority district was needed in order not to violate § 2, and that the legislature at the time it acted had a strong basis in evidence to support that conclusion. We hold that even with the benefit of these assumptions, the North Carolina plan does not survive strict scrutiny because the remedy—the creation of District 12—is not narrowly tailored to the asserted end.

Although we have not always provided precise guidance on how closely the means (the racial classification) must serve the end (the justification or compelling interest), we have always expected that the legislative action would substantially address, if not achieve, the avowed purpose. See *Miller, supra,* at 922, 115 S.Ct., at 2491 ("[T]he judiciary retains an independent obligation ... to ensure that the State's actions are narrowly tailored to achieve a compelling interest"); *Wygant,* 476 U.S., at 280, 106 S.Ct., at 1850 (opinion of Powell, J.) ("[T]he means chosen to accomplish the State's asserted purpose must be specifically and narrowly framed to accomplish that purpose") *id.,* at 278, n. 5, 106 S.Ct., at 1849, n. 5 (opinion of Powell, J.) (race-based state action must be remedial); *Shaw I,* 509 U.S., at 655, 113 S.Ct., at 2831 ("A reapportionment plan would not be narrowly tailored to the goal of avoiding retrogression if the State went beyond what was reasonably necessary to avoid retrogression"). Cf. *Missouri v. Jenkins,* 515 U.S. 70, 88, 115 S.Ct. 2038, 2049, 132 L.Ed.2d 63 (1995) (With regard to the remedial authority of a federal court: " 'The remedy must ... be related to "the *condition* alleged to offend the Constitution...." ' " and must be " '*remedial* in nature, that is, it must be designed as nearly as possible "to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct" ' ") (quoting *Milliken v. Bradley,* 433 U.S. 267, 280–281, 97 S.Ct. 2749, 2757, 53 L.Ed.2d 745 (1977), in turn quoting *Milliken v. Bradley,* 418 U.S. 717, 738, 746, 94 S.Ct. 3112, 3124, 3128, 41 L.Ed.2d 1069 (1974)). Where, as ***916** here, we assume avoidance of § 2 liability ****1906** to be a compelling state interest, we think that the racial classification would have to realize that goal; the legislative action must, at a minimum, remedy the anticipated violation or achieve compliance to be narrowly tailored.[7]

District 12 could not remedy any potential § 2 violation. As discussed above, a plaintiff must show that the minority group is "geographically compact" to establish § 2 liability. No one looking at District 12 could reasonably suggest that the district contains a "geographically compact" population of any race. See 861 F.Supp., at 469. Therefore where that district sits, "there neither has been a wrong nor can be a remedy." *Growe, supra,* at 41, 113 S.Ct., at 1084 (footnote omitted).[8]

Appellees do not defend District 12 by arguing that the district is geographically compact, however. Rather they contend, and a majority of the District Court agreed, 861 F.Supp., at 454–455, n. 50, that once a legislature has a strong basis in evidence for concluding that a § 2 violation exists in the State, it may draw a majority-minority district anywhere, even if the district is in no way coincident with ***917** the compact *Gingles* district, as long as racially polarized voting exists where the district is ultimately drawn. Tr. of Oral Arg. 50–51, 54–56.

We find this position singularly unpersuasive. We do not see how a district so drawn would avoid § 2 liability. If a § 2 violation is proved for a particular area, it flows from the fact that individuals in this area "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b). The vote-dilution injuries suffered by these persons are not remedied by creating a safe majority-black district somewhere else in the State. For example, if a geographically compact, cohesive minority population lives in south-central to southeastern North Carolina, as the Justice Department's objection letter suggested, District 12 that spans the Piedmont Crescent would not address that § 2 violation. The black voters of the south-central to southeastern region would still be suffering precisely the same injury that they suffered before District 12 was drawn. District 12 would not address the professed interest of relieving the vote dilution, much less be narrowly tailored to accomplish the goal.

Arguing, as appellees do and the District Court did, that the State may draw the district anywhere derives from a misconception of the vote-dilution claim. To accept that the district may be placed anywhere implies that the claim, and hence the coordinate right to an undiluted vote (to cast a ballot equal among voters), belongs to the minority as a group and not to its individual members. It does not. See § 1973 ("the right of any citizen").[9]

***918** The United States submits that District 12 does, in fact, incorporate a "substantial portio[n]" of the concentration of

minority voters that would have given rise to a § 2 claim. Brief for United States as *Amicus Curiae* 27. Specifically, the Government claims that "District 12 ... contains the **1907 heavy concentration of African Americans in Mecklenburg County, the same urban component included in the second minority opportunity district in some of the alternative plans." *Ibid.* The portion of District 12 that lies in Mecklenburg County covers not more than 20% of the district. See Exhibit 301 of Plaintiff–Intervenors, Map A, Map 9B. We do not think that this degree of incorporation could mean that District 12 substantially addresses the § 2 violation. We hold, therefore, that District 12 is not narrowly tailored to the State's asserted interest in complying with § 2 of the Voting Rights Act.

For the foregoing reasons, the judgment of the District Court is

Reversed.

Justice STEVENS, with whom Justice GINSBURG and Justice BREYER join as to Parts II–V, dissenting.

As I have explained on prior occasions, I am convinced that the Court's aggressive supervision of state action designed to accommodate the political concerns of historically disadvantaged minority groups is seriously misguided. A majority's attempt to enable the minority to participate more effectively in the process of democratic government should not be viewed with the same hostility that is appropriate for oppressive and exclusionary abuses of political power. See, *e.g., Adarand Constructors, Inc. v. Peña,* 515 U.S. 200, 243–249, 115 S.Ct. 2097, 2120–2123, 132 L.Ed.2d 158 (1995) (sTEVENS, J., dissenting); *Miller v. Johnson,* 515 U.S. 900, 931–933, 115 S.Ct. 2475, 2498–2499, 132 L.Ed.2d 762 (1995) (sTEVENS, J., dissenting); *Shaw v. Reno,* 509 U.S. 630, 634–635, 113 S.Ct. 2816, 2820–2821, 125 L.Ed.2d 511 (1993) *(Shaw I)* (sTEVENS, J., dissenting); *Wygant v. Jackson Bd. of Ed.,* 476 U.S. 267, 316–317, 106 S.Ct. 1842, 1869–1870, 90 L.Ed.2d 260 (1986) (sTEVENS, J., dissenting); *Cousins v. City Council* ***919** *of Chicago,* 466 F.2d 830, 852 (C.A.7 1972) (Stevens, J., dissenting). But even if we accept the Court's refusal to recognize any distinction between two vastly different kinds of situations, we should affirm the judgment of the District Court in this case.

As the Court analyzes the case, it raises three distinct questions: (1) Should North Carolina's decision to create two congressional districts in which a majority of the voters are African–American be subject to strict constitutional scrutiny?; (2) If so, did North Carolina have a compelling interest in creating such districts?; and (3) If so, was the creation of those districts "narrowly tailored" to further the asserted compelling interest? The Court inadequately explains its answer to the first question, and it avoids answering the second because it concludes that its answer to the third disposes of the case. In my estimation, the Court's disposition of all three questions is most unsatisfactory.

After commenting on the majority's treatment of the threshold jurisdictional issue, I shall discuss separately the three questions outlined above. In doing so, I do not mean to imply that I endorse the majority's effort to apply in rigid fashion the strict scrutiny analysis developed for cases of a far different type. I mean only to show that, even on its own terms, the majority's analysis fails to convince.

I

I have explained previously why I believe that the Court has failed to supply a coherent theory of standing to justify its emerging and misguided race-based districting jurisprudence. See *Miller v. Johnson,* 515 U.S., at 929–931, 115 S.Ct., at 2497–2499 (sTEVENS, J., dissenting); *United States v. Hays,* 515 U.S. 737, 750–751, 115 S.Ct. 2431, 2439–2440, 132 L.Ed.2d 635 (1995) (sTEVENS, J., concurring in judgment). The Court's analysis of the standing question in this case is similarly unsatisfactory, and, in my view, reflects the fact that the so-called *Shaw* claim seeks to employ the federal courts to

impose a particular form of electoral process, ***920** rather than to redress any racially discriminatory treatment that the electoral process has imposed. In this instance, therefore, I shall consider the standing question in light of the majority's assertions about the nature of the underlying constitutional challenge.

I begin by noting that this case reveals the *Shaw* claim to be useful less as a tool for ****1908** protecting against racial discrimination than as a means by which state residents may second-guess legislative districting in federal court for partisan ends. The plaintiff-intervenors in this case are Republicans. It is apparent from the record that their real grievance is that they are represented in Congress by Democrats when they would prefer to be represented by members of their own party. They do not suggest that the racial identity of their representatives is a matter of concern, but it is obvious that their political identity is critical. See *Pope v. Blue,* 809 F.Supp. 392 (W.D.N.C.1992).

Significantly, from the outset of the legislative deliberations, the Republican Party did not oppose the creation of more than one majority-minority district. Indeed, several plans proposed by the Republicans in the state legislature provided two such districts. 861 F.Supp. 408, 460 (E.D.N.C.1994). However, now that the State has created a district that is designed to preserve Democratic incumbents, and now that the plaintiff-intervenors' partisan gerrymandering suit has been dismissed for failure to state a claim, these intervenors have joined this racial gerrymandering challenge.

It is plain that these intervenors are using their allegations of impermissibly race-based districting to achieve the same substantive result that their previous, less emotionally charged partisan gerrymandering challenge failed to secure. In light of the amorphous nature of the race discrimination claim recognized in *Shaw I,* it is inevitable that allegations of racial gerrymandering will become a standard means by which unsuccessful majority-race candidates, and their parties, ***921** will seek to obtain judicially what they could not obtain electorally.

Even if the other plaintiffs to this litigation do object to the use of race in the districting process for reasons other than partisan political advantage, the majority fails to explain adequately the nature of their constitutional challenge, or why it should be cognizable under the Equal Protection Clause. Not surprisingly, therefore, the majority's explanation of why these plaintiffs have standing to bring this challenge is unconvincing.

It is important to point out what these plaintiffs do not claim. Counsel for appellees put the matter succinctly when he stated that this case is not *Gomillion v. Lightfoot,* 364 U.S. 339, 81 S.Ct. 125, 5 L.Ed.2d 110 (1960).[1] There, the plaintiffs had been prohibited from voting in municipal elections; here, all voters remain free to select representatives to Congress. Thus, while the plaintiffs purport to be challenging an unconstitutional racial gerrymander, they do not claim that they have been shut out of the electoral process on account of race, or that their voting power has been diluted as a consequence of race-based districting. *Shaw I,* 509 U.S., at 641, 113 S.Ct., at 2823–2824.

What then is the wrong that these plaintiffs have suffered that entitles them to call upon a federal court for redress? In *Shaw I,* the majority construed the plaintiffs' claim to be that the Equal Protection Clause forbids race-based districting designed solely to "separate" voters by race, and that North Carolina's districting process violated the prohibition. *Ibid.* Even if that were the claim before us, these plaintiffs should not have standing to bring it. The record shows that North Carolina's districting plan served to require these plaintiffs to *share* a district with voters of a different race. Thus, the injury that these plaintiffs have suffered, to the extent that there has been injury at all, stems ***922** from the integrative rather than the segregative effects of the State's redistricting plan.

Perhaps cognizant of this incongruity, counsel for plaintiffs asserted a rather more abstract objection to race-based districting at oral argument. He suggested that the plaintiffs objected to the use of race in the districting process not because of any adverse consequence that these plaintiffs, on account of their race, had suffered more than other persons, but rather because the State's failure to obey a constitutional command to legislate in a color-blind manner conveyed a message to voters across the State that ****1909** "there are two black districts and ten white districts."[2] Tr. of Oral Arg. 5.

Such a challenge calls to mind Justice Frankfurter's memorable characterization of the suit brought in *Colegrove v. Green,* 328 U.S. 549, 552, 66 S.Ct. 1198, 1199–1200, 90 L.Ed. 1432 (1946). "This is not an action to recover for damage because of the discriminatory exclusion of a plaintiff from rights enjoyed by other citizens," he explained. "The basis for the suit is not a private wrong, but a wrong suffered by Illinois as a polity." *Ibid.* Suits of this type necessarily press the boundaries of federal-court jurisdiction, if they do not surpass it. When a federal court is called upon, as it is here, to parse among varying legislative choices about the political structure of a State, and when the litigant's claim ultimately rests on "a difference of

opinion as to the function of representative government" rather than a claim of discriminatory exclusion, *Baker v. Carr,* 369 U.S. 186, 333, 82 S.Ct. 691, 772, 7 L.Ed.2d 663 (1962) (Harlan, J., dissenting), there is reason for ***923** pause. Cf. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 573–574, 112 S.Ct. 2130, 2143–2144, 119 L.Ed.2d 351 (1992).[3]

Even if an objection to a State's decision to forgo color-blind districting is cognizable under some constitutional provision, I do not understand why that provision should be the Equal Protection Clause. In *Reynolds v. Sims,* 377 U.S. 533, 561, 84 S.Ct. 1362, 1381, 12 L.Ed.2d 506 (1964), we were careful to point out that "[a] predominant consideration in determining whether a State's legislative apportionment scheme constitutes an invidious discrimination violative of rights asserted under the Equal Protection Clause is that the rights allegedly impaired are individual and personal in nature." In addition, in *Palmer v. Thompson,* 403 U.S. 217, 225, 91 S.Ct. 1940, 1945, 29 L.Ed.2d 438 (1971), we explained that racially motivated legislation violates the Equal Protection Clause only when the challenged legislation "affect[s] blacks differently from whites."

To be sure, as some commentators have noted, we have permitted generalized claims of harm resulting from state-sponsored messages to secure standing under the Establishment Clause. Pildes & Niemi, Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election–District Appearances After *Shaw v. Reno,* 92 Mich. L.Rev. 483, 499–524 (1993). It would be quite strange, however, to confer similarly broad standing under the Equal Protection Clause because that Clause protects against wrongs which by definition burden some persons but not others.

Here, of course, it appears that no individual has been burdened more than any other. The supposedly insidious messages that *Shaw I* contends will follow from extremely irregular ***924** race-based districting will presumably be received in equal measure by *all* state residents. For that reason, the claimed violation of a shared right to a color-blind districting process would not seem to implicate the Equal Protection Clause at all precisely because it rests neither on a challenge to the State's decision to distribute burdens and benefits unequally, nor on a claim that the State's formally equal treatment of its citizens in fact stamps persons of one race with a badge of inferiority. See *Bush v. Vera*, 517 U.S. 952, 1052–1054, 116 S.Ct. 1941, 2001–2002, 135 L.Ed.2d 248 (1996) (SOUTER, j., dissenting).

****1910** Indeed, to the extent that any person has been burdened more than any other by the State's districting plan, geography rather than race would seem to be to blame. The State has not chosen to subject only persons of a particular race to race-based districting. Rather, the State has selected certain geographical regions in which all voters—both white and black—have been assigned to race-based districts. Thus, what distinguishes those residents who have received a "color-blind" districting process from those who have not is geography rather than racial identity. Not surprisingly, therefore, *Shaw I* emphasizes that the race of the members of the plaintiff class is irrelevant. *Shaw I,* 509 U.S., at 641, 113 S.Ct., at 2823–2824.

Given the absence of any showing, or, indeed, any allegation, that any person has been harmed more than any other *on account of race,* the Court's decision to entertain the claim of these plaintiffs would seem to emanate less from the Equal Protection Clause's bar against racial discrimination than from the Court's unarticulated recognition of a new substantive due process right to "color-blind" districting itself. See *id.,* at 641–642, 113 S.Ct., at 2823–2824.[4] Revealed for what it is, the constitutional ***925** claim before us ultimately depends for its success on little more than speculative judicial suppositions about the societal message that is to be gleaned from race-based districting. I know of no workable constitutional principle, however, that can discern whether the message conveyed is a distressing endorsement of racial separatism, or an inspiring call to integrate the political process. As a result, I know of no basis for recognizing the right to color-blind districting that has been asserted here.

Even if there were some merit to the constitutional claim, it is at least clear that it requires the recognition of a new constitutional right. For that very reason, the Court's suggestion that pre-*Shaw,* race discrimination precedent somehow compels the application of strict scrutiny is disingenuous. The fact that our equal protection jurisprudence requires strict scrutiny of a claim that the State has used race as a criterion for imposing burdens on some persons but not others does not mean that the Constitution demands that a similar level of review obtain for a claim that the State has used race to impose equal burdens on the polity as a whole, or upon some nonracially defined portion thereof. As to the latter claim, the State may well deserve more deference when it determines that racial considerations are legitimate in a context that results in no race-based, unequal treatment.

To take but one example, I do not believe that it would make sense to apply strict scrutiny to the Federal Government's decision to require citizens to identify their race on census forms, even though that requirement would force citizens to

classify themselves racially, and even though such a requirement would arguably convey an insidious message about the Government's continuing belief that race remains relevant to the formulation of public policy. Of course, if the Federal Government required only those persons residing in ***926** the Midwest to identify their race on the census form, I do not doubt that only persons living in States in that region who filled out the forms would have standing to bring the constitutional challenge. I do doubt, however, whether our equal protection jurisprudence would require a federal court to evaluate the claim itself under strict scrutiny. In such a case, the only unequal treatment would have resulted from the State's decision to discriminate on the basis of geography, a race-neutral selection criterion that has not generally been thought to necessitate close judicial review.

The majority ignores these concerns and simply applies the standing test set forth in *United States v. Hays,* 515 U.S. 737, 115 S.Ct. 2431, 132 L.Ed.2d 635 (1995), on the ****1911** apparent assumption that this test adequately identifies those who have been personally denied "equal treatment" on account of race. *Id.,* at 745, 115 S.Ct., at 2436. In *Hays,* the Court held that a plaintiff has standing to challenge a State's use of race in districting for *Shaw* claims if he (1) lives in a district that allegedly constitutes a racial gerrymander or (2) shows that, although he resides outside such a district, he has been personally subject to a racial classification. *Ante,* at 1900. On this basis, the Court concludes that none of the plaintiffs in this action has standing to challenge District 1, but that two of them have standing to challenge District 12. *Ibid.*

As I understand it, the distinction drawn in *Hays* between those who live within a district, and those who do not, is thought to be relevant because voters who live in the "gerrymandered" district will have suffered the "personal" injuries inflicted by race-based districting more than other state residents.[5] Those injuries are said to be "representational" harms in the sense that race-based districting may cause officeholders to represent only those of the majority race in ***927** their district, or "stigmatic" harms, in the sense that the race-based line-drawing may promote racial hostility. *United States v. Hays,* 515 U.S., at 744–745, 115 S.Ct., at 2435–2436; *Shaw I,* 509 U.S., at 646–649, 113 S.Ct., at 2826–2828.

Even if I were to accept the flawed assumption that the *Hays* test serves to identify any voter who has been burdened more than any other as a consequence of his race, I would still find it a most puzzling inquiry. What the Court fails to explain, as it failed to explain in *Hays,* is why evidence showing either that one lives in an allegedly racially gerrymandered district or that one's district assignment directly resulted from a racial classification should suffice to distinguish those who have suffered the representational and stigmatic harms that supposedly follow from race-based districting from those who have not.

If representational injuries are what one must show to secure standing under *Hays,* then a demonstration that a voter's race led to his assignment to a particular district would perhaps be relevant to the jurisdictional inquiry, but surely not sufficient to satisfy it. There is no *necessary* correlation between race-based districting assignments and inadequate representation. See *Davis v. Bandemer,* 478 U.S. 109, 132, 106 S.Ct. 2797, 2810, 92 L.Ed.2d 85 (1986) (opinion of White, J.). Indeed, any assumption that such a correlation exists could only be based on a stereotypical assumption about the kind of representation that politicians elected by minority voters are capable of providing. See *Miller v. Johnson,* 515 U.S., at 930, 115 S.Ct., at 2497–2499 (sTEVENS, J., dissenting).

To prove the representational harms that *Hays* holds are needed to establish standing to assert a *Shaw* claim, one would think that plaintiffs should be required to put forth evidence that demonstrates that their political representatives are actually unlikely to provide effective representation to those voters whose interests are not aligned with those of the majority race in their district. Here, as the record reveals, no plaintiff has made such a showing. See ***928** 861 F.Supp., at 424–425, 471, n. 59. Given our general reluctance to hear claims founded on speculative assertions of injury, I do not understand why the majority concludes that the speculative possibility that race-based districting "may" cause these plaintiffs to receive less than complete representation suffices to create a cognizable case or controversy. *United States v. Hays,* 515 U.S., at 745, 115 S.Ct., at 2436.

If under *Hays* the so-called "stigmatic" harms which result from extreme race-based districting suffice to secure standing, then I fail to see why it matters whether the litigants live within the "gerrymandered" district or were placed in a district as a result of their race. As I have pointed out, all voters in North Carolina would seem to be equally affected by the messages of "balkanization" ****1912** or "racial apartheid" that racially gerrymandered maps supposedly convey, cf. *Davis,* 478 U.S., at 153, 106 S.Ct., at 2821 (O'CONNOR, j., concurring in judgment).

Even if race-based districting could be said to impose more personal harms than the so-called "stigmatic" harms that *Hays* itself identified, I do not understand why any voter's reputation or dignity should be *presumed* to have been harmed simply

because he resides in a highly integrated, majority-minority voting district that the legislature has deliberately created. Certainly the background social facts are not such that we should presume that the "stigmatic harm" described in *Hays* and *Shaw I* amounts to that found cognizable under the Equal Protection Clause in *Brown v. Board of Education,* 347 U.S. 483, 495, 74 S.Ct. 686, 692, 98 L.Ed. 873 (1954), where state-sponsored school segregation caused some students, but not others, to be stamped with a badge of inferiority on account of their race. See *Shaw I,* 509 U.S., at 663, n. 4, 113 S.Ct., at 2836, n. 4 (sOUTER, J., dissenting).

In sum, even if it could be assumed that the plaintiffs in this case asserted the personalized injuries recognized in *Hays* at the time of *Shaw I* by virtue of their bare allegations of racial gerrymandering, they have surely failed to prove ***929** the existence of such injuries to the degree that we normally require at this stage of the litigation. See *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). Thus, so long as the Court insists on treating this type of suit as a traditional equal protection claim, it must either mean to take a broader view of the power of federal courts to entertain challenges to race-based governmental action than it has heretofore adopted, see *Allen v. Wright,* 468 U.S. 737, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984); cf. *Palmer,* 403 U.S., at 224–225, 91 S.Ct., at 1944–1945, or to create a special exception to general jurisdictional limitations for plaintiffs such as those before us here. Suffice it to say, I charitably assume the former to be the case, and proceed to consider the merits on the assumption that *Shaw I* was correctly decided.

II

The District Court concluded that *Shaw I* required the application of strict scrutiny in any case containing proof that "racial considerations played a 'substantial' or 'motivating' role in the line-drawing process, even if they were not the only factor that influenced that process." 861 F.Supp., at 431. The court acknowledged that under this standard *any* deliberate effort to draw majority-minority districts in conformity with the Voting Rights Act would attract the strictest constitutional review, regardless of whether race-neutral districting criteria were also considered. *Id.,* at 429. As a consequence, it applied strict scrutiny in this case solely on the basis of North Carolina's concession that it sought to draw two majority-minority districts in order to comply with the Voting Rights Act, and without performing any inquiry into whether North Carolina had considered race-neutral districting criteria in drawing District 12's boundaries.

As the majority concludes, the District Court's test for triggering strict scrutiny set too low a threshold for subjecting a State's districting effort to rigorous, if not fatal, constitutional review. *Ante,* at 1900. In my view, therefore, the Court should at the very least remand the case to allow ***930** the District Court, which possesses an obvious familiarity with the record and a superior understanding of local dynamics,[6] to make the fact-intensive inquiry into legislative purpose that the proper test for triggering strict scrutiny requires. Although I do not share the majority's willingness to divine on my own the degree to which race determined the precise contours of District 12, if forced to decide the matter on this record, I would reject the majority's conclusion that a fair application of precedent dictates that North Carolina's redistricting effort should be subject to strict scrutiny.

Subsequent to the District Court's decision, we handed down ****1913** *Miller v. Johnson,* 515 U.S. 900, 115 S.Ct. 2475, 132 L.Ed.2d 762 (1995), and issued our summary affirmance in *DeWitt v. Wilson,* 515 U.S. 1170, 115 S.Ct. 2637, 132 L.Ed.2d 876 (1995). As I understand the *Miller* test, and as it was applied in *DeWitt,* state legislatures may take racial and ethnic characteristics of voters into account when they are drawing district boundaries without triggering strict scrutiny so long as race is not the "predominant" consideration guiding their deliberations. *Miller v. Johnson,* 515 U.S., at 916, 115 S.Ct., at 2488. To show that race has been "predominant," a plaintiff must show that "the legislature subordinated traditional race-neutral districting principles ... to racial considerations" in drawing that district. *Ibid.;* see also *id.,* at 928, 115 S.Ct., at 2497 (o'CONNOR, J., concurring) ("To invoke strict scrutiny, a plaintiff must show that the State has relied on race in substantial disregard of customary and traditional districting practices"); *DeWitt v. Wilson,* 856 F.Supp. 1409, 1412 (E.D.Cal.1994), aff'd. in part, dism'd in part, 515 U.S. 1170, 115 S.Ct. 2637, 132 L.Ed.2d 876 (1995) (declining to apply strict scrutiny because State complied with traditional districting principles).

***931** Indeed, the principal opinion in *Bush v. Vera*, 517 U.S. 952, 116 S.Ct. 1941, 135 L.Ed.2d 248, issued this same day, makes clear that the deliberate consideration of race in drawing district lines does not in and of itself invite constitutional suspicion. As the opinion there explains, our precedents do not require the application of strict scrutiny "to all cases of intentional creation of majority-minority districts." *Bush,* at 958, 116 S.Ct., at 1951. Rather, strict scrutiny should apply only upon a demonstration that " 'race for its own sake, and not other districting principles, was the legislature's dominant and controlling rationale in drawing its district lines.' " *Ibid.* (quoting *Miller,* 515 U.S., at 913, 115 S.Ct., at 2486).

Because "the legitimate consideration of race in a districting decision is usually inevitable under the Voting Rights Act when communities are racially mixed," *Shaw I,* 509 U.S., at 683, 113 S.Ct., at 2847 (sOUTER, J., dissenting), our decisions in *Miller, DeWitt,* and *Bush* have quite properly declined to deem all race-based districting subject to strict scrutiny. Unlike many situations in which the consideration of race itself necessarily gives rise to constitutional suspicion, see, *e.g., Batson v. Kentucky,* 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986); *Adarand Constructors, Inc. v. Peña,* 515 U.S. 200, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995), our precedents have sensibly recognized that in the context of redistricting a plaintiff must demonstrate that race had been used in a particularly determinative manner before strict constitutional scrutiny should obtain. Cf. *Regents of Univ. of Cal. v. Bakke,* 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978). This higher threshold for triggering strict scrutiny comports with the fact that the shared representational and stigmatic harms that *Shaw* purports to guard against are likely to occur only when the State subordinates race-neutral districting principles to a racial goal. See *Shaw I,* 509 U.S., at 646–649, 113 S.Ct., at 2826–2828; 861 F.Supp., at 476–478 (Voorhees, C. J., dissenting); Pildes & Niemi, 92 Mich. L.Rev., at 499–524.

Shaw I is entirely consistent with our holdings that race-based districting which respects traditional districting principles ***932** does not give rise to constitutional suspicion. As the District Court noted, *Shaw I* expressly reserved the question whether " 'the intentional creation of majority-minority districts, without more,' always gives rise to an equal protection claim." 861 F.Supp., at 429 (quoting *Shaw I,* 509 U.S., at 649, 113 S.Ct., at 2828). *Shaw I* held only that an equal protection claim could lie as a result of allegations suggesting that the State's districting was "so extremely irregular on its face that it rationally can be viewed only as an effort to segregate the races for purposes of voting, *without regard for traditional districting principles*." *Id.,* at 642, 113 S.Ct., at 2824 (emphasis added).

Moreover, *Miller* belies the conclusion that strict scrutiny must apply to all deliberate attempts to draw majority-minority districts if the Equal Protection Clause is to provide any practical limitation on a State's power to engage in race-based districting. Although ****1914** Georgia argued that it had complied with traditional districting principles, the *Miller* majority had little difficulty concluding that the State's race-neutral explanations were implausible. *Miller v. Johnson,* 515 U.S. 900, 115 S.Ct. 2475, 132 L.Ed.2d 762 (1995).[7] Thus, *Miller* demonstrates that although States may avoid strict scrutiny by complying with traditional districting principles, they may not do so by proffering pretextual, race-neutral explanations for their maps.

The notion that conscientious federal judges will be able to distinguish race-neutral explanations from pretextual ones is hardly foreign to our race discrimination jurisprudence. In a variety of contexts, from employment to juror selection, we have required plaintiffs to demonstrate not only that a ***933** defendant's action could be understood as impermissibly racebased, but also that the defendant's assertedly race-neutral explanation for that action was in fact a pretext for racial discrimination. *Purkett v. Elem,* 514 U.S. 765, 767–768, 115 S.Ct. 1769, 1770–1771, 131 L.Ed.2d 834 (1995); *St. Mary's Honor Center v. Hicks,* 509 U.S. 502, 518–519, 113 S.Ct. 2742, 2753–2754, 125 L.Ed.2d 407 (1993). Similarly, I understand *Shaw I, Miller, DeWitt,* and *Bush* to require plaintiffs to prove that the State did not respect traditional districting principles in drawing majority-minority districts. See *Bush,* at 958, 116 S.Ct., at 1951.

In holding that the present record shows race to have been the "predominant" consideration in the creation of District 12, the Court relies on two pieces of evidence: the State's admission that its "overriding" purpose was to " 'create two congressional districts with effective black voting majorities,' " *ante,* at 1900–1901; and the " 'geographically noncompact' " shape of District 12, *ante,* at 1901. In my view, this evidence does not suffice to trigger strict scrutiny under the "demanding" test that *Miller* establishes. *Miller v. Johnson,* 515 U.S., at 928, 115 S.Ct., at 2497 (o'CONNOR, J., concurring).[8]

North Carolina's admission reveals that it intended to create a second majority-minority district.[9] That says nothing ***934** about whether it subordinated traditional districting principles in drawing District 12. States that conclude that federal law requires majority-minority districts have little choice but to give "overriding" weight to that concern. Indeed, in *Voinovich v. Quilter,* 507 U.S. 146, 159, 113 S.Ct. 1149, 1158, 122 L.Ed.2d 500 (1993), we explained that evidence that showed that

Ohio's chief mapmaker preferred "federal over state law when he believed the two in conflict does not raise an inference of intentional discrimination; it demonstrates obedience to the Supremacy Clause of the United States Constitution." For that reason, we have not previously held that concessions such as North Carolina's suffice to trigger strict scrutiny. Cf. ****1915** *Bush,* at 958, 962, 116 S.Ct., at 1951, 1953.[10] Thus, the State's concession is of little significance.

District 12's noncompact appearance also fails to show that North Carolina engaged in suspect race-based districting. There is no federal statutory or constitutional requirement that state electoral boundaries conform to any particular ideal of geographic compactness. In addition, although the North Carolina Constitution requires electoral districts for state elective office to be *contiguous,* it does not require them to be geographically *compact.*[11] ***935** N.C. Const., Art. II, §§ 2, 5 (1984). Given that numerous States have written geographical compactness requirements into their State Constitutions, North Carolina's omission on this score is noteworthy. See Grofman, Criteria for Districting: A Social Science Perspective, 33 UCLA L.Rev. 77, 84 (1985). It reveals that North Carolina's creation of a geographically noncompact district does not itself mark a deviation from any prevailing state districting principle.[12] Thus, while the serpentine character of District 12 may give rise to an *inference* that traditional districting principles were subordinated to race in determining its boundaries, it cannot fairly be said to *prove* that conclusion in light of the clear evidence demonstrating race-neutral explanations for the district's tortured shape. See *infra,* at 1915–1916.

There is a more fundamental flaw in the majority's conclusion that racial concerns predominantly explain the creation of District 12. The evidence of shape and intent relied on by the majority cannot overcome the basic fact that North Carolina did not have to draw Districts 1 and 12 in order to comply with the Justice Department's finding that federal law required the creation of two majority-minority districts. That goal could have been more straightforwardly ***936** accomplished by simply adopting the Attorney General's recommendation to draw a geographically compact district in the southeastern portion of the State in addition to the majority-minority district that had already been drawn in the northeastern and Piedmont regions. See *Shaw I,* 509 U.S., at 634–635, 113 S.Ct., at 2820–2821, 861 F.Supp., at 460, 461–462, 464.

That the legislature chose to draw Districts 1 and 12 instead surely suggests that something more than the desire to create a majority-minority district took precedence. For that reason, this case would seem to present a version of the very hypothetical that the principal opinion in *Bush* suggests should pose no constitutional problem—"an otherwise compact majority-minority district that is misshapen by predominantly nonracial, political manipulation." *Bush,* at 981, 116 S.Ct., at 1962.

****1916** Here, no evidence suggests that race played any role in the legislature's decision to choose the winding contours of District 12 over the more cartographically pleasant boundaries proposed by the Attorney General.[13] Rather, the record ***937** reveals that two race-neutral, traditional districting criteria determined District 12's shape: the interest in ensuring that incumbents would remain residents of the districts they have previously represented; and the interest in placing predominantly rural voters in one district and predominantly urban voters in another. 861 F.Supp., at 466–472; see also *Miller v. Johnson,* 515 U.S. 900, 115 S.Ct. 2475, 132 L.Ed.2d 762 (1995) (considering whether communities of interest were preserved); *White v. Weiser,* 412 U.S. 783, 793–797, 93 S.Ct. 2348, 2353–56, 37 L.Ed.2d 335 (1973) (establishing incumbency protection as a legitimate districting principle).

Unlike most States, North Carolina has not given its chief executive any power to veto enactments of its legislature. Thus, even though the voters had elected a Republican Governor, the Democratic majority in the legislature was in control of the districting process. It was the Democrats who first decided to adopt the 11–white–district plan that arguably would have violated § 2 of the Voting Rights Act and gave rise to the Attorney General's objection under § 5. It was also the Democrats who rejected Republican Party maps that contained two majority-minority districts because they created too many districts in which a majority of the residents were registered Republicans. 861 F.Supp., at 460.

If race rather than incumbency protection had been the dominant consideration, it seems highly unlikely that the Democrats would have drawn this bizarre district rather than accepting more compact options that were clearly available. If race, rather than politics, had been the "predominant" consideration for the Democrats, they could have accepted the Republican Plan, thereby satisfying the Attorney General and avoiding any significant risk of liability as well as the attack mounted by the plaintiffs in this case. Instead, as the detailed findings of the District Court demonstrate, the legislature deliberately crafted a districting plan that ***938** would accommodate the needs of Democratic incumbents. *Id.,* at 466–467.[14]

If the Democrats remain in control of the districting process after the remand in this case, it will be interesting to see whether they will be willing to sacrifice one or more Democratic-majority districts in order to create at least two districts with

effective minority voting majorities. My review of the history revealed in the findings of the District Court persuades me that political considerations will probably take priority over racial considerations in the immediate future, just as they surely did during the process of rejecting the Republican Plan and ultimately adopting the plan challenged in this case.[15]

**1917 A deliberate effort to consolidate urban voters in one district and rural voters in another also explains District 12's highly irregular shape. Before District 12 had been drawn, members of the public as well as legislators had urged that "the observance of distinctive urban and rural communities of interest should be a prime consideration in the general redistricting process." *Id.,* at 466. As a result, the legislature was naturally attracted to a plan that, although less than esthetically pleasing, included both District 12, which links the State's major urban centers, and District 1, which has a population that predominantly lives in cities with populations of less than 20,000. *Id.,* at 467.

*939 Moreover, the record reveals that District 12's lines were drawn in order to unite an African–American community whose political tradition was quite distinct from the one that defines African–American voters in the Coastal Plain, which District 1 surrounds. *Ibid.* Indeed, two other majority-minority-district plans with less torturous boundaries were thought unsatisfactory precisely because they did not unite communities of interest. 861 F.Supp., at 465–466; Tr. 481. Significantly, the irregular contours of District 12 track the State's main interstate highway and are located entirely within the culturally distinct Piedmont Crescent region. 861 F.Supp., at 466. Clearly, then, District 12 was drawn around a community "defined by actual shared interests" rather than racial demography. *Miller v. Johnson,* 515 U.S., at 916, 115 S.Ct., at 2488; see also *Shaw I,* 509 U.S., at 647–648, 113 S.Ct., at 2826–2827; *DeWitt v. Wilson,* 856 F.Supp., at 1412, 1413–1414 (recognizing that districts were "functionally" compact because they surrounded "communit[ies] of interest").

In light of the majority's decision not to remand for proper application of the *Miller* test, I do not understand how it can condemn the drawing of District 12 given these two race-neutral justifications for its shape. To be sure, in choosing a district that snakes rather than sits, North Carolina did not put a premium on geographical compactness. But I do not understand why that should matter in light of the evidence that shows that other race-neutral districting considerations were determinative.[16]

*940 III

As the foregoing discussion illustrates, legislative decisions are often the product of compromise and mixed motives. For that reason, I have always been skeptical about the value of motivational analysis as a basis for constitutional adjudication. See, *e.g., Washington v. Davis,* 426 U.S. 229, 253–254, 96 S.Ct. 2040, 2054, 48 L.Ed.2d 597 (1976) (sTEVENS, J., concurring). I am particularly skeptical of such an inquiry in a case of this type, as mixed motivations would seem to be endemic to the endeavor of political districting. See, *e.g, Bush,* at 959, 116 S.Ct., at 1952 ("The present suit is a mixed motive case").

The majority's analysis of the "compelling interest" issue nicely demonstrates the problem with parsing legislative motive in this context. The majority posits that the legislature's compelling interest in drawing District 12 was its desire to avoid liability under § 2 of the Voting Rights Act. Yet it addresses the question whether North Carolina had a **1918 compelling interest only because it first concludes that a racial purpose dominated the State's districting effort.

It seems to me that if the State's true purpose were to serve its compelling interest in staving off costly litigation by complying with federal law, then it cannot be correct to say that a racially discriminatory purpose *controlled* its line-drawing. A more accurate conclusion would be that the State took race into account only to the extent necessary to meet the requirements of a carefully thought out federal statute. See *Voinovich v. Quilter,* 507 U.S., at 159, 113 S.Ct., at 1158. The majority's implicit equation of the intentional consideration *941 of race in order to comply with the Voting Rights Act with intentional racial discrimination reveals the inadequacy of the framework it adopts for considering the constitutionality of race-based districting.

However, even if I were to assume that strict scrutiny applies, and thus that it makes sense to consider the question, I would not share the majority's hesitancy in concluding that North Carolina had a "compelling interest" in drawing District 12. In my

view, the record identifies not merely one, but at least three acceptable reasons that may have motivated legislators to favor the creation of two such districts. Those three reasons easily satisfy the judicially created requirement that the state legislature's decision be supported by a "compelling state interest," particularly in a case in which the alleged injury to the disadvantaged class—*i.e.,* the majority of voters who are white—is so tenuous.

First, some legislators felt that the sorry history of race relations in North Carolina in past decades was a sufficient reason for making it easier for more black leaders to participate in the legislative process and to represent the State in the Congress of the United States. 861 F.Supp., at 462–463. Even if that history does not provide the kind of precise guidance that will justify certain specific affirmative-action programs in particular industries, see *ante,* at 1902–1903, it surely provides an adequate basis for a decision to facilitate the election of representatives of the previously disadvantaged minority.

As a class, state legislators are far more likely to be familiar with the role that race plays in electoral politics than they are with the role that it plays in hiring decisions within discrete industries. Moreover, given the North Carolina Legislature's own recent experience with voting rights litigation, see *Thornburg v. Gingles,* 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986), as well as the fact that 40 of the State's districts are so-called covered jurisdictions which the Attorney General directly monitors ***942** as a result of prior discriminatory practices, see 42 U.S.C. § 1973c (1988 ed.), there is less reason to assume that the state legislative judgments under review here are based on unwarranted generalizations than may be true in other contexts. Thus, even if a desire to correct past discrimination did not itself drive the legislative decision to draw two majority-minority districts, it plainly constituted a legitimate and significant additional factor supporting the decision to do so. 861 F.Supp., at 472–473.

Second, regardless of whether § 5 of the Act was actually violated, I believe the State's interest in avoiding the litigation that would have been necessary to overcome the Attorney General's objection to the original plan provides an acceptable reason for creating a second majority-minority district. It is entirely proper for a State whose past practices have subjected it to the preclearance obligation set forth in § 5 to presume that the Attorney General's construction of the Act is correct, and to take corrective action rather than challenging him[17] in Court.

Moreover, even if the State's interest in avoiding a court challenge that might have succeeded does not constitute a sufficient justification for its decision to draw a majority-minority district, the State plainly had an interest in complying with a finding by the Attorney General that it reasonably believed could not have been successfully challenged in court. The majority disagrees, relying on our analysis in *Miller v. Johnson,* 515 U.S., at 920–925, 115 S.Ct., at 2490–2493. That reliance is misplaced.

****1919** In *Miller,* the Court concluded that Georgia had simply acceded to the Attorney General's unreasonable construction of § 5 without performing any independent assessment ***943** of its validity. *Ibid.* By contrast, the District Court here found as a factual matter that the legislature's independent assessment of the reasons for the Attorney General's denial of preclearance led it to the reasonable conclusion that its 11–white district plan would violate the purpose prong of § 5. 861 F.Supp., at 474. As a result, I do not accept the Court's conclusion that it was unreasonable for the State to believe that its decision to draw 1 majority-minority district out of 12 would have been subject to a successful attack under the purpose prong of § 5. *Ante,* at 1903–1905.

I acknowledge that when North Carolina sought preclearance it asserted nondiscriminatory reasons for deciding not to draw a second majority-minority district. See 861 F.Supp., at 480, n. 9 (Vorhees, C. J., dissenting). On careful reflection, however, the legislature concluded that those reasons would not likely suffice in a federal action to challenge the Attorney General's ruling. The District Court found that conclusion to be reasonable. *Id.,* at 474. I am mystified as to why this finding does not deserve our acceptance. Nor do I understand the Court's willingness to credit the State's declarations of nondiscriminatory purpose in this context, *ante,* at 1903–1904, in light of its unwillingness to accept any of North Carolina's race-neutral explanations for its decision to draw District 12, *ante,* at 1900–1901.

Third, regardless of the possible outcome of litigation alleging that § 2 of the Voting Rights Act would be violated by a plan that ensured the election of white legislators in 11 of the State's 12 congressional districts, the interest in avoiding the expense and unpleasantness of such litigation was certainly legitimate and substantial. That the legislature reasonably feared the possibility of a successful § 2 challenge cannot be credibly denied.[18]

***944** In the course of the redistricting debate, numerous maps had been presented showing that blacks could constitute more

than 50 percent of the population in two districts. 861 F.Supp., at 460–461, 474. The District Court found that these plans had demonstrated that "the state's African–American population was sufficiently large and geographically compact to constitute a majority in two congressional districts." *Id.,* at 464.

Moreover, the Attorney General denied preclearance on the ground that North Carolina could have created a second majority-minority district that *was,* under any reasonable standard, geographically compact. *Id.,* at 461–462; *Shaw I,* 509 U.S., at 635, 113 S.Ct., at 2820. Maps prepared by the plaintiff-intervenors for this litigation conclusively demonstrate that two compact, majority-minority districts could indeed have been drawn. 861 F.Supp., at 464–465; Plaintiff–Intervenors' Exh. 301, A2–A3.

Even if many of the maps proposing two majority-African-American districts were not particularly compact, the legislature reasonably concluded that a federal court might have determined that some of them could have provided the basis for a viable vote dilution suit pursuant to *Thornburg v. Gingles,* 478 U.S., at 50–51, 106 S.Ct., at 2766–2767. 861 F.Supp., at 474. That conclusion is particularly reasonable in light of the fact that *Gingles* was a case fresh in the minds of many of North Carolina's state legislators, *id.,* at 463. There, the State challenged the plaintiffs' § 2 claim by pointing to the oddly configured lines that defined their proposed majority-minority districts. See *Gingles v. Edmisten,* 590 F.Supp. 345, 373 (E.D.N.C.1984). As we know, North Carolina's defense to § 2 liability proved unsuccessful in that instance, even though the District Court acknowledged that the "single-member district specifically suggested by the plaintiffs ***945 **1920** as a viable one is obviously not a model of aesthetic tidiness." *Id.,* at 374.[19]

Finally, even if the record shows that African–American voters would not have composed more than 50 percent of the population in any plan containing two compact, majority-minority districts, the record reveals that it would have been possible to have drawn a map containing one compact district in which African–Americans would have composed more than 50 percent of the population and another compact district in which African–Americans, by reason of the large presence of Native Americans, would have by far constituted the largest racial group. Plaintiff–Intervenors' Exh. 301, A2–A3. Given our recent emphasis on considering the totality of the circumstances in § 2 cases, we are in no position to rebuke a State for concluding that a 40–plus percent African–American district could provide a defense to a viable *Gingles* challenge as surely as could one with a 50.1 percent African–American population. See *Johnson v. De Grandy,* 512 U.S. 997, 1009–1012, 114 S.Ct. 2647, 2656–2658, 129 L.Ed.2d 775 (1994); *Voinovich v. Quilter,* 507 U.S. 146, 113 S.Ct. 1149, 122 L.Ed.2d 500 (1993); *Rural West Tennessee African–American Affairs Council, Inc. v. McWherter,* 877 F.Supp. 1096 (W.D.Tenn.), aff'd, 516 U.S. 801, 116 S.Ct. 42, 133 L.Ed.2d 9 (1995).[20]

***946** IV

Although the Court assumes that North Carolina had a compelling interest in "avoiding liability" under § 2, *ante,* at 1905, it avoids conclusively resolving that question because it holds that District 12 was not a "narrowly tailored" means of achieving that end. The majority reaches this conclusion by determining that District 12 did not "remedy" any potential violation of § 2 that may have occurred. *Ibid.*

In my judgment, if a State's new plan successfully avoids the potential litigation entirely, there is no reason why it must also take the form of a "remedy" for an unproven violation. Thus, the fact that no § 2 violation has been proved in the territory that constitutes District 12 does not show that the district fails to serve a compelling state interest. It shows only that a federal court, which is constrained by Article III, would not have had the power to *require* North Carolina to draw that district. It is axiomatic that a State should have more authority to institute a districting plan than would a federal court. *Voinovich v. Quilter,* 507 U.S., at 156–157, 113 S.Ct., at 1156–1157.

That District 12 will protect North Carolina from liability seems clear. The record gives no indication that any of the potential § 2 claimants is interested in challenging the plan that contains District 12. Moreover, as a legal matter, North Carolina is in a stronger position to defend against a § 2 lawsuit with District 12 than without it.

Johnson v. De Grandy expressly states that, at least in the context of single-member districting plans, a plaintiff cannot make out a prima facie case of vote dilution under § 2 unless he can demonstrate that his proposed map contains *more* majority-minority districts than the State's. 512 U.S., at 1008, 114 S.Ct., at 2655. By creating a plan with two majority-minority districts ***947** here, the State would seem to have precluded potential litigants from satisfying that precondition.[21]

****1921** In addition, satisfaction of the so-called *Gingles* preconditions does not entitle an individual minority voter to inclusion in a majority-minority district. A court may conclude that a State must create such a district only after it considers the totality of the circumstances. A court would be remiss if it failed to take into account that the State had drawn majority-minority districts proportional to its minority population which include portions of the very minority community in which an individual minority plaintiff resides. Indeed, our recent decisions compel courts to perform just such a calculus. See *Johnson v. De Grandy,* 512 U.S., at 1012–1016, 114 S.Ct., at 2657–2659; *Voinovich v. Quilter,* 507 U.S. 146, 113 S.Ct. 1149, 122 L.Ed.2d 500 (1993); see also *African American Voting Rights Legal Defense Fund, Inc. v. Villa,* 54 F.3d 1345, 1355–1357 (C.A.8 1995).

***948** Finally, North Carolina's chosen means of avoiding liability will impose none of the burdens on third parties that have made the Court wary of voluntary, race-based state action in the past. No white employees or applicants stand to lose jobs on account of their race as a result of North Carolina's actions. In fact, no white voters risk having their votes unlawfully diluted. At most, North Carolina's chosen means will require that some people of both races will be placed in districts other than those to which they would have otherwise been assigned. Even assuming that "burden" is more onerous when it results from racial considerations, it does not rise to a level of injury that justifies a federal court intruding on the State's discretion to formulate a plan that complies with the Voting Rights Act.

In fact, to the extent that plaintiffs in these cases premise their standing on the "representational" harms that they suffer, see *supra,* at 1911–1912, a State's decision to locate a majority-minority district outside the area that suffers from acute, racial bloc voting would seem to diminish the likelihood that representatives in majority-minority districts will serve only the interests of minority voters. After all, a representative of a majority-minority district that does not suffer from racial bloc voting cannot safely ignore the interests of voters of either race. In this respect, the majority's narrow tailoring requirement, by forcing States to remedy perceived § 2 violations only by drawing the district around the area in which the *Gingles* preconditions have been satisfied, has the perverse consequence of requiring States to inflict the very harm that supposedly renders racial gerrymandering challenges constitutionally cognizable.[22]

***949** Although I do not believe a judicial inquiry into "narrow tailoring" is either necessary or appropriate in these cases, the foregoing discussion reveals that the "narrow tailoring" requirement that the Court has fashioned is a pure judicial invention that unfairly deprives the legislature of a sovereign State of its traditional discretion in determining ****1922** the boundaries of its electoral districts.[23] The Court's analysis gives rise to the unfortunate suggestion that a State that fears a § 2 lawsuit must draw the precise district that it believes a federal court would have the power to impose. Such a proposition confounds basic principles of federalism, and forces States to imagine the legally "correct" outcome of a lawsuit that has not even been filed.

The proposition is also at odds with the course of the litigation that led to *Gingles* itself. In that case, the plaintiffs proposed a number of oddly configured majority-minority districts to prove their vote dilution claim. In implementing a remedy for the § 2 violation, the federal court wisely permitted North Carolina to propose its own remedial districts, many of which were highly irregular in dimension. Indeed, so peculiar were some of the shapes concocted by the State that the *Gingles* plaintiffs challenged them on the grounds that they constituted racial gerrymanders which failed to remedy the very violations that had given rise to the need for their creation, and that they reflected only grudging responses designed to protect incumbent officeholders. *Gingles v. Edmisten,* 590 F.Supp., at 381.

Although the District Court in *Gingles* acknowledged that the State's plan was not the one that it would have implemented, it nonetheless concluded that the plan constituted a reasonable exercise of state legislative judgment. "[A] state legislature's primary jurisdiction for legislative apportionmentand ***950** redistricting must include the right, free of judicial rejection, to implement state policies that may fail to remedy to the fullest extent possible the voting rights violations originally found." *Id.,* at 382.

In dramatic contrast, the Court today rejects North Carolina's plan because it does not provide the precise remedy that might

have been ordered by a federal court, even though it satisfies potential plaintiffs, furthers such race-neutral legislative ends as incumbency protection and the preservation of distinct communities of interest, and essentially serves to insulate the State from a successful statutory challenge. There is no small irony in the fact that the Court's decision to intrude into the State's districting process comes in response to a lawsuit brought on behalf of white voters who have suffered no history of exclusion from North Carolina's political process, and whose only claims of harm are at best rooted in speculative and stereotypical assumptions about the kind of representation they are likely to receive from the candidates that their neighbors have chosen.

V

It is, of course, irrelevant whether we, as judges, deem it wise policy to create majority-minority districts as a means of assuring fair and effective representation to minority voters. We have a duty to respect Congress' considered judgment that such a policy may serve to effectuate the ends of the constitutional Amendment that it is charged with enforcing. We should also respect North Carolina's conscientious effort to conform to that congressional determination. Absent some demonstration that voters are being denied fair and effective representation as a result of their race, I find no basis for this Court's intervention into a process by which federal and state actors, both black and white, are jointly attempting to resolve difficult questions of politics and race that have long plagued North Carolina. Nor do I see how our constitutional tradition can ***951** countenance the suggestion that a State may draw unsightly lines to favor farmers or city dwellers, but not to create districts that benefit the very group whose history inspired the Amendment that the Voting Rights Act was designed to implement.

Because I have no hesitation in concluding that North Carolina's decision to adopt a plan in which white voters were in the majority in only 10 of the State's 12 districts did not violate the Equal Protection Clause, I respectfully dissent.

****1923** Justice SOUTER, with whom Justice GINSBURG and Justice BREYER join, dissenting.

My views on this case are substantially expressed in my dissent to *Bush v. Vera*, at 952, 116 S.Ct., at 1997.

All Citations

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Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

1 The complaint also named the Attorney General of the United States and the Assistant Attorney General for the Civil Rights Division as defendants. The District Court granted the federal officials' motion to dismiss, *Shaw v. Barr,* 808 F.Supp. 461 (E.D.N.C.1992).

2 Justice STEVENS would dismiss the complaint for a lack of standing. *Post,* at 1908–1909. Here, as in other places in his dissent, Justice STEVENS' disagreement is more with the Court's prior decisions in *Shaw I,* 509 U.S. 630, 113 S.Ct. 2816, 125 L.Ed.2d 511 (1993), *United States v. Hays,* 515 U.S. 737, 115 S.Ct. 2431, 132 L.Ed.2d 635 (1995), and *Miller v. Johnson,* 515 U.S. 900,

115 S.Ct. 2475, 132 L.Ed.2d 762 (1995), than with this decision. Justice STEVENS challenged the Court's standing analysis and its finding of cognizable injury in both *Hays, supra,* at 751, 115 S.Ct., at 2440 (sTEVENS, J., concurring in judgment), and *Miller, supra,* at 929–931, 115 S.Ct., at 2497–2498 (sTEVENS, J., dissenting), and both Justice White and Justice SOUTER advanced many of the same arguments in *Shaw I.* See *Shaw I,* 509 U.S., at 659–674, 113 S.Ct., at 2834–2842 (White, J., dissenting); *id.,* at 680–687, and n. 9, 113 S.Ct., at 2848–2849, and n. 9 (sOUTER, J., dissenting). Their position has been repeatedly rejected by the Court. See *id.,* at 644–652, 113 S.Ct., at 2825–2830, *Miller, supra,* at 909, 115 S.Ct., at 2485, and *Hays, supra,* at 744–745, 115 S.Ct., at 2436.

[3] Justice STEVENS in dissent incorrectly reads *Miller* as demonstrating that "although States may avoid strict scrutiny by complying with traditional districting principles, they may not do so by proffering pretextual, race-neutral explanations." *Post,* at 1914. *Miller* plainly states that although "compliance with 'traditional districting principles such as compactness, contiguity, and respect for political subdivisions' may well suffice to refute a claim of racial gerrymandering," a State cannot make such a refutation where "those factors *were subordinated to racial objectives.*" *Miller,* 515 U.S., at 919, 115 S.Ct., at 2489 (citation omitted) (emphasis added).

[4] Justice STEVENS in dissent discerns three reasons that he believes "may have motivated" the legislators to favor the creation of the two minority districts and that he believes together amount to a compelling state interest. *Post,* at 1918. As we explain below, a racial classification cannot withstand strict scrutiny based upon speculation about what "may have motivated" the legislature. To be a compelling interest, the State must show that the alleged objective was the legislature's "actual purpose" for the discriminatory classification, see *Mississippi Univ. for Women v. Hogan,* 458 U.S. 718, 730, and n. 16, 102 S.Ct. 3331, 3339, and n. 16, 73 L.Ed.2d 1090 (1982), and the legislature must have had a strong basis in evidence to support that justification before it implements the classification. See *infra,* at 1903. Even if the proper factual basis existed, we believe that the three reasons Justice STEVENS proffers, separately or combined, would not amount to a compelling interest. First, the dissent seems to acknowledge that its initial reason—the "sorry history of race relations in North Carolina," *post,* at 1918—did not itself drive the decision to create the minority districts, presumably for the reasons we discuss *infra,* at 1903. The dissent contends next that an "acceptable reason for creating a second majority-minority district" was the "State's interest in avoiding the litigation that would have been necessary to overcome the Attorney General's objection" under § 5. *Post,* at 1918. If this were true, however, *Miller v. Johnson* would have been wrongly decided because there the Court rejected the contention that complying with the Justice Department's preclearance objection could be a compelling interest. *Miller, supra,* at 921–922, 115 S.Ct., at 2491. It necessarily follows that avoiding the litigation required to overcome the Department's objection could not be a compelling interest. The dissent's final reason—"the interest in avoiding the expense and unpleasantness of [§ 2] litigation" "regardless of the possible outcome of [that] litigation," *post,* at 1919—sweeps too broadly. We assume, *arguendo,* that a State may have a compelling interest in complying with the properly interpreted Voting Rights Act. *Infra,* at 1913. But a State must also have a "strong basis in evidence," see *Shaw I,* 509 U.S., at 656, 113 S.Ct., at 2832 (quoting *Richmond v. J.A. Croson Co.,* 488 U.S. 469, 500, 109 S.Ct. 706, 725, 102 L.Ed.2d 854 (1989)), for believing that it is violating the Act. It has no such interest in avoiding meritless lawsuits.

[5] For examples of this limitation in application see *Wygant,* 476 U.S., at 274–276, 106 S.Ct., at 1847–1848 (where a plurality of the Court concluded that remedying societal discrimination and promoting role models for students was not a compelling interest); *Richmond v. J.A. Croson Co., supra,* 488 U.S., at 498–506, 109 S.Ct., at 723–728.

[6] The United States attempts to distinguish this suit from *Miller* by relying on the District Court's finding that North Carolina conducted "its own independent reassessment" of Chapter 601 and found "the Department's objection was legally and factually supportable." Brief for United States as *Amicus Curiae* 25; 861 F.Supp. 408, 474 (1994) (case below). The "reassessment" was the legislature's determination that it may be susceptible to a § 2 challenge. *Id.,* at 464–465. Even if the General Assembly properly reached that conclusion, we doubt that a showing of discriminatory effect under § 2, alone, could support a claim of discriminatory purpose under § 5. Even if discriminatory purpose could be shown, the means of avoiding such a violation could be race neutral, and so we also doubt that the prospect of violating the purpose prong of § 5 could justify a race-based redistricting plan such as the one implemented by North Carolina.

[7] We do not suggest that where the governmental interest is eradicating the effects of past discrimination the race-based action necessarily would have to achieve fully its task to be narrowly tailored.

[8] Justice STEVENS in dissent argues that it does not matter that District 12 could not possibly remedy a § 2 violation because he believes the State's plan would avoid § 2 liability. *Post,* at 1920–1921. As support, Justice STEVENS relies on our decision in *Johnson v. De Grandy,* 512 U.S. 997, 114 S.Ct. 2647, 129 L.Ed.2d 775 (1994), which he reads to say that "a plaintiff cannot make out a prima facie case of vote dilution under § 2 unless he can demonstrate that his proposed plan contains *more* majority-minority districts than the State's." *Post,* p. 1920 (citing *De Grandy, supra,* at 1008, 114 S.Ct., at 2655). The dissent's reading is flawed by its omission. In *De Grandy,* we presumed that the minority districts drawn in the State's plan were lawfully drawn and, indeed, we expressly stated that a vote dilution claim under § 2 "requires the possibility of creating more *than the existing number of reasonably compact districts* with a sufficiently large minority population to elect candidates of its choice." *De Grandy, supra,* at 1008, 114 S.Ct., at 2655 (emphasis added).

[9] This does not mean that a § 2 plaintiff has the right to be placed in a majority-minority district once a violation of the statute is shown. States retain broad discretion in drawing districts to comply with the mandate of § 2. *Voinovich v. Quilter,* 507 U.S. 146, 156–157, 113 S.Ct. 1149, 1156–1157, 122 L.Ed.2d 500 (1993); *Growe v. Emison,* 507 U.S. 25, 32–37, 113 S.Ct. 1075, 1080–1083, 122 L.Ed.2d 388 (1993).

[1] Tr. of Oral Arg. 58.

[2] Counsel went so far as to liken the State's districting plan to state-run water fountains that are available to citizens of all races but are nevertheless labeled "Black" and "White." He argued that the State's race-based redistricting map constituted an unlawful racial classification in the same way that the signs above the fountains would. Although neither racial classification would deprive any person of a tangible benefit—water from both fountains and effective political representation would remain equally available to persons of all races—each would be unconstitutional because of the very fact that the State had espoused a racial classification publicly. *Id.,* at 5–6.

[3] There, a majority of the Court stated that "[w]e have consistently held that a plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy." *Lujan v. Defenders of Wildlife,* 504 U.S., at 573–574, 112 S.Ct., at 2143.

[4] The Court's decision, in *Powers v. Ohio,* 499 U.S. 400, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991), and *Batson v. Kentucky,* 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), are not to the contrary. There, we have held that defendants have third-party standing, no matter what their race, to assert the rights of jurors, who have been deprived because of their race of a benefit available to all others. No voter in this litigation has shown either that he has uniquely been denied an otherwise generally available benefit on account of race, or that anyone else has.

[5] As I have explained, even if the *Hays* test showed that much, it would still only demonstrate that the State had used geography, rather than race, to select the citizens who would be deprived of a color-blind districting process.

[6] That is particularly true here because the author of the District Court opinion was also the author of the District Court opinion in *Gingles v. Edmisten,* 590 F.Supp. 345 (E.D.N.C.1984), aff'd. in part, rev'd in part, *Thornburg v. Gingles,* 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986).

[7] For example, the State argued that it drew the majority-minority district under review so that it would follow precinct lines, but the Court found that precinct lines had been relied on only because they happened to facilitate the State's effort to achieve a particular

racial makeup. Similarly, the State argued that District 11 was drawn in order to ensure that communities of interest would be kept within a single district, but the Court found that no such communities could be found within the district's boundaries. See *Miller v. Johnson,* 515 U.S., at 918–920, 115 S.Ct., at 2489–2490.

8 It is unclear whether the majority believes that it is the combination of these two pieces of evidence that satisfies *Miller,* or whether either one would suffice.

9 Citing to trial and deposition testimony, the majority also relies on a statement by North Carolina's chief mapmaker, Gerry Cohen, that the creation of a majority-minority district was the " 'principal reason' " for the configurations of District 1 and District 12. *Ante,* at 1901. Mr. Cohen's more complete explanation of the " 'principal reason' " was to create "two majority black districts that had communities of interest within each one." Tr. 514. What Mr. Cohen admitted, therefore, was only that the State intentionally drew a majority-minority district that would respect traditional districting principles. Moreover, Mr. Cohen's "admission" in his deposition only pertained to District 1. App. 675. Finally, he explained in his deposition that "other reasons" also explained that district's configuration. *Ibid.* Absent a showing that those "other reasons" were racebased, Mr. Cohen's admission does not show that North Carolina subordinated race-neutral districting criteria in drawing District 1; it shows only that the need to comply with federal law was critical.

10 In *DeWitt v. Wilson,* 856 F.Supp. 1409 (E.D.Cal.1994), for example, the State conceded that compliance with § 5 of the Voting Rights Act constituted the one unavoidable limitation on its redistricting process. *Id.,* at 1410. Nevertheless, we affirmed the District Court's conclusion that strict scrutiny did not apply because the State gave significant weight to several race-neutral considerations in meeting that goal. *Id.,* at 1415. Moreover, in *Miller v. Johnson,* 515 U.S. 900, 115 S.Ct. 2475, 132 L.Ed.2d 762 (1995), the Court applied strict scrutiny only after it concluded that the State considered only race in adding African–American voters to District 11; it did not hold that Georgia's general admissions about its desire to comply with federal law themselves sufficed. *Id.,* at 917–919, 115 S.Ct., at 2488–2490.

11 The State Constitution sets forth no limitation on districting for federal offices. Moreover, the state-prepared 1991 Legislator's Guide to North Carolina Legislative and Congressional Redistricting points out that the state-law prohibition against dividing counties in formulating state electoral districts was eliminated in the 1980's. See Legislator's Guide to North Carolina Legislative and Congressional Redistricting 12 (Feb.1991).

12 Indeed, the State's guide to redistricting specifically informed state legislators that compactness was of little legal significance. "Neither the State nor federal constitution requires districts to be compact. Critics often refer to the lack of compactness of a particular district or group of districts as a sign of gerrymandering, but no court has ever struck down a plan merely on the basis that it did not appear to be compact. Although there are geometric methods for measuring the compactness of an area, these methods have not been recognized as judicial standards for evaluating the compactness of districts.

> "The recent decision in *Davis v. Bandemer* ... mentions irregularly-shaped districts as a possible sign of gerrymandering but makes clear that irregular shapes alone do not invalidate a redistricting plan." *Ibid.*

13 The State's decision to give little weight to how the district would look on a map is entirely justifiable. Although a voter clearly has an interest in being in a district whose members share similar interests and concerns, that interest need not, and often is not, vindicated by drawing districts with attractive shapes. "[The Districts'] perceived 'ugliness'—their extreme irregularity of shape—is entirely a function of an artificial perspective unrelated to the common goings and comings of the citizen-voter. From the mapmaker's wholly imaginary vertical perspective at 1:25,000 or so range, a citizen may well find his district's one-dimensional, featureless shape aesthetically 'bizarre,' 'grotesque,' or 'ugly.' But back down at ground or eye-level, viewing things from his normal closely-bound horizontal perspective, the irregularity of outline or exact volume of the district in which he resides surely is not a matter of any great practical consequence to his conduct as a citizen-voter." 861 F.Supp. 408, 472, n. 60 (E.D.N.C.1994).

In the same vein, I doubt that residents of hook-shaped Massachusetts receive less effective representation than their

counterparts in perfectly rectangular Wyoming, or that the voting power of residents of Hawaii is in any way impaired by virtue of the fact that their State is not even contiguous.

14 It is ironic that despite the clear indications that party politics explain the district's odd shape, the Court affirmed the District Court's dismissal of the plaintiffs' partisan gerrymandering claim. See *Pope v. Blue,* 506 U.S. 801, 113 S.Ct. 30, 121 L.Ed.2d 3 (1992).

15 Interestingly, the Justice Department concluded that it was the State's impermissible desire to favor white incumbents over African–American voters that explained North Carolina's refusal to create a second district and thus gave rise to a violation of the purpose prong of § 5 of the Voting Rights Act. See *Shaw I,* 509 U.S. 630, 635, 113 S.Ct. 2816, 2821, 125 L.Ed.2d 511 (1993). Of course, the white plaintiffs before us here have no standing to object to District 12 on similar grounds.

16 Although the majority asserts that North Carolina "subordinated" traditional districting principles to racial concerns because "[r]ace was the criterion that, in the State's view, could not be compromised," *ante,* at 1901, no evidence suggests that North Carolina would have sacrificed traditional districting principles in order to draw a second majority-minority district. Rather, the record reveals that the State chose District 12 over other options so that its plan would remain faithful to traditional, race-neutral districting criteria. If strict scrutiny applies even when a State draws a majority-minority district that respects traditional districting principles, then I do not see how a State can ever create a majority-minority district in order to fulfill its obligations under the Voting Rights Act without inviting constitutional suspicion. I had thought that the "demanding" standard *Miller* established, *Miller v. Johnson,* 515 U.S., at 928, 115 S.Ct., at 2497 (O'CONNOR, J., concurring), as well as our summary affirmance in *DeWitt,* reflected our determination that States should not be so constrained.

17 Although Attorney General Reno has endorsed the position taken by the Republican administration in 1991, it was her male predecessor who refused to preclear the State's original plan.

18 While the majority is surely correct in stating that the threat of a lawsuit, however unlikely to succeed, does not constitute a compelling interest, *ante,* at 1902, n. 4, it does not follow that a State has no compelling interest in avoiding litigation over a substantial challenge. Here, of course, the District Court found that North Carolina premised its decision to draw a second majority-minority district on its reasonable conclusion that it would otherwise be subject to a *successful* § 2 challenge, not a "meritless" one.

19 Interestingly, although this Court in *Thornburg v. Gingles* held that § 2 plaintiffs must demonstrate that they live in "compact" majority-minority districts, we affirmed the District Court which had found that the plaintiffs' proposed districts were contiguous but not compact. 478 U.S., at 38, 106 S.Ct., at 2759–2760. Arguably, therefore, the State could have reasonably concluded that the maps proposing District 12 would have themselves provided the foundation for a viable § 2 suit. For a discussion of how compact "compact" districts must be, see Karlan, Maps and Misreadings: The Role of Geographic Compactness in Racial Vote Dilution Litigation, 24 Harv. Civ. Rights–Civ. Lib. L.Rev. 173, 199–213 (1989). See also *Dillard v. Baldwin County Bd. of Ed.,* 686 F.Supp. 1459, 1465–1466 (M.D.Ala.1988); *Houston v. Lafayette County, Miss.,* 56 F.3d 606, 611 (C.A.5 1995).

20 Moreover, Mr. Cohen, the State's chief mapmaker, testified at trial that in statewide elections, Native Americans and African–Americans in the southeastern portion of North Carolina had voted for the same candidates. Tr. 411–412.

21 The majority's assertion that *De Grandy* only requires a plaintiff to show that more "reasonably compact" majority-minority districts could have been drawn would seem to expand dramatically a State's potential liability under § 2. *Ante,* at 1906, n. 8. I would have thought that a State that had drawn *three* majority-minority districts, one of which was "reasonably compact" and two

of which straggled in order to preserve certain distinctive communities of interest, would at the very least be immune to a challenge by a single African–American plaintiff bearing a map proposing to draw but *two* compact majority-minority districts. The Court's expansive notion of § 2 liability, combined with its apparent eagerness to subject all legislative attempts to comply with that Act to strict scrutiny, will place many States in the untenable position of facing substantial litigation no matter how they draw their maps. See *Miller v. Johnson,* 515 U.S., at 949, 115 S.Ct., at 2507 (GINSBURG, J., dissenting).

> Of course, a State that unfairly "packs" African–American voters into a limited number of districts may be subject to a § 2 challenge on the ground that it failed to create so-called "influence" districts, and perhaps the majority means to endorse that proposition as well. I note here, however, that there is no indication that such a challenge could be successfully brought against North Carolina's two majority-minority district plan, which creates districts with only bare African–American majorities.

22 The Court's strict analysis in this case is in some tension with the more reasonable approach endorsed by Justice O'CONNOR this same day. On her view, state legislatures seeking to comply with the Voting Rights Act clearly possess more freedom to draw majority-minority districts than do federal courts attempting to enforce it. *Bush v. Vera,* at 994, 116 S.Ct., at 1970 (O'CONNOR, j., concurring).

23 That judicial creativity rather than constitutional principle defines the narrowing tailoring requirement in this area of our law is clear from *Bush* 's quite different analysis of the same question. See *Bush,* at 977, 116 S.Ct., at 1960.

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113 S.Ct. 2816
Supreme Court of the United States

Ruth O. SHAW, et al., Appellants
v.
Janet RENO, Attorney General, et al.

No. 92–357.
|
Argued April 20, 1993.
|
Decided June 28, 1993.

Synopsis

North Carolina residents brought action against the United States Attorney General, Assistant Attorney General, and various state officials and agencies, challenging North Carolina's congressional redistricting plan. A three-judge panel of the United States District Court for the Eastern District of North Carolina, Phillips, Circuit Judge, joined by Britt, J., dismissed action, 808 F.Supp. 461, and appeal was taken. The Supreme Court, Justice O'Connor, held that allegation that North Carolina's redistricting legislation was so extremely irregular on its face that it could rationally be viewed only as effort to segregate races for purposes of voting, without regard to traditional districting principles and without sufficiently compelling justification, was sufficient to state claim upon which relief could be granted under equal protection clause.

Reversed and remanded.

Justice White filed dissenting opinion in which Justice Blackmun and Justice Stevens joined.

Justice Blackmun, Justice Stevens and Justice Souter filed dissenting opinions.

****2817** *Syllabus*[*]

***630** To comply with § 5 of the Voting Rights Act of 1965—which prohibits a covered jurisdiction from implementing changes in a "standard, practice, or procedure with respect to voting" without federal authorization—North Carolina submitted to the Attorney General a congressional reapportionment plan with one majority-black district. The Attorney General objected to the plan on the ground that a second district could have been created to give effect to minority voting strength in the State's south-central to southeastern region. The State's revised plan contained a second majority-black district in the north-central region. The new district stretches approximately 160 miles along Interstate 85 and, for much of its length, is no ****2818** wider than the I–85 corridor. Appellants, five North Carolina residents, filed this action against appellee state and federal officials, claiming that the State had created an unconstitutional racial gerrymander in violation of, among other things, the Fourteenth Amendment. They alleged that the two districts concentrated a majority of black voters arbitrarily without regard to considerations such as compactness, contiguousness, geographical boundaries, or political subdivisions, in order to create congressional districts along racial lines and to assure the election of two black representatives. The three-judge District Court held that it lacked subject matter jurisdiction over the federal appellees. It also dismissed the complaint against the state appellees, finding, among other things, that, under *United Jewish Organizations of Williamsburgh, Inc. v. Carey,* 430 U.S. 144, 97 S.Ct. 996, 51 L.Ed.2d 229 (*UJO*), appellants had failed to state an equal protection claim because favoring minority voters was not discriminatory in the constitutional sense and the plan did not lead to proportional underrepresentation of white voters statewide.

Held:

1. Appellants have stated a claim under the Equal Protection Clause by alleging that the reapportionment scheme is so irrational on its face that it can be understood only as an effort to segregate voters into separate districts on the basis of race, and that the separation lacks sufficient justification. Pp. 2822–2830.

***631** a) The District Court properly dismissed the claims against the federal appellees. Appellants' racial gerrymandering claims must be examined against the backdrop of this country's long history of racial discrimination in voting. Pp. 2822–2824.

(b) Classifications of citizens based solely on race are by their nature odious to a free people whose institutions are founded upon the doctrine of equality, because they threaten to stigmatize persons by reason of their membership in a racial group and to incite racial hostility. Thus, state legislation that expressly distinguishes among citizens on account of race—whether it contains an explicit distinction or is "unexplainable on grounds other than race," *Arlington Heights v. Metropolitan Housing Development Corp.,* 429 U.S. 252, 266, 97 S.Ct. 555, 564, 50 L.Ed.2d 450—must be narrowly tailored to further a compelling governmental interest. See, *e.g., Wygant v. Jackson Bd. of Ed.,* 476 U.S. 267, 277–278, 106 S.Ct. 1842, 1848–1849, 90 L.Ed.2d 260 (plurality opinion). Redistricting legislation that is alleged to be so bizarre on its face that it is unexplainable on grounds other than race demands the same close scrutiny, regardless of the motivations underlying its adoption. See, *e.g., Gomillion v. Lightfoot,* 364 U.S. 339, 341, 81 S.Ct. 125, 127, 5 L.Ed.2d 110. That it may be difficult to determine from the face of a single-member districting plan that it makes such a distinction does not mean that a racial gerrymander, once established, should receive less scrutiny than other legislation classifying citizens by race. By perpetuating stereotypical notions about members of the same racial group—that they think alike, share the same political interests, and prefer the same candidates—a racial gerrymander may exacerbate the very patterns of racial bloc voting that majority-minority districting is sometimes said to counteract. It also sends to elected representatives the message that their primary obligation is to represent only that group's members, rather than their constituency as a whole. Since the holding here makes it unnecessary to decide whether or how a reapportionment plan that, on its face, can be explained in nonracial terms successfully could be challenged, the Court expresses no view on whether the intentional creation of majority-minority districts, without more, always gives rise to an equal protection claim. Pp. 2824–2828.

(c) The classification of citizens by race threatens special harms that are not present in this Court's vote-dilution cases and thus ****2819** warrants an analysis different from that used in assessing the validity of at-large and multimember gerrymandering schemes. In addition, nothing in the Court's decisions compels the conclusion that racial and political gerrymanders are subject to the same constitutional scrutiny; in fact, this country's long and persistent history of racial discrimination in voting and the Court's Fourteenth Amendment jurisprudence would seem to compel the opposite conclusion. Nor is there any support for the ***632** argument that racial gerrymandering poses no constitutional difficulties when the lines drawn favor the minority, since equal protection analysis is not dependent on the race of those burdened or benefited by a particular classification, *Richmond v. J.A. Croson Co.,* 488 U.S. 469, 494, 109 S.Ct. 706, 722, 102 L.Ed.2d 854 (plurality opinion). Finally, the highly fractured decision in *UJO* does not foreclose the claim recognized here, which is analytically distinct from the vote-dilution claim made there. Pp. 2828–2830.

2. If, on remand, the allegations of a racial gerrymander are not contradicted, the District Court must determine whether the plan is narrowly tailored to further a compelling governmental interest. A covered jurisdiction's interest in creating majority-minority districts in order to comply with the nonretrogression rule under § 5 of the Voting Rights Act does not give it *carte blanche* to engage in racial gerrymandering. The parties' arguments about whether the plan was necessary to avoid dilution of black voting strength in violation of § 2 of the Act and whether the State's interpretation of § 2 is unconstitutional were not developed below, and the issues remain open for consideration on remand. It is also unnecessary to decide at this stage of the litigation whether the plan advances a state interest distinct from the Act: eradicating the effects of past racial discrimination. Although the State argues that it had a strong basis for concluding that remedial action was warranted, only three Justices in *UJO* were prepared to say that States have a significant interest in minimizing the consequences of racial bloc voting apart from the Act's requirements and without regard for sound districting principles. Pp. 2829–2832.

3. The Court expresses no view on whether appellants successfully could have challenged a district such as that suggested by the Attorney General or whether their complaint stated a claim under other constitutional provisions. P. 2832.

808 F.Supp. 461 (EDNC 1992), reversed and remanded.

O'CONNOR, J., delivered the opinion of the Court, in which REHNQUIST, C.J., and SCALIA, KENNEDY, and THOMAS, JJ., joined. WHITE, J., filed a dissenting opinion, in which BLACKMUN and STEVENS, JJ., joined, *post,* p. ——. BLACKMUN, J., STEVENS, J., *post,* p. ——, and SOUTER, J., *post,* p. ——, filed dissenting opinions.

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***633** Edwin S. Kneedler, Washington, DC, for federal appellee.

Opinion

Justice O'CONNOR delivered the opinion of the Court.

This case involves two of the most complex and sensitive issues this Court has faced in recent years: the meaning of the constitutional "right" to vote, and the propriety of race-based state legislation designed to benefit members of historically disadvantaged racial minority groups. As a result of the 1990 census, North Carolina became entitled to a 12th seat in the United States House of Representatives. The General Assembly enacted a reapportionment plan that included one majority-black congressional district. After the Attorney General of the United States objected to the plan pursuant to § 5 of the Voting Rights Act of 1965, 79 Stat. 439, as amended, 42 U.S.C. § 1973c, the General Assembly passed new legislation creating a second majority-black district. Appellants ****2820** allege that the revised plan, which contains district boundary lines of dramatically irregular shape, constitutes ***634** an unconstitutional racial gerrymander. The question before us is whether appellants have stated a cognizable claim.

I

The voting age population of North Carolina is approximately 78% white, 20% black, and 1% Native American; the remaining 1% is predominantly Asian. App. to Brief for Federal Appellees 16a. The black population is relatively dispersed; blacks constitute a majority of the general population in only 5 of the State's 100 counties. Brief for Appellants 57. Geographically, the State divides into three regions: the eastern Coastal Plain, the central Piedmont Plateau, and the western mountains. H. Lefler & A. Newsom, The History of a Southern State: North Carolina 18–22 (3d ed. 1973). The largest concentrations of black citizens live in the Coastal Plain, primarily in the northern part. O. Gade & H. Stillwell, North Carolina: People and Environments 65–68 (1986). The General Assembly's first redistricting plan contained one majority-black district centered in that area of the State.

Forty of North Carolina's one hundred counties are covered by § 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c, which prohibits a jurisdiction subject to its provisions from implementing changes in a "standard, practice, or procedure with respect to voting" without federal authorization, *ibid.* The jurisdiction must obtain either a judgment from the United States District Court for the District of Columbia declaring that the proposed change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color" or administrative preclearance from the Attorney General. *Ibid.* Because the General Assembly's reapportionment plan affected the covered counties, the parties agree that § 5 applied. Tr. of Oral Arg. 14, 27–29. The State chose to submit its plan to the Attorney General for preclearance.

***635** The Attorney General, acting through the Assistant Attorney General for the Civil Rights Division, interposed a formal objection to the General Assembly's plan. The Attorney General specifically objected to the configuration of boundary lines

drawn in the south-central to southeastern region of the State. In the Attorney General's view, the General Assembly could have created a second majority-minority district "to give effect to black and Native American voting strength in this area" by using boundary lines "no more irregular than [those] found elsewhere in the proposed plan," but failed to do so for "pretextual reasons." See App. to Brief for Federal Appellees 10a–11a.

Under § 5, the State remained free to seek a declaratory judgment from the District Court for the District of Columbia notwithstanding the Attorney General's objection. It did not do so. Instead, the General Assembly enacted a revised redistricting plan, 1991 N.C. Extra Sess.Laws, ch. 7, that included a second majority-black district. The General Assembly located the second district not in the south-central to southeastern part of the State, but in the north-central region along Interstate 85. See Appendix, *infra.*

The first of the two majority-black districts contained in the revised plan, District 1, is somewhat hook shaped. Centered in the northeast portion of the State, it moves southward until it tapers to a narrow band; then, with finger-like extensions, it reaches far into the southern-most part of the State near the South Carolina border. District 1 has been compared to a "Rorschach ink-blot test," *Shaw v. Barr,* 808 F.Supp. 461, 476 (EDNC 1992) (Voorhees, C.J., concurring in part and dissenting in part), and a "bug splattered on a windshield," Wall Street Journal, Feb. 4, 1992, p. A14.

The second majority-black district, District 12, is even more unusually shaped. It is approximately 160 miles long and, for much ****2821** of its length, no wider than the I–85 corridor. It winds in snakelike fashion through tobacco country, financial centers, and manufacturing areas "until it gobbles in ***636** enough enclaves of black neighborhoods." 808 F.Supp., at 476–477 (Voorhees, C.J., concurring in part and dissenting in part). Northbound and southbound drivers on I–85 sometimes find themselves in separate districts in one county, only to "trade" districts when they enter the next county. Of the 10 counties through which District 12 passes, 5 are cut into 3 different districts; even towns are divided. At one point the district remains contiguous only because it intersects at a single point with two other districts before crossing over them. See Brief for Republican National Committee as *Amicus Curiae* 14–15. One state legislator has remarked that " '[i]f you drove down the interstate with both car doors open, you'd kill most of the people in the district.' " Washington Post, Apr. 20, 1993, p. A4. The district even has inspired poetry: "Ask not for whom the line is drawn; it is drawn to avoid thee." Grofman, Would Vince Lombardi Have Been Right If He Had Said: "When It Comes to Redistricting, Race Isn't Everything, It's the *Only* Thing"?, 14 Cardozo L.Rev. 1237, 1261, n. 96 (1993) (internal quotation marks omitted).

The Attorney General did not object to the General Assembly's revised plan. But numerous North Carolinians did. The North Carolina Republican Party and individual voters brought suit in Federal District Court, alleging that the plan constituted an unconstitutional political gerrymander under *Davis v. Bandemer,* 478 U.S. 109, 106 S.Ct. 2797, 92 L.Ed.2d 85 (1986). That claim was dismissed, see *Pope v. Blue,* 809 F.Supp. 392 (WDNC), and this Court summarily affirmed, 506 U.S. 801, 113 S.Ct. 30, 121 L.Ed.2d 3 (1992).

Shortly after the complaint in *Pope v. Blue* was filed, appellants instituted the present action in the United States District Court for the Eastern District of North Carolina. Appellants alleged not that the revised plan constituted a political gerrymander, nor that it violated the "one person, one vote" principle, see *Reynolds v. Sims,* 377 U.S. 533, 558, 84 S.Ct. 1362, 1380, 12 L.Ed.2d 506 (1964), but that the State had created an unconstitutional *racial* gerrymander. Appellants are five residents of Durham ***637** County, North Carolina, all registered to vote in that county. Under the General Assembly's plan, two will vote for congressional representatives in District 12 and three will vote in neighboring District 2. Appellants sued the Governor of North Carolina, the Lieutenant Governor, the Secretary of State, the Speaker of the North Carolina House of Representatives, and members of the North Carolina State Board of Elections (state appellees), together with two federal officials, the Attorney General and the Assistant Attorney General for the Civil Rights Division (federal appellees).

Appellants contended that the General Assembly's revised reapportionment plan violated several provisions of the United States Constitution, including the Fourteenth Amendment. They alleged that the General Assembly deliberately "create[d] two Congressional Districts in which a majority of black voters was concentrated arbitrarily—without regard to any other considerations, such as compactness, contiguousness, geographical boundaries, or political subdivisions" with the purpose "to create Congressional Districts along racial lines" and to assure the election of two black representatives to Congress. App. to Juris. Statement 102a. Appellants sought declaratory and injunctive relief against the state appellees. They sought similar relief against the federal appellees, arguing, alternatively, that the federal appellees had misconstrued the Voting Rights Act or that the Act itself was unconstitutional.

The three-judge District Court granted the federal appellees' motion to dismiss. 808 F.Supp. 461 (EDNC 1992). The court agreed unanimously that it lacked subject matter jurisdiction by reason of § 14(b) of ****2822** the Voting Rights Act, 42 U.S.C. § 1973*l* (b), which vests the District Court for the District of Columbia with exclusive jurisdiction to issue injunctions against the execution of the Act and to enjoin actions taken by federal officers pursuant thereto. 808 F.Supp., at 466–467; *id.,* at 474 (Voorhees, C.J., concurring ***638** in relevant part). Two judges also concluded that, to the extent appellants challenged the Attorney General's preclearance decisions, their claim was foreclosed by this Court's holding in *Morris v. Gressette,* 432 U.S. 491, 97 S.Ct. 2411, 53 L.Ed.2d 506 (1977). 808 F.Supp., at 467.

By a 2–to–1 vote, the District Court also dismissed the complaint against the state appellees. The majority found no support for appellants' contentions that race-based districting is prohibited by Article I, § 4, or Article I, § 2, of the Constitution, or by the Privileges and Immunities Clause of the Fourteenth Amendment. It deemed appellants' claim under the Fifteenth Amendment essentially subsumed within their related claim under the Equal Protection Clause. 808 F.Supp., at 468–469. That claim, the majority concluded, was barred by *United Jewish Organizations of Williamsburgh, Inc. v. Carey,* 430 U.S. 144, 97 S.Ct. 996, 51 L.Ed.2d 229 (1977) (*UJO*).

The majority first took judicial notice of a fact omitted from appellants' complaint: that appellants are white. It rejected the argument that race-conscious redistricting to benefit minority voters is *per se* unconstitutional. The majority also rejected appellants' claim that North Carolina's reapportionment plan was impermissible. The majority read *UJO* to stand for the proposition that a redistricting scheme violates white voters' rights only if it is "adopted with the purpose and effect of discriminating against white voters ... on account of their race." 808 F.Supp., at 472. The purposes of favoring minority voters and complying with the Voting Rights Act are not discriminatory in the constitutional sense, the court reasoned, and majority-minority districts have an impermissibly discriminatory effect only when they unfairly dilute or cancel out white voting strength. Because the State's purpose here was to comply with the Voting Rights Act, and because the General Assembly's plan did not lead to proportional underrepresentation of white voters statewide, ***639** the majority concluded that appellants had failed to state an equal protection claim. *Id.,* at 472–473.

Chief Judge Voorhees agreed that race-conscious redistricting is not *per se* unconstitutional but dissented from the rest of the majority's equal protection analysis. He read Justice WHITE's opinion in *UJO* to authorize race-based reapportionment only when the State employs traditional districting principles such as compactness and contiguity. 808 F.Supp., at 475–477 (opinion concurring in part and dissenting in part). North Carolina's failure to respect these principles, in Judge Voorhees' view, "augur[ed] a constitutionally suspect, and potentially unlawful, intent" sufficient to defeat the state appellees' motion to dismiss. *Id.,* at 477.

We noted probable jurisdiction. 506 U.S. 1019, 113 S.Ct. 653, 121 L.Ed.2d 580 (1992).

II

A

"The right to vote freely for the candidate of one's choice is of the essence of a democratic society...." *Reynolds v. Sims,* 377 U.S., at 555, 84 S.Ct., at 1378. For much of our Nation's history, that right sadly has been denied to many because of race. The Fifteenth Amendment, ratified in 1870 after a bloody Civil War, promised unequivocally that "[t]he right of citizens of the United States to vote" no longer would be "denied or abridged ... by any State on account of race, color, or previous condition of servitude." U.S. Const., Amdt. 15, § 1.

But "[a] number of states ... refused to take no for an answer and continued to circumvent the fifteenth amendment's prohibition through the use of both subtle and blunt instruments, perpetuating ugly patterns of ****2823** pervasive racial

discrimination." Blumstein, Defining and Proving Race Discrimination: Perspectives on the Purpose Vs. Results Approach from the Voting Rights Act, 69 Va.L.Rev. 633, 637 (1983). Ostensibly race-neutral devices such as literacy tests with "grandfather" clauses and "good character" provisos were devised to deprive black voters of the franchise. ***640** Another of the weapons in the States' arsenal was the racial gerrymander—"the deliberate and arbitrary distortion of district boundaries ... for [racial] purposes." *Bandemer,* 478 U.S., at 164, 106 S.Ct., at 2826 (Powell, J., concurring in part and dissenting in part) (internal quotation marks omitted). In the 1870's, for example, opponents of Reconstruction in Mississippi "concentrated the bulk of the black population in a 'shoestring' Congressional district running the length of the Mississippi River, leaving five others with white majorities." E. Foner, Reconstruction: America's Unfinished Revolution, 1863–1877, p. 590 (1988). Some 90 years later, Alabama redefined the boundaries of the city of Tuskegee "from a square to an uncouth twenty-eight-sided figure" in a manner that was alleged to exclude black voters, and only black voters, from the city limits. *Gomillion v. Lightfoot,* 364 U.S. 339, 340, 81 S.Ct. 125, 127, 5 L.Ed.2d 110 (1960).

Alabama's exercise in geometry was but one example of the racial discrimination in voting that persisted in parts of this country nearly a century after ratification of the Fifteenth Amendment. See *South Carolina v. Katzenbach,* 383 U.S. 301, 309–313, 86 S.Ct. 803, 808–811, 15 L.Ed.2d 769 (1966). In some States, registration of eligible black voters ran 50% behind that of whites. *Id.,* at 313, 86 S.Ct., at 811. Congress enacted the Voting Rights Act of 1965 as a dramatic and severe response to the situation. The Act proved immediately successful in ensuring racial minorities access to the voting booth; by the early 1970's, the spread between black and white registration in several of the targeted Southern States had fallen to well below 10%. A. Thernstrom, Whose Votes Count? Affirmative Action and Minority Voting Rights 44 (1987).

But it soon became apparent that guaranteeing equal access to the polls would not suffice to root out other racially discriminatory voting practices. Drawing on the "one person, one vote" principle, this Court recognized that "[t]he right to vote can be affected by a *dilution* of voting power as well as by an absolute prohibition on casting a ballot." ***641** *Allen v. State Bd. of Elections,* 393 U.S. 544, 569, 89 S.Ct. 817, 833, 22 L.Ed.2d 1 (1969) (emphasis added). Where members of a racial minority group vote as a cohesive unit, practices such as multimember or at-large electoral systems can reduce or nullify minority voters' ability, as a group, "to elect the candidate of their choice." *Ibid.* Accordingly, the Court held that such schemes violate the Fourteenth Amendment when they are adopted with a discriminatory purpose and have the effect of diluting minority voting strength. See, *e.g., Rogers v. Lodge,* 458 U.S. 613, 616–617, 102 S.Ct. 3272, 3274–3275, 73 L.Ed.2d 1012 (1982); *White v. Regester,* 412 U.S. 755, 765–766, 93 S.Ct. 2332, 2339–2340, 37 L.Ed.2d 314 (1973). Congress, too, responded to the problem of vote dilution. In 1982, it amended § 2 of the Voting Rights Act to prohibit legislation that *results* in the dilution of a minority group's voting strength, regardless of the legislature's intent. 42 U.S.C. § 1973; see *Thornburg v. Gingles,* 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986) (applying amended § 2 to vote-dilution claim involving multimember districts); see also *Voinovich v. Quilter,* 507 U.S. 146, 155, 113 S.Ct. 1149, ——, 122 L.Ed.2d 500 (1993) (single-member districts).

B

It is against this background that we confront the questions presented here. In our view, the District Court properly dismissed appellants' claims against the federal appellees. Our focus is on appellants' claim ****2824** that the State engaged in unconstitutional racial gerrymandering. That argument strikes a powerful historical chord: It is unsettling how closely the North Carolina plan resembles the most egregious racial gerrymanders of the past.

An understanding of the nature of appellants' claim is critical to our resolution of the case. In their complaint, appellants did not claim that the General Assembly's reapportionment plan unconstitutionally "diluted" white voting strength. They did not even claim to be white. Rather, appellants' complaint alleged that the deliberate segregation of voters into separate districts on the basis of race violated their constitutional right to participate in a "color-blind" ***642** electoral process. Complaint ¶ 29, App. to Juris. Statement 89a–90a; see also Brief for Appellants 31–32.

Despite their invocation of the ideal of a "color-blind" Constitution, see *Plessy v. Ferguson,* 163 U.S. 537, 559, 16 S.Ct. 1138, 1146, 41 L.Ed. 256 (1896) (Harlan, J., dissenting), appellants appear to concede that race-conscious redistricting is not

always unconstitutional. See Tr. of Oral Arg. 16–19. That concession is wise: This Court never has held that race-conscious state decisionmaking is impermissible in *all* circumstances. What appellants object to is redistricting legislation that is so extremely irregular on its face that it rationally can be viewed only as an effort to segregate the races for purposes of voting, without regard for traditional districting principles and without sufficiently compelling justification. For the reasons that follow, we conclude that appellants have stated a claim upon which relief can be granted under the Equal Protection Clause. See Fed.Rule Civ.Proc. 12(b)(6).

III

A

The Equal Protection Clause provides that "[n]o State shall ... deny to any person within its jurisdiction the equal protection of the laws." U.S. Const., Amdt. 14, § 1. Its central purpose is to prevent the States from purposefully discriminating between individuals on the basis of race. *Washington v. Davis,* 426 U.S. 229, 239, 96 S.Ct. 2040, 2047, 48 L.Ed.2d 597 (1976). Laws that explicitly distinguish between individuals on racial grounds fall within the core of that prohibition.

No inquiry into legislative purpose is necessary when the racial classification appears on the face of the statute. See *Personnel Administrator of Mass. v. Feeney,* 442 U.S. 256, 272, 99 S.Ct. 2282, 2293, 60 L.Ed.2d 870 (1979). Accord, *Washington v. Seattle School Dist. No. 1,* 458 U.S. 457, 485, 102 S.Ct. 3187, 3203, 73 L.Ed.2d 896 (1982). Express racial classifications are immediately suspect because, "[a]bsent searching judicial inquiry ..., there is simply no way of determining what classifications are 'benign' or 'remedial' and what classifications ***643** are in fact motivated by illegitimate notions of racial inferiority or simple racial politics." *Richmond v. J.A. Croson Co.,* 488 U.S. 469, 493, 109 S.Ct. 706, 721, 102 L.Ed.2d 854 (1989) (plurality opinion); *id.,* at 520, 109 S.Ct., at 736 (SCALIA, J., concurring in judgment); see also *UJO,* 430 U.S., at 172, 97 S.Ct., at 1013 (Brennan, J., concurring in part) ("[A] purportedly preferential race assignment may in fact disguise a policy that perpetuates disadvantageous treatment of the plan's supposed beneficiaries").

Classifications of citizens solely on the basis of race "are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Hirabayashi v. United States,* 320 U.S. 81, 100, 63 S.Ct. 1375, 1385, 87 L.Ed. 1774 (1943). Accord, *Loving v. Virginia,* 388 U.S. 1, 11, 87 S.Ct. 1817, 1823, 18 L.Ed.2d 1010 (1967). They threaten to stigmatize individuals by reason of their membership in a racial group and to incite racial hostility. *Croson, supra,* 488 U.S., at 493, 109 S.Ct., at 721 (plurality opinion); *UJO, supra,* 430 U.S., at 173, 97 S.Ct., at 1014 (Brennan, J., concurring in part) ("[E]ven in the pursuit of remedial objectives, an explicit policy of assignment by ****2825** race may serve to stimulate our society's latent race consciousness, suggesting the utility and propriety of basing decisions on a factor that ideally bears no relationship to an individual's worth or needs"). Accordingly, we have held that the Fourteenth Amendment requires state legislation that expressly distinguishes among citizens because of their race to be narrowly tailored to further a compelling governmental interest. See, *e.g., Wygant v. Jackson Bd. of Ed.,* 476 U.S. 267, 277–278, 106 S.Ct. 1842, 1848–1849, 90 L.Ed.2d 260 (1986) (plurality opinion); *id.,* at 285, 106 S.Ct., at 1853 (O'CONNOR, J., concurring in part and concurring in judgment).

These principles apply not only to legislation that contains explicit racial distinctions, but also to those "rare" statutes that, although race neutral, are, on their face, "unexplainable on grounds other than race." *Arlington Heights v. Metropolitan Housing Development Corp.,* 429 U.S. 252, 266, 97 S.Ct. 555, 564, 50 L.Ed.2d 450 (1977). As we explained in *Feeney:*

> "A racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only ***644** upon an extraordinary justification. *Brown v. Board of Education,* 347 U.S. 483 [74 S.Ct. 686, 98 L.Ed. 873]; *McLaughlin v. Florida,* 379 U.S. 184 [85 S.Ct. 283, 13 L.Ed.2d 222]. This rule applies as well to a classification that is ostensibly neutral but is an obvious pretext for racial discrimination. *Yick Wo v. Hopkins,* 118 U.S. 356 [6 S.Ct. 1064, 30 L.Ed. 220]; *Guinn v. United States,* 238 U.S. 347 [35 S.Ct. 926, 59 L.Ed. 1340]; cf. *Lane v. Wilson,* 307 U.S. 268 [59 S.Ct. 872, 83 L.Ed. 1281]; *Gomillion v. Lightfoot,* 364 U.S. 339 [81 S.Ct. 125, 5 L.Ed.2d 110]." 442 U.S., at 272, 99 S.Ct., at 2292.

B

Appellants contend that redistricting legislation that is so bizarre on its face that it is "unexplainable on grounds other than race," *Arlington Heights, supra,* 429 U.S., at 266, 97 S.Ct., at 564, demands the same close scrutiny that we give other state laws that classify citizens by race. Our voting rights precedents support that conclusion.

In *Guinn v. United States,* 238 U.S. 347, 35 S.Ct. 926, 59 L.Ed. 1340 (1915), the Court invalidated under the Fifteenth Amendment a statute that imposed a literacy requirement on voters but contained a "grandfather clause" applicable to individuals and their lineal descendants entitled to vote "on [or prior to] January 1, 1866." *Id.,* at 357, 35 S.Ct., at 928 (internal quotation marks omitted). The determinative consideration for the Court was that the law, though ostensibly race neutral, on its face "embod[ied] no exercise of judgment and rest[ed] upon no discernible reason" other than to circumvent the prohibitions of the Fifteenth Amendment. *Id.,* at 363, 35 S.Ct. at 931. In other words, the statute was invalid because, on its face, it could not be explained on grounds other than race.

The Court applied the same reasoning to the "uncouth twenty-eight-sided" municipal boundary line at issue in *Gomillion.* Although the statute that redrew the city limits of Tuskegee was race neutral on its face, plaintiffs alleged that its effect was impermissibly to remove from the city virtually all black voters and no white voters. The Court reasoned:

> ***645** "If these allegations upon a trial remained uncontradicted or unqualified, the conclusion would be irresistible, tantamount for all practical purposes to a mathematical demonstration, that the legislation is solely concerned with segregating white and colored voters by fencing Negro citizens out of town so as to deprive them of their pre-existing municipal vote." 364 U.S., at 341, 81 S.Ct., at 127.

The majority resolved the case under the Fifteenth Amendment. *Id.,* at 342–348, 81 S.Ct., at 127–130. Justice Whittaker, however, concluded that the "unlawful segregation ****2826** of races of citizens" into different voting districts was cognizable under the Equal Protection Clause. *Id.,* at 349, 81 S.Ct., at 131 (concurring opinion). This Court's subsequent reliance on *Gomillion* in other Fourteenth Amendment cases suggests the correctness of Justice Whittaker's view. See, *e.g., Feeney, supra,* 442 U.S., at 272, 99 S.Ct., at 2293; *Whitcomb v. Chavis,* 403 U.S. 124, 149, 91 S.Ct. 1858, 1872, 29 L.Ed.2d 363 (1971); see also *Mobile v. Bolden,* 446 U.S. 55, 86, 100 S.Ct. 1490, 1509, 64 L.Ed.2d 47 (1980) (STEVENS, J., concurring in judgment) (*Gomillion*'s holding "is compelled by the Equal Protection Clause"). *Gomillion* thus supports appellants' contention that district lines obviously drawn for the purpose of separating voters by race require careful scrutiny under the Equal Protection Clause regardless of the motivations underlying their adoption.

The Court extended the reasoning of *Gomillion* to congressional districting in *Wright v. Rockefeller,* 376 U.S. 52, 84 S.Ct. 603, 11 L.Ed.2d 512 (1964). At issue in *Wright* were four districts contained in a New York apportionment statute. The plaintiffs alleged that the statute excluded nonwhites from one district and concentrated them in the other three. *Id.,* at 53–54, 84 S.Ct., at 603–604. Every Member of the Court assumed that the plaintiffs' allegation that the statute "segregate[d] eligible voters by race and place of origin" stated a constitutional claim. *Id.,* at 56, 84 S.Ct., at 605 (internal quotation marks omitted); *id.,* at 58, 84 S.Ct., at 606 (Harlan, J., concurring); *id.,* at 59–62, 84 S.Ct., at 606–609 (Douglas, J., dissenting). The Justices disagreed only as to whether the plaintiffs had carried their burden of proof at trial. The dissenters thought the unusual ***646** shape of the district lines could "be explained only in racial terms." *Id.,* at 59, 84 S.Ct., at 607. The majority, however, accepted the District Court's finding that the plaintiffs had failed to establish that the districts were in fact drawn on racial lines. Although the boundary lines were somewhat irregular, the majority reasoned, they were not so bizarre as to permit of no other conclusion. Indeed, because most of the nonwhite voters lived together in one area, it would have been difficult to construct voting districts without concentrations of nonwhite voters. *Id.,* at 56–58, 84 S.Ct., at 605–606.

Wright illustrates the difficulty of determining from the face of a single-member districting plan that it purposefully distinguishes between voters on the basis of race. A reapportionment statute typically does not classify persons at all; it classifies tracts of land, or addresses. Moreover, redistricting differs from other kinds of state decisionmaking in that the legislature always is *aware* of race when it draws district lines, just as it is aware of age, economic status, religious and

political persuasion, and a variety of other demographic factors. That sort of race consciousness does not lead inevitably to impermissible race discrimination. As *Wright* demonstrates, when members of a racial group live together in one community, a reapportionment plan that concentrates members of the group in one district and excludes them from others may reflect wholly legitimate purposes. The district lines may be drawn, for example, to provide for compact districts of contiguous territory, or to maintain the integrity of political subdivisions. See *Reynolds,* 377 U.S., at 578, 84 S.Ct., at 1390 (recognizing these as legitimate state interests).

The difficulty of proof, of course, does not mean that a racial gerrymander, once established, should receive less scrutiny under the Equal Protection Clause than other state legislation classifying citizens by race. Moreover, it seems clear to us that proof sometimes will not be difficult at all. In some exceptional cases, a reapportionment plan may be so highly irregular that, on its face, it rationally cannot be ***647** understood as anything other than an effort to "segregat[e] ... voters" on the basis of race. *Gomillion, supra,* 364 U.S., at 341, 81 S.Ct., at 127. *Gomillion,* in which a tortured municipal ****2827** boundary line was drawn to exclude black voters, was such a case. So, too, would be a case in which a State concentrated a dispersed minority population in a single district by disregarding traditional districting principles such as compactness, contiguity, and respect for political subdivisions. We emphasize that these criteria are important not because they are constitutionally required—they are not, cf. *Gaffney v. Cummings,* 412 U.S. 735, 752, n. 18, 93 S.Ct. 2321, 2331, n. 18, 37 L.Ed.2d 298 (1973)—but because they are objective factors that may serve to defeat a claim that a district has been gerrymandered on racial lines. Cf. *Karcher v. Daggett,* 462 U.S. 725, 755, 103 S.Ct. 2653, 2672, 77 L.Ed.2d 133 (1983) (STEVENS, J., concurring) ("One need not use Justice Stewart's classic definition of obscenity—'I know it when I see it'—as an ultimate standard for judging the constitutionality of a gerrymander to recognize that dramatically irregular shapes may have sufficient probative force to call for an explanation" (footnotes omitted)).

Put differently, we believe that reapportionment is one area in which appearances do matter. A reapportionment plan that includes in one district individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin, bears an uncomfortable resemblance to political apartheid. It reinforces the perception that members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike, share the same political interests, and will prefer the same candidates at the polls. We have rejected such perceptions elsewhere as impermissible racial stereotypes. See, *e.g., Holland v. Illinois,* 493 U.S. 474, 484, n. 2, 110 S.Ct. 803, 809, n. 2, 107 L.Ed.2d 905 (1990) ("[A] prosecutor's assumption that a black juror may be presumed to be partial simply because he is black ... violates the Equal Protection ***648** Clause" (internal quotation marks omitted)); see also *Edmonson v. Leesville Concrete Co.,* 500 U.S. 614, 630–631, 111 S.Ct. 2077, 2088, 114 L.Ed.2d 660 (1991) ("If our society is to continue to progress as a multiracial democracy, it must recognize that the automatic invocation of race stereotypes retards that progress and causes continued hurt and injury"). By perpetuating such notions, a racial gerrymander may exacerbate the very patterns of racial bloc voting that majority-minority districting is sometimes said to counteract.

The message that such districting sends to elected representatives is equally pernicious. When a district obviously is created solely to effectuate the perceived common interests of one racial group, elected officials are more likely to believe that their primary obligation is to represent only the members of that group, rather than their constituency as a whole. This is altogether antithetical to our system of representative democracy. As Justice Douglas explained in his dissent in *Wright v. Rockefeller* nearly 30 years ago:

> "Here the individual is important, not his race, his creed, or his color. The principle of equality is at war with the notion that District A must be represented by a Negro, as it is with the notion that District B must be represented by a Caucasian, District C by a Jew, District D by a Catholic, and so on.... That system, by whatever name it is called, is a divisive force in a community, emphasizing differences between candidates and voters that are irrelevant in the constitutional sense....
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> . . . . .
>
> "When racial or religious lines are drawn by the State, the multiracial, multireligious communities that our Constitution seeks to weld together as one become separatist; antagonisms that relate to race or to religion rather than to political issues are generated; communities seek not the best representative but the best racial or religious partisan. Since that system is at war with ***649** the democratic ideal, it should ****2828** find no footing here." 376 U.S., at 66–67, 84 S.Ct., at 611 (dissenting opinion).

For these reasons, we conclude that a plaintiff challenging a reapportionment statute under the Equal Protection Clause may state a claim by alleging that the legislation, though race-neutral on its face, rationally cannot be understood as anything other than an effort to separate voters into different districts on the basis of race, and that the separation lacks sufficient justification. It is unnecessary for us to decide whether or how a reapportionment plan that, on its face, can be explained in nonracial terms successfully could be challenged. Thus, we express no view as to whether "the intentional creation of majority-minority districts, without more," always gives rise to an equal protection claim. *Post,* at 2839 (WHITE, J., dissenting). We hold only that, on the facts of this case, appellants have stated a claim sufficient to defeat the state appellees' motion to dismiss.

C

The dissenters consider the circumstances of this case "functionally indistinguishable" from multimember districting and at-large voting systems, which are loosely described as "other varieties of gerrymandering." *Post,* at 2840 (WHITE, J., dissenting); see also *post,* at 2847–2848 (SOUTER, J., dissenting). We have considered the constitutionality of these practices in other Fourteenth Amendment cases and have required plaintiffs to demonstrate that the challenged practice has the purpose and effect of diluting a racial group's voting strength. See, *e.g., Rogers v. Lodge,* 458 U.S. 613, 102 S.Ct. 3272, 73 L.Ed.2d 1012 (1982) (at-large system); *Mobile v. Bolden,* 446 U.S. 55, 100 S.Ct. 1490, 64 L.Ed.2d 47 (1980) (same); *White v. Regester,* 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973) (multimember districts); *Whitcomb v. Chavis,* 403 U.S. 124, 91 S.Ct. 1858, 29 L.Ed.2d 363 (1971) (same); see also *supra,* at 2823. At-large and multimember schemes, however, do not classify voters on the basis of race. Classifying citizens by race, as we have said, threatens special ***650** harms that are not present in our vote-dilution cases. It therefore warrants different analysis.

Justice SOUTER apparently believes that racial gerrymandering is harmless unless it dilutes a racial group's voting strength. See *post,* at 2847 (dissenting opinion). As we have explained, however, reapportionment legislation that cannot be understood as anything other than an effort to classify and separate voters by race injures voters in other ways. It reinforces racial stereotypes and threatens to undermine our system of representative democracy by signaling to elected officials that they represent a particular racial group rather than their constituency as a whole. See *supra,* at 2826–2828. Justice SOUTER does not adequately explain why these harms are not cognizable under the Fourteenth Amendment.

The dissenters make two other arguments that cannot be reconciled with our precedents. First, they suggest that a racial gerrymander of the sort alleged here is functionally equivalent to gerrymanders for nonracial purposes, such as political gerrymanders. See *post,* at 2844 (opinion of STEVENS, J.); see also *post,* at 2835–2836 (opinion of WHITE, J.). This Court has held political gerrymanders to be justiciable under the Equal Protection Clause. See *Davis v. Bandemer,* 478 U.S., at 118–127, 106 S.Ct., at 2802–2808. But nothing in our case law compels the conclusion that racial and political gerrymanders are subject to precisely the same constitutional scrutiny. In fact, our country's long and persistent history of racial discrimination in voting—as well as our Fourteenth Amendment jurisprudence, which always has reserved the strictest scrutiny for discrimination on the basis of race, see *supra,* at 2824–2825—would seem to compel the opposite conclusion.

****2829** Second, Justice STEVENS argues that racial gerrymandering poses no constitutional difficulties when district lines are drawn to favor the minority, rather than the majority. See *post,* at —— (dissenting opinion). We have made clear, however, that equal protection analysis "is not dependent ***651** on the race of those burdened or benefited by a particular classification." *Croson,* 488 U.S., at 494, 109 S.Ct., at 722 (plurality opinion); see also *id.,* at 520, 109 S.Ct., at 735 (SCALIA, J., concurring in judgment). Accord, *Wygant,* 476 U.S., at 273, 106 S.Ct., at 1846 (plurality opinion). Indeed, racial classifications receive close scrutiny even when they may be said to burden or benefit the races equally. See *Powers v. Ohio,* 499 U.S. 400, 410, 111 S.Ct. 1364, 1370, 113 L.Ed.2d 411 (1991) ("It is axiomatic that racial classifications do not become legitimate on the assumption that all persons suffer them in equal degree").

Finally, nothing in the Court's highly fractured decision in *UJO*—on which the District Court almost exclusively relied, and which the dissenters evidently believe controls, see *post,* at 2837–2838 (opinion of WHITE, J.); *post,* at 2847–2848, and n. 6 (opinion of SOUTER, J.)—forecloses the claim we recognize today. *UJO* concerned New York's revision of a

reapportionment plan to include additional majority-minority districts in response to the Attorney General's denial of administrative preclearance under § 5. In that regard, it closely resembles the present case. But the cases are critically different in another way. The plaintiffs in *UJO*—members of a Hasidic community split between two districts under New York's revised redistricting plan—did not allege that the plan, on its face, was so highly irregular that it rationally could be understood only as an effort to segregate voters by race. Indeed, the facts of the case would not have supported such a claim. Three Justices approved the New York statute, in part, precisely because it adhered to traditional districting principles:

> "[W]e think it ... permissible for a State, *employing sound districting principles such as compactness and population equality,* to attempt to prevent racial minorities from being repeatedly outvoted by creating districts that will afford fair representation to the members of those racial groups who are sufficiently numerous *and whose residential patterns afford the opportunity* of creating districts in which they will be in the majority." ***652** 430 U.S., at 168, 97 S.Ct., at 1011 (opinion of WHITE, J., joined by STEVENS and REHNQUIST, JJ.) (emphasis added).

As a majority of the Justices construed the complaint, the *UJO* plaintiffs made a different claim: that the New York plan impermissibly "diluted" their voting strength. Five of the eight Justices who participated in the decision resolved the case under the framework the Court previously had adopted for vote-dilution cases. Three Justices rejected the plaintiffs' claim on the grounds that the New York statute "represented no racial slur or stigma with respect to whites or any other race" and left white voters with better than proportional representation. *Id.,* at 165–166, 97 S.Ct., at 1009–1010. Two others concluded that the statute did not minimize or cancel out a minority group's voting strength and that the State's intent to comply with the Voting Rights Act, as interpreted by the Department of Justice, "foreclose[d] any finding that [the State] acted with the invidious purpose of discriminating against white voters." *Id.,* at 180, 97 S.Ct., at 1017 (Stewart, J., joined by Powell, J., concurring in judgment).

The District Court below relied on these portions of *UJO* to reject appellants' claim. See 808 F.Supp., at 472–473. In our view, the court used the wrong analysis. *UJO* 's framework simply does not apply where, as here, a reapportionment plan is alleged to be so irrational on its face that it immediately offends principles of racial equality. *UJO* set forth a standard under which white voters can establish unconstitutional vote dilution. ****2830** But it did not purport to overrule *Gomillion* or *Wright.* Nothing in the decision precludes white voters (or voters of any other race) from bringing the analytically distinct claim that a reapportionment plan rationally cannot be understood as anything other than an effort to segregate citizens into separate voting districts on the basis of race without sufficient justification. Because appellants here stated such a claim, the District Court erred in dismissing their complaint.

***653** IV

Justice SOUTER contends that exacting scrutiny of racial gerrymanders under the Fourteenth Amendment is inappropriate because reapportionment "nearly always require[s] some consideration of race for legitimate reasons." *Post,* at 2845 (dissenting opinion). "As long as members of racial groups have [a] commonality of interest" and "racial bloc voting takes place," he argues, "legislators will have to take race into account" in order to comply with the Voting Rights Act. *Ibid.* Justice SOUTER's reasoning is flawed.

Earlier this Term, we unanimously reaffirmed that racial bloc voting and minority-group political cohesion never can be assumed, but specifically must be proved in each case in order to establish that a redistricting plan dilutes minority voting strength in violation of § 2. See *Growe v. Emison,* 507 U.S. 25, 40–41, 113 S.Ct. 1075, 1076, 122 L.Ed.2d 388 (1993) ("Unless these points are established, there neither has been a wrong nor can be a remedy"). That racial bloc voting or minority political cohesion may be found to exist in *some* cases, of course, is no reason to treat *all* racial gerrymanders differently from other kinds of racial classification. Justice SOUTER apparently views racial gerrymandering of the type presented here as a special category of "benign" racial discrimination that should be subject to relaxed judicial review. Cf. *post,* at 2847–2848 (dissenting opinion). As we have said, however, the very reason that the Equal Protection Clause demands strict scrutiny of all racial classifications is because without it, a court cannot determine whether or not the discrimination truly is "benign." See *supra,* at 2824. Thus, if appellants' allegations of a racial gerrymander are not

contradicted on remand, the District Court must determine whether the General Assembly's reapportionment plan satisfies strict scrutiny. We therefore consider what that level of scrutiny requires in the reapportionment context.

The state appellees suggest that a covered jurisdiction may have a compelling interest in creating majority-minority ***654** districts in order to comply with the Voting Rights Act. The States certainly have a very strong interest in complying with federal antidiscrimination laws that are constitutionally valid as interpreted and as applied. But in the context of a Fourteenth Amendment challenge, courts must bear in mind the difference between what the law permits and what it requires.

For example, on remand North Carolina might claim that it adopted the revised plan in order to comply with the § 5 "nonretrogression" principle. Under that principle, a proposed voting change cannot be precleared if it will lead to "a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Beer v. United States,* 425 U.S. 130, 141, 96 S.Ct. 1357, 1364, 47 L.Ed.2d 629 (1976). In *Beer,* we held that a reapportionment plan that created one majority-minority district where none existed before passed muster under § 5 because it improved the position of racial minorities. *Id.,* at 141–142, 96 S.Ct., at 1363–1364; see also *Richmond v. United States,* 422 U.S. 358, 370–371, 95 S.Ct. 2296, 2303–2304, 45 L.Ed.2d 245 (1975) (annexation that reduces percentage of blacks in population satisfies § 5 where post-annexation districts "fairly reflect" current black voting strength).

Although the Court concluded that the redistricting scheme at issue in *Beer* was ****2831** nonretrogressive, it did not hold that the plan, for that reason, was immune from constitutional challenge. The Court expressly declined to reach that question. See 425 U.S., at 142, n. 14, 96 S.Ct., at 1364, n. 14. Indeed, the Voting Rights Act and our case law make clear that a reapportionment plan that satisfies § 5 still may be enjoined as unconstitutional. See 42 U.S.C. § 1973c (neither a declaratory judgment by the District Court for the District of Columbia nor preclearance by the Attorney General "shall bar a subsequent action to enjoin enforcement" of new voting practice); *Allen,* 393 U.S., at 549–550, 89 S.Ct., at 823–824 (after preclearance, "private parties may enjoin the enforcement of the new enactment ... in traditional suits attacking its constitutionality"). Thus, ***655** we do not read *Beer* or any of our other § 5 cases to give covered jurisdictions *carte blanche* to engage in racial gerrymandering in the name of nonretrogression. A reapportionment plan would not be narrowly tailored to the goal of avoiding retrogression if the State went beyond what was reasonably necessary to avoid retrogression. Our conclusion is supported by the plurality opinion in *UJO,* in which four Justices determined that New York's creation of additional majority-minority districts was constitutional because the plaintiffs had failed to demonstrate that the State "did more than the Attorney General was authorized to *require* it to do under the nonretrogression principle of *Beer.*" 430 U.S., at 162–163, 97 S.Ct., at 1008–1009 (opinion of WHITE, J., joined by BRENNAN, BLACKMUN, and STEVENS, JJ.) (emphasis added).

Before us, the state appellees contend that the General Assembly's revised plan was necessary not to prevent retrogression, but to avoid dilution of black voting strength in violation of § 2, as construed in *Thornburg v. Gingles,* 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986). In *Gingles* the Court considered a multimember redistricting plan for the North Carolina State Legislature. The Court held that members of a racial minority group claiming § 2 vote dilution through the use of multimember districts must prove three threshold conditions: that the minority group "is sufficiently large and geographically compact to constitute a majority in a single-member district," that the minority group is "politically cohesive," and that "the white majority votes sufficiently as a bloc to enable it ... usually to defeat the minority's preferred candidate." *Id.,* at 50–51, 106 S.Ct., at 2766–2767. We have indicated that similar preconditions apply in § 2 challenges to single-member districts. See *Voinovich v. Quilter,* 507 U.S., at 157–158, 113 S.Ct., at 1084–1085; *Growe v. Emison,* 507 U.S., at 40, 113 S.Ct., at ——.

Appellants maintain that the General Assembly's revised plan could not have been required by § 2. They contend that the State's black population is too dispersed to support two geographically compact majority-black districts, as the bizarre ***656** shape of District 12 demonstrates, and that there is no evidence of black political cohesion. They also contend that recent black electoral successes demonstrate the willingness of white voters in North Carolina to vote for black candidates. Appellants point out that blacks currently hold the positions of State Auditor, Speaker of the North Carolina House of Representatives, and chair of the North Carolina State Board of Elections. They also point out that in 1990 a black candidate defeated a white opponent in the Democratic Party runoff for a United States Senate seat before being defeated narrowly by the Republican incumbent in the general election. Appellants further argue that if § 2 did require adoption of North Carolina's revised plan, § 2 is to that extent unconstitutional. These arguments were not developed below, and the issues remain open for consideration on remand.

The state appellees alternatively argue that the General Assembly's plan advanced a compelling interest entirely distinct from the Voting Rights Act. We previously have recognized a significant state interest in eradicating the effects of past racial

discrimination. See, *e.g.,* ****2832** *Croson,* 488 U.S., at 491–493, 109 S.Ct., at 720–722 (opinion of O'CONNOR, J., joined by REHNQUIST, C.J., and WHITE, J.); *id.,* at 518, 109 S.Ct., at 734–735 (KENNEDY, J., concurring in part and concurring in judgment); *Wygant,* 476 U.S., at 280–282, 106 S.Ct., at 1850–1851 (plurality opinion); *id.,* at 286, 106 S.Ct., at 1853 (O'CONNOR, J., concurring in part and concurring in judgment). But the State must have a " 'strong basis in evidence for [concluding] that remedial action [is] necessary.' " *Croson, supra,* 488 U.S., at 500, 109 S.Ct., at 725 (quoting *Wygant, supra,* 476 U.S., at 277, 106 S.Ct., at 1848 (plurality opinion)).

The state appellees submit that two pieces of evidence gave the General Assembly a strong basis for believing that remedial action was warranted here: the Attorney General's imposition of the § 5 preclearance requirement on 40 North Carolina counties, and the *Gingles* District Court's findings of a long history of official racial discrimination in North Carolina's political system and of pervasive racial bloc voting. ***657** The state appellees assert that the deliberate creation of majority-minority districts is the most precise way—indeed the only effective way—to overcome the effects of racially polarized voting. This question also need not be decided at this stage of the litigation. We note, however, that only three Justices in *UJO* were prepared to say that States have a significant interest in minimizing the consequences of racial bloc voting apart from the requirements of the Voting Rights Act. And those three Justices specifically concluded that race-based districting, as a response to racially polarized voting, is constitutionally permissible only when the State "employ[s] sound districting principles," and only when the affected racial group's "residential patterns afford the opportunity of creating districts in which they will be in the majority." 430 U.S., at 167–168, 97 S.Ct., at 1011 (opinion of WHITE, J., joined by STEVENS and REHNQUIST, JJ.).

V

Racial classifications of any sort pose the risk of lasting harm to our society. They reinforce the belief, held by too many for too much of our history, that individuals should be judged by the color of their skin. Racial classifications with respect to voting carry particular dangers. Racial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions; it threatens to carry us further from the goal of a political system in which race no longer matters—a goal that the Fourteenth and Fifteenth Amendments embody, and to which the Nation continues to aspire. It is for these reasons that race-based districting by our state legislatures demands close judicial scrutiny.

In this case, the Attorney General suggested that North Carolina could have created a reasonably compact second majority-minority district in the south-central to southeastern part of the State. We express no view as to whether appellants successfully could have challenged such a district under the Fourteenth Amendment. We also do not decide ***658** whether appellants' complaint stated a claim under constitutional provisions other than the Fourteenth Amendment. Today we hold only that appellants have stated a claim under the Equal Protection Clause by alleging that the North Carolina General Assembly adopted a reapportionment scheme so irrational on its face that it can be understood only as an effort to segregate voters into separate voting districts because of their race, and that the separation lacks sufficient justification. If the allegation of racial gerrymandering remains uncontradicted, the District Court further must determine whether the North Carolina plan is narrowly tailored to further a compelling governmental interest. Accordingly, we reverse the judgment of the District Court and remand the case for further proceedings consistent with this opinion.

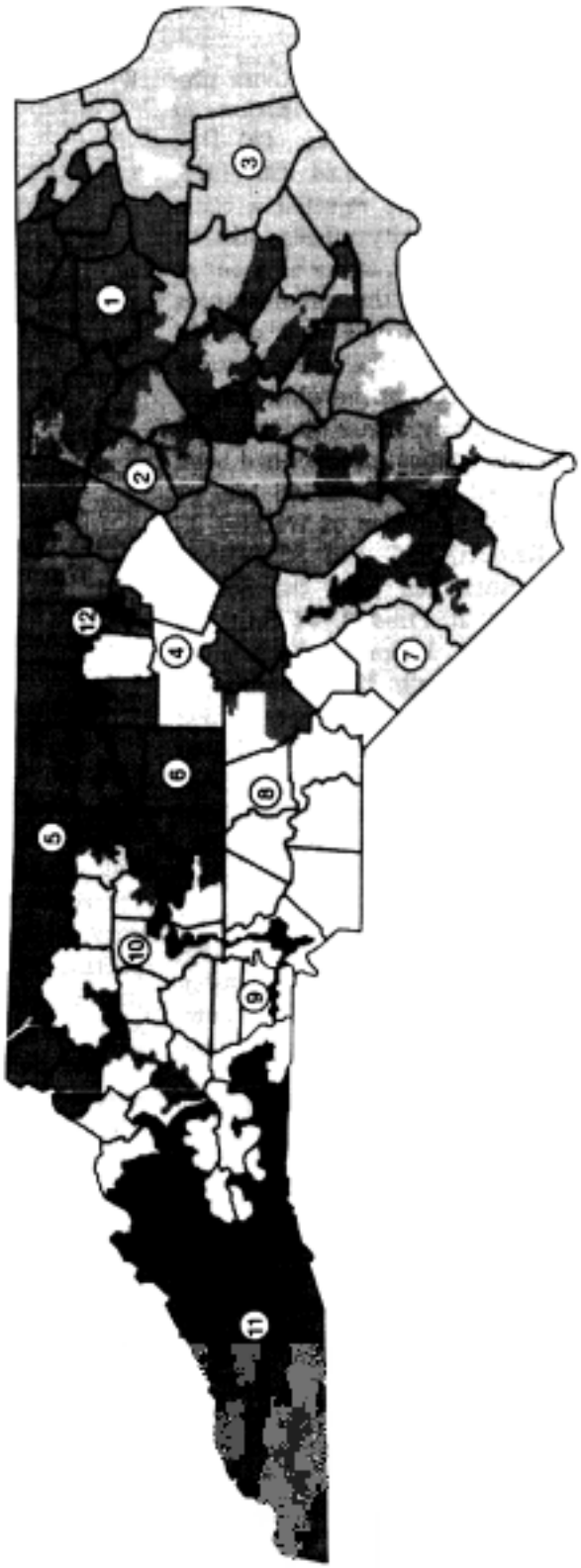
It is so ordered.

***659**

****2833** APPENDIX

NORTH CAROLINA CONGRESSIONAL PLAN

Chapter 7 of the 1991 Session Laws (1991 Extra Session)



**2834 Justice WHITE, with whom Justice BLACKMUN and Justice STEVENS join, dissenting.

The facts of this case mirror those presented in *United Jewish Organizations of Williamsburgh, Inc. v. Carey,* 430 U.S. 144, 97 S.Ct. 996, 51 L.Ed.2d 229 (1977) *(UJO),* where the Court rejected a claim that creation of a majority-minority district violated the Constitution, either as a *per se* matter or in light of the circumstances leading to the creation of such a district. Of particular relevance, five of the Justices reasoned that members of the white majority could not plausibly argue that their influence over the political process had been unfairly canceled, see *id.,* at 165–168, 97 S.Ct., at 1009–1011 (opinion of WHITE, J., joined by REHNQUIST and STEVENS, JJ.), or that such had been the State's intent, see *id.,* at 179–180, 97 S.Ct., at 1016–1017 (Stewart, J., joined by Powell, J., concurring in judgment). Accordingly, they held that plaintiffs were not entitled to relief under the Constitution's **659 Equal Protection Clause. On the same reasoning, I would affirm the District Court's dismissal of appellants' claim in this instance.

The Court today chooses not to overrule, but rather to sidestep, *UJO.* It does so by glossing over the striking similarities, focusing on surface differences, most notably the (admittedly unusual) shape of the newly created district, and imagining an entirely new cause of action. Because the holding is limited to such anomalous circumstances, *ante,* at ——, it perhaps will not substantially hamper a State's legitimate efforts to redistrict in favor of racial minorities. Nonetheless, the notion that North Carolina's plan, under which whites remain a voting majority in a disproportionate number of congressional districts, and pursuant to which the State has sent its *first* black representatives since Reconstruction to the United States Congress, might have violated appellants' constitutional rights is both a fiction and a departure from settled equal protection principles. Seeing no good reason to engage in either, I dissent.

I

A

The grounds for my disagreement with the majority are simply stated: Appellants have not presented a cognizable claim, because they have not alleged a cognizable injury. To date, we have held that only two types of state voting practices could give rise to a constitutional claim. The first involves direct and outright deprivation of the right to vote, for example by means of a poll tax or literacy test. See, *e.g., Guinn v. United States,* 238 U.S. 347, 35 S.Ct. 926, 59 L.Ed. 1340 (1915). Plainly, this variety is not implicated by appellants' allegations and need not detain us further. The second type of unconstitutional practice is that which "affects the political strength of various groups," *Mobile v. Bolden,* 446 U.S. 55, 83, 100 S.Ct. 1490, 1508, 64 L.Ed.2d 47 (1980) (STEVENS, J., concurring in judgment), in violation of the Equal Protection Clause. As for this latter category, we **660 have insisted that members of the political or racial group demonstrate that the challenged action have the intent and effect of unduly diminishing their influence on the political process.[1] Although this severe burden has limited the number of successful suits, it was adopted for sound reasons.

The central explanation has to do with the nature of the redistricting process. As the majority recognizes, "redistricting differs from other kinds of state decisionmaking in that the legislature always is *aware* of race when it draws district lines, just as it is aware of age, economic status, religious and political persuasion, and a variety of other **2835 demographic factors." *Ante,* at 2826 (emphasis in original). "Being aware," in this context, is shorthand for "taking into account," and it hardly can be doubted that legislators routinely engage in the business of making electoral predictions based on group characteristics—racial, ethnic, and the like.

> "[L]ike bloc-voting by race, [the racial composition of geographic area] too is a fact of life, well known to those responsible for drawing electoral district lines. These lawmakers are quite aware that the districts they create will have a

> white or a black majority; and with each new district comes the unavoidable choice as to the racial composition of the district." *Beer v. United States,* 425 U.S. 130, 144, 96 S.Ct. 1357, 1365, 47 L.Ed.2d 629 (1976) (WHITE, J., dissenting).

As we have said, "it requires no special genius to recognize the political consequences of drawing a district line along one street rather than another." ***661** *Gaffney v. Cummings,* 412 U.S. 735, 753, 93 S.Ct. 2321, 2331, 37 L.Ed.2d 298 (1973); see also *Mobile v. Bolden, supra,* 446 U.S., at 86–87, 100 S.Ct., at 1509–1510 (STEVENS, J., concurring in judgment). Because extirpating such considerations from the redistricting process is unrealistic, the Court has not invalidated all plans that consciously use race, but rather has looked at their impact.

Redistricting plans also reflect group interests and inevitably are conceived with partisan aims in mind. To allow judicial interference whenever this occurs would be to invite constant and unmanageable intrusion. Moreover, a group's power to affect the political process does not automatically dissipate by virtue of an electoral loss. Accordingly, we have asked that an identifiable group demonstrate more than mere lack of success at the polls to make out a successful gerrymandering claim. See, *e.g., White v. Regester,* 412 U.S. 755, 765–766, 93 S.Ct. 2332, 2339–2340, 37 L.Ed.2d 314 (1973); *Whitcomb v. Chavis,* 403 U.S. 124, 153–155, 91 S.Ct. 1858, 1873–1875, 29 L.Ed.2d 363 (1971).

With these considerations in mind, we have limited such claims by insisting upon a showing that "the political processes ... were not equally open to participation by the group in question—that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice." *White v. Regester, supra,* 412 U.S., at 766, 93 S.Ct., at 2339. Indeed, as a brief survey of decisions illustrates, the Court's gerrymandering cases all carry this theme—that it is not mere suffering at the polls but discrimination in the polity with which the Constitution is concerned.

In *Whitcomb v. Chavis,* 403 U.S., at 149, 91 S.Ct., at 1872, we searched in vain for evidence that black voters "had less opportunity than did other ... residents to participate in the political processes and to elect legislators of their choice." More generally, we remarked:

> "The mere fact that one interest group or another concerned with the outcome of [the district's] elections has found itself outvoted and without legislative seats of its ***662** own provides no basis for invoking constitutional remedies where ... there is no indication that this segment of the population is being denied access to the political system." *Id.,* at 154–155, 91 S.Ct., at 1875.

Again, in *White v. Regester, supra,* the same criteria were used to uphold the District Court's finding that a redistricting plan was unconstitutional. The "historic and present condition" of the Mexican–American community, *id.,* 412 U.S., at 767, 93 S.Ct., at 2340, a status of cultural and economic marginality, *id.,* at 768, 93 S.Ct., at 2340–2341, as well as the legislature's unresponsiveness to the group's interests, *id.,* at 768–769, 93 S.Ct., at 2340–2341, justified the conclusion that Mexican–Americans were " 'effectively removed from the political processes,' " and "invidiously excluded ... from effective participation in political life," *id.,* at 769, 93 S.Ct., at 2341. Other decisions of this Court adhere to the ****2836** same standards. See *Rogers v. Lodge,* 458 U.S. 613, 624–626, 102 S.Ct. 3272, 3279–3280, 73 L.Ed.2d 1012 (1982); *Chapman v. Meier,* 420 U.S. 1, 17, 95 S.Ct. 751, 761, 42 L.Ed.2d 766 (1975) (requiring proof that "the group has been denied access to the political process equal to the access of other groups").[2]

I summed up my views on this matter in the plurality opinion in *Davis v. Bandemer,* 478 U.S. 109, 106 S.Ct. 2797, 92 L.Ed.2d 85 (1986).[3] Because districting inevitably is the expression of interest group politics, and because "the power to influence the political process is not limited to winning elections," *id.,* at 132, 106 S.Ct., at 2810, ***663** the question in gerrymandering cases is "whether a particular group has been unconstitutionally denied its chance to effectively influence the political process." *Id.,* at 132–133, 106 S.Ct., at 2810. Thus, "an equal protection violation may be found only where the electoral system *substantially disadvantages certain voters in their opportunity to influence the political process effectively." Id.,* at 133, 106 S.Ct., at 2810 (emphasis added). By this, I meant that the group must exhibit "strong indicia of lack of political power and the denial of fair representation," so that it could be said that it has "essentially been shut out of the political process." *Id.,* at 139, 106 S.Ct., at 2814. In short, even assuming that racial (or political) factors were considered in the drawing of district boundaries, a showing of discriminatory effects is a "threshold requirement" in the absence of which there is no equal protection violation, *id.,* at 143, 106 S.Ct., at 2815–2816, and no need to "reach the question of the state interests ... served by the particular districts," *id.,* at 142, 106 S.Ct., at 2815.[4]

To distinguish a claim that alleges that the redistricting scheme has discriminatory intent and effect from one that does not has nothing to do with dividing racial classifications between the "benign" and the malicious—an enterprise which, as the majority notes, the Court has treated with skepticism. See *ante,* at 2824. Rather, the issue is whether the classification based

on race discriminates ***664** against *anyone* by denying equal access to the political process. Even Members of the Court least inclined to approve of race-based remedial measures have acknowledged the significance of this factor. See *Fullilove v. Klutznick,* 448 U.S. 448, 524–525, n. 3, 100 S.Ct. 2758, 2798–2799, n. 3, 65 L.Ed.2d 902 (1980) (Stewart, J., dissenting) ("No person in [*UJO*] was deprived of his electoral franchise"); *Regents of Univ. of Cal. v. Bakke,* 438 U.S. 265, 304–305, 98 S.Ct. 2733, 2755–2756, 57 L.Ed.2d 750 (1978) ****2837** (Powell, J.) ("*United Jewish Organizations* ... properly is viewed as a case in which the remedy for an administrative finding of discrimination encompassed measures to improve the previously disadvantaged group's ability to participate, *without excluding individuals belonging to any other group from enjoyment of the relevant opportunity—meaningful participation in the electoral process*") (emphasis added).

B

The most compelling evidence of the Court's position prior to this day, for it is most directly on point, is *UJO,* 430 U.S. 144, 97 S.Ct. 996, 51 L.Ed.2d 229 (1977). The Court characterizes the decision as "highly fractured," *ante,* at 2829, but that should not detract attention from the rejection by a majority in *UJO* of the claim that the State's intentional creation of majority-minority districts transgressed constitutional norms. As stated above, five Justices were of the view that, absent any contention that the proposed plan was adopted with the intent, or had the effect, of unduly minimizing the white majority's voting strength, the Fourteenth Amendment was not implicated. Writing for three Members of the Court, I justified this conclusion as follows:

> "It is true that New York deliberately increased the nonwhite majorities in certain districts in order to enhance the opportunity for election of nonwhite representatives from those districts. Nevertheless, there was no fencing out of the white population from participation in the political processes of the county, and the ***665** plan did not minimize or unfairly cancel out white voting strength." 430 U.S., at 165, 97 S.Ct., at 1010 (opinion of WHITE, J.).

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

> "The petitioners have made no showing that a racial criterion was used as a basis for denying them their right to vote, in contravention of the Fifteenth Amendment. See *Gomillion v. Lightfoot,* 364 U.S. 339, [81 S.Ct. 125]. They have made no showing that the redistricting scheme was employed as part of a 'contrivance to segregate'; to minimize or cancel out the voting strength of a minority class or interest; or otherwise to impair or burden the opportunity of affected persons to participate in the political process." *Id.,* 430 U.S., at 179, 97 S.Ct., at 1017 (opinion concurring in judgment) (some citations omitted).

Under either formulation, it is irrefutable that appellants in this proceeding likewise have failed to state a claim. As was the case in New York, a number of North Carolina's political subdivisions have interfered with black citizens' meaningful exercise of the franchise and are therefore subject to §§ 4 and 5 of the Voting Rights Act. Cf. *UJO, supra,* at 148, 97 S.Ct., at 1001. In other words, North Carolina was found by Congress to have " 'resorted to the extraordinary stratagem of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination in the face of adverse federal court decrees' " and therefore "would be likely to engage in 'similar maneuvers in the future in order to evade the remedies for voting discrimination contained in the Act itself.' " *McCain v. Lybrand,* 465 U.S. 236, 245, 104 S.Ct. 1037, 1044, 79 L.Ed.2d 271 (1984) (quoting *South Carolina v. Katzenbach,* 383 U.S. 301, 334, 335, 86 S.Ct. 803, 821–822, 15 L.Ed.2d 769 (1966)).[5] Like New York, North Carolina failed to prove to ***666** the Attorney General's satisfaction that its proposed redistricting had neither the purpose nor the effect of abridging the right to vote on account of race or color. Cf. *UJO, supra,* 430 U.S., at 150, 97 S.Ct., at 1002. ****2838** The Attorney General's interposition of a § 5 objection "properly is viewed" as "an administrative finding of discrimination" against a racial minority. *Regents of Univ. of Cal. v. Bakke, supra,* 438 U.S., at 305, 98 S.Ct., at 2756 (opinion of Powell, J.). Finally, like New York, North Carolina reacted by modifying its plan and creating additional majority-minority districts. Cf. *UJO, supra,* 430 U.S., at 151–152, 97 S.Ct., at 1002–1003.

In light of this background, it strains credulity to suggest that North Carolina's purpose in creating a second

majority-minority district was to discriminate against members of the majority group by "impair[ing] or burden [ing their] opportunity ... to participate in the political process." *Id.,* at 179, 97 S.Ct., at 1017 (Stewart, J., concurring in judgment). The State has made no mystery of its intent, which was to respond to the Attorney General's objections, see Brief for State Appellees 13–14, by improving the minority group's prospects of electing a candidate of its choice. I doubt that this constitutes a discriminatory purpose as defined in the Court's equal protection cases—*i.e.,* an intent to aggravate "the unequal distribution of electoral power." *Post,* at 2844 (STEVENS, J., dissenting). But even assuming that it does, there is no question that appellants have not alleged the requisite discriminatory effects. Whites constitute roughly 76% of the total population and 79% of the voting age population in North Carolina. Yet, under the State's plan, they still constitute a voting majority in 10 (or 83%) of the 12 congressional districts. Though they might be dissatisfied at the prospect of casting a vote for a losing candidate—a lot shared by many, including a disproportionate number of minority ***667** voters—surely they cannot complain of discriminatory treatment.[6]

II

The majority attempts to distinguish *UJO* by imagining a heretofore unknown type of constitutional claim. In its words, "*UJO* set forth a standard under which white voters can establish unconstitutional vote dilution.... Nothing in the decision precludes white voters (or voters of any other race) from bringing the analytically distinct claim that a reapportionment plan rationally cannot be understood as anything other than an effort to segregate citizens into separate voting districts on the basis of race without sufficient justification." *Ante,* at 2830. There is no support for this distinction in *UJO,* and no authority in the cases relied on by the Court either. More importantly, the majority's submission does not withstand analysis. The logic of its theory appears to be that race-conscious redistricting that "segregates" by drawing odd-shaped lines is qualitatively different from race-conscious redistricting that affects groups in some other way. The distinction is without foundation.

A

The essence of the majority's argument is that *UJO* dealt with a claim of vote dilution—which required a specific showing of harm—and that cases such as *Gomillion v. Lightfoot,* 364 U.S. 339, 81 S.Ct. 125, 5 L.Ed.2d 110 (1960), and *Wright v. Rockefeller,* 376 U.S. 52, 84 S.Ct. 603, 11 L.Ed.2d 512 (1964), dealt with claims of racial segregation—which did not. I read these decisions quite differently. Petitioners' ***668** claim in *UJO* was that the State had "violated the Fourteenth and Fifteenth Amendments by *deliberately revising its reapportionment* ****2839** *plan along racial lines.*" 430 U.S., at 155, 97 S.Ct., at 1005 (plurality opinion) (emphasis added). They also stated: " 'Our argument is ... that the history of the area demonstrates that there could be—and in fact was—*no reason other than race* to divide the community at this time.' " *Id.,* at 154, n. 14, 97 S.Ct., at 1004, n. 14 (quoting Brief for Petitioners, O.T. 1976, No. 75–104, p. 6, n. 6) (emphasis in original). Nor was it ever in doubt that "the State deliberately used race in a purposeful manner." 430 U.S., at 165, 97 S.Ct., at 1010. In other words, the "analytically distinct claim" the majority discovers today was in plain view and did not carry the day for petitioners. The fact that a demonstration of discriminatory effect was required in that case was not a function of the kind of claim that was made. It was a function of the type of injury upon which the Court insisted.

Gomillion is consistent with this view. To begin, the Court's reliance on that case as the font of its novel type of claim is curious. Justice Frankfurter characterized the complaint as alleging a deprivation of the right to vote in violation of the *Fifteenth* Amendment. See 364 U.S., at 341, 346, 81 S.Ct., at 127, 130. Regardless whether that description was accurate, see *ante,* at 2825, it seriously deflates the precedential value which the majority seeks to ascribe to *Gomillion:* As I see it, the case cannot stand for the proposition that the intentional creation of majority-minority districts, without more, gives rise to an equal protection challenge under the Fourteenth Amendment. But even recast as a Fourteenth Amendment case, *Gomillion*

does not assist the majority, for its focus was on the alleged *effect* of the city's action, which was to exclude black voters from the municipality of Tuskegee. As the Court noted, the "inevitable effect of this redefinition of Tuskegee's boundaries" was "to deprive the Negro petitioners discriminatorily of the benefits of residence in Tuskegee." 364 U.S., at 341, 81 S.Ct., at 127. Even Justice Whittaker's ***669** concurrence appears to be premised on the notion that black citizens were being "fenc[ed] out" of municipal benefits. *Id.,* at 349, 81 S.Ct., at 131–132. Subsequent decisions of this Court have similarly interpreted *Gomillion* as turning on the unconstitutional effect of the legislation. See *Palmer v. Thompson,* 403 U.S. 217, 225, 91 S.Ct. 1940, 1945, 29 L.Ed.2d 438 (1971); *United States v. O'Brien,* 391 U.S. 367, 385, 88 S.Ct. 1673, 1683–1684, 20 L.Ed.2d 672 (1968). In *Gomillion,* in short, the group that formed the majority at the state level purportedly set out to manipulate city boundaries in order to remove members of the minority, thereby denying them valuable municipal services. No analogous purpose or effect has been alleged in this case.

The only other case invoked by the majority is *Wright v. Rockefeller, supra. Wright* involved a challenge to a legislative plan that created four districts. In the 17th, 19th and 20th Districts, Whites constituted respectively 94.9%, 71.5%, and 72.5% of the population. 86.3% of the population in the 18th District was classified as nonwhite or Puerto Rican. See *Wright v. Rockefeller,* 211 F.Supp. 460, 472 (SDNY 1962) (Murphy, J., dissenting); 376 U.S., at 54, 84 S.Ct., at 604. The plaintiffs alleged that the plan was drawn with the intent to segregate voters on the basis of race, in violation of the Fourteenth and Fifteenth Amendments. *Id.,* at 53–54, 84 S.Ct., at 603–604. The Court affirmed the District Court's dismissal of the complaint on the ground that plaintiffs had not met their burden of proving discriminatory intent. See *id.,* at 55, 58, 84 S.Ct., at 604–605, 606. I fail to see how a decision based on a failure to establish discriminatory *intent* can support the inference that it is unnecessary to prove discriminatory *effect.*

Wright is relevant only to the extent that it illustrates a proposition with which I have no problem: that a complaint stating that a plan has carved out districts on the basis of race *can,* under certain circumstances, state a claim under the Fourteenth Amendment. To ****2840** that end, however, there must be an allegation of discriminatory purpose and effect, for the constitutionality of a race-conscious redistricting plan ***670** depends on these twin elements. In *Wright,* for example, the facts might have supported the contention that the districts were intended to, and did in fact, shield the 17th District from any minority influence and "pack" black and Puerto Rican voters in the 18th, thereby invidiously minimizing their voting strength. In other words, the purposeful creation of a majority-minority district could have discriminatory effect if it is achieved by means of "packing"—*i.e.,* overconcentration of minority voters. In the present case, the facts could sustain no such allegation.

B

Lacking support in any of the Court's precedents, the majority's novel type of claim also makes no sense. As I understand the theory that is put forth, a redistricting plan that uses race to "segregate" voters by drawing "uncouth" lines is harmful in a way that a plan that uses race to distribute voters differently is not, for the former "bears an uncomfortable resemblance to political apartheid." See *ante,* at 2827. The distinction is untenable.

Racial gerrymanders come in various shades: At-large voting schemes, see, *e.g., White v. Regester,* 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973); the fragmentation of a minority group among various districts "so that it is a majority in none," *Voinovich v. Quilter,* 507 U.S. 146, 153, 113 S.Ct. 1149, 1155, 122 L.Ed.2d 500 (1993), otherwise known as "cracking," cf. *Connor v. Finch,* 431 U.S. 407, 422, 97 S.Ct. 1828, 1838, 52 L.Ed.2d 465 (1977); the "stacking" of "a large minority population concentration ... with a larger white population," Parker, Racial Gerrymandering and Legislative Reapportionment, in Minority Vote Dilution 85, 92 (C. Davidson ed. 1984); and, finally, the "concentration of [minority voters] into districts where they constitute an excessive majority," *Thornburg v. Gingles,* 478 U.S. 30, 46, n. 11, 106 S.Ct. 2752, 2764, n. 11, 92 L.Ed.2d 25 (1986), also called "packing," *Voinovich, supra,* 507 U.S., at 153, 113 S.Ct., at 1155. In each instance, race is consciously utilized by the legislature for electoral purposes; in each instance, we have put the plaintiff challenging the district lines to the ***671** burden of demonstrating that the plan was meant to, and did in fact, exclude an identifiable racial group from participation in the political process.

Not so, apparently, when the districting "segregates" by drawing odd-shaped lines.[7] In that case, we are told, such proof no longer is needed. Instead, it is the *State* that must rebut the allegation that race was taken into account, a fact that, together with the legislators' consideration of ethnic, religious, and other group characteristics, I had thought we practically took for granted, see *supra,* at 2834–2835. Part of the explanation for the majority's approach has to do, perhaps, with the emotions stirred by words such as "segregation" and "political apartheid." But their loose and imprecise use by today's majority has, I fear, led it astray. See n. 7, *supra.* The consideration of race in "segregation" cases is no different than in other race-conscious districting; from the standpoint of the affected groups, moreover, the line-drawings all act in similar fashion.[8] A plan that "segregates" being functionally ****2841** indistinguishable from any of the other varieties of gerrymandering, we should be consistent in what we require from a claimant: proof of discriminatory purpose and effect.

The other part of the majority's explanation of its holding is related to its simultaneous discomfort and fascination with irregularly shaped districts. Lack of compactness or contiguity, like uncouth district lines, certainly is a helpful ***672** indicator that some form of gerrymandering (racial or other) might have taken place and that "something may be amiss." *Karcher v. Daggett,* 462 U.S. 725, 758, 103 S.Ct. 2653, 2674, 77 L.Ed.2d 133 (1983) (STEVENS, J., concurring). Cf. *Connor, supra,* 431 U.S., at 425, 97 S.Ct., at 1839. Disregard for geographic divisions and compactness often goes hand in hand with partisan gerrymandering. See *Karcher, supra,* 462 U.S., at 776, 103 S.Ct., at 2683 (WHITE, J., dissenting); *Wells v. Rockefeller,* 394 U.S. 542, 554, 89 S.Ct. 1234, 2683, 22 L.Ed.2d 535 (1969) (WHITE, J., dissenting).

But while district irregularities may provide strong indicia of a potential gerrymander, they do no more than that. In particular, they have no bearing on whether the plan ultimately is found to violate the Constitution. Given two districts drawn on similar, race-based grounds, the one does not become more injurious than the other simply by virtue of being snake-like, at least so far as the Constitution is concerned and absent any evidence of differential racial impact. The majority's contrary view is perplexing in light of its concession that "compactness or attractiveness has never been held to constitute an independent federal constitutional requirement for state legislative districts." *Gaffney,* 412 U.S., at 752, n. 18, 93 S.Ct., at 2331, n. 18; see *ante,* at ——. It is shortsighted as well, for a regularly shaped district can just as effectively effectuate racially discriminatory gerrymandering as an odd-shaped one.[9] By focusing on looks rather than impact, the majority "immediately casts attention in the wrong direction—toward superficialities of shape and size, rather than toward the political realities of district composition." R. Dixon, Democratic Representation: Reapportionment in Law and Politics 459 (1968).

***673** Limited by its own terms to cases involving unusually shaped districts, the Court's approach nonetheless will unnecessarily hinder to some extent a State's voluntary effort to ensure a modicum of minority representation. This will be true in areas where the minority population is geographically dispersed. It also will be true where the minority population is not scattered but, for reasons unrelated to race—for example incumbency protection—the State would rather not create the majority-minority district in its most "obvious" location.[10] When, ****2842** as is the case here, the creation of ***674** a majority-minority district does not unfairly minimize the voting power of any other group, the Constitution does not justify, much less mandate, such obstruction. We said as much in *Gaffney:*

> "[C]ourts have [no] constitutional warrant to invalidate a state plan, otherwise within tolerable population limits, because it undertakes, not to minimize or eliminate the political strength of any group or party, but to recognize it and, through districting, provide a rough sort of proportional representation in the legislative halls of the State." 412 U.S., at 754, 93 S.Ct., at 2332.

III

Although I disagree with the holding that appellants' claim is cognizable, the Court's discussion of the level of scrutiny it requires warrants a few comments. I have no doubt that a State's compliance with the Voting Rights Act clearly constitutes a compelling interest. Cf. *UJO,* 430 U.S., at 162–165, 97 S.Ct., at 1008–1010 (opinion of WHITE, J.); *id.,* at 175–179, 97 S.Ct., at 1008–1010 (Brennan, J., concurring in part); *id.,* at 180, 97 S.Ct., at 1017 (Stewart, J., concurring in judgment). Here, the Attorney General objected to the State's plan on the ground that it failed to draw a second majority-minority district

for what appeared to be pretextual reasons. Rather than challenge this conclusion, North Carolina chose to draw the second district. As *UJO* held, a State is entitled to take such action. See also *Wygant v. Jackson Bd. of Ed.,* 476 U.S. 267, 291, 106 S.Ct. 1842, 1856, 90 L.Ed.2d 260 (O'CONNOR, J., concurring in part and concurring in judgment).

The Court, while seemingly agreeing with this position, warns that the State's redistricting effort must be "narrowly tailored" to further its interest in complying with the law. *Ante,* at ——. It is evident to me, however, that what North Carolina did was precisely tailored to meet the objection of the Attorney General to its prior plan. Hence, I see no need ***675** for a remand at all, even accepting the majority's basic approach to this case.

Furthermore, how it intends to manage this standard, I do not know. Is it more "narrowly tailored" to create an irregular majority-minority district as opposed to one that is compact but harms other state interests such as incumbency protection or the representation of rural interests? Of the following two options—creation of two minority influence districts or of a single majority-minority district—is one "narrowly tailored" and the other not? Once the Attorney General has found that a proposed redistricting change violates § 5's nonretrogression principle in that it will abridge a racial minority's right to vote, does "narrow tailoring" mean that the most the State can do is preserve the *status quo?* Or can it maintain that change, while attempting to enhance minority voting power in some other manner? This small sample only begins to scratch the surface of the problems raised by the majority's test. But it suffices to illustrate the unworkability of a standard that is divorced from any measure of constitutional harm. In that, state efforts to remedy minority vote dilution are wholly unlike what typically has been labeled "affirmative action." To the extent that no other racial group is injured, remedying a Voting Rights Act violation does not involve preferential treatment. Cf. ****2843** *Wygant, supra,* at 295, 106 S.Ct., at 1858 (WHITE, J., concurring in judgment). It involves, instead, an attempt to *equalize* treatment, and to provide minority voters with an effective voice in the political process. The Equal Protection Clause of the Constitution, surely, does not stand in the way.

IV

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

***676** Justice BLACKMUN, dissenting.

I join Justice WHITE's dissenting opinion. I did not join Part IV of his opinion in *United Jewish Organizations of Williamsburgh, Inc. v. Carey,* 430 U.S. 144, 97 S.Ct. 996, 51 L.Ed.2d 229 (1977), because I felt that its "additional argument," *id.,* at 165, 97 S.Ct., at 1009–1010, was not necessary to decide that case. I nevertheless agree that the conscious use of race in redistricting does not violate the Equal Protection Clause unless the effect of the redistricting plan is to deny a particular group equal access to the political process or to minimize its voting strength unduly. See, *e.g., Chapman v. Meier,* 420 U.S. 1, 17, 95 S.Ct. 751, 761, 42 L.Ed.2d 766 (1975); *White v. Regester,* 412 U.S. 755, 765–766, 93 S.Ct. 2332, 2339–2340, 37 L.Ed.2d 314 (1973). It is particularly ironic that the case in which today's majority chooses to abandon settled law and to recognize for the first time this "analytically distinct" constitutional claim, *ante,* at 2830, is a challenge by white voters to the plan under which North Carolina has sent black representatives to Congress for the first time since Reconstruction. I dissent.

Justice STEVENS, dissenting.

For the reasons stated by Justice WHITE, the decision of the District Court should be affirmed. I add these comments to emphasize that the two critical facts in this case are undisputed: First, the shape of District 12 is so bizarre that it must have

been drawn for the purpose of either advantaging or disadvantaging a cognizable group of voters; and, second, regardless of that shape, it *was* drawn for the purpose of facilitating the election of a second black representative from North Carolina.

These unarguable facts, which the Court devotes most of its opinion to proving, give rise to three constitutional questions: Does the Constitution impose a requirement of contiguity or compactness on how the States may draw their electoral districts? Does the Equal Protection Clause prevent a State from drawing district boundaries for the purpose of ***677** facilitating the election of a member of an identifiable group of voters? And, finally, if the answer to the second question is generally "No," should it be different when the favored group is defined by race? Since I have already written at length about these questions,[1] my negative answer to each can be briefly explained.

The first question is easy. There is no independent constitutional requirement of compactness or contiguity, and the Court's opinion (despite its many references to the shape of District 12, see *ante,* at 2820–2821, 2823, 2824, 2825–2827) does not suggest otherwise. The existence of bizarre and uncouth district boundaries is powerful evidence of an ulterior purpose behind the shaping of those boundaries—usually a purpose to advantage the political party in control ****2844** of the districting process. Such evidence will always be useful in cases that lack other evidence of invidious intent. In this case, however, we know what the legislators' purpose was: The North Carolina Legislature drew District 12 to include a majority of African–American voters. See *ante,* at 2820–2821, 2827. Evidence of the district's shape is therefore convincing, but it is also cumulative, and, for our purposes, irrelevant.

As for the second question, I believe that the Equal Protection Clause is violated when the State creates the kind of uncouth district boundaries seen in *Karcher v. Daggett,* 462 U.S. 725, 103 S.Ct. 2653, 77 L.Ed.2d 133 (1983), *Gomillion v. Lightfoot,* 364 U.S. 339, 81 S.Ct. 125, 5 L.Ed.2d 110 (1960), and this case, for the sole purpose of making it more difficult for members of a minority group to win an election.[2] The ***678** duty to govern impartially is abused when a group with power over the electoral process defines electoral boundaries solely to enhance its own political strength at the expense of any weaker group. That duty, however, is not violated when the majority acts to facilitate the election of a member of a group that lacks such power because it remains underrepresented in the state legislature—whether that group is defined by political affiliation, by common economic interests, or by religious, ethnic, or racial characteristics. The difference between constitutional and unconstitutional gerrymanders has nothing to do with whether they are based on assumptions about the groups they affect, but whether their purpose is to enhance the power of the group in control of the districting process at the expense of any minority group, and thereby to strengthen the unequal distribution of electoral power. When an assumption that people in a particular minority group (whether they are defined by the political party, religion, ethnic group, or race to which they belong) will vote in a particular way is used to *benefit* that group, no constitutional violation occurs. Politicians have always relied on assumptions that people in particular groups are likely to vote in a particular way when they draw new district lines, and I cannot believe that anything in today's opinion will stop them from doing so in the future.[3]

***679** Finally, we must ask whether otherwise permissible redistricting to benefit an underrepresented minority group becomes impermissible when the minority group is defined by its race. The Court today answers this question in the affirmative, and its answer is wrong. If it is permissible to draw boundaries to provide adequate representation for rural voters, for union members, for Hasidic Jews, for Polish Americans, or for Republicans, it necessarily follows that it is permissible ****2845** to do the same thing for members of the very minority group whose history in the United States gave birth to the Equal Protection Clause. See, *e.g., ante,* at 2822–2824.[4] A contrary conclusion could only be described as perverse.

Accordingly, I respectfully dissent.

Justice SOUTER, dissenting.

Today, the Court recognizes a new cause of action under which a State's electoral redistricting plan that includes a configuration "so bizarre," *ante,* at 2825, that it "rationally cannot be understood as anything other than an effort to separate voters into different districts on the basis of race [without] sufficient justification," *ante,* at 2828, will be subjected to strict scrutiny. In my view there is no justification for the ***680** Court's determination to depart from our prior decisions by carving out this narrow group of cases for strict scrutiny in place of the review customarily applied in cases dealing with discrimination in electoral districting on the basis of race.

I

Until today, the Court has analyzed equal protection claims involving race in electoral districting differently from equal protection claims involving other forms of governmental conduct, and before turning to the different regimes of analysis it will be useful to set out the relevant respects in which such districting differs from the characteristic circumstances in which a State might otherwise consciously consider race. Unlike other contexts in which we have addressed the State's conscious use of race, see, *e.g., Richmond v. J.A. Croson Co.,* 488 U.S. 469, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989) (city contracting); *Wygant v. Jackson Bd. of Ed.,* 476 U.S. 267, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986) (teacher layoffs), electoral districting calls for decisions that nearly always require some consideration of race for legitimate reasons where there is a racially mixed population. As long as members of racial groups have the commonality of interest implicit in our ability to talk about concepts like "minority voting strength," and "dilution of minority votes," cf. *Thornburg v. Gingles,* 478 U.S. 30, 46–51, 106 S.Ct. 2752, 2764–2767, 92 L.Ed.2d 25 (1986), and as long as racial bloc voting takes place,[1] legislators will have to take race into account in order to avoid dilution of minority voting strength in the districting plans they adopt.[2] One need look ***681** no further than the Voting Rights Act to understand that this may be required, and we have held that race may constitutionally be taken into account in order to comply with that Act. *United Jewish Organizations of Williamsburgh, Inc. v. Carey,* 430 U.S. 144, 161–162, 97 S.Ct. 996, 1007–1008, 51 L.Ed.2d 229 (1977) (*UJO*) (plurality opinion of WHITE, J., joined by Brennan, BLACKMUN, and STEVENS, JJ.); ****2846** *id.,* at 180, and n., 97 S.Ct., at 1017, and n. (Stewart, J., joined by Powell, J., concurring in judgment).[3]

A second distinction between districting and most other governmental decisions in which race has figured is that those other decisions using racial criteria characteristically occur in circumstances in which the use of race to the advantage of one person is necessarily at the obvious expense of a member of a different race. Thus, for example, awarding government contracts on a racial basis excludes certain firms from competition on racial grounds. See *Richmond v. J.A. Croson Co., supra,* 488 U.S., at 493, 109 S.Ct., at 721; see also *Fullilove v. Klutznick,* 448 U.S. 448, 484, 100 S.Ct. 2758, 2777–2778, 65 L.Ed.2d 902 (1980) (opinion of Burger, C.J.). And when race is used to supplant seniority in layoffs, someone is laid off who would not be otherwise. *Wygant v. Jackson Bd. of Ed., supra,* 476 U.S., at 282–283, 106 S.Ct., at 1851–1852 (plurality opinion). The same principle pertains in nondistricting aspects of voting law, where race-based discrimination places the disfavored voters at the disadvantage of exclusion from the franchise without any alternative benefit. See, *e.g., Gomillion v. Lightfoot,* 364 U.S. 339, 341, 81 S.Ct. 125, 127, 5 L.Ed.2d 110 (1960) (voters alleged to have been excluded from voting in the municipality).

In districting, by contrast, the mere placement of an individual in one district instead of another denies no one a right ***682** or benefit provided to others.[4] All citizens may register, vote, and be represented. In whatever district, the individual voter has a right to vote in each election, and the election will result in the voter's representation. As we have held, one's constitutional rights are not violated merely because the candidate one supports loses the election or because a group (including a racial group) to which one belongs winds up with a representative from outside that group. See *Whitcomb v. Chavis,* 403 U.S. 124, 153–155, 91 S.Ct. 1858, 1873–1875, 29 L.Ed.2d 363 (1971). It is true, of course, that one's vote may be more or less effective depending on the interests of the other individuals who are in one's district, and our cases recognize the reality that members of the same race often have shared interests. "Dilution" thus refers to the effects of districting decisions not on an individual's political power viewed in isolation, but on the political power of a group. See *UJO, supra,* 430 U.S., at 165, 97 S.Ct., at 1009–1010 (plurality opinion). This is the reason that the placement of given voters in a given district, even on the basis of race, does not, without more, diminish the effectiveness of the individual as a voter.

II

Our different approaches to equal protection in electoral districting and nondistricting cases reflect these differences. There is a characteristic coincidence of disadvantageous effect and illegitimate purpose associated with the State's use of race in those situations in which it has immediately triggered ***683** at least heightened scrutiny (which every ****2847** Member of the Court to address the issue has agreed must be applied even to race-based classifications designed to serve some permissible state interest).[5] Presumably because the legitimate consideration of race in a districting decision is usually inevitable under the Voting Rights Act when communities are racially mixed, however, and because, without more, it does not result in diminished political effectiveness for anyone, we have not taken the approach of applying the usual standard of such heightened "scrutiny" to race-based districting decisions. To be sure, as the Court says, it would be logically possible to apply strict scrutiny to these cases (and to uphold those uses of race that are permissible), see *ante,* at 2830–2832. But just because there frequently will be a constitutionally permissible use of race in electoral districting, as exemplified by the consideration of race to comply with the Voting Rights Act (quite apart from the consideration of race to remedy a violation of the Act or the Constitution), ***684** it has seemed more appropriate for the Court to identify impermissible uses by describing particular effects sufficiently serious to justify recognition under the Fourteenth Amendment. Under our cases there is in general a requirement that in order to obtain relief under the Fourteenth Amendment, the purpose and effect of the districting must be to devalue the effectiveness of a voter compared to what, as a group member, he would otherwise be able to enjoy. See *UJO,* 430 U.S., at 165–166, 97 S.Ct., at 1009–1010 (plurality opinion of WHITE, J., joined by STEVENS and REHNQUIST, JJ.); *id.,* at 179–180, 97 S.Ct., at 1016–1017 (Stewart, J., joined by Powell, J., concurring in judgment). Justice WHITE describes the formulations we have used and the common categories of dilutive practice in his dissenting opinion. See *ante,* at 2835–2836; *ante,* at 2840.[6]

A consequence of this categorical approach is the absence of any need for further searching "scrutiny" once it has been shown that a given districting decision has a purpose and effect falling within one of those categories. If a cognizable harm like dilution or the abridgment of the right to participate in the electoral process is shown, the districting plan violates the Fourteenth Amendment. If not, it does not. Under this approach, in the absence of an allegation of such cognizable harm, there is no need for further scrutiny because a gerrymandering claim cannot be proven without the element of harm. Nor if dilution is proven is there any need for further constitutional scrutiny; there has never been a suggestion that such use of race could be justified under any type of scrutiny, since ****2848** the dilution of the right to vote can not be said to serve any legitimate governmental purpose.

There is thus no theoretical inconsistency in having two distinct approaches to equal protection analysis, one for ***685** cases of electoral districting and one for most other types of state governmental decisions. Nor, because of the distinctions between the two categories, is there any risk that Fourteenth Amendment districting law as such will be taken to imply anything for purposes of general Fourteenth Amendment scrutiny about "benign" racial discrimination, or about group entitlement as distinct from individual protection, or about the appropriateness of strict or other heightened scrutiny.[7]

III

The Court appears to accept this, and it does not purport to disturb the law of vote dilution in any way. See *ante,* at 2830 (acknowledging that "*UJO* set forth a standard under which white voters can establish unconstitutional vote dilution"). Instead, the Court creates a new "analytically distinct," *ibid.,* cause of action, the principal element of which is that a districting plan be "so bizarre on its face," *ante,* at 2825, or "irrational on its face," *ante,* at 2829, or "extremely irregular on its face," *ante,* at 2824, that it "rationally cannot be understood as anything other than an effort to segregate citizens into separate voting districts on the basis of race without sufficient justification," *ante,* at 2830. Pleading such an element, the Court holds, suffices without a further allegation of harm, to state a claim upon which relief can be granted under the Fourteenth Amendment. See *ante,* at 2827.

It may be that the terms for pleading this cause of action will be met so rarely that this case will wind up an aberration. ***686** The shape of the district at issue in this case is indeed so bizarre that few other examples are ever likely to carry the unequivocal implication of impermissible use of race that the Court finds here. It may therefore be that few electoral

districting cases are ever likely to employ the strict scrutiny the Court holds to be applicable on remand if appellants' allegations are "not contradicted." *Ante,* at 2830; see also *ante,* at 2832.[8]

Nonetheless, in those cases where this cause of action is sufficiently pleaded, the State will have to justify its decision to consider race as being required by a compelling state interest, and its use of race as narrowly tailored to that interest. Meanwhile, in other districting cases, specific consequential harm will still need to be pleaded and proven, in the absence of which the use of race may be invalidated only if it is shown to serve no legitimate state purpose. Cf. *Bolling v. Sharpe,* 347 U.S. 497, 500, 74 S.Ct. 693, 694–695, 98 L.Ed. 884 (1954).

The Court offers no adequate justification for treating the narrow category of bizarrely shaped district claims differently from other districting claims.[9] The only justification I ****2849 *687** can imagine would be the preservation of "sound districting principles," *UJO,* 430 U.S., at 168, 97 S.Ct., at 1011, such as compactness and contiguity. But as Justice WHITE points out, see *ante,* at 2841 (dissenting opinion), and as the Court acknowledges, see *ante,* at 2826, we have held that such principles are not constitutionally required, with the consequence that their absence cannot justify the distinct constitutional regime put in place by the Court today. Since there is no justification for the departure here from the principles that continue to govern electoral districting cases generally in accordance with our prior decisions, I would not respond to the seeming egregiousness of the redistricting now before us by untethering the concept of racial gerrymander in such a case from the concept of harm exemplified by dilution. In the absence of an allegation of such harm, I would affirm the judgment of the District Court. I respectfully dissent.

All Citations

509 U.S. 630, 113 S.Ct. 2816, 125 L.Ed.2d 511, 61 USLW 4818

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

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

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

3 Although *Davis* involved political groups, the principles were expressly drawn from the Court's racial gerrymandering cases. See 478 U.S., at 131, n. 12, 106 S.Ct., at 2810, n. 12 (plurality opinion).

4 Although disagreeing with the Court's holding in *Davis* that claims of political gerrymandering are justiciable, see *id.,* at 144, 106 S.Ct., at 2816 (O'CONNOR, J., concurring in judgment), the author of today's opinion expressed views on racial gerrymandering quite similar to my own:

> "[W]here a racial minority group is characterized by 'the traditional indicia of suspectness' and is vulnerable to exclusion from the political process ... individual voters who belong to that group enjoy some measure of protection against intentional dilution of their group voting strength by means of racial gerrymandering.... Even so, *the individual's right is infringed only if the racial*

minority can prove that it has 'essentially been shut out of the political process.' " *Id.,* at 151–152, 106 S.Ct., at 2820–2821 (emphasis added). As explained below, that position cannot be squared with the one taken by the majority in this case.

5 In *Thornburg v. Gingles,* 478 U.S. 30, 38, 106 S.Ct. 2752, 2760, 92 L.Ed.2d 25 (1986), we noted the District Court's findings that "North Carolina had officially discriminated against its black citizens with respect to their exercise of the voting franchise from approximately 1900 to 1970 by employing a poll tax [and] a literacy test."

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

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

8 The black plaintiffs in *Gomillion v. Lightfoot,* 364 U.S. 339, 81 S.Ct. 125, 5 L.Ed.2d 110 (1960), I am confident, would have suffered equally had whites in Tuskegee sought to maintain their control by annexing predominantly white suburbs, rather than splitting the municipality in two.

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

10 This appears to be what has occurred in this instance. In providing the reasons for the objection, the Attorney General noted that "[f]or the south-central to southeast area, there were several plans drawn providing for a second majority-minority congressional district" and that such a district would have been no more irregular than others in the State's plan. See App. to Brief for Federal Appellees 10a. North Carolina's decision to create a majority-minority district can be explained as an attempt to meet this objection. Its decision not to create the more compact southern majority-minority district that was suggested, on the other hand, was more likely a result of partisan considerations. Indeed, in a suit brought prior to this one, different plaintiffs charged that District 12 was "grossly contorted" and had "no logical explanation other than incumbency protection and the enhancement of Democratic partisan interests.... The plan ... ignores the directive of the [Department of Justice] to create a minority district in the southeastern portion of North Carolina since any such district would jeopardize the reelection of ... the Democratic incumbent." App. to Juris. Statement, O.T. 1991, No. 91–2038, p. 43a (Complaint in *Pope v. Blue,* No. 3:92CV71–P (WDNC)). With respect to this incident, one writer has observed that "understanding why the configurations are shaped as they are requires us to know at least as much about the interests of incumbent Democratic politicians, as it does knowledge of the Voting Rights Act." Grofman, Would Vince Lombardi Have Been Right If He Had Said: "When It Comes to Redistricting, Race Isn't Everything, It's the *Only* Thing"?, 14 Cardozo L.Rev. 1237, 1258 (1993). The District Court in *Pope* dismissed appellants' claim, reasoning in part that "plaintiffs do not allege, nor can they, that the state's redistricting plan has caused them to be 'shut out of the political process.' " *Pope v. Blue,* 809 F.Supp. 392, 397 (WDNC 1992). We summarily affirmed that decision. 506 U.S. 801, 113 S.Ct. 30, 121 L.Ed.2d 3 (1992).

1 See *Cousins v. City Council of Chicago,* 466 F.2d 830, 848–852 (CA7) (Stevens, J., dissenting), cert. denied, 409 U.S. 893, 93 S.Ct. 85, 34 L.Ed.2d 151 (1972); *Mobile v. Bolden,* 446 U.S. 55, 83–94, 100 S.Ct. 1490, 1508–1514, 64 L.Ed.2d 47 (1980)

(STEVENS, J., concurring in judgment); *Karcher v. Daggett,* 462 U.S. 725, 744–765, 103 S.Ct. 2653, 2665–2678, 77 L.Ed.2d 133 (1983) (STEVENS, J., concurring); see also *Davis v. Bandemer,* 478 U.S. 109, 161–185, 106 S.Ct. 2797, 2825–2838, 92 L.Ed.2d 85 (1986) (Powell, J., joined by STEVENS, J., concurring in part and dissenting in part).

2 See *Karcher,* 462 U.S., at 748, 103 S.Ct., at 2669 (STEVENS, J., concurring) ("If they serve no purpose other than to favor one segment—whether racial, ethnic, religious, economic, or political—that may occupy a position of strength at a particular point in time, or to disadvantage a politically weak segment of the community, they violate the constitutional guarantee of equal protection"); *Davis v. Bandemer,* 478 U.S., at 178–183, and nn. 21–24, 106 S.Ct., at 2834–2837, and nn. 21–24 (Powell, J., joined by STEVENS, J., concurring in part and dissenting in part) (describing "grotesque gerrymandering" and "unusual shapes" drawn solely to deprive Democratic voters of electoral power).

3 The majority does not acknowledge that we *require* such a showing from plaintiffs who bring a vote dilution claim under § 2 of the Voting Rights Act. Under the three-part test established by *Thornburg v. Gingles,* 478 U.S. 30, 50–51, 106 S.Ct. 2752, 2766–2767, 92 L.Ed.2d 25 (1986), a minority group must show that it could constitute the majority in a single-member district, "that it is politically cohesive," and "that the white majority votes sufficiently as a bloc to enable it ... usually to defeat the minority's preferred candidate." At least the latter two of these three conditions depend on proving that what the Court today brands as "impermissible racial stereotypes," *ante,* at 2827, are true. Because *Gingles* involved North Carolina, which the Court admits has earlier established the existence of "pervasive racial bloc voting", *ante,* at 2830, its citizens and legislators—as well as those from other States—will no doubt be confused by the Court's requirement of evidence in one type of case that the Constitution now prevents reliance on in another. The Court offers them no explanation of this paradox.

4 The Court's opinion suggests that African–Americans may now be the only group to which it is unconstitutional to offer specific benefits from redistricting. Not very long ago, of course, it was argued that minority groups defined by race were the only groups the Equal Protection Clause *protected* in this context. See *Mobile v. Bolden,* 446 U.S., at 86–90, and nn. 6–10, 100 S.Ct., at 1509–1512, and nn. 6–10 (STEVENS, J., concurring in judgment).

1 "Bloc racial voting is an unfortunate phenomenon, but we are repeatedly faced with the findings of knowledgeable district courts that it is a fact of life. Where it exists, most often the result is that neither white nor black can be elected from a district in which his race is in the minority." *Beer v. United States,* 425 U.S. 130, 144, 96 S.Ct. 1357, 1365, 47 L.Ed.2d 629 (1976) (WHITE, J., dissenting).

2 Recognition of actual commonality of interest and racially polarized bloc voting cannot be equated with the " 'invocation of race stereotypes' " described by the Court, *ante,* at 2827 (quoting *Edmonson v. Leesville Concrete Co.,* 500 U.S. 614, 630–631, 111 S.Ct. 2077, 2088, 114 L.Ed.2d 660 (1991)), and forbidden by our case law.

3 Section 5 of the Voting Rights Act requires a covered jurisdiction to demonstrate either to the Attorney General or to the District Court that each new districting plan "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race [,] color, or [membership in a language minority.]" 42 U.S.C. § 1973c; see also § 1973b(f)(2). Section 2 of the Voting Rights Act forbids districting plans that will have a discriminatory effect on minority groups. § 1973.

4 The majority's use of "segregation" to describe the effect of districting here may suggest that it carries effects comparable to school segregation making it subject to like scrutiny. But a principal consequence of school segregation was inequality in educational opportunity provided, whereas use of race (or any other group characteristic) in districting does not, without more deny equality of political participation. *Brown v. Board of Education,* 347 U.S. 483, 495, 74 S.Ct. 686, 692, 98 L.Ed. 873 (1954). And while *Bolling v. Sharpe,* 347 U.S. 497, 500, 74 S.Ct. 693, 694–695, 98 L.Ed. 884 (1954), held that requiring segregation in public education served no legitimate public purpose, consideration of race may be constitutionally appropriate in electoral districting

decisions in racially mixed political units. See *supra,* at 2843.

5 See *Richmond v. J.A. Croson Co.,* 488 U.S. 469, 493–495, 109 S.Ct. 706, 721–723, 102 L.Ed.2d 854 (1989) (plurality opinion of O'CONNOR, J., joined by REHNQUIST, C.J., and WHITE and KENNEDY, JJ.) (referring variously to "strict scrutiny," "the standard of review employed in *Wygant,*" and "heightened scrutiny"); *id.,* at 520, 109 S.Ct., at 735 (SCALIA, J., concurring in judgment) ("strict scrutiny"); *id.,* at 535, 109 S.Ct., at 743–744 (Marshall, J., dissenting) (classifications " 'must serve important governmental objectives and must be substantially related to achievement of those objectives' " (quoting *Regents of Univ. of Cal. v. Bakke,* 438 U.S. 265, 359, 98 S.Ct. 2733, 2783, 57 L.Ed.2d 750 (1978) (Brennan, WHITE, Marshall, and BLACKMUN, JJ., concurring in judgment in part and dissenting in part)); *id.,* at 514–516, 98 S.Ct., at 2914–2916 (STEVENS, J., concurring in part and concurring in judgment) (undertaking close examination of the characteristics of the advantaged and disadvantaged racial groups said to justify the disparate treatment although declining to articulate different standards of review); see also *Wygant v. Jackson Bd. of Ed.,* 476 U.S. 267, 279–280, 106 S.Ct. 1842, 1849–1850, 90 L.Ed.2d 260 (1986) (plurality opinion of Powell, J.) (equating various articulations of standards of review "more stringent" than " 'reasonableness' " with "strict scrutiny"). Of course the Court has not held that the disadvantaging effect of these uses of race can never be justified by a sufficiently close relationship to a sufficiently strong state interest. See, *e.g., Croson, supra,* 488 U.S., at 509, 109 S.Ct., at 730 (plurality opinion).

6 In this regard, I agree with Justice WHITE's assessment of the difficulty the white plaintiffs would have here in showing that their opportunity to participate equally in North Carolina's electoral process has been unconstitutionally diminished. See *ante,* at 2838, and n. 6 (dissenting opinion).

7 The Court accuses me of treating the use of race in electoral redistricting as a "benign" form of discrimination. *Ante,* at 2830. What I am saying is that in electoral districting there frequently are permissible uses of race, such as its use to comply with the Voting Rights Act, as well as impermissible ones. In determining whether a use of race is permissible in cases in which there is a bizarrely shaped district, we can readily look to its effects, just as we would in evaluating any other electoral districting scheme.

8 While the Court "express[es] no view as to whether 'the intentional creation of majority-minority districts, without more,' always gives rise to an equal protection claim," *ante,* at 2828 (quoting *ante,* at 2839 (WHITE, J., dissenting)), it repeatedly emphasizes that there is some reason to believe that a configuration devised with reference to traditional districting principles would present a case falling outside the cause of action recognized today. See *ante,* at 2824, 2827, 2830, 2832.

9 The Court says its new cause of action is justified by what I understand to be some ingredients of stigmatic harm, see *ante,* at 2826–2827, and by a "threa[t] to ... our system of representative democracy," *ante,* at 2828, both caused by the mere adoption of a districting plan with the elements I have described in the text, *supra,* at 2848. To begin with, the complaint nowhere alleges any type of stigmatic harm. See App. to Juris. Statement 67a–100a (Complaint and Motion for Preliminary Injunction and For Temporary Restraining Order). Putting that to one side, it seems utterly implausible to me to presume, as the Court does, that North Carolina's creation of this strangely shaped majority-minority district "generates" within the white plaintiffs here anything comparable to "a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." *Brown v. Board of Education,* 347 U.S., at 494, 74 S.Ct., at 691. As for representative democracy, I have difficulty seeing how it is threatened (indeed why it is not, rather, enhanced) by districts that are not even alleged to dilute anyone's vote.

143 S.Ct. 2141
Supreme Court of the United States.

STUDENTS FOR FAIR ADMISSIONS, INC., Petitioner
v.
PRESIDENT AND FELLOWS OF HARVARD COLLEGE
Students for Fair Admissions, Inc., Petitioner
v.
University of North Carolina, et al.

No. 20-1199, No. 21-707
|
Argued October 31, 2022
|
Decided June 29, 2023

Synopsis

Background: In first case, nonprofit organization brought action for declaratory and injunctive relief against private college, alleging that its race-based admissions program violated Equal Protection Clause, Title VI of Civil Rights Act, and federal statute prohibiting racial discrimination in contracting. The United States District Court for the District of Massachusetts, Allison D. Burroughs, J., 261 F.Supp.3d 99, denied motion to dismiss for lack of Article III standing, and following bench trial entered judgment for college, 397 F.Supp.3d 126. Organization appealed. The United States Court of Appeals for the First Circuit, Lynch, Circuit Judge, 980 F.3d 157, affirmed. Certiorari was granted. In second case, same nonprofit organization brought action for declaratory and injunctive relief against public university, asserting same constitutional and statutory claims as in first case. Following a bench trial, the United States District Court for the Middle District of North Carolina, Loretta C. Biggs, J., 567 F.Supp.3d 580, entered judgment for university. Organization appealed to the United States Court of Appeals for the Fourth Circuit, and the Supreme Court granted certiorari before judgment.

Holdings: The Supreme Court, Chief Justice Roberts, held that:

nonprofit organization established its representational or organizational standing under Article III;

college's asserted compelling interests for race-based admissions program did not satisfy requirement of being sufficiently measurable to permit strict scrutiny for equal protection violation, which would also be a Title VI violation;

university's asserted compelling interests were not sufficiently measurable;

college and university failed to articulate a meaningful connection between the means they employed and their diversity goals;

admissions programs failed strict scrutiny by using race as a stereotype or negative; and

admissions programs failed strict scrutiny by lacking a logical end point.

Court of Appeals reversed in first case; District Court reversed in second case.

Justices Thomas, Alito, Gorsuch, Kavanaugh, and Barrett joined.

Justice Thomas filed a concurring opinion.

Justice Gorsuch filed a concurring opinion, in which Justice Thomas joined.

Justice Kavanaugh filed a concurring opinion.

Justice Sotomayor filed a dissenting opinion, in which Justice Kagan joined, and in which Justice Jackson joined as it applied to second case.

Justice Jackson filed a dissenting opinion in second case, in which Justices Sotomayor and Kagan joined.

Justice Jackson took no part in consideration or decision of first case.

****2147** *Syllabus*[*]

Harvard College and the University of North Carolina (UNC) are two of the oldest institutions of higher learning in the United States. Every year, tens of thousands of students apply to each school; many fewer are admitted. Both Harvard and UNC employ a highly selective admissions process to make their decisions. Admission to each school can depend on a student's grades, recommendation letters, or extracurricular involvement. It can also depend on their race. The question presented is whether the admissions systems used by Harvard College and UNC are lawful under the Equal Protection Clause of the Fourteenth Amendment.

At Harvard, each application for admission is initially screened by a "first reader," who assigns a numerical score in each of six categories: academic, extracurricular, athletic, school support, personal, and overall. For the "overall" category—a composite of the five other ratings—a first reader can and does consider the applicant's race. Harvard's admissions subcommittees then review all applications from a particular geographic area. These regional subcommittees make recommendations to the full admissions committee, and they take an applicant's race into account. When the 40-member full admissions committee begins its deliberations, it discusses the relative breakdown of applicants by race. The goal of the process, according to Harvard's director of admissions, is ensuring there is no "dramatic drop-off" in minority admissions from the prior class. An applicant receiving a majority of the full committee's votes is tentatively accepted for admission. At the end of this process, the racial composition of the tentative applicant pool is disclosed to the committee. The last stage of Harvard's admissions process, called the "lop," winnows the list of tentatively admitted students to arrive at the final class. Applicants that Harvard considers cutting at this stage are placed on the "lop list," which contains only four pieces of information: legacy status, recruited athlete status, financial aid eligibility, and race. In the Harvard admissions process, "race is a determinative tip for" a significant percentage "of all admitted African American and Hispanic applicants."

UNC has a similar admissions process. Every application is reviewed first by an admissions office reader, who assigns a numerical rating to each of several categories. Readers are required to consider the applicant's race as a factor in their review. Readers then make a written recommendation on each assigned application, and they may provide an applicant a substantial "plus" depending on the applicant's race. At this stage, most recommendations are provisionally final. A committee of experienced staff members then conducts a "school group review" of every initial decision made by a reader and either approves or rejects the recommendation. In making those decisions, the committee may consider the applicant's race.

Petitioner, Students for Fair Admissions (SFFA), is a nonprofit organization whose stated purpose is "to defend human and civil rights secured by law, including the right of individuals to equal protection under the law." SFFA filed separate lawsuits against Harvard and UNC, arguing that their race-based admissions programs violate, respectively, Title VI of the Civil Rights Act of 1964 and the Equal Protection Clause of the Fourteenth Amendment. After separate bench trials, both admissions programs were found permissible under the Equal Protection Clause and this Court's precedents. In the Harvard case, the First Circuit affirmed, and this Court granted certiorari. In the UNC case, this Court granted certiorari before judgment.

Held: Harvard's and UNC's admissions programs violate the Equal Protection Clause of the Fourteenth Amendment. Pp. 2156 - 21761.

(a) Because SFFA complies with the standing requirements for organizational plaintiffs articulated by this Court in *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 97 S.Ct. 2434, 53 L.Ed.2d 383, SFFA's obligations under Article III are satisfied, and this Court has jurisdiction to consider the merits of SFFA's claims.

The Court rejects UNC's argument that SFFA lacks standing because it is not a "genuine" membership organization. An organizational plaintiff can satisfy Article III jurisdiction in two ways, one of which is to assert "standing solely as the representative of its members," *Warth v. Seldin*, 422 U.S. 490, 511, 95 S.Ct. 2197, 45 L.Ed.2d 343, an approach known as representational or organizational standing. To invoke it, an organization must satisfy the three-part test in *Hunt*. Respondents do not suggest that SFFA fails *Hunt*'s test for organizational standing. They argue instead that SFFA cannot invoke organizational standing at all because SFFA was not a genuine membership organization at the time it filed suit. Respondents maintain that, under *Hunt*, a group qualifies as a genuine membership organization only if it is controlled and funded by its members. In *Hunt*, this Court determined that a state agency with no traditional members could still qualify as a genuine membership organization in substance because the agency represented the interests of individuals and otherwise satisfied *Hunt*'s three-part test for organizational standing. See 432 U.S. at 342, 97 S.Ct. 2434. *Hunt*'s "indicia of membership" analysis, however, has no applicability here. As the courts below found, SFFA is indisputably a voluntary membership organization with identifiable members who support its mission and whom SFFA represents in good faith. SFFA is thus entitled to rely on the organizational standing doctrine as articulated in *Hunt*. Pp. 2156 - 2159.

(b) Proposed by Congress and ratified by the States in the wake of the Civil War, the Fourteenth Amendment provides that no State shall "deny to any person ... the equal protection of the laws." Proponents of the Equal Protection Clause described its "foundation[al] principle" as "not permit[ing] any distinctions of law based on race or color." Any "law which operates upon one man," they maintained, should "operate equally upon all." Accordingly, as this Court's early decisions interpreting the Equal Protection Clause explained, the Fourteenth Amendment guaranteed "that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States."

Despite the early recognition of the broad sweep of the Equal Protection Clause, the Court—alongside the country—quickly failed to live up to the Clause's core commitments. For almost a century after the Civil War, state-mandated segregation was in many parts of the Nation a regrettable norm. This Court played its own role in that ignoble history, allowing in *Plessy* v. *Ferguson* the separate but equal regime that would come to deface much of America. 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256.

After *Plessy*, "American courts ... labored with the doctrine [of separate but equal] for over half a century." *Brown v. Board of Education*, 347 U.S. 483, 491, 74 S.Ct. 686, 98 L.Ed. 873. Some cases in this period attempted to curtail the perniciousness of the doctrine by emphasizing that it required States to provide black students educational opportunities equal to—even if formally separate from—those enjoyed by white students. See, *e.g.*, *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337, 349–350, 59 S.Ct. 232, 83 L.Ed. 208. But the inherent folly of that approach—of trying to derive equality from inequality—soon became apparent. As the Court subsequently recognized, even racial distinctions that were argued to have no palpable effect worked to subordinate the afflicted students. See, *e.g.*, *McLaurin v. Oklahoma State Regents for Higher Ed.*, 339 U.S. 637, 640–642, 70 S.Ct. 851, 94 L.Ed. 1149. By 1950, the inevitable truth of the Fourteenth Amendment had thus begun to reemerge: Separate cannot be equal.

The culmination of this approach came finally in *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873. There, the Court overturned the separate but equal regime established in *Plessy* and began on the path of invalidating all *de jure* racial discrimination by the States and Federal Government. The conclusion reached by the *Brown* Court was unmistakably clear: the right to a public education "must be made available to all on equal terms." 347 U.S. at 493, 74 S.Ct. 686. The Court reiterated that rule just one year later, holding that "full compliance" with *Brown* required schools to admit students "on a racially nondiscriminatory basis." *Brown v. Board of Education*, 349 U.S. 294, 300–301, 75 S.Ct. 753, 99 L.Ed. 1083.

In the years that followed, *Brown*'s "fundamental principle that racial discrimination in public education is unconstitutional," *id.*, at 298, 75 S.Ct. 753, reached other areas of life—for example, state and local laws requiring segregation in busing, *Gayle v. Browder*, 352 U.S. 903, 77 S.Ct. 145, 1 L.Ed.2d 114 (*per curiam*); racial segregation in the enjoyment of public beaches

and bathhouses *Mayor and City Council of Baltimore v. Dawson*, 350 U.S. 877, 76 S.Ct. 133, 100 L.Ed. 774 (*per curiam*); and antimiscegenation laws, *Loving v. Virginia*, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010. These decisions, and others like them, reflect the "core purpose" of the Equal Protection Clause: "do[ing] away with all governmentally imposed discrimination based on race." *Palmore v. Sidoti*, 466 U.S. 429, 432, 104 S.Ct. 1879, 80 L.Ed.2d 421.

Eliminating racial discrimination means eliminating all of it. Accordingly, the Court has held that the Equal Protection Clause applies "without regard to any differences of race, of color, or of nationality"—it is "universal in [its] application." *Yick Wo v. Hopkins*, 118 U.S. 356, 369, 6 S.Ct. 1064, 30 L.Ed. 220. For "[t]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color." *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 289–290, 98 S.Ct. 2733, 57 L.Ed.2d 750.

Any exceptions to the Equal Protection Clause's guarantee must survive a daunting two-step examination known as "strict scrutiny," *Adarand Constructors, Inc.* v. *Peña*, 515 U.S. 200, 227, 115 S.Ct. 2097, 132 L.Ed.2d 158, which asks first whether the racial classification is used to "further compelling governmental interests," *Grutter v. Bollinger*, 539 U.S. 306, 326, 123 S.Ct. 2325, 156 L.Ed.2d 304, and second whether the government's use of race is "narrowly tailored," *i.e.,* "necessary," to achieve that interest, *Fisher v. University of Tex. at Austin*, 570 U.S. 297, 311–312, 133 S.Ct. 2411, 186 L.Ed.2d 474. Acceptance of race-based state action is rare for a reason: "[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Rice v. Cayetano*, 528 U.S. 495, 517, 120 S.Ct. 1044, 145 L.Ed.2d 1007. Pp. 2158 - 2163.

(c) This Court first considered whether a university may make race-based admissions decisions in *Bakke,* 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750. In a deeply splintered decision that produced six different opinions, Justice Powell's opinion for himself alone would eventually come to "serv[e] as the touchstone for constitutional analysis of race-conscious admissions policies." *Grutter*, 539 U.S. at 323, 123 S.Ct. 2325. After rejecting three of the University's four justifications as not sufficiently compelling, Justice Powell turned to its last interest asserted to be compelling—obtaining the educational benefits that flow from a racially diverse student body. Justice Powell found that interest to be "a constitutionally permissible goal for an institution of higher education," which was entitled as a matter of academic freedom "to make its own judgments as to ... the selection of its student body." 438 U.S. at 311–312, 98 S.Ct. 2733. But a university's freedom was not unlimited—"[r]acial and ethnic distinctions of any sort are inherently suspect," Justice Powell explained, and antipathy toward them was deeply "rooted in our Nation's constitutional and demographic history." *Id.*, at 291, 98 S.Ct. 2733. Accordingly, a university could not employ a two-track quota system with a specific number of seats reserved for individuals from a preferred ethnic group. *Id.,* at 315, 98 S.Ct. 2733. Neither still could a university use race to foreclose an individual from all consideration. *Id.,* at 318, 98 S.Ct. 2733. Race could only operate as "a 'plus' in a particular applicant's file," and even then it had to be weighed in a manner "flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant." *Id.,* at 317, 98 S.Ct. 2733. Pp. 2162 - 2164.

(d) For years following *Bakke*, lower courts struggled to determine whether Justice Powell's decision was "binding precedent." *Grutter*, 539 U.S. at 325, 123 S.Ct. 2325. Then, in *Grutter* v. *Bollinger*, the Court for the first time "endorse[d] Justice Powell's view that student body diversity is a compelling state interest that can justify the use of race in university admissions." *Ibid.* The *Grutter* majority's analysis tracked Justice Powell's in many respects, including its insistence on limits on how universities may consider race in their admissions programs. Those limits, *Grutter* explained, were intended to guard against two dangers that all race-based government action portends. The first is the risk that the use of race will devolve into "illegitimate ... stereotyp[ing]." *Richmond v. J. A. Croson Co.*, 488 U.S. 469, 493, 109 S.Ct. 706, 102 L.Ed.2d 854 (plurality opinion). Admissions programs could thus not operate on the "belief that minority students always (or even consistently) express some characteristic minority viewpoint on any issue." *Grutter*, 539 U.S. at 333, 123 S.Ct. 2325 (internal quotation marks omitted). The second risk is that race would be used not as a plus, but as a negative—to discriminate *against* those racial groups that were not the beneficiaries of the race-based preference. A university's use of race, accordingly, could not occur in a manner that "unduly harm[ed] nonminority applicants." *Id.*, at 341, 123 S.Ct. 2325.

To manage these concerns, *Grutter* imposed one final limit on race-based admissions programs: At some point, the Court held, they must end. *Id.,* at 342, 123 S.Ct. 2325. Recognizing that "[e]nshrining a permanent justification for racial preferences would offend" the Constitution's unambiguous guarantee of equal protection, the Court expressed its expectation that, in 25 years, "the use of racial preferences will no longer be necessary to further the interest approved today." *Id.,* at 343, 123 S.Ct. 2325. Pp. 2164 - 2166.

(e) Twenty years have passed since *Grutter*, with no end to race-based college admissions in sight. But the Court has permitted race-based college admissions only within the confines of narrow restrictions: such admissions programs must comply with strict scrutiny, may never use race as a stereotype or negative, and must—at some point—end. Respondents' admissions systems fail each of these criteria and must therefore be invalidated under the Equal Protection Clause of the Fourteenth Amendment. Pp. 2165 - 2173.

(1) Respondents fail to operate their race-based admissions programs in a manner that is "sufficiently measurable to permit judicial [review]" under the rubric of strict scrutiny. *Fisher v. University of Tex. at Austin*, 579 U.S. 365, 381, 136 S.Ct. 2198, 195 L.Ed.2d 511. First, the interests that respondents view as compelling cannot be subjected to meaningful judicial review. Those interests include training future leaders, acquiring new knowledge based on diverse outlooks, promoting a robust marketplace of ideas, and preparing engaged and productive citizens. While these are commendable goals, they are not sufficiently coherent for purposes of strict scrutiny. It is unclear how courts are supposed to measure any of these goals, or if they could, to know when they have been reached so that racial preferences can end. The elusiveness of respondents' asserted goals is further illustrated by comparing them to recognized compelling interests. For example, courts can discern whether the temporary racial segregation of inmates will prevent harm to those in the prison, see *Johnson v. California*, 543 U.S. 499, 512–513, 125 S.Ct. 1141, 160 L.Ed.2d 949, but the question whether a particular mix of minority students produces "engaged and productive citizens" or effectively "train[s] future leaders" is standardless.

Second, respondents' admissions programs fail to articulate a meaningful connection between the means they employ and the goals they pursue. To achieve the educational benefits of diversity, respondents measure the racial composition of their classes using racial categories that are plainly overbroad (expressing, for example, no concern whether *South* Asian or *East* Asian students are adequately represented as "Asian"); arbitrary or undefined (the use of the category "Hispanic"); or underinclusive (no category at all for Middle Eastern students). The unclear connection between the goals that respondents seek and the means they employ preclude courts from meaningfully scrutinizing respondents' admissions programs.

The universities' main response to these criticisms is "trust us." They assert that universities are owed deference when using race to benefit some applicants but not others. While this Court has recognized a "tradition of giving a degree of deference to a university's academic decisions," it has made clear that deference must exist "within constitutionally prescribed limits." *Grutter*, 539 U.S. at 328, 123 S.Ct. 2325. Respondents have failed to present an exceedingly persuasive justification for separating students on the basis of race that is measurable and concrete enough to permit judicial review, as the Equal Protection Clause requires. Pp. 2166 - 2168.

(2) Respondents' race-based admissions systems also fail to comply with the Equal Protection Clause's twin commands that race may never be used as a "negative" and that it may not operate as a stereotype. The First Circuit found that Harvard's consideration of race has resulted in fewer admissions of Asian-American students. Respondents' assertion that race is never a negative factor in their admissions programs cannot withstand scrutiny. College admissions are zero-sum, and a benefit provided to some applicants but not to others necessarily advantages the former at the expense of the latter.

Respondents admissions programs are infirm for a second reason as well: They require stereotyping—the very thing *Grutter* foreswore. When a university admits students "on the basis of race, it engages in the offensive and demeaning assumption that [students] of a particular race, because of their race, think alike." *Miller v. Johnson*, 515 U.S. 900, 911–912, 115 S.Ct. 2475, 132 L.Ed.2d 762. Such stereotyping is contrary to the "core purpose" of the Equal Protection Clause. *Palmore*, 466 U.S. at 432, 104 S.Ct. 1879. Pp. 2168 - 2169.

(3) Respondents' admissions programs also lack a "logical end point" as *Grutter* required. 539 U.S. at 342, 123 S.Ct. 2325. Respondents suggest that the end of race-based admissions programs will occur once meaningful representation and diversity are achieved on college campuses. Such measures of success amount to little more than comparing the racial breakdown of the incoming class and comparing it to some other metric, such as the racial makeup of the previous incoming class or the population in general, to see whether some proportional goal has been reached. The problem with this approach is well established: "[O]utright racial balancing" is "patently unconstitutional." *Fisher,* 570 U.S. at 311, 133 S.Ct. 2411. Respondents' second proffered end point—when students receive the educational benefits of diversity—fares no better. As explained, it is unclear how a court is supposed to determine if or when such goals would be adequately met. Third, respondents suggest the 25-year expectation in *Grutter* means that race-based preferences must be allowed to continue until at least 2028. The Court's statement in *Grutter*, however, reflected only that Court's expectation that race-based preferences would, by 2028, be unnecessary in the context of racial diversity on college campuses. Finally, respondents argue that the

frequent reviews they conduct to determine whether racial preferences are still necessary obviates the need for an end point. But *Grutter* never suggested that periodic review can make unconstitutional conduct constitutional. Pp. 2169 - 2173.

(f) Because Harvard's and UNC's admissions programs lack sufficiently focused and measurable objectives warranting the use of race, unavoidably employ race in a negative manner, involve racial stereotyping, and lack meaningful end points, those admissions programs cannot be reconciled with the guarantees of the Equal Protection Clause. At the same time, nothing prohibits universities from considering an applicant's discussion of how race affected the applicant's life, so long as that discussion is concretely tied to a quality of character or unique ability that the particular applicant can contribute to the university. Many universities have for too long wrongly concluded that the touchstone of an individual's identity is not challenges bested, skills built, or lessons learned, but the color of their skin. This Nation's constitutional history does not tolerate that choice. Pp. 39–40.

980 F.3d 157; 567 F.Supp.3d 580, reversed.

ROBERTS, C. J., delivered the opinion of the Court, in which THOMAS, ALITO, GORSUCH, KAVANAUGH, and BARRETT, JJ., joined. THOMAS, J., filed a concurring opinion. GORSUCH, J., filed a concurring opinion, in which THOMAS, J., joined. KAVANAUGH, J., filed a concurring opinion. SOTOMAYOR, J., filed a dissenting opinion, in which KAGAN, J., joined, and in which JACKSON, J., joined as it applies to No. 21–707. JACKSON, J., filed a dissenting opinion in No. 21–707, in which SOTOMAYOR and KAGAN, JJ., joined. JACKSON, J., took no part in the consideration or decision of the case in No. 20–1199.

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Opinion

Chief Justice ROBERTS delivered the opinion of the Court.

***190** ****2154** In these cases we consider whether the admissions systems used by Harvard College and the University of North ***191** Carolina, two of the oldest institutions of higher learning in the United States, are lawful under the Equal Protection Clause of the Fourteenth Amendment.

***192** I

A

Founded in 1636, Harvard College has one of the most selective application processes in the country. Over 60,000 ***193** people applied to the school last year; fewer than 2,000 were admitted. Gaining admission to Harvard is thus no easy feat. It can depend on having excellent grades, glowing recommendation letters, or overcoming significant adversity. ***194** See 980 F.3d 157, 166–169 (CA1 2020). It can also depend on your race.

The admissions process at Harvard works as follows. Every application is initially screened by a "first reader," who assigns scores in six categories: academic, extracurricular, athletic, school support, personal, and overall. *Ibid.* A rating of "1" is the best; a rating of "6" the worst. *Ibid.* In the academic category, for example, a "1" signifies "near-perfect standardized test scores and grades"; in the extracurricular category, it indicates "truly unusual achievement"; and in the personal category, it denotes "outstanding" attributes like maturity, integrity, leadership, kindness, and courage. *Id.*, at 167–168. A score of "1" on the overall rating—a composite of the five other ratings—"signifies an exceptional candidate with >90% chance of admission." *Id.*, at 169 (internal quotation marks omitted). In assigning the overall rating, the first readers "can and do take an applicant's race into account." *Ibid.*

Once the first read process is complete, Harvard convenes admissions subcommittees. *Ibid.* Each subcommittee meets for three to five days and evaluates all applicants from a particular geographic area. *Ibid.* The subcommittees are responsible for making recommendations to the full admissions committee. *Id.*, at 169–170. The subcommittees can and do take an applicant's race into account when making their recommendations. *Id.*, at 170.

****2155** The next step of the Harvard process is the full committee meeting. The committee has 40 members, and its discussion centers around the applicants who have been recommended by the regional subcommittees. *Ibid.* At the beginning of the meeting, the committee discusses the relative breakdown of applicants by race. The "goal," according to Harvard's director of admissions, "is to make sure that [Harvard does] not hav[e] a dramatic drop-off " in minority admissions from the prior class. 2 App. in No. 20–1199, pp. 744, 747–748. Each applicant considered by the full committee is discussed ***195** one by one, and every member of the committee must vote on admission. 980 F.3d at 170. Only when an applicant secures a majority of the full committee's votes is he or she tentatively accepted for admission. *Ibid.* At the end of the full committee meeting, the racial composition of the pool of tentatively admitted students is disclosed to the committee. *Ibid.*; 2 App. in No. 20–1199, at 861.

The final stage of Harvard's process is called the "lop," during which the list of tentatively admitted students is winnowed

further to arrive at the final class. Any applicants that Harvard considers cutting at this stage are placed on a "lop list," which contains only four pieces of information: legacy status, recruited athlete status, financial aid eligibility, and race. 980 F.3d at 170. The full committee decides as a group which students to lop. 397 F.Supp.3d 126, 144 (Mass. 2019). In doing so, the committee can and does take race into account. *Ibid.* Once the lop process is complete, Harvard's admitted class is set. *Ibid.* In the Harvard admissions process, "race is a determinative tip for" a significant percentage "of all admitted African American and Hispanic applicants." *Id.*, at 178.

B

Founded shortly after the Constitution was ratified, the University of North Carolina (UNC) prides itself on being the "nation's first public university." 567 F.Supp.3d 580, 588 (MDNC 2021). Like Harvard, UNC's "admissions process is highly selective": In a typical year, the school "receives approximately 43,500 applications for its freshman class of 4,200." *Id.*, at 595.

Every application the University receives is initially reviewed by one of approximately 40 admissions office readers, each of whom reviews roughly five applications per hour. *Id.*, at 596, 598. Readers are required to consider "[r]ace and ethnicity ... as one factor" in their review. *Id.*, at 597 (internal quotation marks omitted). Other factors include ***196** academic performance and rigor, standardized testing results, extracurricular involvement, essay quality, personal factors, and student background. *Id.*, at 600. Readers are responsible for providing numerical ratings for the academic, extracurricular, personal, and essay categories. *Ibid.* During the years at issue in this litigation, underrepresented minority students were "more likely to score [highly] on their personal ratings than their white and Asian American peers," but were more likely to be "rated lower by UNC readers on their academic program, academic performance, ... extracurricular activities," and essays. *Id.*, at 616–617.

After assessing an applicant's materials along these lines, the reader "formulates an opinion about whether the student should be offered admission" and then "writes a comment defending his or her recommended decision." *Id.*, at 598 (internal quotation marks omitted). In making that decision, readers may offer students a "plus" based on their race, which "may be significant in an individual case." *Id.*, at 601 (internal quotation marks omitted). ****2156** The admissions decisions made by the first readers are, in most cases, "provisionally final." *Students for Fair Admissions, Inc.* v. *University of N. C. at Chapel Hill*, No. 1:14–cv–954, 2020 WL 13414000 (MDNC, Nov. 9, 2020), ECF Doc. 225, p. 7, ¶52.

Following the first read process, "applications then go to a process called 'school group review' ... where a committee composed of experienced staff members reviews every [initial] decision." 567 F.Supp.3d at 599. The review committee receives a report on each student which contains, among other things, their "class rank, GPA, and test scores; the ratings assigned to them by their initial readers; and their status as residents, legacies, or special recruits." *Ibid.* (footnote omitted). The review committee either approves or rejects each admission recommendation made by the first reader, after which the admissions decisions are finalized. *Ibid.* In making those decisions, the review committee may ***197** also consider the applicant's race. *Id.*, at 607; 2 App. in No. 21–707, p. 407.[1]

C

Petitioner, Students for Fair Admissions (SFFA), is a nonprofit organization founded in 2014 whose purpose is "to defend human and civil rights secured by law, including the right of individuals to equal protection under the law." 980 F.3d at 164 (internal quotation marks omitted). In November 2014, SFFA filed separate lawsuits against Harvard College and the University of North Carolina, arguing that their ***198** race-based admissions programs violated, respectively, Title VI of the Civil Rights Act of 1964, 78 Stat. 252, 42 U.S.C. § 2000d *et seq.*, and the Equal Protection Clause of the Fourteenth Amendment.[2] ****2157** See 397 F.Supp.3d at 131–132; 567 F.Supp.3d at 585–586. The District Courts in both cases held bench trials to evaluate SFFA's claims. See 980 F.3d at 179; 567 F.Supp.3d at 588. Trial in the Harvard case lasted 15 days and included testimony from 30 witnesses, after which the Court concluded that Harvard's admissions program comported with our precedents on the use of race in college admissions. See 397 F.Supp.3d at 132, 183. The First Circuit affirmed that

determination. See 980 F.3d at 204. Similarly, in the UNC case, the District Court concluded after an eight-day trial that UNC's admissions program was permissible under the Equal Protection Clause. 567 F.Supp.3d at 588, 666.

We granted certiorari in the Harvard case and certiorari before judgment in the UNC case. 595 U. S. ——, 142 S.Ct. 895, 211 L.Ed.2d 604 (2022).

II

Before turning to the merits, we must assure ourselves of our jurisdiction. See *Summers v. Earth Island Institute*, 555 U.S. 488, 499, 129 S.Ct. 1142, 173 L.Ed.2d 1 (2009). UNC argues that SFFA lacks standing to bring its claims because it is not a "genuine" membership organization. Brief for University Respondents in No. 21–707, pp. 23–26. Every court to have considered ***199** this argument has rejected it, and so do we. See *Students for Fair Admissions, Inc. v. University of Tex. at Austin*, 37 F.4th 1078, 1084–1086, and n. 8 (CA5 2022) (collecting cases).

Article III of the Constitution limits "[t]he judicial power of the United States" to "cases" or "controversies," ensuring that federal courts act only "as a necessity in the determination of real, earnest and vital" disputes. *Muskrat v. United States*, 219 U.S. 346, 351, 359, 31 S.Ct. 250, 55 L.Ed. 246 (1911) (internal quotation marks omitted). "To state a case or controversy under Article III, a plaintiff must establish standing." *Arizona Christian School Tuition Organization v. Winn*, 563 U.S. 125, 133, 131 S.Ct. 1436, 179 L.Ed.2d 523 (2011). That, in turn, requires a plaintiff to demonstrate that it has "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338, 136 S.Ct. 1540, 194 L.Ed.2d 635 (2016).

In cases like these, where the plaintiff is an organization, the standing requirements of Article III can be satisfied in two ways. Either the organization can claim that it suffered an injury in its own right or, alternatively, it can assert "standing solely as the representative of its members." *Warth v. Seldin*, 422 U.S. 490, 511, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975). The latter approach is known as representational or organizational standing. *Ibid.*; *Summers*, 555 U.S. at 497–498, 129 S.Ct. 1142. To invoke it, an organization must demonstrate that "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977).

****2158** Respondents do not contest that SFFA satisfies the three-part test for organizational standing articulated in *Hunt*, and like the courts below, we find no basis in the record to conclude otherwise. See 980 F.3d at 182–184; ***200** 397 F.Supp.3d at 183–184; No. 1:14–cv–954 (MDNC, Sept. 29, 2018), App. D to Pet. for Cert. in No. 21–707, pp. 237–245 (2018 DC Opinion). Respondents instead argue that SFFA was not a "genuine 'membership organization' " when it filed suit, and thus that it could not invoke the doctrine of organizational standing in the first place. Brief for University Respondents in No. 21–707, at 24. According to respondents, our decision in *Hunt* established that groups qualify as genuine membership organizations only if they are controlled and funded by their members. And because SFFA's members did neither at the time this litigation commenced, respondents' argument goes, SFFA could not represent its members for purposes of Article III standing. Brief for University Respondents in No. 21–707, at 24 (citing *Hunt*, 432 U.S. at 343, 97 S.Ct. 2434).

Hunt involved the Washington State Apple Advertising Commission, a state agency whose purpose was to protect the local apple industry. The Commission brought suit challenging a North Carolina statute that imposed a labeling requirement on containers of apples sold in that State. The Commission argued that it had standing to challenge the requirement on behalf of Washington's apple industry. See *id.*, at 336–341, 97 S.Ct. 2434. We recognized, however, that as a state agency, "the Commission [wa]s not a traditional voluntary membership organization ..., for it ha[d] no members at all." *Id.*, at 342, 97 S.Ct. 2434. As a result, we could not easily apply the three-part test for organizational standing, which asks whether an organization's *members* have standing. We nevertheless concluded that the Commission had standing because the apple growers and dealers it represented were *effectively* members of the Commission. *Id.*, at 344, 97 S.Ct. 2434. The growers and dealers "alone elect[ed] the members of the Commission," "alone ... serve[d] on the Commission," and "alone finance[d] its activities"—they possessed, in other words, "all of the indicia of membership." *Ibid.* The Commission was therefore a genuine membership organization in substance, if not in form. And it was "clearly" entitled to ***201** rely on the doctrine of

organizational standing under the three-part test recounted above. *Id.*, at 343, 97 S.Ct. 2434.

The indicia of membership analysis employed in *Hunt* has no applicability in these cases. Here, SFFA *is* indisputably a voluntary membership organization with identifiable members—it is not, as in *Hunt*, a state agency that concededly has no members. See 2018 DC Opinion 241–242. As the First Circuit in the Harvard litigation observed, at the time SFFA filed suit, it was "a validly incorporated 501(c)(3) nonprofit with forty-seven members who joined voluntarily to support its mission." 980 F.3d at 184. Meanwhile in the UNC litigation, SFFA represented four members in particular—high school graduates who were denied admission to UNC. See 2018 DC Opinion 234. Those members filed declarations with the District Court stating "that they have voluntarily joined SFFA; they support its mission; they receive updates about the status of the case from SFFA's President; and they have had the opportunity to have input and direction on SFFA's case." *Id.*, at 234–235 (internal quotation marks omitted). Where, as here, an organization has identified members and represents them in good faith, our cases do not require further scrutiny into how the organization operates. Because SFFA complies with the standing requirements demanded of organizational ****2159** plaintiffs in *Hunt*, its obligations under Article III are satisfied.

III

A

In the wake of the Civil War, Congress proposed and the States ratified the Fourteenth Amendment, providing that no State shall "deny to any person ... the equal protection of the laws." Amdt. 14, § 1. To its proponents, the Equal Protection Clause represented a "foundation[al] principle"—"the absolute equality of all citizens of the United States politically and civilly before their own laws." Cong. Globe, 39th Cong., 1st Sess., 431 (1866) (statement of Rep. Bingham) ***202** (Cong. Globe). The Constitution, they were determined, "should not permit any distinctions of law based on race or color," Supp. Brief for United States on Reargument in *Brown* v. *Board of Education*, O. T. 1953, No. 1 etc., p. 41 (detailing the history of the adoption of the Equal Protection Clause), because any "law which operates upon one man [should] operate *equally* upon all," Cong. Globe 2459 (statement of Rep. Stevens). As soon-to-be President James Garfield observed, the Fourteenth Amendment would hold "over every American citizen, without regard to color, the protecting shield of law." *Id.*, at 2462. And in doing so, said Senator Jacob Howard of Michigan, the Amendment would give "to the humblest, the poorest, the most despised of the race the same rights and the same protection before the law as it gives to the most powerful, the most wealthy, or the most haughty." *Id.*, at 2766. For "[w]ithout this principle of equal justice," Howard continued, "there is no republican government and none that is really worth maintaining." *Ibid.*

At first, this Court embraced the transcendent aims of the Equal Protection Clause. "What is this," we said of the Clause in 1880, "but declaring that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States?" *Strauder v. West Virginia*, 100 U.S. 303, 307–309, 25 L.Ed. 664. "[T]he broad and benign provisions of the Fourteenth Amendment" apply "to all persons," we unanimously declared six years later; it is "hostility to ... race and nationality" "which in the eye of the law is not justified." *Yick Wo v. Hopkins*, 118 U.S. 356, 368–369, 373–374, 6 S.Ct. 1064, 30 L.Ed. 220 (1886); see also *id.*, at 368, 6 S.Ct. 1064 (applying the Clause to "aliens and subjects of the Emperor of China"); *Truax v. Raich*, 239 U.S. 33, 36, 36 S.Ct. 7, 60 L.Ed. 131 (1915) ("a native of Austria"); semble *Strauder*, 100 U.S. at 308–309 ("Celtic Irishmen") (dictum).

Despite our early recognition of the broad sweep of the Equal Protection Clause, this Court—alongside the country—quickly ***203** failed to live up to the Clause's core commitments. For almost a century after the Civil War, state-mandated segregation was in many parts of the Nation a regrettable norm. This Court played its own role in that ignoble history, allowing in *Plessy* v. *Ferguson* the separate but equal regime that would come to deface much of America. 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256 (1896). The aspirations of the framers of the Equal Protection Clause, "[v]irtually strangled in [their] infancy," would remain for too long only that—aspirations. J. Tussman & J. tenBroek, The Equal Protection of the Laws, 37 Cal. L. Rev. 341, 381 (1949).

After *Plessy*, "American courts ... labored with the doctrine [of separate but equal] for over half a century." *Brown v. Board*

of Education, 347 U.S. 483, 491, 74 S.Ct. 686, 98 L.Ed. 873 (1954). Some cases ****2160** in this period attempted to curtail the perniciousness of the doctrine by emphasizing that it required States to provide black students educational opportunities equal to—even if formally separate from—those enjoyed by white students. See, *e.g.*, *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337, 349–350, 59 S.Ct. 232, 83 L.Ed. 208 (1938) ("The admissibility of laws separating the races in the enjoyment of privileges afforded by the State rests wholly upon the equality of the privileges which the laws give to the separated groups ...."). But the inherent folly of that approach—of trying to derive equality from inequality—soon became apparent. As the Court subsequently recognized, even racial distinctions that were argued to have no palpable effect worked to subordinate the afflicted students. See, *e.g.*, *McLaurin v. Oklahoma State Regents for Higher Ed.*, 339 U.S. 637, 640–642, 70 S.Ct. 851, 94 L.Ed. 1149 (1950) ("It is said that the separations imposed by the State in this case are in form merely nominal.... But they signify that the State ... sets [petitioner] apart from the other students."). By 1950, the inevitable truth of the Fourteenth Amendment had thus begun to reemerge: Separate cannot be equal.

The culmination of this approach came finally in *Brown* v. *Board of Education*. In that seminal decision, we overturned ***204** *Plessy* for good and set firmly on the path of invalidating all *de jure* racial discrimination by the States and Federal Government. 347 U.S. at 494–495, 74 S.Ct. 686. *Brown* concerned the permissibility of racial segregation in public schools. The school district maintained that such segregation was lawful because the schools provided to black students and white students were of roughly the same quality. But we held such segregation impermissible "*even though* the physical facilities and other 'tangible' factors may be equal." *Id.*, at 493, 74 S.Ct. 686 (emphasis added). The mere act of separating "children ... because of their race," we explained, itself "generate[d] a feeling of inferiority." *Id.*, at 494, 74 S.Ct. 686.

The conclusion reached by the *Brown* Court was thus unmistakably clear: the right to a public education "must be made available to all on equal terms." *Id.*, at 493, 74 S.Ct. 686. As the plaintiffs had argued, "no State has any authority under the equal-protection clause of the Fourteenth Amendment to use race as a factor in affording educational opportunities among its citizens." Tr. of Oral Arg. in *Brown I*, O. T. 1952, No. 8, p. 7 (Robert L. Carter, Dec. 9, 1952); see also Supp. Brief for Appellants on Reargument in Nos. 1, 2, and 4, and for Respondents in No. 10, in *Brown* v. *Board of Education*, O. T. 1953, p. 65 ("That the Constitution is color blind is our dedicated belief."); *post*, at 2197, n. 7 (THOMAS, J., concurring). The Court reiterated that rule just one year later, holding that "full compliance" with *Brown* required schools to admit students "on a racially nondiscriminatory basis." *Brown v. Board of Education*, 349 U.S. 294, 300–301, 75 S.Ct. 753, 99 L.Ed. 1083 (1955). The time for making distinctions based on race had passed. *Brown*, the Court observed, "declar[ed] the fundamental principle that racial discrimination in public education is unconstitutional." *Id.*, at 298, 75 S.Ct. 753.

So too in other areas of life. Immediately after *Brown*, we began routinely affirming lower court decisions that invalidated all manner of race-based state action. In *Gayle* v. *Browder*, for example, we summarily affirmed a decision ***205** invalidating state and local laws that required segregation in busing. 352 U.S. 903, 77 S.Ct. 145, 1 L.Ed.2d 114 (1956) (*per curiam*). As the lower court explained, "[t]he equal protection clause requires equality of treatment ****2161** before the law for all persons without regard to race or color." *Browder v. Gayle*, 142 F.Supp. 707, 715 (MD Ala. 1956). And in *Mayor and City Council of Baltimore* v. *Dawson*, we summarily affirmed a decision striking down racial segregation at public beaches and bathhouses maintained by the State of Maryland and the city of Baltimore. 350 U.S. 877, 76 S.Ct. 133, 100 L.Ed. 774 (1955) (*per curiam*). "It is obvious that racial segregation in recreational activities can no longer be sustained," the lower court observed. *Dawson v. Mayor and City Council of Baltimore*, 220 F.2d 386, 387 (CA4 1955) (*per curiam*). "[T]he ideal of equality before the law which characterizes our institutions" demanded as much. *Ibid.*

In the decades that followed, this Court continued to vindicate the Constitution's pledge of racial equality. Laws dividing parks and golf courses; neighborhoods and businesses; buses and trains; schools and juries were undone, all by a transformative promise "stemming from our American ideal of fairness": " 'the Constitution ... forbids ... discrimination by the General Government, or by the States, against any citizen because of his race.' " *Bolling v. Sharpe*, 347 U.S. 497, 499, 74 S.Ct. 693, 98 L.Ed. 884 (1954) (quoting *Gibson v. Mississippi*, 162 U.S. 565, 591, 16 S.Ct. 904, 40 L.Ed. 1075 (1896) (Harlan, J., for the Court)). As we recounted in striking down the State of Virginia's ban on interracial marriage 13 years after *Brown*, the Fourteenth Amendment "proscri[bes] ... all invidious racial discriminations." *Loving v. Virginia*, 388 U.S. 1, 8, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967). Our cases had thus "consistently denied the constitutionality of measures which restrict the rights of citizens on account of race." *Id.*, at 11–12, 87 S.Ct. 1817; see also *Yick Wo*, 118 U.S. at 373–375, 6 S.Ct. 1064 (commercial property); *Shelley v. Kraemer*, 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161 (1948) (housing covenants); *Hernandez v. Texas*, 347 U.S. 475, 74 S.Ct. 667, 98 L.Ed. 866 (1954) (composition of juries); *Dawson*, 350 U.S. at 877, 76 S.Ct. 133 (beaches and bathhouses); ***206** *Holmes v. Atlanta*, 350 U.S. 879, 76 S.Ct. 141, 100 L.Ed. 776 (1955) (*per curiam*) (golf courses); *Browder*, 352 U.S. at 903, 77 S.Ct. 145 (busing); *New Orleans City Park Improvement Assn. v. Detiege*, 358

U.S. 54, 79 S.Ct. 99, 3 L.Ed.2d 46 (1958) (*per curiam*) (public parks); *Bailey v. Patterson*, 369 U.S. 31, 82 S.Ct. 549, 7 L.Ed.2d 512 (1962) (*per curiam*) (transportation facilities); *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971) (education); *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986) (peremptory jury strikes).

These decisions reflect the "core purpose" of the Equal Protection Clause: "do[ing] away with all governmentally imposed discrimination based on race." *Palmore v. Sidoti*, 466 U.S. 429, 432, 104 S.Ct. 1879, 80 L.Ed.2d 421 (1984) (footnote omitted). We have recognized that repeatedly. "The clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States." *Loving*, 388 U.S. at 10, 87 S.Ct. 1817; see also *Washington v. Davis*, 426 U.S. 229, 239, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976) ("The central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race."); *McLaughlin v. Florida*, 379 U.S. 184, 192, 85 S.Ct. 283, 13 L.Ed.2d 222 (1964) ("[T]he historical fact [is] that the central purpose of the Fourteenth Amendment was to eliminate racial discrimination.").

Eliminating racial discrimination means eliminating all of it. And the Equal Protection Clause, we have accordingly ****2162** held, applies "without regard to any differences of race, of color, or of nationality"—it is "universal in [its] application." *Yick Wo*, 118 U.S. at 369, 6 S.Ct. 1064. For "[t]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color." *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 289–290, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978) (opinion of Powell, J.). "If both are not accorded the same protection, then it is not equal." *Id.*, at 290, 98 S.Ct. 2733.

Any exception to the Constitution's demand for equal protection must survive a daunting two-step examination known in our cases as "strict scrutiny." *Adarand Constructors, Inc.* v. *Peña*, 515 U.S. 200, 227, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995). Under that standard we ask, first, whether the racial classification ***207** is used to "further compelling governmental interests." *Grutter v. Bollinger*, 539 U.S. 306, 326, 123 S.Ct. 2325, 156 L.Ed.2d 304 (2003). Second, if so, we ask whether the government's use of race is "narrowly tailored"—meaning "necessary"—to achieve that interest. *Fisher v. University of Tex. at Austin*, 570 U.S. 297, 311–312, 133 S.Ct. 2411, 186 L.Ed.2d 474 (2013) (*Fisher I*) (internal quotation marks omitted).

Outside the circumstances of these cases, our precedents have identified only two compelling interests that permit resort to race-based government action. One is remediating specific, identified instances of past discrimination that violated the Constitution or a statute. See, *e.g.*, *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701, 720, 127 S.Ct. 2738, 168 L.Ed.2d 508 (2007); *Shaw v. Hunt*, 517 U.S. 899, 909–910, 116 S.Ct. 1894, 135 L.Ed.2d 207 (1996); *post*, at 2186 - 2187, 2192 - 2193 (opinion of THOMAS, J.). The second is avoiding imminent and serious risks to human safety in prisons, such as a race riot. See *Johnson v. California*, 543 U.S. 499, 512–513, 125 S.Ct. 1141, 160 L.Ed.2d 949 (2005).[3]

***208** Our acceptance of race-based state action has been rare for a reason. "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." ****2163** *Rice v. Cayetano*, 528 U.S. 495, 517, 120 S.Ct. 1044, 145 L.Ed.2d 1007 (2000) (quoting *Hirabayashi v. United States*, 320 U.S. 81, 100, 63 S.Ct. 1375, 87 L.Ed. 1774 (1943)). That principle cannot be overridden except in the most extraordinary case.

B

These cases involve whether a university may make admissions decisions that turn on an applicant's race. Our Court first considered that issue in *Regents of University of California* v. *Bakke*, which involved a set-aside admissions program used by the University of California, Davis, medical school. 438 U.S. at 272–276, 98 S.Ct. 2733. Each year, the school held 16 of its 100 seats open for members of certain minority groups, who were reviewed on a special admissions track separate from those in the main admissions pool. *Id.*, at 272–275, 98 S.Ct. 2733. The plaintiff, Allan Bakke, was denied admission two years in a row, despite the admission of minority applicants with lower grade point averages and MCAT scores. *Id.*, at 276–277, 98 S.Ct. 2733. Bakke subsequently sued the school, arguing that its set-aside program violated the Equal Protection Clause.

In a deeply splintered decision that produced six different opinions—none of which commanded a majority of the Court—we ultimately ruled in part in favor of the school and in part in favor of Bakke. Justice Powell announced the Court's judgment, and his opinion—though written for himself alone—would eventually come to "serv[e] as the touchstone for constitutional analysis of race-conscious admissions policies." *Grutter*, 539 U.S. at 323, 123 S.Ct. 2325.

Justice Powell began by finding three of the school's four justifications for its policy not sufficiently compelling. The school's first justification of "reducing the historic deficit of traditionally disfavored minorities in medical schools," he wrote, was akin to "[p]referring members of any one group ***209** for no reason other than race or ethnic origin." *Bakke*, 438 U.S. at 306–307, 98 S.Ct. 2733 (internal quotation marks omitted). Yet that was "discrimination for its own sake," which "the Constitution forbids." *Id.*, at 307, 98 S.Ct. 2733 (citing, *inter alia*, *Loving*, 388 U.S. at 11, 87 S.Ct. 1817). Justice Powell next observed that the goal of "remedying ... the effects of 'societal discrimination' " was also insufficient because it was "an amorphous concept of injury that may be ageless in its reach into the past." *Bakke*, 438 U.S. at 307, 98 S.Ct. 2733. Finally, Justice Powell found there was "virtually no evidence in the record indicating that [the school's] special admissions program" would, as the school had argued, increase the number of doctors working in underserved areas. *Id.*, at 310, 98 S.Ct. 2733.

Justice Powell then turned to the school's last interest asserted to be compelling—obtaining the educational benefits that flow from a racially diverse student body. That interest, in his view, was "a constitutionally permissible goal for an institution of higher education." *Id.*, at 311–312, 98 S.Ct. 2733. And that was so, he opined, because a university was entitled as a matter of academic freedom "to make its own judgments as to ... the selection of its student body." *Id.*, at 312, 98 S.Ct. 2733.

But a university's freedom was not unlimited. "Racial and ethnic distinctions of any sort are inherently suspect," Justice Powell explained, and antipathy toward them was deeply "rooted in our Nation's constitutional and demographic history." *Id.*, at 291, 98 S.Ct. 2733. A university could not employ a quota system, for example, reserving "a specified number of seats in each class for individuals from the preferred ethnic groups." *Id.*, at 315, 98 S.Ct. 2733. Nor could it impose a "multitrack ****2164** program with a prescribed number of seats set aside for each identifiable category of applicants." *Ibid.* And neither still could it use race to foreclose an individual "from all consideration ... simply because he was not the right color." *Id.*, at 318, 98 S.Ct. 2733.

The role of race had to be cabined. It could operate only as "a 'plus' in a particular applicant's file." *Id.*, at 317, 98 S.Ct. 2733. And ***210** even then, race was to be weighed in a manner "flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant." *Ibid.* Justice Powell derived this approach from what he called the "illuminating example" of the admissions system then used by Harvard College. *Id.*, at 316, 98 S.Ct. 2733. Under that system, as described by Harvard in a brief it had filed with the Court, "the race of an applicant may tip the balance in his favor just as geographic origin or a life [experience] may tip the balance in other candidates' cases." *Ibid.* (internal quotation marks omitted). Harvard continued: "A farm boy from Idaho can bring something to Harvard College that a Bostonian cannot offer. Similarly, a black student can usually bring something that a white person cannot offer." *Ibid.* (internal quotation marks omitted). The result, Harvard proclaimed, was that "race has been"—and should be—"a factor in some admission decisions." *Ibid.* (internal quotation marks omitted).

No other Member of the Court joined Justice Powell's opinion. Four Justices instead would have held that the government may use race for the purpose of "remedying the effects of past societal discrimination." *Id.*, at 362, 98 S.Ct. 2733 (joint opinion of Brennan, White, Marshall, and Blackmun, JJ., concurring in judgment in part and dissenting in part). Four other Justices, meanwhile, would have struck down the Davis program as violative of Title VI. In their view, it "seem[ed] clear that the proponents of Title VI assumed that the Constitution itself required a colorblind standard on the part of government." *Id.*, at 416, 98 S.Ct. 2733 (Stevens, J., joined by Burger, C. J., and Stewart and Rehnquist, JJ., concurring in judgment in part and dissenting in part). The Davis program therefore flatly contravened a core "principle imbedded in the constitutional *and* moral understanding of the times": the prohibition against "racial discrimination." *Id.*, at 418, n. 21, 98 S.Ct. 2733 (internal quotation marks omitted).

***211** C

In the years that followed our "fractured decision in *Bakke*," lower courts "struggled to discern whether Justice Powell's" opinion constituted "binding precedent." *Grutter*, 539 U.S. at 325, 123 S.Ct. 2325. We accordingly took up the matter again in 2003, in the case *Grutter* v. *Bollinger*, which concerned the admissions system used by the University of Michigan law school. *Id.*, at 311, 123 S.Ct. 2325. There, in another sharply divided decision, the Court for the first time "endorse[d] Justice Powell's view that student body diversity is a compelling state interest that can justify the use of race in university admissions." *Id.*, at 325, 123 S.Ct. 2325.

The Court's analysis tracked Justice Powell's in many respects. As for compelling interest, the Court held that "[t]he Law School's educational judgment that such diversity is essential to its educational mission is one to which we defer." *Id.*, at 328, 123 S.Ct. 2325. In achieving that goal, however, the Court made clear—just as Justice Powell had—that the law school was limited in the means that it could pursue. The school could not "establish quotas for members of certain racial groups or put members of those groups on ****2165** separate admissions tracks." *Id.*, at 334, 123 S.Ct. 2325. Neither could it "insulate applicants who belong to certain racial or ethnic groups from the competition for admission." *Ibid.* Nor still could it desire "some specified percentage of a particular group merely because of its race or ethnic origin." *Id.*, at 329–330, 123 S.Ct. 2325 (quoting *Bakke*, 438 U.S. at 307, 98 S.Ct. 2733 (opinion of Powell, J.)).

These limits, *Grutter* explained, were intended to guard against two dangers that all race-based government action portends. The first is the risk that the use of race will devolve into "illegitimate ... stereotyp[ing]." *Richmond v. J. A. Croson Co.*, 488 U.S. 469, 493, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989) (plurality opinion). Universities were thus not permitted to operate their admissions programs on the "belief that minority students always (or even consistently) express some characteristic minority ***212** viewpoint on any issue." *Grutter*, 539 U.S. at 333, 123 S.Ct. 2325 (internal quotation marks omitted). The second risk is that race would be used not as a plus, but as a negative—to discriminate *against* those racial groups that were not the beneficiaries of the race-based preference. A university's use of race, accordingly, could not occur in a manner that "unduly harm[ed] nonminority applicants." *Id.*, at 341, 123 S.Ct. 2325.

But even with these constraints in place, *Grutter* expressed marked discomfort with the use of race in college admissions. The Court stressed the fundamental principle that "there are serious problems of justice connected with the idea of [racial] preference itself." *Ibid.* (quoting *Bakke*, 438 U.S. at 298, 98 S.Ct. 2733 (opinion of Powell, J.)). It observed that all "racial classifications, however compelling their goals," were "dangerous." *Grutter*, 539 U.S. at 342, 123 S.Ct. 2325. And it cautioned that all "race-based governmental action" should "remai[n] subject to continuing oversight to assure that it will work the least harm possible to other innocent persons competing for the benefit." *Id.*, at 341, 123 S.Ct. 2325 (internal quotation marks omitted).

To manage these concerns, *Grutter* imposed one final limit on race-based admissions programs. At some point, the Court held, they must end. *Id.*, at 342, 123 S.Ct. 2325. This requirement was critical, and *Grutter* emphasized it repeatedly. "[A]ll race-conscious admissions programs [must] have a termination point"; they "must have reasonable durational limits"; they "must be limited in time"; they must have "sunset provisions"; they "must have a logical end point"; their "deviation from the norm of equal treatment" must be "a temporary matter." *Ibid.* (internal quotation marks omitted). The importance of an end point was not just a matter of repetition. It was the reason the Court was willing to dispense temporarily with the Constitution's unambiguous guarantee of equal protection. The Court recognized as much: "[e]nshrining a permanent justification for racial preferences," the Court explained, "would offend this fundamental equal protection principle." *Ibid.*; see also ***213** *id.*, at 342–343, 123 S.Ct. 2325 (quoting N. Nathanson & C. Bartnik, The Constitutionality of Preferential Treatment for Minority Applicants to Professional Schools, 58 Chi. Bar Rec. 282, 293 (May–June 1977), for the proposition that "[i]t would be a sad day indeed, were America to become a quota-ridden society, with each identifiable minority assigned proportional representation in every desirable walk of life").

Grutter thus concluded with the following caution: "It has been 25 years since Justice Powell first approved the use of race to further an interest in student body diversity in the context of public higher education.... We expect that 25 years ****2166** from now, the use of racial preferences will no longer be necessary to further the interest approved today." 539 U.S. at 343, 123 S.Ct. 2325.

IV

Twenty years later, no end is in sight. "Harvard's view about when [race-based admissions will end] doesn't have a date on it." Tr. of Oral Arg. in No. 20–1199, p. 85; Brief for Respondent in No. 201199, p. 52. Neither does UNC's. 567 F.Supp.3d at 612. Yet both insist that the use of race in their admissions programs must continue.

But we have permitted race-based admissions only within the confines of narrow restrictions. University programs must comply with strict scrutiny, they may never use race as a stereotype or negative, and—at some point—they must end. Respondents' admissions systems—however well intentioned and implemented in good faith—fail each of these criteria. They must therefore be invalidated under the Equal Protection Clause of the Fourteenth Amendment.[4]

***214** A

Because "[r]acial discrimination [is] invidious in all contexts," *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 619, 111 S.Ct. 2077, 114 L.Ed.2d 660 (1991), we have required that universities operate their race-based admissions programs in a manner that is "sufficiently measurable to permit judicial [review]" under the rubric of strict scrutiny, *Fisher v. University of Tex. at Austin*, 579 U.S. 365, 381, 136 S.Ct. 2198, 195 L.Ed.2d 511 (2016) (*Fisher II*). "Classifying and assigning" students based on their race "requires more than ... an amorphous end to justify it." *Parents Involved*, 551 U.S. at 735, 127 S.Ct. 2738.

Respondents have fallen short of satisfying that burden. First, the interests they view as compelling cannot be subjected to meaningful judicial review. Harvard identifies the following educational benefits that it is pursuing: (1) "training future leaders in the public and private sectors"; (2) preparing graduates to "adapt to an increasingly pluralistic society"; (3) "better educating its students through diversity"; and (4) "producing new knowledge stemming from diverse outlooks." 980 F.3d at 173–174. UNC points to similar benefits, namely, "(1) promoting the robust exchange of ideas; (2) broadening and refining understanding; (3) fostering innovation and problem-solving; (4) preparing engaged and productive citizens and leaders; [and] (5) enhancing appreciation, respect, and empathy, cross-racial understanding, and breaking down stereotypes." 567 F.Supp.3d at 656.

Although these are commendable goals, they are not sufficiently coherent for purposes of strict scrutiny. At the outset, it is unclear how courts are supposed to measure any of these goals. How is a court to know whether leaders have been adequately "train[ed]"; whether the exchange of ideas is "robust"; or whether "new knowledge" is being developed? *Ibid.*; 980 F.3d at 173–174. Even if these goals could somehow be measured, moreover, how is a court to know when they have been reached, and when the perilous remedy of racial preferences may cease? There is no particular point ***215** at which there exists sufficient "innovation and problem-solving," or ****2167** students who are appropriately "engaged and productive." 567 F.Supp.3d at 656. Finally, the question in this context is not one of *no* diversity or of *some*: it is a question of degree. How many fewer leaders Harvard would create without racial preferences, or how much poorer the education at Harvard would be, are inquiries no court could resolve.

Comparing respondents' asserted goals to interests we have recognized as compelling further illustrates their elusive nature. In the context of racial violence in a prison, for example, courts can ask whether temporary racial segregation of inmates will prevent harm to those in the prison. See *Johnson*, 543 U.S. at 512–513, 125 S.Ct. 1141. When it comes to workplace discrimination, courts can ask whether a race-based benefit makes members of the discriminated class "whole for [the] injuries [they] suffered." *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 763, 96 S.Ct. 1251, 47 L.Ed.2d 444 (1976) (internal quotation marks omitted). And in school segregation cases, courts can determine whether any race-based remedial action produces a distribution of students "compar[able] to what it would have been in the absence of such constitutional violations." *Dayton Bd. of Ed. v. Brinkman*, 433 U.S. 406, 420, 97 S.Ct. 2766, 53 L.Ed.2d 851 (1977).

Nothing like that is possible when it comes to evaluating the interests respondents assert here. Unlike discerning whether a prisoner will be injured or whether an employee should receive backpay, the question whether a particular mix of minority students produces "engaged and productive citizens," sufficiently "enhance[s] appreciation, respect, and empathy," or effectively "train[s] future leaders" is standardless. 567 F.Supp.3d at 656; 980 F.3d at 173–174. The interests that respondents seek, though plainly worthy, are inescapably imponderable.

Second, respondents' admissions programs fail to articulate a meaningful connection between the means they employ and the

goals they pursue. To achieve the educational ***216** benefits of diversity, UNC works to avoid the underrepresentation of minority groups, 567 F.Supp.3d at 591–592, and n. 7, while Harvard likewise "guard[s] against inadvertent drop-offs in representation" of certain minority groups from year to year, Brief for Respondent in No. 20–1199, at 16. To accomplish both of those goals, in turn, the universities measure the racial composition of their classes using the following categories: (1) Asian; (2) Native Hawaiian or Pacific Islander; (3) Hispanic; (4) White; (5) African-American; and (6) Native American. See, *e.g.*, 397 F.Supp.3d at 137, 178; 3 App. in No. 20–1199, at 1278, 1280–1283; 3 App. in No. 21–707, at 1234–1241. It is far from evident, though, how assigning students to these racial categories and making admissions decisions based on them furthers the educational benefits that the universities claim to pursue.

For starters, the categories are themselves imprecise in many ways. Some of them are plainly overbroad: by grouping together all Asian students, for instance, respondents are apparently uninterested in whether *South* Asian or *East* Asian students are adequately represented, so long as there is enough of one to compensate for a lack of the other. Meanwhile other racial categories, such as "Hispanic," are arbitrary or undefined. See, *e.g.*, M. Lopez, J. Krogstad, & J. Passel, Pew Research Center, Who is Hispanic? (Sept. 15, 2022) (referencing the "long history of changing labels [and] shifting categories ... reflect[ing] evolving cultural norms about what it means to be Hispanic or Latino in the U. S. today"). And still other ****2168** categories are underinclusive. When asked at oral argument "how are applicants from Middle Eastern countries classified, [such as] Jordan, Iraq, Iran, [and] Egypt," UNC's counsel responded, "[I] do not know the answer to that question." Tr. of Oral Arg. in No. 21–707, p. 107; cf. *post*, at 2210 - 2211 (GORSUCH, J., concurring) (detailing the "incoherent" and "irrational stereotypes" that these racial categories further).

***217** Indeed, the use of these opaque racial categories undermines, instead of promotes, respondents' goals. By focusing on underrepresentation, respondents would apparently prefer a class with 15% of students from Mexico over a class with 10% of students from several Latin American countries, simply because the former contains more Hispanic students than the latter. Yet "[i]t is hard to understand how a plan that could allow these results can be viewed as being concerned with achieving enrollment that is 'broadly diverse.' " *Parents Involved*, 551 U.S. at 724, 127 S.Ct. 2738 (quoting *Grutter*, 539 U.S. at 329, 123 S.Ct. 2325). And given the mismatch between the means respondents employ and the goals they seek, it is especially hard to understand how courts are supposed to scrutinize the admissions programs that respondents use.

The universities' main response to these criticisms is, essentially, "trust us." None of the questions recited above need answering, they say, because universities are "owed deference" when using race to benefit some applicants but not others. Brief for University Respondents in No. 21–707, at 39 (internal quotation marks omitted). It is true that our cases have recognized a "tradition of giving a degree of deference to a university's academic decisions." *Grutter*, 539 U.S. at 328, 123 S.Ct. 2325. But we have been unmistakably clear that any deference must exist "within constitutionally prescribed limits," *ibid.*, and that "deference does not imply abandonment or abdication of judicial review," *Miller–El* v. *Cockrell*, 537 U.S. 322, 340, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003). Universities may define their missions as they see fit. The Constitution defines ours. Courts may not license separating students on the basis of race without an exceedingly persuasive justification that is measurable and concrete enough to permit judicial review. As this Court has repeatedly reaffirmed, "[r]acial classifications are simply too pernicious to permit any but the most exact connection between justification and classification." *Gratz v. Bollinger*, 539 U.S. 244, 270, 123 S.Ct. 2411, 156 L.Ed.2d 257 (2003) (internal quotation marks ***218** omitted). The programs at issue here do not satisfy that standard.[5]

B

The race-based admissions systems that respondents employ also fail to comply with the twin commands of the Equal Protection Clause that race may never be used as a "negative" and that it may not operate as a stereotype.

First, our cases have stressed that an individual's race may never be used against him in the admissions process. Here, however, the First Circuit found that Harvard's consideration of race has led to an 11.1% decrease in the number of Asian-Americans admitted to Harvard. 980 F.3d at 170, n. 29. And the District Court ****2169** observed that Harvard's "policy of considering applicants' race ... overall results in fewer Asian American and white students being admitted." 397 F.Supp.3d at 178.

Respondents nonetheless contend that an individual's race is never a negative factor in their admissions programs, but that assertion cannot withstand scrutiny. Harvard, for example, draws an analogy between race and other factors it considers in admission. "[W]hile admissions officers may give a preference to applicants likely to excel in the Harvard-Radcliffe Orchestra," Harvard explains, "that does not mean it is a 'negative' not to excel at a musical instrument." Brief for Respondent in No. 20–1199, at 51. But on Harvard's logic, while it gives preferences to applicants with high grades and test scores, "that does not mean it is a 'negative' " to be a student with lower grades and lower test scores. *Ibid.* This understanding of the admissions process is hard to take seriously. College admissions are zero-sum. A benefit ***219** provided to some applicants but not to others necessarily advantages the former group at the expense of the latter.

Respondents also suggest that race is not a negative factor because it does not impact many admissions decisions. See *id.*, at 49; Brief for University Respondents in No. 21–707, at 2. Yet, at the same time, respondents also maintain that the demographics of their admitted classes would meaningfully change if race-based admissions were abandoned. And they acknowledge that race is determinative for at least some—if not many—of the students they admit. See, *e.g.*, Tr. of Oral Arg. in No. 20–1199, at 67; 567 F.Supp.3d at 633. How else but "negative" can race be described if, in its absence, members of some racial groups would be admitted in greater numbers than they otherwise would have been? The "[e]qual protection of the laws is not achieved through indiscriminate imposition of inequalities." *Shelley*, 334 U.S. at 22, 68 S.Ct. 836.[6]

Respondents' admissions programs are infirm for a second reason as well. We have long held that universities may not operate their admissions programs on the "belief that minority students always (or even consistently) express some characteristic minority viewpoint on any issue." *Grutter*, 539 U.S. at 333, 123 S.Ct. 2325 (internal quotation marks omitted). That requirement is found throughout our Equal Protection Clause ***220** jurisprudence more generally. See, *e.g.*, *Schuette v. BAMN*, 572 U.S. 291, 308, 134 S.Ct. 1623, 188 L.Ed.2d 613 (2014) (plurality opinion) ("In cautioning against 'impermissible racial stereotypes,' this Court has rejected the assumption that 'members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike ....' " (quoting *Shaw v. Reno*, 509 U.S. 630, 647, 113 S.Ct. 2816, 125 L.Ed.2d 511 (1993))).

Yet by accepting race-based admissions programs in which some students may obtain ****2170** preferences on the basis of race alone, respondents' programs tolerate the very thing that *Grutter* foreswore: stereotyping. The point of respondents' admissions programs is that there is an inherent benefit in race *qua* race—in race for race's sake. Respondents admit as much. Harvard's admissions process rests on the pernicious stereotype that "a black student can usually bring something that a white person cannot offer." *Bakke*, 438 U.S. at 316, 98 S.Ct. 2733 (opinion of Powell, J.) (internal quotation marks omitted); see also Tr. of Oral Arg. in No. 20–1199, at 92. UNC is much the same. It argues that race in itself "says [something] about who you are." Tr. of Oral Arg. in No. 21–707, at 97; see also *id.*, at 96 (analogizing being of a certain race to being from a rural area).

We have time and again forcefully rejected the notion that government actors may intentionally allocate preference to those "who may have little in common with one another but the color of their skin." *Shaw*, 509 U.S. at 647, 113 S.Ct. 2816. The entire point of the Equal Protection Clause is that treating someone differently because of their skin color is *not* like treating them differently because they are from a city or from a suburb, or because they play the violin poorly or well.

"One of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities." *Rice*, 528 U.S. at 517, 120 S.Ct. 1044. But when a university admits students "on the basis of race, it engages in the offensive and demeaning assumption that ***221** [students] of a particular race, because of their race, think alike," *Miller v. Johnson*, 515 U.S. 900, 911–912, 115 S.Ct. 2475, 132 L.Ed.2d 762 (1995) (internal quotation marks omitted)—at the very least alike in the sense of being different from nonminority students. In doing so, the university furthers "stereotypes that treat individuals as the product of their race, evaluating their thoughts and efforts—their very worth as citizens—according to a criterion barred to the Government by history and the Constitution." *Id.*, at 912, 115 S.Ct. 2475 (internal quotation marks omitted). Such stereotyping can only "cause[ ] continued hurt and injury," *Edmonson*, 500 U.S. at 631, 111 S.Ct. 2077, contrary as it is to the "core purpose" of the Equal Protection Clause, *Palmore*, 466 U.S. at 432, 104 S.Ct. 1879.

C

If all this were not enough, respondents' admissions programs also lack a "logical end point." *Grutter*, 539 U.S. at 342, 123 S.Ct. 2325.

Respondents and the Government first suggest that respondents' race-based admissions programs will end when, in their absence, there is "meaningful representation and meaningful diversity" on college campuses. Tr. of Oral Arg. in No. 21–707, at 167. The metric of meaningful representation, respondents assert, does not involve any "strict numerical benchmark," *id.*, at 86; or "precise number or percentage," *id.*, at 167; or "specified percentage," Brief for Respondent in No. 20–1199, at 38 (internal quotation marks omitted). So what does it involve?

Numbers all the same. At Harvard, each full committee meeting begins with a discussion of "how the breakdown of the class compares to the prior year in terms of racial identities." 397 F.Supp.3d at 146. And "if at some point in the admissions process it appears that a group is notably underrepresented or has suffered a dramatic drop off relative to the prior year, the Admissions Committee may decide to give additional attention to applications from students within that group." *Ibid.*; see also *id.*, at 147 (District Court ***222** finding that Harvard uses race to "trac[k] how ****2171** each class is shaping up relative to previous years with an eye towards achieving a level of racial diversity"); 2 App. in No. 20–1199, at 821–822.

The results of the Harvard admissions process reflect this numerical commitment. For the admitted classes of 2009 to 2018, black students represented a tight band of 10.0%–11.7% of the admitted pool. The same theme held true for other minority groups:

Share of Students Admitted to Harvard by Race

	African-American Share of Class	Hispanic Share of Class	Asian-American Share of Class
Class of 2009	11%	8%	18%
Class of 2010	10%	10%	18%
Class of 2011	10%	10%	19%
Class of 2012	10%	9%	19%
Class of 2013	10%	11%	17%
Class of 2014	11%	9%	20%
Class of 2015	12%	11%	19%

Class of 2016	10%	9%	20%
Class of 2017	11%	10%	20%
Class of 2018	12%	12%	19%

Brief for Petitioner in No. 20–1199 etc., p. 23. Harvard's focus on numbers is obvious.[7]
***223** UNC's admissions program operates similarly. The University frames the challenge it faces as "the admission and enrollment of underrepresented minorities," Brief for University Respondents in No. 21–707, at 7, a metric that turns solely on whether a group's "percentage enrollment ****2172** within the undergraduate student body is lower than their percentage within the general population in North Carolina," 567 F.Supp.3d at 591, n. 7; see also Tr. of Oral Arg. in No. 21–707, at 79. The University "has not yet fully achieved its diversity-related educational goals," it explains, in part due to its failure to obtain closer to proportional representation. Brief for University Respondents in No. 21–707, at 7; see also 567 F.Supp.3d at 594.

The problem with these approaches is well established. "[O]utright racial balancing" is "patently unconstitutional." *Fisher I*, 570 U.S. at 311, 133 S.Ct. 2411 (internal quotation marks omitted). That is so, we have repeatedly explained, because "[a]t the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class." *Miller,* 515 U.S. at 911, 115 S.Ct. 2475 (internal quotation marks omitted). By promising to terminate their use of race only when some rough percentage of various racial groups is admitted, respondents turn that principle on ***224** its head. Their admissions programs "effectively assure[ ] that race will always be relevant ... and that the ultimate goal of eliminating" race as a criterion "will never be achieved." *Croson*, 488 U.S. at 495, 109 S.Ct. 706 (internal quotation marks omitted).

Respondents' second proffered end point fares no better. Respondents assert that universities will no longer need to engage in race-based admissions when, in their absence, students nevertheless receive the educational benefits of diversity. But as we have already explained, it is not clear how a court is supposed to determine when stereotypes have broken down or "productive citizens and leaders" have been created. 567 F.Supp.3d at 656. Nor is there any way to know whether those goals would adequately be met in the absence of a race-based admissions program. As UNC itself acknowledges, these "qualitative standard[s]" are "difficult to measure." Tr. of Oral Arg. in No. 21–707, at 78; but see *Fisher II*, 579 U.S. at 381, 136 S.Ct. 2198 (requiring race-based admissions programs to operate in a manner that is "sufficiently measurable").

Third, respondents suggest that race-based preferences must be allowed to continue for at least five more years, based on the Court's statement in *Grutter* that it "expect[ed] that 25 years from now, the use of racial preferences will no longer be necessary." 539 U.S. at 343, 123 S.Ct. 2325. The 25-year mark articulated in *Grutter*, however, reflected only that Court's view that race-based preferences would, by 2028, be unnecessary to ensure a requisite level of racial diversity on college campuses. *Ibid.* That expectation was oversold. Neither Harvard nor UNC believes that race-based admissions will in fact be unnecessary in five years, and both universities thus expect to continue using race as a criterion well beyond the time limit that *Grutter* suggested. See Tr. of Oral Arg. in No. 20–1199, at 84–85; Tr. of Oral Arg. in No. 21–707, at 85–86. Indeed, the high school applicants that Harvard and ***225** UNC will evaluate this fall using their race-based admissions systems are expected to graduate in 2028—25 years after *Grutter* was decided.

Finally, respondents argue that their programs need not have an end point at all because they frequently review them to determine whether they remain necessary. See Brief for Respondent in No. 20–1199, at 52; Brief for University Respondents in No. 21–707, at 58–59. Respondents point to language in *Grutter* that, they contend, permits "the durational requirement

[to] be met" with "periodic reviews to determine ****2173** whether racial preferences are still necessary to achieve student body diversity." 539 U.S. at 342, 123 S.Ct. 2325. But *Grutter* never suggested that periodic review could make unconstitutional conduct constitutional. To the contrary, the Court made clear that race-based admissions programs eventually had to end—despite whatever periodic review universities conducted. *Ibid.*; see also *supra*, at 2163 - 2164.

Here, however, Harvard concedes that its race-based admissions program has no end point. Brief for Respondent in No. 20–1199, at 52 (Harvard "has not set a sunset date" for its program (internal quotation marks omitted)). And it acknowledges that the way it thinks about the use of race in its admissions process "is the same now as it was" nearly 50 years ago. Tr. of Oral Arg. in No. 20–1199, at 91. UNC's race-based admissions program is likewise not set to expire any time soon—nor, indeed, any time at all. The University admits that it "has not set forth a proposed time period in which it believes it can end all race-conscious admissions practices." 567 F.Supp.3d at 612. And UNC suggests that it might soon use race to a *greater* extent than it currently does. See Brief for University Respondents in No. 21–707, at 57. In short, there is no reason to believe that respondents will—even acting in good faith—comply with the Equal Protection Clause any time soon.

***226** V

The dissenting opinions resist these conclusions. They would instead uphold respondents' admissions programs based on their view that the Fourteenth Amendment permits state actors to remedy the effects of societal discrimination through explicitly race-based measures. Although both opinions are thorough and thoughtful in many respects, this Court has long rejected their core thesis.

The dissents' interpretation of the Equal Protection Clause is not new. In *Bakke*, four Justices would have permitted race-based admissions programs to remedy the effects of societal discrimination. 438 U.S. at 362, 98 S.Ct. 2733 (joint opinion of Brennan, White, Marshall, and Blackmun, JJ., concurring in judgment in part and dissenting in part). But that minority view was just that—a minority view. Justice Powell, who provided the fifth vote and controlling opinion in *Bakke*, firmly rejected the notion that societal discrimination constituted a compelling interest. Such an interest presents "an amorphous concept of injury that may be ageless in its reach into the past," he explained. *Id.*, at 307, 98 S.Ct. 2733. It cannot "justify a [racial] classification that imposes disadvantages upon persons ... who bear no responsibility for whatever harm the beneficiaries of the [race-based] admissions program are thought to have suffered." *Id.*, at 310, 98 S.Ct. 2733.

The Court soon adopted Justice Powell's analysis as its own. In the years after *Bakke*, the Court repeatedly held that ameliorating societal discrimination does not constitute a compelling interest that justifies race-based state action. "[A]n effort to alleviate the effects of societal discrimination is not a compelling interest," we said plainly in *Hunt*, a 1996 case about the Voting Rights Act. 517 U.S. at 909–910, 116 S.Ct. 1894. We reached the same conclusion in *Croson*, a case that concerned a preferential government contracting program. Permitting "past societal discrimination" to "serve as the basis for rigid racial preferences would be to open the door to competing claims for 'remedial relief ' for every disadvantaged ***227** group." 488 U.S. at 505, 109 S.Ct. 706. Opening that door would shutter another—"[t]he dream of a Nation of equal citizens ... would be lost," we observed, "in a mosaic of shifting ****2174** preferences based on inherently unmeasurable claims of past wrongs." *Id.*, at 505–506, 109 S.Ct. 706. "[S]uch a result would be contrary to both the letter and spirit of a constitutional provision whose central command is equality." *Id.*, at 506, 109 S.Ct. 706.

The dissents here do not acknowledge any of this. They fail to cite *Hunt*. They fail to cite *Croson*. They fail to mention that the entirety of their analysis of the Equal Protection Clause—the statistics, the cases, the history—has been considered and rejected before. There is a reason the principal dissent must invoke Justice Marshall's partial dissent in *Bakke* nearly a dozen times while mentioning Justice Powell's controlling opinion barely once (Justice JACKSON's opinion ignores Justice Powell altogether). For what one dissent denigrates as "rhetorical flourishes about colorblindness," *post*, at 2232 (opinion of SOTOMAYOR, J.), are in fact the proud pronouncements of cases like *Loving* and *Yick Wo*, like *Shelley* and *Bolling*—they are defining statements of law. We understand the dissents want that law to be different. They are entitled to that desire. But they surely cannot claim the mantle of *stare decisis* while pursuing it.[8]

The dissents are no more faithful to our precedent on race-based admissions. To hear the principal dissent tell it, *Grutter* blessed such programs indefinitely, until "racial inequality ***228** will end." *Post*, at 2255 (opinion of SOTOMAYOR, J.). But

Grutter did no such thing. It emphasized—not once or twice, but at least six separate times—that race-based admissions programs "must have reasonable durational limits" and that their "deviation from the norm of equal treatment" must be "a temporary matter." 539 U.S. at 342, 123 S.Ct. 2325. The Court also disclaimed "[e]nshrining a permanent justification for racial preferences." *Ibid.* Yet the justification for race-based admissions that the dissent latches on to is just that—unceasing.

The principal dissent's reliance on *Fisher II* is similarly mistaken. There, by a 4-to-3 vote, the Court upheld a "*sui generis*" race-based admissions program used by the University of Texas, 579 U.S. at 377, 136 S.Ct. 2198, whose "goal" it was to enroll a "critical mass" of certain minority students, *Fisher I*, 570 U.S. at 297, 133 S.Ct. 2411. But neither Harvard nor UNC claims to be using the critical mass concept—indeed, the universities admit they do not even know what it means. See 1 App. in No. 21–707, at 402 ("[N]o one has directed anybody to achieve a critical mass, and I'm not even sure we would know what it is." (testimony of UNC administrator)); 3 App. in No. 20–1199, at 1137–1138 (similar testimony from Harvard administrator).

Fisher II also recognized the "enduring challenge" that race-based admissions systems place on "the constitutional promise of equal treatment." 579 U.S. at 388, 136 S.Ct. 2198. The Court thus reaffirmed the "continuing obligation" of universities "to satisfy the burden of strict scrutiny." *Id.*, at 379, 136 S.Ct. 2198. To drive the point home, *Fisher II* limited itself just as ****2175** *Grutter* had—in duration. The Court stressed that its decision did "*not* necessarily mean the University may rely on the same policy" going forward. 579 U.S. at 388, 136 S.Ct. 2198 (emphasis added); see also *Fisher I*, 570 U.S. at 313, 133 S.Ct. 2411 (recognizing that "*Grutter* ... approved the plan at issue upon concluding that it ... was limited in time"). And the Court openly acknowledged ***229** that its decision offered limited "prospective guidance." *Fisher II*, 579 U.S. at 379, 136 S.Ct. 2198.[9]

The principal dissent wrenches our case law from its context, going to lengths to ignore the parts of that law it does not like. The serious reservations that *Bakke*, *Grutter*, and *Fisher* had about racial preferences go unrecognized. The unambiguous requirements of the Equal Protection Clause—"the most rigid," "searching" scrutiny it entails—go without note. *Fisher I*, 570 U.S. at 310, 133 S.Ct. 2411. And the repeated demands that race-based admissions programs must end go overlooked—contorted, worse still, into a demand that such programs never stop.

Most troubling of all is what the dissent must make these omissions to defend: a judiciary that picks winners and losers based on the color of their skin. While the dissent would certainly not permit university programs that discriminated *against* black and Latino applicants, it is perfectly willing to let the programs here continue. In its view, this Court is supposed to tell state actors when they have picked the right races to benefit. Separate but equal is "*inherently* unequal," said *Brown,* 347 U.S. at 495, 74 S.Ct. 686 (emphasis added). It depends, says the dissent.

***230** That is a remarkable view of the judicial role—remarkably wrong. Lost in the false pretense of judicial humility that the dissent espouses is a claim to power so radical, so destructive, that it required a Second Founding to undo. "Justice Harlan knew better," one of the dissents decrees. *Post*, at 2265 (opinion of JACKSON, J.). Indeed he did:

> "[I]n view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens." *Plessy*, 163 U.S. at 559, 16 S.Ct. 1138 (Harlan, J., dissenting).

VI

For the reasons provided above, the Harvard and UNC admissions programs cannot be reconciled with the guarantees of the Equal Protection Clause. Both programs lack sufficiently focused and measurable objectives warranting the use of race, unavoidably employ race in a negative manner, involve racial stereotyping, and lack meaningful end points. We have never permitted admissions programs to work in that way, and we will not do so today.

****2176** At the same time, as all parties agree, nothing in this opinion should be construed as prohibiting universities from considering an applicant's discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise. See, *e.g.*, 4 App. in No. 21–707, at 1725–1726, 1741; Tr. of Oral Arg. in No. 20–1199, at 10. But, despite the

dissent's assertion to the contrary, universities may not simply establish through application essays or other means the regime we hold unlawful today. (A dissenting opinion is generally not the best source of legal advice on how to comply with the majority opinion.) "[W]hat cannot be done directly cannot be done indirectly. The Constitution deals with substance, not shadows," and the prohibition against racial discrimination is "levelled at the thing, not the name." *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 325, 18 L.Ed. 356 (1867). A benefit ***231** to a student who overcame racial discrimination, for example, must be tied to *that student's* courage and determination. Or a benefit to a student whose heritage or culture motivated him or her to assume a leadership role or attain a particular goal must be tied to *that student's* unique ability to contribute to the university. In other words, the student must be treated based on his or her experiences as an individual—not on the basis of race.

Many universities have for too long done just the opposite. And in doing so, they have concluded, wrongly, that the touchstone of an individual's identity is not challenges bested, skills built, or lessons learned but the color of their skin. Our constitutional history does not tolerate that choice.

The judgments of the Court of Appeals for the First Circuit and of the District Court for the Middle District of North Carolina are reversed.

It is so ordered.

Justice JACKSON took no part in the consideration or decision of the case in No. 20–1199.

Justice THOMAS, concurring.

In the wake of the Civil War, the country focused its attention on restoring the Union and establishing the legal status of newly freed slaves. The Constitution was amended to abolish slavery and proclaim that all persons born in the United States are citizens, entitled to the privileges or immunities of citizenship and the equal protection of the laws. Amdts. 13, 14. Because of that second founding, "[o]ur Constitution is color-blind, and neither knows nor tolerates classes among citizens." *Plessy v. Ferguson*, 163 U.S. 537, 559, 16 S.Ct. 1138, 41 L.Ed. 256 (1896) (Harlan, J., dissenting).

This Court's commitment to that equality principle has ebbed and flowed over time. After forsaking the principle for decades, offering a judicial *imprimatur* to segregation ***232** and ushering in the Jim Crow era, the Court finally corrected course in *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954), announcing that primary schools must either desegregate with all deliberate speed or else close their doors. See also *Brown v. Board of Education*, 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083 (1955) (*Brown II*). It then pulled back in *Grutter v. Bollinger*, 539 U.S. 306, 123 S.Ct. 2325, 156 L.Ed.2d 304 (2003), permitting universities to discriminate based on race in their admissions process (though only temporarily) in order to achieve alleged "educational benefits of diversity." *Id.*, at 319, 123 S.Ct. 2325. Yet, the Constitution continues to embody a simple truth: Two discriminatory wrongs cannot make a right.

I wrote separately in *Grutter*, explaining that the use of race in higher education ****2177** admissions decisions—regardless of whether intended to help or to hurt—violates the Fourteenth Amendment. *Id.*, at 351, 123 S.Ct. 2325 (opinion concurring in part and dissenting in part). In the decades since, I have repeatedly stated that *Grutter* was wrongly decided and should be overruled. *Fisher v. University of Tex. at Austin*, 570 U.S. 297, 315, 328, 133 S.Ct. 2411, 186 L.Ed.2d 474 (2013) (concurring opinion) (*Fisher I*); *Fisher v. University of Tex. at Austin*, 579 U.S. 365, 389, 136 S.Ct. 2198, 195 L.Ed.2d 511 (2016) (dissenting opinion). Today, and despite a lengthy interregnum, the Constitution prevails.

Because the Court today applies genuine strict scrutiny to the race-conscious admissions policies employed at Harvard and the University of North Carolina (UNC) and finds that they fail that searching review, I join the majority opinion in full. I write separately to offer an originalist defense of the colorblind Constitution; to explain further the flaws of the Court's *Grutter* jurisprudence; to clarify that all forms of discrimination based on race—including so-called affirmative action—are prohibited under the Constitution; and to emphasize the pernicious effects of all such discrimination.

I

In the 1860s, Congress proposed and the States ratified the Thirteenth and Fourteenth Amendments. And, with ***233** the authority conferred by these Amendments, Congress passed two landmark Civil Rights Acts. Throughout the debates on each of these measures, their proponents repeatedly affirmed their view of equal citizenship and the racial equality that flows from it. In fact, they held this principle so deeply that their crowning accomplishment—the Fourteenth Amendment—ensures racial equality *with no textual reference to race whatsoever*. The history of these measures' enactment renders their motivating principle as clear as their text: All citizens of the United States, regardless of skin color, are equal before the law.

I do not contend that all of the individuals who put forth and ratified the Fourteenth Amendment universally believed this to be true. Some Members of the proposing Congress, for example, opposed the Amendment. And, the historical record—particularly with respect to the debates on ratification in the States—is sparse. Nonetheless, substantial evidence suggests that the Fourteenth Amendment was passed to "establis[h] the broad constitutional principle of full and complete equality of all persons under the law," forbidding "all legal distinctions based on race or color." Supp. Brief for United States on Reargument in *Brown* v. *Board of Education*, O. T. 1953, No. 1 etc., p. 115 (U. S. *Brown* Reargument Brief).

This was Justice Harlan's view in his lone dissent in *Plessy*, where he observed that "[o]ur Constitution is color-blind." 163 U.S. at 559, 16 S.Ct. 1138. It was the view of the Court in *Brown*, which rejected " 'any authority ... to use race as a factor in affording educational opportunities.' " *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701, 747, 127 S.Ct. 2738, 168 L.Ed.2d 508 (2007). And, it is the view adopted in the Court's opinion today, requiring "the absolute equality of all citizens" under the law. *Ante*, at 2159 (internal quotation marks omitted).

A

In its 1864 election platform, the Republican Party pledged to amend the Constitution to accomplish the "utter ***234** and complete extirpation" of slavery from "the soil of the Republic." 2 A. Schlesinger, History of U. S. Political Parties 1860–1910, p. 1303 ****2178** (1973). After their landslide victory, Republicans quickly moved to make good on that promise. Congress proposed what would become the Thirteenth Amendment to the States in January 1865, and it was ratified as part of the Constitution later that year. The new Amendment stated that "[n]either slavery nor involuntary servitude ... shall exist" in the United States "except as a punishment for crime whereof the party shall have been duly convicted." § 1. It thus not only prohibited States from themselves enslaving persons, but also obligated them to end enslavement by private individuals within their borders. Its Framers viewed the text broadly, arguing that it "allowed Congress to legislate not merely against slavery itself, but against all the badges and relics of a slave system." A. Amar, America's Constitution: A Biography 362 (2005) (internal quotation marks omitted). The Amendment also authorized "Congress ... to enforce" its terms "by appropriate legislation"—authority not granted in any prior Amendment. § 2. Proponents believed this enforcement clause permitted legislative measures designed to accomplish the Amendment's broader goal of equality for the freedmen.

It quickly became clear, however, that further amendment would be necessary to safeguard that goal. Soon after the Thirteenth Amendment's adoption, the reconstructed Southern States began to enact "Black Codes," which circumscribed the newly won freedoms of blacks. The Black Code of Mississippi, for example, "imposed all sorts of disabilities" on blacks, "including limiting their freedom of movement and barring them from following certain occupations, owning firearms, serving on juries, testifying in cases involving whites, or voting." E. Foner, The Second Founding 48 (2019).

Congress responded with the landmark Civil Rights Act of 1866, 14 Stat. 27, in an attempt to pre-empt the Black ***235** Codes. The 1866 Act promised such a sweeping form of equality that it would lead many to say that it exceeded the scope of Congress' authority under the Thirteenth Amendment. As enacted, it stated:

> "*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding."

The text of the provision left no doubt as to its aim: All persons born in the United States were equal citizens entitled to the same rights and subject to the same penalties as white citizens in the categories enumerated. See M. McConnell, Originalism and the Desegregation Decisions, 81 Va. L. Rev. 947, 958 (1995) ("Note that the bill neither forbade racial discrimination generally nor did it guarantee particular rights to all persons. Rather, it required an equality in certain specific rights"). And, while the 1866 Act used the rights of ****2179** "white citizens" as a benchmark, its rule was decidedly colorblind, safeguarding legal equality for *all* citizens "of every race and color" and providing the same rights to all.

***236** The 1866 Act's evolution further highlights its rule of equality. To start, *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 15 L.Ed. 691 (1857), had previously held that blacks "were not regarded as a portion of the people or citizens of the Government" and "had no rights which the white man was bound to respect." *Id.*, at 407, 411. The Act, however, would effectively overrule *Dred Scott* and ensure the equality that had been promised to blacks. But the Act went further still. On January 29, 1866, Senator Lyman Trumbull, the bill's principal sponsor in the Senate, proposed text stating that "all persons of African descent born in the United States are hereby declared to be citizens." Cong. Globe, 39th Cong., 1st Sess., 474. The following day, Trumbull revised his proposal, removing the reference to "African descent" and declaring more broadly that "all persons born in the United States, and not subject to any foreign Power," are "citizens of the United States." *Id.*, at 498.

"In the years before the Fourteenth Amendment's adoption, jurists and legislators often connected citizenship with equality," where "the absence or presence of one entailed the absence or presence of the other." *United States* v. *Vaello Madero*, 596 U. S. ——, ——, 142 S.Ct. 1539, 1547, 212 L.Ed.2d 496 (2022) (THOMAS, J., concurring). The addition of a citizenship guarantee thus evidenced an intent to broaden the provision, extending beyond recently freed blacks and incorporating a more general view of equality for *all* Americans. Indeed, the drafters later included a specific carveout for "Indians not taxed," demonstrating the breadth of the bill's otherwise general citizenship language. 14 Stat. 27.[1] As Trumbull explained, the provision created a bond between all Americans; "any statute which is not equal to *all*, and which deprives any citizen of civil rights which are secured to other citizens," was "an unjust encroachment upon his liberty" and a "badge of servitude" prohibited ***237** by the Constitution. Cong. Globe, 39th Cong., 1st Sess., at 474 (emphasis added).

Trumbull and most of the Act's other supporters identified the Thirteenth Amendment as a principal source of constitutional authority for the Act's nondiscrimination provisions. See, *e.g.*, *id.*, at 475 (statement of Sen. Trumbull); *id.*, at 1152 (statement of Rep. Thayer); *id.*, at 503–504 (statement of Sen. Howard). In particular, they explained that the Thirteenth Amendment allowed Congress not merely to legislate against slavery itself, but also to counter measures "which depriv[e] any citizen of civil rights which are secured to other citizens." *Id.*, at 474.

But opponents argued that Congress' authority did not sweep so broadly. President Andrew Johnson, for example, contended that Congress lacked authority to pass the measure, seizing on the breadth of the citizenship text and emphasizing state authority over matters of state citizenship. See S. Doc. No. 31, 39th Cong., 1st Sess., 1, 6 (1866) (Johnson veto message). Consequently, "doubts about the constitutional authority conferred by that measure led supporters to supplement their Thirteenth Amendment arguments with other sources of constitutional authority." R. Williams, ****2180** Originalism and the Other Desegregation Decision, 99 Va. L. Rev. 493, 532–533 (2013) (describing appeals to the naturalization power and the inherent power to protect the rights of citizens). As debates continued, it became increasingly apparent that safeguarding the 1866 Act, including its promise of black citizenship and the equal rights that citizenship entailed, would require further submission to the people of the United States in the form of a proposed constitutional amendment. See, *e.g.*, Cong. Globe,

39th Cong., 1st Sess., at 498 (statement of Sen. Van Winkle).

B

Critically, many of those who believed that Congress lacked the authority to enact the 1866 Act also supported the ***238** principle of racial equality. So, almost immediately following the ratification of the Thirteenth Amendment, several proposals for further amendments were submitted in Congress. One such proposal, approved by the Joint Committee on Reconstruction and then submitted to the House of Representatives on February 26, 1866, would have declared that "[t]he Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States, and to all persons in the several States equal protection in the rights of life, liberty, and property." *Id.*, at 1033–1034. Representative John Bingham, its drafter, was among those who believed Congress lacked the power to enact the 1866 Act. See *id.*, at 1291. Specifically, he believed the "very letter of the Constitution" already required equality, but the enforcement of that requirement "is of the reserved powers of the States." Cong. Globe, 39th Cong., 1st Sess., at 1034, 1291 (statement of Rep. Bingham). His proposed constitutional amendment accordingly would provide a clear constitutional basis for the 1866 Act and ensure that future Congresses would be unable to repeal it. See W. Nelson, The Fourteenth Amendment 48–49 (1988).

Discussion of Bingham's initial draft was later postponed in the House, but the Joint Committee on Reconstruction continued its work. See 2 K. Lash, The Reconstruction Amendments 8 (2021). In April, Representative Thaddeus Stevens proposed to the Joint Committee an amendment that began, "[n]o discrimination shall be made by any State nor by the United States as to the civil rights of persons because of race, color, or previous condition of servitude." S. Doc. No. 711, 63d Cong., 1st Sess., 31–32 (1915) (reprinting the Journal of the Joint Committee on Reconstruction for the Thirty-Ninth Congress). Stevens' proposal was later revised to read as follows: " 'No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any ***239** person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.' " *Id.*, at 39. This revised text was submitted to the full House on April 30, 1866. Cong. Globe, 39th Cong., 1st Sess., at 2286–2287. Like the eventual first section of the Fourteenth Amendment, this proposal embodied the familiar Privileges or Immunities, Due Process, and Equal Protection Clauses. And, importantly, it also featured an enforcement clause—with text borrowed from the Thirteenth Amendment—conferring upon Congress the power to enforce its provisions. *Ibid.*

Stevens explained that the draft was intended to "allo[w] Congress to correct the unjust legislation of the States, so far that the law which operates upon one man shall operate *equally* upon all." *Id.*, at 2459. Moreover, Stevens' later statements indicate that he did not believe there was a ****2181** difference "in substance between the new proposal and" earlier measures calling for impartial and equal treatment without regard to race. U. S. *Brown* Reargument Brief 44 (noting a distinction only with respect to a suffrage provision). And, Bingham argued that the need for the proposed text was "one of the lessons that have been taught ... by the history of the past four years of terrific conflict" during the Civil War. Cong. Globe, 39th Cong., 1st Sess., at 2542. The proposal passed the House by a vote of 128 to 37. *Id.*, at 2545.

Senator Jacob Howard introduced the proposed Amendment in the Senate, powerfully asking, "Ought not the time to be now passed when one measure of justice is to be meted out to a member of one caste while another and a different measure is meted out to the member of another caste, both castes being alike citizens of the United States, both bound to obey the same laws, to sustain the burdens of the same Government, and both equally responsible to justice and to God for the deeds done in the body?" *Id.*, at 2766. In keeping with this view, he proposed an introductory sentence, declaring that " 'all persons born in the United States, and ***240** subject to the jurisdiction thereof, are citizens of the United States and of the States wherein they reside.' " *Id.*, at 2869. This text, the Citizenship Clause, was the final missing element of what would ultimately become § 1 of the Fourteenth Amendment. Howard's draft for the proposed citizenship text was modeled on the Civil Rights Act of 1866's text, and he suggested the alternative language to "remov[e] all doubt as to what persons are or are not citizens of the United States," a question which had "long been a great desideratum in the jurisprudence and legislation of this country." *Id.*, at 2890. He further characterized the addition as "simply declaratory of what I regard as the law of the land already." *Ibid.*

The proposal was approved in the Senate by a vote of 33 to 11. *Id.*, at 3042. The House then reconciled differences between the two measures, approving the Senate's changes by a vote of 120 to 32. See *id.*, at 3149. And, in June 1866, the amendment was submitted to the States for their consideration and ratification. Two years later, it was ratified by the requisite number of States and became the Fourteenth Amendment to the United States Constitution. See 15 Stat. 706–707; *id.*, at 709–711. Its opening words instilled in our Nation's Constitution a new birth of freedom:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." § 1.

As enacted, the text of the Fourteenth Amendment provides a firm statement of equality before the law. It begins by guaranteeing citizenship status, invoking the "longstanding ***241** political and legal tradition that closely associated the status of citizenship with the entitlement to legal equality." *Vaello Madero*, 596 U. S., at ——, 142 S.Ct., at 1547 (THOMAS, J., concurring) (internal quotation marks omitted). It then confirms that States may not "abridge the rights of national citizenship, including whatever civil equality is guaranteed to 'citizens' under the Citizenship Clause." *Id.*, at ——, n. 3, 142 S.Ct., at 1550 n. 3. Finally, it pledges that even noncitizens must be treated equally "as individuals, and not as members of racial, ethnic, or religious groups." ****2182** *Missouri v. Jenkins*, 515 U.S. 70, 120–121, 115 S.Ct. 2038, 132 L.Ed.2d 63 (1995) (THOMAS, J., concurring).

The drafters and ratifiers of the Fourteenth Amendment focused on this broad equality idea, offering surprisingly little explanation of which term was intended to accomplish which part of the Amendment's overall goal. "The available materials ... show," however, "that there were widespread expressions of a general understanding of the broad scope of the Amendment similar to that abundantly demonstrated in the Congressional debates, namely, that the first section of the Amendment would establish the full constitutional right of all persons to equality before the law and would prohibit legal distinctions based on race or color." U. S. *Brown* Reargument Brief 65 (citation omitted). For example, the Pennsylvania debate suggests that the Fourteenth Amendment was understood to make the law "what justice is represented to be, blind" to the "color of [one's] skin." App. to Pa. Leg. Record XLVIII (1867) (Rep. Mann).

The most commonly held view today—consistent with the rationale repeatedly invoked during the congressional debates, see, *e.g.*, Cong. Globe, 39th Cong., 1st Sess., at 2458–2469—is that the Amendment was designed to remove any doubts regarding Congress' authority to enact the Civil Rights Act of 1866 and to establish a nondiscrimination rule that could not be repealed by future Congresses. See, *e.g.*, J. Harrison, Reconstructing the Privileges or Immunities Clause, 101 Yale L. J. 1385, 1388 (1992) (noting that the "primary ***242** purpose" of the Fourteenth Amendment "was to mandate certain rules of racial equality, especially those contained in Section 1 of the Civil Rights Act of 1866").[2] The Amendment's phrasing supports this view, and there does not appear to have been any argument to the contrary predating *Brown*.

Consistent with the Civil Rights Act of 1866's aim, the Amendment definitively overruled Chief Justice Taney's opinion in *Dred Scott* that blacks "were not regarded as a portion of the people or citizens of the Government" and "had no rights which the white man was bound to respect." 19 How. at 407, 411. And, like the 1866 Act, the Amendment also clarified that American citizenship conferred rights not just against the Federal Government but also the government of the citizen's State of residence. Unlike the Civil Rights Act, however, the Amendment employed a wholly race-neutral text, extending privileges or immunities to all "citizens"—even if its practical effect was to provide all citizens with the same privileges then enjoyed by whites. That citizenship guarantee was often linked with the concept of equality. *Vaello Madero*, 596 U. S., at ——, 142 S.Ct., at 1548 (THOMAS, J., concurring). Combining the citizenship guarantee with the Privileges or Immunities Clause and the Equal Protection Clause, the Fourteenth Amendment ensures protection for all equal citizens of the Nation without regard to race. Put succinctly, "[o]ur Constitution is color-blind." ****2183** *Plessy*, 163 U.S. at 559, 16 S.Ct. 1138 (Harlan, J., dissenting).

***243** C

In the period closely following the Fourteenth Amendment's ratification, Congress passed several statutes designed to enforce its terms, eliminating government-based Black Codes—systems of government-imposed segregation—and criminalizing racially motivated violence. The marquee legislation was the Civil Rights Act of 1875, ch. 114, 18 Stat. 335–337, and the justifications offered by proponents of that measure are further evidence for the colorblind view of the Fourteenth Amendment.

The Civil Rights Act of 1875 sought to counteract the systems of racial segregation that had arisen in the wake of the Reconstruction era. Advocates of so-called separate-but-equal systems, which allowed segregated facilities for blacks and whites, had argued that laws permitting or requiring such segregation treated members of both races precisely alike: Blacks could not attend a white school, but symmetrically, whites could not attend a black school. See *Plessy*, 163 U.S. at 544, 16 S.Ct. 1138 (arguing that, in light of the social circumstances at the time, racial segregation did not "necessarily imply the inferiority of either race to the other"). Congress was not persuaded. Supporters of the soon-to-be 1875 Act successfully countered that symmetrical restrictions did not constitute equality, and they did so on colorblind terms.

For example, they asserted that "free government demands the abolition of all distinctions founded on color and race." 2 Cong. Rec. 4083 (1874). And, they submitted that "[t]he time has come when all distinctions that grew out of slavery ought to disappear." Cong. Globe, 42d Cong., 2d Sess., 3193 (1872) ("[A]s long as you have distinctions and discriminations between white and black in the enjoyment of legal rights and privileges[,] you will have discontent and parties divided between black and white"). Leading Republican Senator Charles Sumner compellingly argued that "any rule excluding a man on account of his color is an indignity, an insult, and a wrong." *Id.*, at 242; see also *ibid.* ("I insist ***244** that by the law of the land all persons without distinction of color shall be equal before the law"). Far from conceding that segregation would be perceived as inoffensive if race roles were reversed, he declared that "[t]his is plain oppression, which you ... would feel keenly were it directed against you or your child." *Id.*, at 384. He went on to paraphrase the English common-law rule to which he subscribed: "[The law] makes no discrimination on account of color." *Id.*, at 385.

Others echoed this view. Representative John Lynch declared that "[t]he duty of the law-maker is to know no race, no color, no religion, no nationality, except to prevent distinctions on any of these grounds, so far as the law is concerned." 3 Cong. Rec. 945 (1875). Senator John Sherman believed that the route to peace was to "[w]ipe out all legal discriminations between white and black [and] make no distinction between black and white." Cong. Globe, 42d Cong., 2d Sess., at 3193. And, Senator Henry Wilson sought to "make illegal all distinctions on account of color" because "there should be no distinction recognized by the laws of the land." *Id.*, at 819; see also 3 Cong. Rec., at 956 (statement of Rep. Cain) ("[M]en [are] formed of God equally .... The civil-rights bill simply declares this: that there shall be no discriminations between citizens of this land so far as the laws of the land are concerned"). The view of the Legislature was clear: The Constitution "neither knows nor tolerates classes among citizens." ****2184** *Plessy*, 163 U.S. at 559, 16 S.Ct. 1138 (Harlan, J., dissenting).

D

The earliest Supreme Court opinions to interpret the Fourteenth Amendment did so in colorblind terms. Their statements characterizing the Amendment evidence its commitment to equal rights for all citizens, regardless of the color of their skin. See *ante*, at 2159 – 2160.

In the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 21 L.Ed. 394 (1873), the Court identified the "pervading purpose" of the Reconstruction ***245** Amendments as "the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him." *Id.*, at 67–72. Yet, the Court quickly acknowledged that the language of the Amendments did not suggest "that no one else but the negro can share in this protection." *Id.*, at 72. Rather, "[i]f Mexican peonage or the

Chinese coolie labor system shall develop slavery of the Mexican or Chinese race within our territory, [the Thirteenth Amendment] may safely be trusted to make it void." *Ibid.* And, similarly, "if other rights are assailed by the States which properly and necessarily fall within the protection of these articles, that protection will apply, though the party interested may not be of African descent." *Ibid.* The Court thus made clear that the Fourteenth Amendment's equality guarantee applied to members of *all* races, including Asian Americans, ensuring all citizens equal treatment under law.

Seven years later, the Court relied on the *Slaughter-House* view to conclude that "[t]he words of the [Fourteenth A]mendment ... contain a necessary implication of a positive immunity, or right, most valuable to the colored race,—the right to exemption from unfriendly legislation against them distinctively as colored." *Strauder v. West Virginia*, 100 U.S. 303, 307–308, 25 L.Ed. 664 (1880). The Court thus found that the Fourteenth Amendment banned "expres[s]" racial classifications, no matter the race affected, because these classifications are "a stimulant to ... race prejudice." *Id.*, at 308. See also *ante*, at 2159 – 2160. Similar statements appeared in other cases decided around that time. See *Virginia v. Rives*, 100 U.S. 313, 318, 25 L.Ed. 667 (1880) ("The plain object of these statutes [enacted to enforce the Fourteenth Amendment], as of the Constitution which authorized them, was to place the colored race, in respect of civil rights, upon a level with whites. They made the rights and responsibilities, civil and ***246** criminal, of the two races exactly the same"); *Ex parte Virginia*, 100 U.S. 339, 344–345, 25 L.Ed. 676 (1880) ("One great purpose of [the Thirteenth and Fourteenth Amendments] was to raise the colored race from that condition of inferiority and servitude in which most of them had previously stood, into perfect equality of civil rights with all other persons within the jurisdiction of the States").

This Court's view of the Fourteenth Amendment reached its nadir in *Plessy*, infamously concluding that the Fourteenth Amendment "could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either." 163 U.S. at 544, 16 S.Ct. 1138. That holding stood in sharp contrast to the Court's earlier embrace of the Fourteenth Amendment's equality ideal, as Justice Harlan emphasized in dissent: The Reconstruction Amendments had aimed to remove "the race line from our systems of governments." *Id.*, at 563, 16 S.Ct. 1138. For Justice Harlan, the Constitution was ****2185** colorblind and categorically rejected laws designed to protect "a dominant race—a superior class of citizens," while imposing a "badge of servitude" on others. *Id.*, at 560–562, 16 S.Ct. 1138.

History has vindicated Justice Harlan's view, and this Court recently acknowledged that *Plessy* should have been overruled immediately because it "betrayed our commitment to 'equality before the law.' " *Dobbs* v. *Jackson Women's Health Organization*, 597 U. S. ——, ——, 142 S.Ct. 2228, 2265, 213 L.Ed.2d 545 (2022). Nonetheless, and despite Justice Harlan's efforts, the era of state-sanctioned segregation persisted for more than a half century.

E

Despite the extensive evidence favoring the colorblind view, as detailed above, it appears increasingly in vogue to embrace an "antisubordination" view of the Fourteenth Amendment: that the Amendment forbids only laws that hurt, but not help, blacks. Such a theory lacks any basis in ***247** the original meaning of the Fourteenth Amendment. Respondents cite a smattering of federal and state statutes passed during the years surrounding the ratification of the Fourteenth Amendment. And, Justice SOTOMAYOR's dissent argues that several of these statutes evidence the ratifiers' understanding that the Equal Protection Clause "permits consideration of race to achieve its goal." *Post*, at 2228. Upon examination, however, it is clear that these statutes are fully consistent with the colorblind view.

Start with the 1865 Freedmen's Bureau Act. That Act established the Freedmen's Bureau to issue "provisions, clothing, and fuel ... needful for the immediate and temporary shelter and supply of destitute and suffering refugees and freedmen and their wives and children" and the setting "apart, for the use of loyal refugees and freedmen," abandoned, confiscated, or purchased lands, and assigning "to every male citizen, whether refugee or freedman, ... not more than forty acres of such land." Ch. 90, §§ 2, 4, 13 Stat. 507. The 1866 Freedmen's Bureau Act then expanded upon the prior year's law, authorizing the Bureau to care for all loyal refugees and freedmen. Ch. 200, 14 Stat. 173–174. Importantly, however, the Acts applied to *freedmen* (and

refugees), a formally race-neutral category, not blacks writ large. And, because "not all blacks in the United States were former slaves," " 'freedman' " was a decidedly under-inclusive proxy for race. M. Rappaport, Originalism and the Colorblind Constitution, 89 Notre Dame L. Rev. 71, 98 (2013) (Rappaport). Moreover, the Freedmen's Bureau served newly freed slaves alongside white refugees. P. Moreno, Racial Classifications and Reconstruction Legislation, 61 J. So. Hist. 271, 276–277 (1995); R. Barnett & E. Bernick, The Original Meaning of the Fourteenth Amendment 119 (2021). And, advocates of the law explicitly disclaimed any view rooted in modern conceptions of antisubordination. To the contrary, they explicitly clarified that the equality sought by the law was not one in which all men shall be "six feet high"; ***248** rather, it strove to ensure that freedmen enjoy "equal rights before the law" such that "each man shall have the right to pursue in his own way life, liberty, and happiness." Cong. Globe, 39th Cong., 1st Sess., at 322, 342.

Several additional federal laws cited by respondents appear to classify based on race, rather than previous condition of servitude. For example, an 1866 law adopted special rules and procedures for the payment of "colored" servicemen in the Union Army to agents who helped them secure bounties, pensions, and other payments that they were due. 14 Stat. 367–368. At ****2186** the time, however, Congress believed that many "black servicemen were significantly overpaying for these agents' services in part because [the servicemen] did not understand how the payment system operated." Rappaport 110; see also S. Siegel, The Federal Government's Power To Enact Color-Conscious Laws: An Originalist Inquiry, 92 Nw. U. L. Rev. 477, 561 (1998). Thus, while this legislation appears to have provided a discrete race-based benefit, its aim—to prohibit race-based exploitation—may not have been possible at the time without using a racial screen. In other words, the statute's racial classifications may well have survived strict scrutiny. See Rappaport 111–112. Another law, passed in 1867, provided funds for "freedmen or destitute colored people" in the District of Columbia. Res. of Mar. 16, 1867, No. 4, 15 Stat. 20. However, when a prior version of this law targeting only blacks was criticized for being racially discriminatory, "it was defended on the grounds that there were various places in the city where former slaves ... lived in densely populated shantytowns." Rappaport 104–105 (citing Cong. Globe, 39th Cong., 1st Sess., at 1507). Congress thus may have enacted the measure not because of race, but rather to address a special problem in shantytowns in the District where blacks lived.

These laws—even if targeting race as such—likely were also constitutionally permissible examples of Government action "undo[ing] the effects of past discrimination in [a way] ***249** that do[es] not involve classification by race," even though they had "a racially disproportionate impact." *Richmond v. J. A. Croson Co.*, 488 U.S. 469, 526, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989) (Scalia, J., concurring in judgment) (internal quotation marks omitted). The government can plainly remedy a race-based injury that it has inflicted—though such remedies must be meant to further a colorblind government, not perpetuate racial consciousness. See *id.*, at 505, 109 S.Ct. 706 (majority opinion). In that way, "[r]ace-based government measures during the 1860's and 1870's to remedy *state-enforced slavery* were ... not inconsistent with the colorblind Constitution." *Parents Involved*, 551 U.S. at 772, n. 19, 127 S.Ct. 2738 (THOMAS, J., concurring). Moreover, the very same Congress passed both these laws *and* the unambiguously worded Civil Rights Act of 1866 that clearly prohibited discrimination on the basis of race.[3] And, as noted above, the proponents of these laws explicitly sought equal rights without regard to race while disavowing any antisubordination view.

Justice SOTOMAYOR argues otherwise, pointing to "a number of race-conscious" federal laws passed around the time of the Fourteenth Amendment's enactment. *Post*, at 2228 (dissenting opinion). She identifies the Freedmen's Bureau Act of 1865, already discussed above, as one such law, but she admits that the programs did not benefit blacks exclusively. She also does not dispute that legislation targeting the needs of newly freed blacks in 1865 could be understood as directly remedial. Even today, nothing prevents the States from according an admissions preference to identified victims of discrimination. See *Croson*, 488 U.S. at 526, 109 S.Ct. 706 ***250** (opinion of Scalia, J.) ("While most of the beneficiaries might be black, neither the ****2187** beneficiaries nor those disadvantaged by the preference would be identified *on the basis of their race*" (emphasis in original)); see also *ante*, at 2175 – 2176.

Justice SOTOMAYOR points also to the Civil Rights Act of 1866, which as discussed above, mandated that all citizens have the same rights as those "enjoyed by white citizens." 14 Stat. 27. But these references to the station of white citizens do not refute the view that the Fourteenth Amendment is colorblind. Rather, they specify that, in meeting the Amendment's goal of equal citizenship, States must level up. The Act did not single out a group of citizens for special treatment—rather, all citizens were meant to be treated the same as those who, at the time, had the full rights of citizenship. Other provisions of the 1866 Act reinforce this view, providing for equality in civil rights. See Rappaport 97. Most notably, § 14 stated that the basic civil rights of citizenship shall be secured "without respect to race or color." 14 Stat. 176–177. And, § 8 required that funds from land sales must be used to support schools "without distinction of color or race, ... in the parishes of " the area where the land had been sold. *Id.*, at 175.

In addition to these federal laws, Harvard also points to two state laws: a South Carolina statute that placed the burden of proof on the defendant when a "colored or black" plaintiff claimed a violation, 1870 S. C. Acts pp. 387–388, and Kentucky legislation that authorized a county superintendent to aid "negro paupers" in Mercer County, 1871 Ky. Acts pp. 273–274. Even if these statutes provided race-based benefits, they do not support respondents' and Justice SOTOMAYOR's view that the Fourteenth Amendment was contemporaneously understood to permit differential treatment based on race, prohibiting only caste legislation while authorizing antisubordination measures. Cf., *e.g.*, O. Fiss, Groups and the Equal Protection Clause, 5 Philos. & Pub. Aff. 107, 147 (1976) (articulating the antisubordination view); ***251** R. Siegel, Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles Over *Brown*, 117 Harv. L. Rev. 1470, 1473, n. 8 (2004) (collecting scholarship). At most, these laws would support the kinds of discrete remedial measures that our precedents have permitted.

If services had been given only to white persons up to the Fourteenth Amendment's adoption, then providing those same services only to previously excluded black persons would work to equalize treatment against a concrete baseline of government-imposed inequality. It thus may have been the case that Kentucky's county-specific, race-based public aid law was necessary because that particular county was not providing certain services to local poor blacks. Similarly, South Carolina's burden-shifting framework (where the substantive rule being applied remained notably race neutral) may have been necessary to streamline litigation around the most commonly litigated type of case: a lawsuit seeking to remedy discrimination against a member of the large population of recently freed black Americans. See 1870 S. C. Acts, at 386 (documenting "persist[ent]" racial discrimination by state-licensed entities).

Most importantly, however, there was a wide range of federal and state statutes enacted at the time of the Fourteenth Amendment's adoption and during the period thereafter that explicitly sought to discriminate *against* blacks on the basis of race or a proxy for race. See Rappaport 113–115. These laws, hallmarks of the race-conscious Jim Crow era, are precisely the sort of enactments that the Framers of the Fourteenth Amendment sought to eradicate. Yet, proponents of an antisubordination view necessarily do not take those ****2188** laws as evidence of the Fourteenth Amendment's true meaning. And rightly so. Neither those laws, nor a small number of laws that appear to target blacks for preferred treatment, displace the equality vision reflected in the history of the Fourteenth Amendment's enactment. This is particularly true in light of the clear equality requirements present in the ***252** Fourteenth Amendment's text. See *New York State Rifle & Pistol Assn., Inc.* v. *Bruen*, 597 U. S. ——, —— – ——, 142 S.Ct. 2111, 2128–2129, 213 L.Ed.2d 387 (2022) (noting that text controls over inconsistent postratification history).

II

Properly understood, our precedents have largely adhered to the Fourteenth Amendment's demand for colorblind laws.[4] That is why, for example, courts "must subject all racial classifications to the strictest of scrutiny." *Jenkins*, 515 U.S. at 121, 115 S.Ct. 2038 (THOMAS, J., concurring); see also *ante*, at 2166, n. 4 (emphasizing the consequences of an insufficiently searching inquiry). And, in case after case, we have employed strict scrutiny vigorously to reject various forms of racial discrimination as unconstitutional. See *Fisher I*, 570 U.S. at 317–318, 133 S.Ct. 2411 (THOMAS, J., concurring). The Court today rightly upholds that tradition and acknowledges the consequences that have flowed from *Grutter*'s contrary approach.

Three aspects of today's decision warrant comment: First, to satisfy strict scrutiny, universities must be able to establish an actual link between racial discrimination and educational benefits. Second, those engaged in racial discrimination do not deserve deference with respect to their reasons for discriminating. Third, attempts to remedy past governmental ***253** discrimination must be closely tailored to address *that* particular past governmental discrimination.

A

To satisfy strict scrutiny, universities must be able to establish a compelling reason to racially discriminate. *Grutter* recognized "only one" interest sufficiently compelling to justify race-conscious admissions programs: the "educational benefits of a diverse student body." 539 U.S. at 328, 333, 123 S.Ct. 2325. Expanding on this theme, Harvard and UNC have offered a grab bag of interests to justify their programs, spanning from " 'training future leaders in the public and private sectors' " to " 'enhancing appreciation, respect, and empathy,' " with references to " 'better educating [their] students through diversity' " in between. *Ante*, at 2166. The Court today finds that each of these interests are too vague and immeasurable to suffice, *ibid.*, and I agree.

Even in *Grutter*, the Court failed to clearly define "the educational benefits of a ****2189** diverse student body." 539 U.S. at 333, 123 S.Ct. 2325. Thus, in the years since *Grutter*, I have sought to understand exactly how racial diversity yields *educational* benefits. With nearly 50 years to develop their arguments, neither Harvard nor UNC—two of the foremost research institutions in the world—nor any of their *amici* can explain that critical link.

Harvard, for example, offers a report finding that meaningful representation of racial minorities promotes several goals. Only one of those goals—"producing new knowledge stemming from diverse outlooks," 980 F.3d 157, 174 (CA1 2020)—bears any possible relationship to educational benefits. Yet, it too is extremely vague and offers no indication that, for example, student test scores increased as a result of Harvard's efforts toward racial diversity.

More fundamentally, it is not clear how racial diversity, as opposed to other forms of diversity, uniquely and independently advances Harvard's goal. This is particularly true because ***254** Harvard blinds itself to other forms of applicant diversity, such as religion. See 2 App. in No. 20–1199, pp. 734–743. It may be the case that exposure to different perspectives and thoughts can foster debate, sharpen young minds, and hone students' reasoning skills. But, it is not clear how diversity with respect to race, *qua* race, furthers this goal. Two white students, one from rural Appalachia and one from a wealthy San Francisco suburb, may well have more diverse outlooks on this metric than two students from Manhattan's Upper East Side attending its most elite schools, one of whom is white and other of whom is black. If Harvard cannot even *explain* the link between racial diversity and education, then surely its interest in racial diversity cannot be compelling enough to overcome the constitutional limits on race consciousness.

UNC fares no better. It asserts, for example, an interest in training students to "live together in a diverse society." Brief for University Respondents in No. 21707, p. 39. This may well be important to a university experience, but it is a *social* goal, not an educational one. See *Grutter*, 539 U.S. at 347–348, 123 S.Ct. 2325 (Scalia, J., concurring in part and dissenting in part) (criticizing similar rationales as divorced from educational goals). And, again, UNC offers no reason why seeking a diverse society would not be equally supported by admitting individuals with diverse perspectives and backgrounds, rather than varying skin pigmentation.

Nor have *amici* pointed to any concrete and quantifiable *educational* benefits of racial diversity. The United States focuses on alleged civic benefits, including "increasing tolerance and decreasing racial prejudice." Brief for United States as *Amicus Curiae* 21–22. Yet, when it comes to educational benefits, the Government offers only one study purportedly showing that "college diversity experiences are significantly and positively related to cognitive development" and that "interpersonal interactions with racial diversity are the most strongly related to cognitive development." ***255** N. Bowman, College Diversity Experiences and Cognitive Development: A Meta-Analysis, 80 Rev. Educ. Research 4, 20 (2010). Here again, the link is, at best, tenuous, unspecific, and stereotypical. Other *amici* assert that diversity (generally) fosters the even-more nebulous values of "creativity" and "innovation," particularly in graduates' future workplaces. See, *e.g.*, Brief for Major American Business Enterprises as *Amici Curiae* 7–9; Brief for Massachusetts Institute of Technology et al. as *Amici Curiae* 16–17 (describing experience at IBM). Yet, none of those assertions deals exclusively with *racial* diversity—as ****2190** opposed to cultural or ideological diversity. And, none of those *amici* demonstrate measurable or concrete benefits that have resulted from universities' race-conscious admissions programs.

Of course, even if these universities had shown that racial diversity yielded any concrete or measurable benefits, they would still face a very high bar to show that their interest is compelling. To survive strict scrutiny, any such benefits would have to outweigh the tremendous harm inflicted by sorting individuals on the basis of race. See *Cooper v. Aaron*, 358 U.S. 1, 16, 78 S.Ct. 1401, 3 L.Ed.2d 5, 3 L.Ed.2d 19 (1958) (following *Brown*, "law and order are not here to be preserved by depriving the

Negro children of their constitutional rights"). As the Court's opinions in these cases make clear, all racial stereotypes harm and demean individuals. That is why "only those measures the State must take to provide a bulwark against anarchy, or to prevent violence, will constitute a pressing public necessity" sufficient to satisfy strict scrutiny today. *Grutter*, 539 U.S. at 353, 123 S.Ct.. 2325 (opinion of THOMAS, J.) (internal quotations marks omitted). Cf. *Lee v. Washington*, 390 U.S. 333, 334, 88 S.Ct. 994, 19 L.Ed.2d 1212 (1968) (Black, J., concurring) (protecting prisoners from violence might justify narrowly tailored discrimination); *Croson*, 488 U.S. at 521, 109 S.Ct. 706 (opinion of Scalia, J.) ("At least where state or local action is at issue, only a social emergency rising to the level of imminent danger to life and ***256** limb ... can justify [racial discrimination]"). For this reason, "just as the alleged educational benefits of segregation were insufficient to justify racial discrimination [in the 1950s], see *Brown* v. *Board of Education*, the alleged educational benefits of diversity cannot justify racial discrimination today." *Fisher I*, 570 U.S. at 320, 133 S.Ct. 2411 (THOMAS, J., concurring) (citation omitted).

B

The Court also correctly refuses to defer to the universities' own assessments that the alleged benefits of race-conscious admissions programs are compelling. It instead demands that the "interests [universities] view as compelling" must be capable of being "subjected to meaningful judicial review." *Ante*, at 2166. In other words, a court must be able to measure the goals asserted and determine when they have been reached. *Ante*, at 2166 – 2167. The Court's opinion today further insists that universities must be able to "articulate a meaningful connection between the means they employ and the goals they pursue." *Ante*, at 2167. Again, I agree. Universities' self-proclaimed righteousness does not afford them license to discriminate on the basis of race.

In fact, it is error for a court to defer to the views of an alleged discriminator while assessing claims of racial discrimination. See *Grutter*, 539 U.S. at 362–364, 123 S.Ct. 2325 (opinion of THOMAS, J.); see also *Fisher I*, 570 U.S. at 318–319, 133 S.Ct. 2411 (THOMAS, J., concurring); *United States v. Virginia*, 518 U.S. 515, 551, n. 19, 116 S.Ct. 2264, 135 L.Ed.2d 735 (1996) (refusing to defer to the Virginia Military Institute's judgment that the changes necessary to accommodate the admission of women would be too great and characterizing the necessary changes as "manageable"). We would not offer such deference in any other context. In employment discrimination lawsuits under Title VII of the Civil Rights Act, for example, courts require only a minimal prima facie showing by a complainant before shifting the burden onto the shoulders of the alleged-discriminator employer. See ***257** *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 803–805, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). And, Congress has passed numerous ****2191** laws—such as the Civil Rights Act of 1875—under its authority to enforce the Fourteenth Amendment, each designed to counter discrimination and each relying on courts to bring a skeptical eye to alleged discriminators.

This judicial skepticism is vital. History has repeatedly shown that purportedly benign discrimination may be pernicious, and discriminators may go to great lengths to hide and perpetuate their unlawful conduct. Take, for example, the university respondents here. Harvard's "holistic" admissions policy began in the 1920s when it was developed to exclude Jews. See M. Synnott, The Half-Opened Door: Discrimination and Admission at Harvard, Yale, and Princeton, 1900–1970, pp. 58–59, 61, 69, 73–74 (2010). Based on *de facto* quotas that Harvard quietly implemented, the proportion of Jews in Harvard's freshman class declined from 28% as late as 1925 to just 12% by 1933. J. Karabel, The Chosen: The Hidden History of Admission and Exclusion at Harvard, Yale, and Princeton 172 (2005). During this same period, Harvard played a prominent role in the eugenics movement. According to then-President Abbott Lawrence Lowell, excluding Jews from Harvard would help maintain admissions opportunities for Gentiles and perpetuate the purity of the Brahmin race—New England's white, Protestant upper crust. See D. Okrent, The Guarded Gate 309, and n. * (2019).

UNC also has a checkered history, dating back to its time as a segregated university. It admitted its first black undergraduate students in 1955—but only after being ordered to do so by a court, following a long legal battle in which UNC sought to keep its segregated status. Even then, UNC did not turn on a dime: The first three black students admitted as undergraduates enrolled at UNC but ultimately earned their bachelor's degrees elsewhere. See M. Beauregard, Column: The Desegregation of UNC, The Daily Tar Heel, Feb. 16, 2022. To the extent past is prologue, the university ***258** respondents' histories hardly

recommend them as trustworthy arbiters of whether racial discrimination is necessary to achieve educational goals.

Of course, none of this should matter in any event; courts have an independent duty to interpret and uphold the Constitution that no university's claimed interest may override. See *ante*, at 2168, n. 5. The Court today makes clear that, in the future, universities wishing to discriminate based on race in admissions must articulate and justify a compelling and measurable state interest based on concrete evidence. Given the strictures set out by the Court, I highly doubt any will be able to do so.

C

In an effort to salvage their patently unconstitutional programs, the universities and their *amici* pivot to argue that the Fourteenth Amendment permits the use of race to benefit only certain racial groups—rather than applicants writ large. Yet, this is just the latest disguise for discrimination. The sudden narrative shift is not surprising, as it has long been apparent that " 'diversity [was] merely the current rationale of convenience' " to support racially discriminatory admissions programs. *Grutter*, 539 U.S. at 393, 123 S.Ct. 2325 (Kennedy, J., dissenting). Under our precedents, this new rationale is also lacking.

To start, the case for affirmative action has emphasized a number of rationales over the years, including: (1) restitution to compensate those who have been victimized by past discrimination, (2) fostering "diversity," (3) facilitating "integration" and the destruction of perceived racial castes, and (4) countering longstanding ****2192** and diffuse racial prejudice. See R. Kennedy, For Discrimination: Race, Affirmative Action, and the Law 78 (2013); see also P. Schuck, Affirmative Action: Past, Present, and Future, 20 Yale L. & Pol'y Rev. 1, 22–46 (2002). Again, this Court has only recognized one interest as compelling: the educational benefits of diversity ***259** embraced in *Grutter*. Yet, as the universities define the "diversity" that they practice, it encompasses social and aesthetic goals far afield from the education-based interest discussed in *Grutter*. See *supra*, at 2188. The dissents too attempt to stretch the diversity rationale, suggesting that it supports broad remedial interests. See, *e.g.*, *post*, at 2237 – 2238, 2248 – 2249, 2262 (opinion of SOTOMAYOR, J.) (noting that UNC's black admissions percentages "do not reflect the diversity of the State"; equating the diversity interest under the Court's precedents with a goal of "integration in higher education" more broadly; and warning of "the dangerous consequences of an America where its leadership does not reflect the diversity of the People"); *post*, at 2275 – 2276 (opinion of JACKSON, J.) (explaining that diversity programs close wealth gaps). But language—particularly the language of controlling opinions of this Court—is not so elastic. See J. Pieper, Abuse of Language—Abuse of Power 23 (L. Krauth transl. 1992) (explaining that propaganda, "in contradiction to the nature of language, intends not to communicate but to manipulate" and becomes an "[i]nstrument of power" (emphasis deleted)).

The Court refuses to engage in this lexicographic drift, seeing these arguments for what they are: a remedial rationale in disguise. See *ante*, at 2172 – 2174. As the Court points out, the interest for which respondents advocate has been presented to and rejected by this Court many times before. In *Regents of University of California v. Bakke*, 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978), the University of California made clear its rationale for the quota system it had established: It wished to "counteract effects of generations of pervasive discrimination" against certain minority groups. Brief for Petitioner, O. T. 1977, No. 76811, p. 2. But, the Court rejected this distinctly remedial rationale, with Justice Powell adopting in its place the familiar "diversity" interest that appeared later in *Grutter*. See *Bakke*, 438 U.S. at 306, 98 S.Ct. 2733 (plurality opinion). The Court similarly did not adopt the broad remedial rationale ***260** in *Grutter*; and it rejects it again today. Newly and often minted theories cannot be said to be commanded by our precedents.

Indeed, our precedents have repeatedly and soundly distinguished between programs designed to compensate victims of past governmental discrimination from so-called benign race-conscious measures, such as affirmative action. *Croson*, 488 U.S. at 504–505, 109 S.Ct. 706; *Adarand Constructors, Inc.* v. *Peña*, 515 U.S. 200, 226–227, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995). To enforce that distinction, our precedents explicitly require that any attempt to compensate victims of past governmental discrimination must be concrete and traceable to the *de jure* segregated system, which must have some discrete and continuing discriminatory effect that warrants a present remedy. See *United States v. Fordice*, 505 U.S. 717, 731, 112 S.Ct. 2727, 120 L.Ed.2d 575 (1992). Today's opinion for the Court reaffirms the need for such a close remedial fit, hewing to

the same line we have consistently drawn. *Ante*, at 2167 – 2168.

Without such guardrails, the Fourteenth Amendment would become self-defeating, promising a Nation based on the equality ideal but yielding a quota- and caste-ridden society steeped in race-based discrimination. Even *Grutter* itself could not tolerate this outcome. It accordingly imposed a ****2193** time limit for its race-based regime, observing that " 'a core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race.' " 539 U.S. at 341–342, 123 S.Ct. 2325 (quoting *Palmore v. Sidoti*, 466 U.S. 429, 432, 104 S.Ct. 1879, 80 L.Ed.2d 421 (1984); alterations omitted).

The Court today enforces those limits. And rightly so. As noted above, both Harvard and UNC have a history of racial discrimination. But, neither have even attempted to explain how their current racially discriminatory programs are even remotely traceable to their past discriminatory conduct. Nor could they; the current race-conscious admissions programs take no account of ancestry and, at least for Harvard, likely have the effect of discriminating against some of ***261** the very same ethnic groups against which Harvard previously discriminated (*i.e.*, Jews and those who are not part of the white elite). All the while, Harvard and UNC ask us to blind ourselves to the burdens imposed on the millions of innocent applicants denied admission because of their membership in a currently disfavored race.

The Constitution neither commands nor permits such a result. "Purchased at the price of immeasurable human suffering," the Fourteenth Amendment recognizes that classifications based on race lead to ruinous consequences for individuals and the Nation. *Adarand Constructors, Inc.*, 515 U.S. at 240, 115 S.Ct. 2097 (THOMAS, J., concurring in part and concurring in judgment). Consequently, "*all*" racial classifications are "inherently suspect," *id.*, at 223–224, 115 S.Ct. 2097 (majority opinion) (emphasis added; internal quotation marks omitted), and must be subjected to the searching inquiry conducted by the Court, *ante*, at 2165 – 2173.

III

Both experience and logic have vindicated the Constitution's colorblind rule and confirmed that the universities' new narrative cannot stand. Despite the Court's hope in *Grutter* that universities would voluntarily end their race-conscious programs and further the goal of racial equality, the opposite appears increasingly true. Harvard and UNC now forthrightly state that they racially discriminate when it comes to admitting students, arguing that such discrimination is consistent with this Court's precedents. And they, along with today's dissenters, defend that discrimination as *good*. More broadly, it is becoming increasingly clear that discrimination on the basis of race—often packaged as "affirmative action" or "equity" programs—are based on the benighted notion "that it is possible to tell when discrimination helps, rather than hurts, racial minorities." *Fisher I*, 570 U.S. at 328, 133 S.Ct. 2411 (THOMAS, J., concurring).

We cannot be guided by those who would desire less in our Constitution, or by those who would desire more. "The ***262** Constitution abhors classifications based on race, not only because those classifications can harm favored races or are based on illegitimate motives, but also because every time the government places citizens on racial registers and makes race relevant to the provision of burdens or benefits, it demeans us all." *Grutter*, 539 U.S. at 353, 123 S.Ct. 2325 (opinion of THOMAS, J.).

A

The Constitution's colorblind rule reflects one of the core principles upon which our Nation was founded: that "all men are

created equal." Those words featured prominently in our Declaration of Independence and were inspired by a rich tradition of political thinkers, from Locke to Montesquieu, who considered equality to be the ****2194** foundation of a just government. See, *e.g.*, J. Locke, Second Treatise of Civil Government 48 (J. Gough ed. 1948); T. Hobbes, Leviathan 98 (M. Oakeshott ed. 1962); 1 B. Montesquieu, The Spirit of Laws 121 (T. Nugent transl., J. Prichard ed. 1914). Several Constitutions enacted by the newly independent States at the founding reflected this principle. For example, the Virginia Bill of Rights of 1776 explicitly affirmed "[t]hat all men are by nature equally free and independent, and have certain inherent rights." Ch. 1, § 1. The State Constitutions of Massachusetts, Pennsylvania, and New Hampshire adopted similar language. Pa. Const., Art. I (1776), in 2 Federal and State Constitutions 1541 (P. Poore ed. 1877); Mass. Const., Art. I (1780), in 1 *id*., at 957; N. H. Const., Art. I (1784), in 2 *id*., at 1280.[5] And, prominent Founders publicly mused ***263** about the need for equality as the foundation for government. *E.g.*, 1 Cong. Register 430 (T. Lloyd ed. 1789) (Madison, J.); 1 Letters and Other Writings of James Madison 164 (J. Lippincott ed. 1867); N. Webster, The Revolution in France, in 2 Political Sermons of the Founding Era, 1730–1805, pp. 1236–1299 (1998). As Jefferson declared in his first inaugural address, "the minority possess their equal rights, which equal law must protect." First Inaugural Address (Mar. 4, 1801), in 8 The Writings of Thomas Jefferson 4 (Washington ed. 1854).

Our Nation did not initially live up to the equality principle. The institution of slavery persisted for nearly a century, and the United States Constitution itself included several provisions acknowledging the practice. The period leading up to our second founding brought these flaws into bold relief and encouraged the Nation to finally make good on the equality promise. As Lincoln recognized, the promise of equality extended to *all people*—including immigrants and blacks whose ancestors had taken no part in the original founding. See Speech at Chicago, Ill. (July 10, 1858), in 2 The Collected Works of Abraham Lincoln 488–489, 499 (R. Basler ed. 1953). Thus, in Lincoln's view, " 'the natural rights enumerated in the Declaration of Independence' " extended to blacks as his " 'equal,' " and " 'the equal of every living man.' " The Lincoln-Douglas Debates 285 (H. Holzer ed. 1993).

As discussed above, the Fourteenth Amendment reflected that vision, affirming that equality and racial discrimination cannot coexist. Under that Amendment, the color of a person's skin is irrelevant to that individual's equal status as a citizen of this Nation. To treat him differently on the basis of such a legally irrelevant trait is therefore a deviation from the equality principle and a constitutional injury.

***264** Of course, even the promise of the second founding took time to materialize. Seeking to perpetuate a segregationist system in the wake of the Fourteenth Amendment's ratification, proponents urged a "separate but equal" regime. They met with initial success, ossifying the segregationist view for over a half century. As this Court said in *Plessy*:

> ****2195** "A statute which implies merely a legal distinction between the white and colored races—a distinction which is founded in the color of the two races, and which must always exist so long as white men are distinguished from the other race by color—has no tendency to destroy the legal equality of the two races, or reestablish a state of involuntary servitude." 163 U.S. at 543, 16 S.Ct.. 1138.

Such a statement, of course, is precisely antithetical to the notion that all men, regardless of the color of their skin, are born equal and must be treated equally under the law. Only one Member of the Court adhered to the equality principle; Justice Harlan, standing alone in dissent, wrote: "Our constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law." *Id.*, at 559, 16 S.Ct. 1138. Though Justice Harlan rightly predicted that *Plessy* would, "in time, prove to be quite as pernicious as the decision made ... in the *Dred Scott* case," the *Plessy* rule persisted for over a half century. *Ibid.* While it remained in force, Jim Crow laws prohibiting blacks from entering or utilizing public facilities such as schools, libraries, restaurants, and theaters sprang up across the South.

This Court rightly reversed course in *Brown* v. *Board of Education*. The *Brown* appellants—those challenging segregated schools—embraced the equality principle, arguing that "[a] racial criterion is a constitutional irrelevance, and is not saved from condemnation even though dictated by a sincere desire to avoid the possibility of violence or race friction." Brief for Appellants in ***265** *Brown* v. *Board of Education*, O. T. 1952, No. 1, p. 7 (citation omitted).[6] Embracing that view, the Court held that "in the field of public education the doctrine of 'separate but equal' has no place" and "[s]eparate educational facilities are inherently unequal." *Brown*, 347 U.S. at 493, 495, 74 S.Ct. 686. Importantly, in reaching this conclusion, *Brown* did not rely on the particular qualities of the Kansas schools. The mere separation of students on the basis of race—the "*segregation* complained of," *id.*, at 495, 74 S.Ct. 686 (emphasis added)—constituted a constitutional injury. See *ante*, at 2160 ("Separate cannot be equal").

Just a few years later, the Court's application of *Brown* made explicit what was already forcefully implied: "[O]ur decisions have foreclosed any possible contention that ... a statute or regulation" fostering segregation in public facilities "may stand consistently with the Fourteenth Amendment." *Turner v. Memphis*, 369 U.S. 350, 353, 82 S.Ct. 805, 7 L.Ed.2d 762 (1962) (*per curiam*); cf. A. Blaustein & C. Ferguson, Desegregation and the Law: The Meaning and Effect of the School Segregation Cases 145 (rev. 2d ed. 1962) (arguing that the Court in *Brown* had "adopt[ed] a constitutional standard" declaring "that all classification by race is unconstitutional *per se*").

Today, our precedents place this principle beyond question. In assessing racial segregation during a race-motivated prison riot, for example, this Court applied strict scrutiny without requiring an allegation of ****2196** unequal treatment among the segregated facilities. *Johnson v. California*, 543 U.S. 499, 505–506, 125 S.Ct. 1141, 160 L.Ed.2d 949 (2005). The Court today reaffirms the rule, stating that, following *Brown*, "[t]he time for making distinctions ***266** based on race had passed." *Ante*, at 2160. "What was wrong" when the Court decided *Brown* "in 1954 cannot be right today." *Parents Involved*, 551 U.S. at 778, 127 S.Ct. 2738 (THOMAS, J., concurring). Rather, we must adhere to the promise of equality under the law declared by the Declaration of Independence and codified by the Fourteenth Amendment.

B

Respondents and the dissents argue that the universities' race-conscious admissions programs ought to be permitted because they accomplish positive social goals. I would have thought that history had by now taught a "greater humility" when attempting to "distinguish good from harmful uses of racial criteria." *Id.*, at 742, 127 S.Ct. 2738 (plurality opinion). From the Black Codes, to discriminatory and destructive social welfare programs, to discrimination by individual government actors, bigotry has reared its ugly head time and again. Anyone who today thinks that some form of racial discrimination will prove "helpful" should thus tread cautiously, lest racial discriminators succeed (as they once did) in using such language to disguise more invidious motives.

Arguments for the benefits of race-based solutions have proved pernicious in segregationist circles. Segregated universities once argued that race-based discrimination was needed "to preserve harmony and peace and at the same time furnish equal education to both groups." Brief for Respondents in *Sweatt* v. *Painter*, O. T. 1949, No. 44, p. 94; see also *id.*, at 79 (" '[T]he *mores* of racial relationships are such as to rule out, for the present at least, any possibility of admitting white persons and Negroes to the same institutions' "). And, parties consistently attempted to convince the Court that the time was not right to disrupt segregationist systems. See Brief for Appellees in *McLaurin* v. *Oklahoma State Regents for Higher Ed.*, O. T. 1949, No. 34, p. 12 (claiming that a holding rejecting separate but equal would "necessarily result ... [i]n the *abandoning* of many of the ***267** state's existing educational establishments" and the "*crowding* of other such establishments"); Brief for State of Kansas on Reargument in *Brown* v. *Board of Education*, O. T. 1953, No. 1, p. 56 ("We grant that segregation may not be the ethical or political ideal. At the same time we recognize that practical considerations may prevent realization of the ideal"); Tr. of Oral Arg. in *Davis* v. *School Bd. of Prince Edward Cty.*, O. T. 1954, No. 3, p. 208 ("We are up against the proposition: What does the Negro profit if he procures an immediate detailed decree from this Court now and then impairs or mars or destroys the public school system in Prince Edward County"). Litigants have even gone so far as to offer straight-faced arguments that segregation has practical benefits. Brief for Respondents in *Sweatt* v. *Painter*, at 77–78 (requesting deference to a state law, observing that " 'the necessity for such separation [of the races] still exists in the interest of public welfare, safety, harmony, health, and recreation ...' " and remarking on the reasonableness of the position); Brief for Appellees in *Davis* v. *County School Bd. of Prince Edward Cty.*, O. T. 1952, No. 3, p. 17 ("Virginia has established segregation in certain fields as a part of her public policy to prevent violence and reduce resentment. The result, in the view of an overwhelming Virginia majority, has been to improve the relationship between the different races"); *id.*, at 25 ("If segregation be stricken down, the ****2197** general welfare will be definitely harmed ... there would be more friction developed" (internal quotation marks omitted)). In fact, slaveholders once "argued that slavery was a 'positive good' that civilized blacks and elevated them in every dimension of life," and "segregationists similarly asserted that segregation was not only benign, but good for black students." *Fisher I*, 570 U.S. at 328–329, 133 S.Ct. 2411 (THOMAS, J., concurring).

"Indeed, if our history has taught us anything, it has taught us to beware of elites bearing racial theories." *Parents Involved*, 551 U.S. at 780–781, 127 S.Ct. 2738 (THOMAS, J., concurring). ***268** We cannot now blink reality to pretend, as the dissents urge, that affirmative action should be legally permissible merely because the experts assure us that it is "good" for black students. Though I do not doubt the sincerity of my dissenting colleagues' beliefs, experts and elites have been wrong before—and they may prove to be wrong again. In part for this reason, the Fourteenth Amendment outlaws government-sanctioned racial discrimination of all types. The stakes are simply too high to gamble.[7] Then, as now, the views that motivated *Dred Scott* and *Plessy* have not been confined to the past, and we must remain ever vigilant against *all* forms of racial discrimination.

C

Even taking the desire to help on its face, what initially seems like aid may in reality be a burden, including for the very people it seeks to assist. Take, for example, the college admissions policies here. "Affirmative action" policies do nothing to increase the overall number of blacks and Hispanics able to access a college education. Rather, those racial policies simply redistribute individuals among institutions of higher learning, placing some into more competitive institutions than they otherwise would have attended. See T. Sowell, Affirmative Action Around the World 145–146 (2004). ***269** In doing so, those policies sort at least some blacks and Hispanics into environments where they are less likely to succeed academically relative to their peers. *Ibid.* The resulting mismatch places "many blacks and Hispanics who likely would have excelled at less elite schools ... in a position where underperformance is all but inevitable because they are less academically prepared than the white and Asian students with whom they must compete." *Fisher I*, 570 U.S. at 332, 133 S.Ct. 2411 (THOMAS, J., concurring).

It is self-evident why that is so. As anyone who has labored over an algebra textbook has undoubtedly discovered, academic advancement results from hard work and practice, not mere declaration. Simply treating students as though their grades put them at the top of their high school classes does nothing to enhance the performance level of those students or otherwise prepare them for competitive college environments. In fact, studies suggest that large racial preferences for black and Hispanic applicants have led to a disproportionately ****2198** large share of those students receiving mediocre or poor grades once they arrive in competitive collegiate environments. See, *e.g.*, R. Sander, A Systemic Analysis of Affirmative Action in American Law Schools, 57 Stan. L. Rev. 367, 371–372 (2004); see also R. Sander & R. Steinbuch, Mismatch and Bar Passage: A School-Specific Analysis (Oct. 6, 2017), https://ssrn.com/abstract=3054208. Take science, technology, engineering, and mathematics (STEM) fields, for example. Those students who receive a large admissions preference are more likely to drop out of STEM fields than similarly situated students who did not receive such a preference. F. Smith & J. McArdle, Ethnic and Gender Differences in Science Graduation at Selective Colleges With Implications for Admission Policy and College Choice, 45 Research in Higher Ed. 353 (2004). "Even if most minority students are able to meet the normal standards at the 'average' range of colleges and universities, the systematic mismatching of minority students begun at the top can ***270** mean that such students are generally overmatched throughout all levels of higher education." T. Sowell, Race and Culture 176–177 (1994).[8]

These policies may harm even those who succeed academically. I have long believed that large racial preferences in college admissions "stamp [blacks and Hispanics] with a badge of inferiority." *Adarand*, 515 U.S. at 241, 115 S.Ct. 2097 (opinion of THOMAS, J.). They thus "tain[t] the accomplishments of all those who are admitted as a result of racial discrimination" as well as "all those who are the same race as those admitted as a result of racial discrimination" because "no one can distinguish those students from the ones whose race played a role in their admission." *Fisher I*, 570 U.S. at 333, 133 S.Ct. 2411 (opinion of THOMAS, J.). Consequently, "[w]hen blacks" and, now, Hispanics "take positions in the highest places of government, industry, or academia, it is an open question ... whether their skin color played a part in their advancement." *Grutter*, 539 U.S. at 373, 123 S.Ct. 2325 (THOMAS, J., concurring). "The question itself is the stigma—because either racial discrimination did play a role, in which case the person may be deemed 'otherwise unqualified,' or it did not, in which case asking the question itself unfairly marks those ... who would succeed without discrimination." *Ibid.*

***271** Yet, in the face of those problems, it seems increasingly clear that universities are focused on "aesthetic" solutions unlikely to help deserving members of minority groups. In fact, universities' affirmative action programs are a particularly poor use of such resources. To start, these programs are overinclusive, providing the same admissions bump to a wealthy black applicant given every advantage in life as to a black applicant from a poor family with seemingly insurmountable barriers to overcome. In doing so, the programs may wind up helping the most well-off members of minority races without meaningfully assisting those who struggle with real hardship. Simultaneously, the programs risk ****2199** continuing to ignore the academic underperformance of "the purported 'beneficiaries' " of racial preferences and the racial stigma that those preferences generate. *Grutter*, 539 U.S. at 371, 123 S.Ct. 2325 (opinion of THOMAS, J.). Rather than performing their academic mission, universities thus may "see[k] only a facade—it is sufficient that the class looks right, even if it does not perform right." *Id.*, at 372, 123 S.Ct. 2325.

D

Finally, it is not even theoretically possible to "help" a certain racial group without causing harm to members of other racial groups. "It should be obvious that every racial classification helps, in a narrow sense, some races and hurts others." *Adarand*, 515 U.S. at 241, n. *, 115 S.Ct. 2097 (opinion of THOMAS, J.). And, even purportedly benign race-based discrimination has secondary effects on members of other races. The antisubordination view thus has never guided the Court's analysis because "whether a law relying upon racial taxonomy is 'benign' or 'malign' either turns on 'whose ox is gored' or on distinctions found only in the eye of the beholder." *Ibid.* (citations and some internal quotation marks omitted). Courts are not suited to the impossible task of determining which racially discriminatory programs are helping ***272** which members of which races—and whether those benefits outweigh the burdens thrust onto other racial groups.

As the Court's opinion today explains, the zero-sum nature of college admissions—where students compete for a finite number of seats in each school's entering class—aptly demonstrates the point. *Ante*, at 2168 – 2169.[9] Petitioner here represents Asian Americans who allege that, at the margins, Asian applicants were denied admission because of their race. Yet, Asian Americans can hardly be described as the beneficiaries of historical racial advantages. To the contrary, our Nation's first immigration ban targeted the Chinese, in part, based on "worker resentment of the low wage rates accepted by Chinese workers." U. S. Commission on Civil Rights, Civil Rights Issues Facing Asian Americans in the 1990s, p. 3 (1992) (Civil Rights Issues); Act of May 6, 1882, ch. 126, 22 Stat. 58–59.

In subsequent years, "strong anti-Asian sentiments in the Western States led to the adoption of many discriminatory laws at the State and local levels, similar to those aimed at blacks in the South," and "segregation in public facilities, including schools, was quite common until after the Second World War." Civil Rights Issues 7; see also S. Hinnershitz, A Different Shade of Justice: Asian American Civil Rights ***273** in the South 21 (2017) (explaining that while both Asians and blacks have at times fought "against similar forms of discrimination," "[t]he issues of citizenship and ****2200** immigrant status often defined Asian American battles for civil rights and separated them from African American legal battles"). Indeed, this Court even sanctioned this segregation—in the context of schools, no less. In *Gong Lum v. Rice*, 275 U.S. 78, 81–82, 85–87, 48 S.Ct. 91, 72 L.Ed. 172 (1927), the Court held that a 9-year-old Chinese-American girl could be denied entry to a "white" school because she was "a member of the Mongolian or yellow race."

Also, following the Japanese attack on the U. S. Navy base at Pearl Harbor, Japanese Americans in the American West were evacuated and interned in relocation camps. See Exec. Order No. 9066, 3 C.F.R. 1092 (1943). Over 120,000 were removed to camps beginning in 1942, and the last camp that held Japanese Americans did not close until 1948. National Park Service, Japanese American Life During Internment, www.nps.gov/articles/japanese-american-internment-archeology.htm. In the interim, this Court endorsed the practice. *Korematsu v. United States*, 323 U.S. 214, 65 S.Ct. 193, 89 L.Ed. 194 (1944).

Given the history of discrimination against Asian Americans, especially their history with segregated schools, it seems particularly incongruous to suggest that a past history of segregationist policies toward blacks should be remedied at the expense of Asian American college applicants.[10] But this problem is not limited to Asian Americans; more broadly,

universities' discriminatory policies burden millions ***274** of applicants who are not responsible for the racial discrimination that sullied our Nation's past. That is why, "[i]n the absence of special circumstances, the remedy for *de jure* segregation ordinarily should not include educational programs for students who were not in school (or even alive) during the period of segregation." *Jenkins*, 515 U.S. at 137, 115 S.Ct. 2038 (THOMAS, J., concurring). Today's 17-year-olds, after all, did not live through the Jim Crow era, enact or enforce segregation laws, or take any action to oppress or enslave the victims of the past. Whatever their skin color, today's youth simply are not responsible for instituting the segregation of the 20th century, and they do not shoulder the moral debts of their ancestors. Our Nation should not punish today's youth for the sins of the past.

IV

Far from advancing the cause of improved race relations in our Nation, affirmative action highlights our racial differences with pernicious effect. In fact, recent history reveals a disturbing pattern: Affirmative action policies appear to have prolonged the asserted need for racial discrimination. Parties and *amici* in these cases report that, in the nearly 50 years since *Bakke*, 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750, racial progress on campuses adopting affirmative action admissions policies has stagnated, including making no meaningful progress toward a colorblind goal since *Grutter*. See *ante*, at 2165 – 2166. Rather, the legacy of *Grutter* appears to be ever increasing and strident demands for *yet more* racially oriented solutions.

A

It has become clear that sorting by race does not stop at the admissions office. In ****2201** his *Grutter* opinion, Justice Scalia criticized universities for "talk[ing] of multiculturalism and racial diversity," but supporting "tribalism and racial segregation on their campuses," including through "minority only ***275** student organizations, separate minority housing opportunities, separate minority student centers, even separate minority-only graduation ceremonies." 539 U.S. at 349, 123 S.Ct. 2325 (opinion concurring in part and dissenting in part). This trend has hardly abated with time, and today, such programs are commonplace. See Brief for Gail Heriot et al. as *Amici Curiae* 9. In fact, a recent study considering 173 schools found that 43% of colleges offered segregated housing to students of different races, 46% offered segregated orientation programs, and 72% sponsored segregated graduation ceremonies. D. Pierre & P. Wood, Neo-Segregation at Yale 16–17 (2019); see also D. Pierre, Demands for Segregated Housing at Williams College Are Not News, Nat. Rev., May 8, 2019. In addition to contradicting the universities' claims regarding the need for interracial interaction, see Brief for National Association of Scholars as *Amicus Curiae* 4–12, these trends increasingly encourage our Nation's youth to view racial differences as important and segregation as routine.

Meanwhile, these discriminatory policies risk creating new prejudices and allowing old ones to fester. I previously observed that "[t]here can be no doubt" that discriminatory affirmative action policies "injur[e] white and Asian applicants who are denied admission because of their race." *Fisher I*, 570 U.S. at 331, 133 S.Ct. 2411 (concurring opinion). Petitioner here clearly demonstrates this fact. Moreover, "no social science has disproved the notion that this discrimination 'engenders attitudes of superiority or, alternatively, provokes resentment among those who believe that they have been wronged by the government's use of race.' " *Grutter*, 539 U.S. at 373, 123 S.Ct. 2325 (opinion of THOMAS, J.) (quoting *Adarand*, 515 U.S. at 241, 115 S.Ct. 2097 (opinion of THOMAS, J.) (alterations omitted)). Applicants denied admission to certain colleges may come to believe—accurately or not—that their race was responsible for their failure to attain a life-long dream. These individuals, and ***276** others who wished for their success, may resent members of what they perceive to be favored races, believing that the successes of those individuals are unearned.

What, then, would be the endpoint of these affirmative action policies? Not racial harmony, integration, or equality under the law. Rather, these policies appear to be leading to a world in which everyone is defined by their skin color, demanding ever-increasing entitlements and preferences on that basis. Not only is that *exactly* the kind of factionalism that the Constitution was meant to safeguard against, see The Federalist No. 10 (J. Madison), but it is a factionalism based on ever-shifting sands.

That is because race is a social construct; we may each identify as members of particular races for any number of reasons, having to do with our skin color, our heritage, or our cultural identity. And, over time, these ephemeral, socially constructed categories have often shifted. For example, whereas universities today would group all white applicants together, white elites previously sought to exclude Jews and other white immigrant groups from higher education. In fact, it is impossible to look at an individual and know definitively his or her race; some who would consider themselves black, for example, may be quite fair skinned. Yet, university admissions policies ask individuals to identify themselves as belonging to one of only a few reductionist racial groups. With boxes for only "black," "white," "Hispanic," ****2202** "Asian," or the ambiguous "other," how is a Middle Eastern person to choose? Someone from the Philippines? See *post*, at 2209 – 2211 (GORSUCH, J., concurring). Whichever choice he makes (in the event he chooses to report a race at all), the form silos him into an artificial category. Worse, it sends a clear signal that the category matters.

But, under our Constitution, race is irrelevant, as the Court acknowledges. In fact, all racial categories are little more than stereotypes, suggesting that immutable characteristics ***277** somehow conclusively determine a person's ideology, beliefs, and abilities. Of course, that is false. See *ante*, at 2169 – 2171 (noting that the Court's Equal Protection Clause jurisprudence forbids such stereotyping). Members of the same race do not all share the exact same experiences and viewpoints; far from it. A black person from rural Alabama surely has different experiences than a black person from Manhattan or a black first-generation immigrant from Nigeria, in the same way that a white person from rural Vermont has a different perspective than a white person from Houston, Texas. Yet, universities' racial policies suggest that racial identity "*alone constitutes the being* of the race or the man." J. Barzun, Race: A Study in Modern Superstition 114 (1937). That is the same naked racism upon which segregation itself was built. Small wonder, then, that these policies are leading to increasing racial polarization and friction. This kind of reductionist logic leads directly to the "disregard for what does not jibe with preconceived theory," providing a "cloa[k] to conceal complexity, argumen[t] to the crown for praising or damning without the trouble of going into details"—such as details about an individual's ideas or unique background. *Ibid.* Rather than forming a more pluralistic society, these policies thus strip us of our individuality and undermine the very diversity of thought that universities purport to seek.

The solution to our Nation's racial problems thus cannot come from policies grounded in affirmative action or some other conception of equity. Racialism simply cannot be undone by different or more racialism. Instead, the solution announced in the second founding is incorporated in our Constitution: that we are all equal, and should be treated equally before the law without regard to our race. Only that promise can allow us to look past our differing skin colors and identities and see each other for what we truly are: individuals with unique thoughts, perspectives, and goals, but with equal dignity and equal rights under the law.

***278** B

Justice JACKSON has a different view. Rather than focusing on individuals as individuals, her dissent focuses on the historical subjugation of black Americans, invoking statistical racial gaps to argue in favor of defining and categorizing individuals by their race. As she sees things, we are all inexorably trapped in a fundamentally racist society, with the original sin of slavery and the historical subjugation of black Americans still determining our lives today. *Post*, at 2263 – 2277 (dissenting opinion). The panacea, she counsels, is to unquestioningly accede to the view of elite experts and reallocate society's riches by racial means as necessary to "level the playing field," all as judged by racial metrics. *Post*, at 2277. I strongly disagree.

First, as stated above, any statistical gaps between the average wealth of black and white Americans is constitutionally irrelevant. I, of course, agree that our society is not, and has never been, colorblind. *Post*, at 2263 – 2264 (JACKSON, J., dissenting); see also *Plessy*, 163 U.S. at 559, 16 S.Ct. 1138 (Harlan, J., dissenting). People ****2203** discriminate against one another for a whole host of reasons. But, under the Fourteenth Amendment, the law must disregard all racial distinctions:

> "[I]n view of the constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved." *Ibid.*

With the passage of the Fourteenth Amendment, the people of our Nation proclaimed that the law may not sort citizens based on race. It is this principle that the Framers of ***279** the Fourteenth Amendment adopted in the wake of the Civil War to fulfill the promise of equality under the law. And it is this principle that has guaranteed a Nation of equal citizens the privileges or immunities of citizenship and the equal protection of the laws. To now dismiss it as "two-dimensional flatness," *post*, at 2276 (JACKSON, J., dissenting), is to abdicate a sacred trust to ensure that our "honored dead ... shall not have died in vain." A. Lincoln, Gettysburg Address (1863).

Yet, Justice JACKSON would replace the second Founders' vision with an organizing principle based on race. In fact, on her view, almost all of life's outcomes may be unhesitatingly ascribed to race. *Post*, at 2276 – 2277. This is so, she writes, because of statistical disparities among different racial groups. See *post*, at 2268 – 2270. Even if some whites have a lower household net worth than some blacks, what matters to Justice JACKSON is that the *average* white household has more wealth than the *average* black household. *Post*, at 2268 – 2269.

This lore is not and has never been true. Even in the segregated South where I grew up, individuals were not the sum of their skin color. Then as now, not all disparities are based on race; not all people are racist; and not all differences between individuals are ascribable to race. Put simply, "the fate of abstract categories of wealth statistics is not the same as the fate of a given set of flesh-and-blood human beings." T. Sowell, Wealth, Poverty and Politics 333 (2016). Worse still, Justice JACKSON uses her broad observations about statistical relationships between race and select measures of health, wealth, and well-being to label all blacks as victims. Her desire to do so is unfathomable to me. I cannot deny the great accomplishments of black Americans, including those who succeeded despite long odds.

Nor do Justice JACKSON's statistics regarding a correlation between levels of health, wealth, and well-being between selected racial groups prove anything. Of course, none of those statistics are capable of drawing a direct causal ***280** link between race—rather than socioeconomic status or any other factor—and individual outcomes. So Justice JACKSON supplies the link herself: the legacy of slavery and the nature of inherited wealth. This, she claims, locks blacks into a seemingly perpetual inferior caste. Such a view is irrational; it is an insult to individual achievement and cancerous to young minds seeking to push through barriers, rather than consign themselves to permanent victimhood. If an applicant has less financial means (because of generational inheritance or otherwise), then surely a university may take that into account. If an applicant has medical struggles or a family member with medical concerns, a university may consider that too. ****2204** What it cannot do is use the applicant's skin color as a heuristic, assuming that because the applicant checks the box for "black" he therefore conforms to the university's monolithic and reductionist view of an abstract, average black person.

Accordingly, Justice JACKSON's race-infused world view falls flat at each step. Individuals are the sum of their unique experiences, challenges, and accomplishments. What matters is not the barriers they face, but how they choose to confront them. And their race is not to blame for everything—good or bad—that happens in their lives. A contrary, myopic world view based on individuals' skin color to the total exclusion of their personal choices is nothing short of racial determinism.

Justice JACKSON then builds from her faulty premise to call for action, arguing that courts should defer to "experts" and allow institutions to discriminate on the basis of race. Make no mistake: Her dissent is not a vanguard of the innocent and helpless. It is instead a call to empower privileged elites, who will "tell us [what] is required to level the playing field" among castes and classifications that they alone can divine. *Post*, at 2277; see also *post*, at 2209 – 2211 (GORSUCH, J., concurring) (explaining the arbitrariness of these classifications). Then, after siloing us all into racial castes and pitting those ***281** castes against each other, the dissent somehow believes that we will be able—at some undefined point—to "march forward together" into some utopian vision. *Post*, at 2277 (opinion of JACKSON, J.). Social movements that invoke these sorts of

rallying cries, historically, have ended disastrously.

Unsurprisingly, this tried-and-failed system defies both law and reason. Start with the obvious: If social reorganization in the name of equality may be justified by the mere fact of statistical disparities among racial groups, then that reorganization must continue until these disparities are fully eliminated, regardless of the reasons for the disparities and the cost of their elimination. If blacks fail a test at higher rates than their white counterparts (regardless of whether the reason for the disparity has anything at all to do with race), the only solution will be race-focused measures. If those measures were to result in blacks failing at yet higher rates, the only solution would be to double down. In fact, there would seem to be no logical limit to what the government may do to level the racial playing field—outright wealth transfers, quota systems, and racial preferences would all seem permissible. In such a system, it would not matter how many innocents suffer race-based injuries; all that would matter is reaching the race-based goal.

Worse, the classifications that Justice JACKSON draws are themselves race-based stereotypes. She focuses on two hypothetical applicants, John and James, competing for admission to UNC. John is a white, seventh-generation legacy at the school, while James is black and would be the first in his family to attend UNC. *Post*, at 2264. Justice JACKSON argues that race-conscious admission programs are necessary to adequately compare the two applicants. As an initial matter, it is not clear why James's race is the only factor that could encourage UNC to admit him; his status as a first-generation college applicant seems to contextualize his application. But, setting that aside, why is it that John should be judged based on the actions of his great-great-great-grandparents? ***282** And what would Justice JACKSON say to John when deeming him not as worthy of admission: Some statistically significant number of white people had advantages in college admissions seven generations ****2205** ago, and you have inherited their incurable sin?

Nor should we accept that John or James represent all members of their respective races. All racial groups are heterogeneous, and blacks are no exception—encompassing northerners and southerners, rich and poor, and recent immigrants and descendants of slaves. See, *e.g.*, T. Sowell, Ethnic America 220 (1981) (noting that the great success of West Indian immigrants to the United States—disproportionate among blacks more broadly—"seriously undermines the proposition that color is a fatal handicap in the American economy"). Eschewing the complexity that comes with individuality may make for an uncomplicated narrative, but lumping people together and judging them based on assumed inherited or ancestral traits is nothing but stereotyping.[11]

To further illustrate, let's expand the applicant pool beyond John and James. Consider Jack, a black applicant and the son of a multimillionaire industrialist. In a world of race-based preferences, James' seat could very well go to Jack rather than John—both are black, after all. And what about members of the numerous other racial and ethnic groups in our Nation? What about Anne, the child of Chinese immigrants? Jacob, the grandchild of Holocaust survivors who escaped to this Nation with nothing and faced discrimination upon arrival? Or Thomas, the great-grandchild of Irish immigrants escaping famine? While articulating her black and white world (literally), Justice JACKSON ignores the experiences of other immigrant groups (like ***283** Asians, see *supra*, at 2199 – 2200) and white communities that have faced historic barriers.

Though Justice JACKSON seems to think that her race-based theory can somehow benefit everyone, it is an immutable fact that "every time the government uses racial criteria to 'bring the races together,' someone gets excluded, and the person excluded suffers an injury solely because of his or her race." *Parents Involved*, 551 U.S. at 759, 127 S.Ct. 2738 (THOMAS, J., concurring) (citation omitted). Indeed, Justice JACKSON seems to have no response—no explanation at all—for the people who will shoulder that burden. How, for example, would Justice JACKSON explain the need for race-based preferences to the Chinese student who has worked hard his whole life, only to be denied college admission in part because of his skin color? If such a burden would seem difficult to impose on a bright-eyed young person, that's because it should be. History has taught us to abhor theories that call for elites to pick racial winners and losers in the name of sociological experimentation.

Nor is it clear what another few generations of race-conscious college admissions may be expected to accomplish. Even today, affirmative action programs that offer an admissions boost to black and Hispanic students discriminate against those who identify themselves as members of other races that do not receive such preferential treatment. Must others in the future make sacrifices to re-level the playing field for this new phase of racial subordination? And then, out of whose lives should the debt owed to those further victims be repaid? This vision of meeting social racism with government-imposed racism is thus self-defeating, resulting in a never-ending cycle of victimization. There is no reason to ****2206** continue down that path. In the wake of the Civil War, the Framers of the Fourteenth Amendment charted a way out: a colorblind Constitution that

requires the government to, at long last, put aside its citizens' skin color and focus on their individual achievements.

***284** C

Universities' recent experiences confirm the efficacy of a colorblind rule. To start, universities prohibited from engaging in racial discrimination by state law continue to enroll racially diverse classes by race-neutral means. For example, the University of California purportedly recently admitted its "most diverse undergraduate class ever," despite California's ban on racial preferences. T. Watanabe, UC Admits Largest, Most Diverse Class Ever, But It Was Harder To Get Accepted, L. A. Times, July 20, 2021, p. A1. Similarly, the University of Michigan's 2021 incoming class was "among the university's most racially and ethnically diverse classes, with 37% of first-year students identifying as persons of color." S. Dodge, Largest Ever Student Body at University of Michigan This Fall, Officials Say, MLive.com (Oct. 22, 2021), https://www.mlive.com/news/ann-arbor/2021/10/largest-ever-student-body-at-university-of-michigan-this-fall-officials-say.html. In fact, at least one set of studies suggests that, "when we consider the higher education system as a whole, it is clear that the vast majority of schools would be as racially integrated, or more racially integrated, under a system of no preferences than under a system of large preferences." Brief for Richard Sander as *Amicus Curiae* 26. Race-neutral policies may thus achieve the same benefits of racial harmony and equality without any of the burdens and strife generated by affirmative action policies.

In fact, meritocratic systems have long refuted bigoted misperceptions of what black students can accomplish. I have always viewed "higher education's purpose as imparting knowledge and skills to students, rather than a communal, rubber-stamp, credentialing process." *Grutter*, 539 U.S. at 371–372, 123 S.Ct. 2325 (opinion concurring in part and dissenting in part). And, I continue to strongly believe (and have never doubted) that "blacks can achieve in every avenue of American life without the meddling of university administrators." *Id.*, at 350, 123 S.Ct. 2325. Meritocratic systems, with objective grading ***285** scales, are critical to that belief. Such scales have always been a great equalizer—offering a metric for achievement that bigotry could not alter. Racial preferences take away this benefit, eliminating the very metric by which those who have the most to prove can clearly demonstrate their accomplishments—both to themselves and to others.

Schools' successes, like students' grades, also provide objective proof of ability. Historically Black Colleges and Universities (HBCUs) do not have a large amount of racial diversity, but they demonstrate a marked ability to improve the lives of their students. To this day, they have proved "to be extremely effective in educating Black students, particularly in STEM," where "HBCUs represent seven of the top eight institutions that graduate the highest number of Black undergraduate students who go on to earn [science and engineering] doctorates." W. Wondwossen, The Science Behind HBCU Success, Nat. Science Foundation (Sept. 24, 2020), https://beta.nsf.gov/science-matters/science-behind-hbcu-success. "HBCUs have produced 40% of all Black engineers." Presidential Proclamation No. 10451, 87 Fed. Reg. 57567 (2022). And, they "account for 80% of Black judges, 50% of Black doctors, and 50% of Black lawyers." M. Hammond, L. ****2207** Owens, & B. Gulko, Social Mobility Outcomes for HBCU Alumni, United Negro College Fund 4 (2021) (Hammond), https://cdn.uncf.org/wp-content/uploads/Social-Mobility-Report-FINAL.pdf; see also 87 Fed. Reg. 57567 (placing the percentage of black doctors even higher, at 70%). In fact, Xavier University, an HBCU with only a small percentage of white students, has had better success at helping its low-income students move into the middle class than Harvard has. See Hammond 14; see also Brief for Oklahoma et al. as *Amici Curiae* 18. And, each of the top 10 HBCUs have a success rate above the national average. Hammond 14.[12]

***286** Why, then, would this Court need to allow other universities to racially discriminate? Not for the betterment of those black students, it would seem. The hard work of HBCUs and their students demonstrate that "black schools can function as the center and symbol of black communities, and provide examples of independent black leadership, success, and achievement." *Jenkins*, 515 U.S. at 122, 115 S.Ct. 2038 (THOMAS, J., concurring) (citing *Fordice*, 505 U.S. at 748, 112 S.Ct. 2727 (THOMAS, J., concurring)). And, because race-conscious college admissions are plainly not necessary to serve even the interests of blacks, there is no justification to compel such programs more broadly. See *Parents Involved*, 551 U.S. at 765, 127 S.Ct. 2738 (THOMAS, J., concurring).

* * *

The great failure of this country was slavery and its progeny. And, the tragic failure of this Court was its misinterpretation of the Reconstruction Amendments, as Justice Harlan predicted in *Plessy*. We should not repeat this mistake merely because we think, as our predecessors thought, that the present arrangements are superior to the Constitution.

***287** The Court's opinion rightly makes clear that *Grutter* is, for all intents and purposes, overruled. And, it sees the universities' admissions policies for what they are: rudderless, race-based preferences designed to ensure a particular racial mix in their entering classes. Those policies fly in the face of our colorblind Constitution and our Nation's equality ideal. In short, they are plainly—and boldly—unconstitutional. See *Brown II*, 349 U.S. at 298, 75 S.Ct. 753 (noting that the *Brown* case one year earlier had "declare[d] the fundamental principle that racial discrimination in public education is unconstitutional").

While I am painfully aware of the social and economic ravages which have befallen my race and all who suffer discrimination, I hold out enduring hope that this country ****2208** will live up to its principles so clearly enunciated in the Declaration of Independence and the Constitution of the United States: that all men are created equal, are equal citizens, and must be treated equally before the law.

Justice GORSUCH, with whom Justice THOMAS joins, concurring.

For many students, an acceptance letter from Harvard or the University of North Carolina is a ticket to a brighter future. Tens of thousands of applicants compete for a small number of coveted spots. For some time, both universities have decided which applicants to admit or reject based in part on race. Today, the Court holds that the Equal Protection Clause of the Fourteenth Amendment does not tolerate this practice. I write to emphasize that Title VI of the Civil Rights Act of 1964 does not either.

I

"[F]ew pieces of federal legislation rank in significance with the Civil Rights Act of 1964." *Bostock* v. *Clayton County*, 590 U. S. ——, ——, 140 S.Ct. 1731, 1737, 207 L.Ed.2d 218 (2020). Title VI of that law contains terms as powerful as they are easy to understand: "No ***288** person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d. The message for these cases is unmistakable. Students for Fair Admissions (SFFA) brought claims against Harvard and UNC under Title VI. That law applies to both institutions, as they elect to receive millions of dollars of federal assistance annually. And the trial records reveal that both schools routinely discriminate on the basis of race when choosing new students—exactly what the law forbids.

A

When a party seeks relief under a statute, our task is to apply the law's terms as a reasonable reader would have understood

them at the time Congress enacted them. "After all, only the words on the page constitute the law adopted by Congress and approved by the President." *Bostock*, 590 U. S., at ——, 140 S.Ct., at 1738.

The key phrases in Title VI at issue here are "subjected to discrimination" and "on the ground of." Begin with the first. To "discriminate" against a person meant in 1964 what it means today: to "trea[t] that individual worse than others who are similarly situated." *Id.*, at ——, 140 S.Ct., at 1740; see also Webster's New International Dictionary 745 (2d ed. 1954) ("[t]o make a distinction" or "[t]o make a difference in treatment or favor (of one as compared with others)"); Webster's Third New International Dictionary 648 (1961) ("to make a difference in treatment or favor on a class or categorical basis"). The provision of Title VI before us, this Court has also held, "prohibits only intentional discrimination." *Alexander v. Sandoval*, 532 U.S. 275, 280, 121 S.Ct. 1511, 149 L.Ed.2d 517 (2001). From this, we can safely say that Title VI forbids a recipient of federal funds from intentionally treating one person worse than another similarly situated person on the ground of race, color, or national origin.

***289** What does the statute's second critical phrase—"on the ground of "—mean? Again, the answer is uncomplicated: It means "because of." See, *e.g.,* Webster's New World Dictionary 640 (1960) ("because of "); Webster's Third New International Dictionary, at 1002 (defining "grounds" as "a logical condition, physical ****2209** cause, or metaphysical basis"). "Because of " is a familiar phrase in the law, one we often apply in cases arising under the Civil Rights Act of 1964, and one that we usually understand to invoke "the 'simple' and 'traditional' standard of but-for causation." *Bostock*, 590 U. S., at ——, 140 S.Ct., at 1739 (quoting *University of Tex. Southwestern Medical Center v. Nassar*, 570 U.S. 338, 346, 360, 133 S.Ct. 2517, 186 L.Ed.2d 503 (2013); some internal quotation marks omitted). The but-for-causation standard is a "sweeping" one too. *Bostock*, 590 U. S., at ——, 140 S.Ct., at 1739–1740. A defendant's actions need not be the primary or proximate cause of the plaintiff 's injury to qualify. Nor may a defendant avoid liability "just by citing some *other* factor that contributed to" the plaintiff 's loss. *Id*., at ——, 140 S.Ct., at 1739. All that matters is that the plaintiff 's injury would not have happened *but for* the defendant's conduct. *Ibid.*

Now put these pieces back together and a clear rule emerges. Title VI prohibits a recipient of federal funds from intentionally treating one person worse than another similarly situated person because of his race, color, or national origin. It does not matter if the recipient can point to "some other ... factor" that contributed to its decision to disfavor that individual. *Id.,* at —— – ——, 140 S.Ct., at 1743–1745. It does not matter if the recipient discriminates in order to advance some further benign "intention" or "motivation." *Id.,* at ——, 140 S.Ct., at 1743; see also *Automobile Workers v. Johnson Controls, Inc.*, 499 U.S. 187, 199, 111 S.Ct. 1196, 113 L.Ed.2d 158 (1991) ("the absence of a malevolent motive does not convert a facially discriminatory policy into a neutral policy with a discriminatory effect" or "alter [its] intentionally discriminatory character"). Nor does it matter if the recipient discriminates against an individual member of a protected class with the idea that doing so might "favor" the interests ***290** of that "class" as a whole or otherwise "promot[e] equality at the group level." *Bostock*, 590 U. S., at ——, ——, 140 S.Ct., at 1743, 1744. Title VI prohibits a recipient of federal funds from intentionally treating any individual worse even in part because of his race, color, or national origin and without regard to any other reason or motive the recipient might assert. Without question, Congress in 1964 could have taken the law in various directions. But to safeguard the civil rights of all Americans, Congress chose a simple and profound rule. One holding that a recipient of federal funds may never discriminate based on race, color, or national origin—period.

If this exposition of Title VI sounds familiar, it should. Just next door, in Title VII, Congress made it "unlawful ... for an employer ... to discriminate against any individual ... because of such individual's race, color, religion, sex, or national origin." § 2000e–2(a)(1). Appreciating the breadth of this provision, just three years ago this Court read its essentially identical terms the same way. See *Bostock*, 590 U. S., at —— – ——, 140 S.Ct., at 1738–1741. This Court has long recognized, too, that when Congress uses the same terms in the same statute, we should presume they "have the same meaning." *IBP, Inc. v. Alvarez*, 546 U.S. 21, 34, 126 S.Ct. 514, 163 L.Ed.2d 288 (2005). And that presumption surely makes sense here, for as Justice Stevens recognized years ago, "[b]oth Title VI and Title VII" codify a categorical rule of "individual equality, without regard to race." *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 416, n. 19, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978) (opinion concurring in judgment in part and dissenting in part) (emphasis deleted).

B

Applying Title VI to the cases now before us, the result is plain. The parties ****2210** debate certain details of Harvard's and UNC's admissions practices. But no one disputes that both universities operate "program[s] or activit[ies] receiving Federal financial assistance." § 2000d. No one questions that both institutions consult race when making their admissions decisions. And no one can doubt that both schools intentionally ***291** treat some applicants worse than others at least in part because of their race.

1

Start with how Harvard and UNC use race. Like many colleges and universities, those schools invite interested students to complete the Common Application. As part of that process, the trial records show, applicants are prompted to tick one or more boxes to explain "how you identify yourself." 4 App. in No. 21–707, p. 1732. The available choices are American Indian or Alaska Native; Asian; Black or African American; Native Hawaiian or Other Pacific Islander; Hispanic or Latino; or White. Applicants can write in further details if they choose. *Ibid.*; see also 397 F.Supp.3d 126, 137 (Mass. 2019); 567 F.Supp.3d 580, 596 (MDNC 2021).

Where do these boxes come from? Bureaucrats. A federal interagency commission devised this scheme of classifications in the 1970s to facilitate data collection. See D. Bernstein, The Modern American Law of Race, 94 S. Cal. L. Rev. 171, 196–202 (2021); see also 43 Fed. Reg. 19269 (1978). That commission acted "without any input from anthropologists, sociologists, ethnologists, or other experts." Brief for David E. Bernstein as *Amicus Curiae* 3 (Bernstein *Amicus* Brief). Recognizing the limitations of their work, federal regulators cautioned that their classifications "should not be interpreted as being scientific or anthropological in nature, *nor should they be viewed as determinants of eligibility for participation in any Federal program*." 43 Fed. Reg. 19269 (emphasis added). Despite that warning, others eventually used this classification system for that very purpose—to "sor[t] out winners and losers in a process that, by the end of the century, would grant preference[s] in jobs ... and university admissions." H. Graham, The Origins of Official Minority Designation, in The New Race Question: How the Census Counts Multiracial Individuals 289 (J. Perlmann & M. Waters eds. 2002).

These classifications rest on incoherent stereotypes. Take the "Asian" category. It sweeps into one pile East ***292** Asians (*e.g.,* Chinese, Korean, Japanese) and South Asians (*e.g.,* Indian, Pakistani, Bangladeshi), even though together they constitute about 60% of the world's population. Bernstein *Amicus* Brief 2, 5. This agglomeration of so many peoples paves over countless differences in "language," "culture," and historical experience. *Id*., at 5–6. It does so even though few would suggest that all such persons share "similar backgrounds and similar ideas and experiences." *Fisher v. University of Tex. at Austin*, 579 U.S. 365, 414, 136 S.Ct. 2198, 195 L.Ed.2d 511 (2016) (ALITO, J., dissenting). Consider, as well, the development of a separate category for "Native Hawaiian or Other Pacific Islander." It seems federal officials disaggregated these groups from the "Asian" category only in the 1990s and only "in response to political lobbying." Bernstein *Amicus* Brief 9–10. And even that category contains its curiosities. It appears, for example, that Filipino Americans remain classified as "Asian" rather than "Other Pacific Islander." See 4 App. in No. 21–707, at 1732.

The remaining classifications depend just as much on irrational stereotypes. The "Hispanic" category covers those whose ancestral language is Spanish, Basque, or ****2211** Catalan—but it also covers individuals of Mayan, Mixtec, or Zapotec descent who do not speak any of those languages and whose ancestry does not trace to the Iberian Peninsula but bears deep ties to the Americas. See Bernstein *Amicus* Brief 10–11. The "White" category sweeps in anyone from "Europe, Asia west of India, and North Africa." *Id.*, at 14. That includes those of Welsh, Norwegian, Greek, Italian, Moroccan, Lebanese, Turkish, or Iranian descent. It embraces an Iraqi or Ukrainian refugee as much as a member of the British royal family. Meanwhile, "Black or African American" covers everyone from a descendant of enslaved persons who grew up poor in the rural South, to a first-generation child of wealthy Nigerian immigrants, to a Black-identifying applicant with multiracial ancestry whose family lives in a typical American suburb. See *id.,* at 15–16.

***293** If anything, attempts to divide us all up into a handful of groups have become only more incoherent with time. American families have become increasingly multicultural, a fact that has led to unseemly disputes about whether someone is *really* a member of a certain racial or ethnic group. There are decisions denying Hispanic status to someone of Italian-Argentine descent, *Marinelli Constr. Corp. v. New York*, 200 App.Div.2d 294, 296–297, 613 N.Y.S.2d 1000, 1002 (1994), as well as someone with one Mexican grandparent, *Major Concrete Constr., Inc. v. Erie County*, 134 App.Div.2d 872, 873, 521 N.Y.S.2d 959, 960 (1987). Yet there are also decisions granting Hispanic status to a Sephardic Jew whose ancestors fled Spain centuries ago, *In re Rothschild-Lynn Legal & Fin. Servs.*, SBA No. 499, 1995 WL 542398, *2–*4 (Apr. 12, 1995), and bestowing a "sort of Hispanic" status on a person with one Cuban grandparent, Bernstein, 94 S. Cal. L. Rev., at 232 (discussing *In re Kist Corp.*, 99 F. C. C. 2d 173, 193 (1984)).

Given all this, is it any surprise that members of certain groups sometimes try to conceal their race or ethnicity? Or that a cottage industry has sprung up to help college applicants do so? We are told, for example, that one effect of lumping so many people of so many disparate backgrounds into the "Asian" category is that many colleges consider "Asians" to be "overrepresented" in their admission pools. Brief for Asian American Coalition for Education et al. as *Amici Curiae* 12–14, 18–19. Paid advisors, in turn, tell high school students of Asian descent to downplay their heritage to maximize their odds of admission. " 'We will make them appear less Asian when they apply,' " one promises. *Id.,* at 16. " 'If you're given an option, don't attach a photograph to your application,' " another instructs. *Ibid.*[1] It is difficult ***294** to imagine those who receive this advice would find comfort in a bald (and mistaken) assurance that "race-conscious admissions benefit ... the Asian American community," *post*, at 2258 (SOTOMAYOR, J., dissenting). See 397 F.Supp.3d at 178 (district court finding that "overall" Harvard's race-conscious admissions policy "results in fewer Asian American[s]" being admitted). And it is hard not to wonder whether those left paying the steepest price are those least able to afford it—children of families with no chance of hiring ****2212** the kind of consultants who know how to play this game.[2]

2

Just as there is no question Harvard and UNC consider race in their admissions processes, there is no question both schools intentionally treat some applicants worse than others because of their race. Both schools frequently choose to award a "tip" or a "plus" to applicants from certain racial groups but not others. These tips or plusses are just what they sound like—"factors that might tip an applicant into [an] admitted class." 980 F.3d 157, 170 (CA1 2020). And in a process where applicants compete for a limited pool of spots, "[a] tip for one race" necessarily works as "a penalty against other races." Brief for Economists as *Amici Curiae* 20. As the trial court in the Harvard case put it: "Race conscious admissions will always penalize to some extent the groups that are not being advantaged by the process." 397 F.Supp.3d at 202–203.

***295** Consider how this plays out at Harvard. In a given year, the university's undergraduate program may receive 60,000 applications for roughly 1,600 spots. Tr. of Oral Arg. in No. 20–1199, p. 60. Admissions officers read each application and rate students across several categories: academic, extracurricular, athletic, school support, personal, and overall. 980 F.3d at 167. Harvard says its admissions officers "should not" consider race or ethnicity when assigning the "personal" rating. *Id.,* at 169 (internal quotation marks omitted). But Harvard did not make this instruction explicit until *after* SFFA filed this suit. *Ibid.* And, in any event, Harvard concedes that its admissions officers "*can* and *do* take an applicant's race into account when assigning an *overall* rating." *Ibid.* (emphasis added). At that stage, the lower courts found, applicants of certain races may receive a "tip" in their favor. *Ibid.*

The next step in the process is committee review. Regional subcommittees may consider an applicant's race when deciding whether to recommend admission. *Id.*, at 169–170. So, too, may the full admissions committee. *Ibid.* As the Court explains, that latter committee "discusses the relative breakdown of applicants by race." *Ante*, at 2147 – 2149. And "if at some point in the admissions process it appears that a group is notably underrepresented or has suffered a dramatic drop off relative to the prior year, the [committee] may decide to give additional attention to applications from students within that group." 397 F.Supp.3d at 146.

The last step is "lopping," where the admissions committee trims the list of "prospective admits" before settling on a final class. *Id.,* at 144 (internal quotation marks omitted). At this stage, again, the committee considers the "characteristics of the admitted class," including its "racial composition." *Ibid.* Once more, too, the committee may consider each applicant's race in deciding whom to "lop off." *Ibid.*

All told, the district court made a number of findings about Harvard's use of race-based tips. For example: "[T]he tip[s] ***296** given for race impac[t] who among the highly-qualified students in the applicant pool will be selected for admission." *Id.*, at 178. "At least 10% of Harvard's admitted class ... would most likely not be admitted ****2213** in the absence of Harvard's race-conscious admissions process." *Ibid.* Race-based tips are "determinative" in securing favorable decisions for a significant percentage of "African American and Hispanic applicants," the "primary beneficiaries" of this system. *Ibid.* There are clear losers too. "[W]hite and Asian American applicants are unlikely to receive a meaningful race-based tip," *id.,* at 190, n. 56, and "overall" the school's race-based practices "resul[t] in fewer Asian American and white students being admitted," *id.*, at 178. For these reasons and others still, the district court concluded that "Harvard's admissions process is not facially neutral" with respect to race. *Id.,* at 189–190; see also *id.*, at 190, n. 56 ("The policy cannot ... be considered facially neutral from a Title VI perspective.").

Things work similarly at UNC. In a typical year, about 44,000 applicants vie for 4,200 spots. 567 F.Supp.3d at 595. Admissions officers read each application and rate prospective students along eight dimensions: academic programming, academic performance, standardized tests, extracurriculars, special talents, essays, background, and personal. *Id.,* at 600. The district court found that "UNC's admissions policies mandate that race is taken into consideration" in this process as a " 'plus' facto[r]." *Id.,* at 594–595. It is a plus that is "sometimes" awarded to "underrepresented minority" or "URM" candidates—a group UNC defines to include " 'those students identifying themselves as African American or [B]lack; American Indian or Alaska Native; or Hispanic, Latino, or Latina,' " but not Asian or white students. *Id*., at 591–592, n. 7, 601.

At UNC, the admissions officers' decisions to admit or deny are " 'provisionally final.' " *Ante*, at 2155 – 2156 (opinion for the Court). The decisions become truly final only after a ***297** committee approves or rejects them. 567 F.Supp.3d at 599. That committee may consider an applicant's race too. *Id.*, at 607. In the end, the district court found that "race plays a role"—perhaps even "a determinative role"—in the decision to admit or deny some "URM students." *Id.,* at 634; see also *id.,* at 662 ("race may tip the scale"). Nor is this an accident. As at Harvard, officials at UNC have made a "deliberate decision" to employ race-conscious admissions practices. *Id.,* at 588–589.

While the district courts' findings tell the full story, one can also get a glimpse from aggregate statistics. Consider the chart in the Court's opinion collecting Harvard's data for the period 2009 to 2018. *Ante,* at 2171. The racial composition of each incoming class remained steady over that time—remarkably so. The proportion of African Americans hovered between 10% and 12%; the proportion of Hispanics between 8% and 12%; and the proportion of Asian Americans between 17% and 20%. *Ibid.* Might this merely reflect the demographics of the school's applicant pool? Cf. *post*, at 2244 (opinion of SOTOMAYOR, J.). Perhaps—at least assuming the applicant pool looks much the same each year and the school rather mechanically admits applicants based on objective criteria. But the possibility that it instead betrays the school's persistent focus on numbers of this race and numbers of that race is entirely consistent with the findings recounted above. See, *e.g.,* 397 F.Supp.3d at 146 ("if at some point in the admissions process it appears that a group is notably underrepresented or has suffered a dramatic drop off relative to the prior year, the [committee] may decide to give additional attention to applications from students within that group"); cf. *ante,* at 2171, n.7 (opinion for the Court).

C

Throughout this litigation, the parties have spent less time contesting these facts than debating other matters.

***298 **2214** For example, the parties debate *how much* of a role race plays in admissions at Harvard and UNC. Both schools insist that they consider race as just one of many factors when making admissions decisions in their self-described "holistic" review of each applicant. SFFA responds with trial evidence showing that, whatever label the universities use to describe their processes, they intentionally consult race and, by design, their race-based tips and plusses benefit applicants of certain groups to the detriment of others. See Brief for Petitioner 20–35, 40–45.

The parties also debate the *reasons* both schools consult race. SFFA observes that, in the 1920s, Harvard began moving away from "test scores" and toward "plac[ing] greater emphasis on character, fitness, and other subjective criteria." *Id.*, at 12–13 (internal quotation marks omitted). Harvard made this move, SFFA asserts, because President A. Lawrence Lowell and other university leaders had become "alarmed by the growing number of Jewish students who were testing in," and they sought some way to cap the number of Jewish students without " 'stat[ing] frankly' " that they were " 'directly excluding all [Jews] beyond a certain percentage.' " *Id.,* at 12; see also 3 App. in No. 20–1199, pp. 1131–1133. SFFA contends that Harvard's current "holistic" approach to admissions works similarly to disguise the school's efforts to assemble classes with a particular racial composition—and, in particular, to limit the number of Asian Americans it admits. Brief for Petitioner 12–14, 25–32. For its part, Harvard expresses regret for its past practices while denying that they resemble its current ones. Tr. of Oral Arg. in No. 20–1199, at 51. And both schools insist that their student bodies would lack sufficient diversity without race-conscious admissions. Brief for Respondent in No. 20–1199, pp. 52–54; Brief for University Respondents in No. 21–707, pp. 54–59.

When it comes to defining and measuring diversity, the parties spar too. SFFA observes that the racial categories ***299** the universities employ in the name of diversity do not begin to reflect the differences that exist within each group. See Part I–B–1, *supra*. Instead, they lump together white and Asian students from privileged backgrounds with "Jewish, Irish, Polish, or other 'white' ethnic groups whose ancestors faced discrimination" and "descendants of those Japanese-American citizens interned during World War II." *Ante*, at 2200, n. 10 (THOMAS, J., concurring). Even putting all that aside, SFFA stresses that neither Harvard nor UNC is willing to quantify how much racial and ethnic diversity they think sufficient. And, SFFA contends, the universities may not wish to do so because their stated goal implies a desire to admit some fixed number (or quota) of students from each racial group. See Brief for Petitioner 77, 80; Tr. of Oral Arg. in No. 21–707, p. 180. Besides, SFFA asks, if it is diversity the schools are after, why do they exhibit so little interest in other (non-racial) markers of it? See Brief for Petitioner 78, 83–86. While Harvard professes interest in socioeconomic diversity, for example, SFFA points to trial testimony that there are "23 times as many rich kids on campus as poor kids." 2 App. in No. 20–1199, p. 756.[3]

****2215** Even beyond all this, the parties debate the availability of alternatives. SFFA contends that both Harvard and UNC could obtain significant racial diversity without resorting to race-based admissions practices. Many other universities across the country, SFFA points out, have sought to do just that by reducing legacy preferences, increasing financial aid, and the like. Brief for Petitioner 85–86; see also Brief for ***300** Oklahoma et al. as *Amici Curiae* 9–19.[4] As part of its affirmative case, SFFA also submitted evidence that Harvard could nearly replicate the current racial composition of its student body without resorting to race-based practices if it: (1) provided socioeconomically disadvantaged applicants just *half* of the tip it gives recruited athletes; and (2) eliminated tips for the children of donors, alumni, and faculty. Brief for Petitioner 33–34, 81; see 2 App. in No. 20–1199, at 763–765, 774–775. Doing these two things would barely affect the academic credentials of each incoming class. Brief for Petitioner 33–34. And it would not require Harvard to end tips for recruited athletes, who as a group are much weaker academically than non-athletes.[5]

***301** At trial, however, Harvard resisted this proposal. Its preferences for the children of donors, alumni, and faculty are no help to applicants who cannot boast of their parents' good fortune or trips to the alumni tent all their lives. While race-neutral on their face, too, these preferences undoubtedly benefit white and wealthy applicants the most. See 980 F.3d at 171. Still, Harvard stands by them. See Brief for Respondent in No. 20–1199, at 52–54; Tr. of Oral Arg. in No. 21–1199, at 48–49. As a result, athletes and the children of donors, alumni, and faculty—groups that together "make up less than 5% of applicants to Harvard"—constitute "around 30% of the applicants admitted each year." 980 F.3d at 171.

To be sure, the parties' debates raise some hard-to-answer questions. Just how many admissions decisions turn on race? And what really motivates the universities' race-conscious admissions policies and their refusal to modify other preferential practices? Fortunately, Title VI does not require an answer to any of these questions. It does not ask how much a recipient of federal funds discriminates. It does not scrutinize a recipient's reasons or motives ****2216** for discriminating. Instead, the law prohibits covered institutions from intentionally treating *any* individual worse even *in part* because of race. So yes, of course, the universities consider many non-racial factors in their admissions processes too. And perhaps they mean well when they favor certain candidates over others based on the color of their skin. But even if all that is true, their conduct violates Title VI

just the same. See Part I–A, *supra*; see also *Bostock*, 590 U. S., at ——, —— – ——, 140 S.Ct., at 1739–1740, 1742–1745.

D

The principal dissent contends that this understanding of Title VI is contrary to precedent. *Post*, at 2239, n. 21 (opinion of SOTOMAYOR, J.). But the dissent does not dispute that everything said here about the meaning of Title VI tracks ***302** this Court's precedent in *Bostock* interpreting materially identical language in Title VII. That raises two questions: Do the dissenters think *Bostock* wrongly decided? Or do they read the same words in neighboring provisions of the same statute—enacted at the same time by the same Congress—to mean different things? Apparently, the federal government takes the latter view. The Solicitor General insists that there is "ambiguity in the term 'discrimination' " in Title VI but no ambiguity in the term "discriminate" in Title VII. Tr. of Oral Arg. in No. 21–707, at 164. Respectfully, I do not see it. The words of the Civil Rights Act of 1964 are not like mood rings; they do not change their message from one moment to the next.

Rather than engage with the statutory text or our precedent in *Bostock*, the principal dissent seeks to sow confusion about the facts. It insists that all applicants to Harvard and UNC are "eligible" to receive a race-based tip. *Post*, at 2243, n. 27 (opinion of SOTOMAYOR, J.); cf. *post*, at 2272 (JACKSON, J., dissenting). But the question in these cases is not who could *hypothetically* receive a race-based tip. It is who *actually* receives one. And on that score the lower courts left no doubt. The district court in the Harvard case found that the school's admissions policy "cannot ... be considered facially neutral from a Title VI perspective given that admissions officers provide [race-based] tips to African American and Hispanic applicants, while white and Asian American applicants are unlikely to receive a meaningful race-based tip." 397 F.Supp.3d at 190, n. 56; see also *id.*, at 189–190 ("Harvard's admissions process is not facially neutral."). Likewise, the district court in the UNC case found that admissions officers "sometimes" award race-based plusses to URM candidates—a category that excludes Asian American and white students. 567 F.Supp.3d at 591–592, n. 7, 601.[6]

***303** Nor could anyone doubt that these cases are about intentional discrimination just because Harvard in particular " 'does not *explicitly* prioritize any particular racial group over any other.' " *Post,* at 2243, n. 27 (opinion of SOTOMAYOR, J.) (emphasis ****2217** added). Forget for a moment the universities' concessions about how they deliberately consult race when deciding whom to admit. See *supra,* at 2213 – 2214.[7] Look past the lower courts' findings recounted above about how the universities intentionally give tips to students of some races and not others. See *supra,* at 2211 – 2214, 2215 – 2217. Put to the side telling evidence that came out in discovery.[8] Ignore, too, our many precedents holding that it does not matter how a defendant "label[s]" its practices, *Bostock*, 590 U. S., at ——, 140 S.Ct., at 1743–1744; that intentional discrimination between individuals is unlawful whether "motivated by a wish to achieve classwide equality" or any other purpose, *id.*, at ——, 140 S.Ct., at 1743; and that "the absence of a malevolent motive does not convert a facially discriminatory policy into a neutral policy with a [merely] discriminatory effect," *Johnson Controls*, 499 U.S. at 199, 111 S.Ct. 1196. ***304** Consider just the dissents in these cases. From start to finish and over the course of nearly 100 pages, they defend the universities' purposeful discrimination between applicants based on race. "[N]eutrality," they insist, is not enough. *Post,* at 2231, 2262 – 2263 (opinion of SOTOMAYOR, J.); cf. *post*, at 2274 – 2275 (opinion of JACKSON, J.). "[T]he use of race," they stress, "is critical." *Post,* at 2257 – 2258 (opinion of SOTOMAYOR, J.); see *id.,* at 2225 – 2226, 2243, 2246 – 2247, 2248 – 2250; cf. *post,* at 2263 – 2264, 2277 (opinion of JACKSON, J.). Plainly, Harvard and UNC choose to treat some students worse than others in part because of race. To suggest otherwise—or to cling to the fact that the schools do not always say the quiet part aloud—is to deny reality.[9]

II

So far, we have seen that Title VI prohibits a recipient of federal funds from discriminating against individuals even in part because of race. We have seen, too, that Harvard and UNC do just what the law forbids. One might wonder, then, why the parties have devoted years and fortunes litigating other matters, like how much the universities discriminate and why they do so. The answer lies in *Bakke*.

A

Bakke concerned admissions to the medical school at the University of California, ****2218** Davis. That school set aside a certain ***305** number of spots in each class for minority applicants. See 438 U.S. at 272–276, 98 S.Ct. 2733 (opinion of Powell, J.). Allan Bakke argued that the school's policy violated Title VI and the Equal Protection Clause of the Fourteenth Amendment. *Id.,* at 270, 98 S.Ct. 2733. The Court agreed with Mr. Bakke. In a fractured decision that yielded six opinions, a majority of the Court held that the school's set-aside system went too far. At the same time, however, a different coalition of five Justices ventured beyond the facts of the case to suggest that, in other circumstances not at issue, universities may sometimes permissibly use race in their admissions processes. See *ante*, at 2162 – 2164 (opinion for the Court).

As important as these conclusions were some of the interpretive moves made along the way. Justice Powell (writing only for himself) and Justice Brennan (writing for himself and three others) argued that Title VI is coterminous with the Equal Protection Clause. Put differently, they read Title VI to prohibit recipients of federal funds from doing whatever the Equal Protection Clause prohibits States from doing. Justice Powell and Justice Brennan then proceeded to evaluate racial preferences in higher education directly under the Equal Protection Clause. From there, however, their paths diverged. Justice Powell thought some racial preferences might be permissible but that the admissions program at issue violated the promise of equal protection. 438 U.S. at 315–320, 98 S.Ct. 2733. Justice Brennan would have given a wider berth to racial preferences and allowed the challenged program to proceed. *Id.*, at 355–379, 98 S.Ct. 2733.

Justice Stevens (also writing for himself and three others) took an altogether different approach. He began by noting the Court's "settled practice" of "avoid[ing] the decision of a constitutional issue if a case can be fairly decided on a statutory ground." *Id.,* at 411, 98 S.Ct. 2733. He then turned to the "broad prohibition" of Title VI, *id.,* at 413, 98 S.Ct. 2733, and summarized his views this way: "The University ... excluded Bakke from participation in its program of medical education because of ***306** his race. The University also acknowledges that it was, and still is, receiving federal financial assistance. The plain language of the statute therefore requires" finding a Title VI violation. *Id.,* at 412, 98 S.Ct. 2733 (footnote omitted).

In the years following *Bakke*, this Court hewed to Justice Powell's and Justice Brennan's shared premise that Title VI and the Equal Protection Clause mean the same thing. See *Gratz v. Bollinger*, 539 U.S. 244, 276, n. 23, 123 S.Ct. 2411, 156 L.Ed.2d 257 (2003); *Grutter v. Bollinger*, 539 U.S. 306, 343, 123 S.Ct. 2325, 156 L.Ed.2d 304 (2003). Justice Stevens's statute-focused approach receded from view. As a result, for over four decades, every case about racial preferences in school admissions under Title VI has turned into a case about the meaning of the Fourteenth Amendment.

And what a confused body of constitutional law followed. For years, this Court has said that the Equal Protection Clause requires any consideration of race to satisfy "strict scrutiny," meaning it must be "narrowly tailored to further compelling governmental interests." *Grutter*, 539 U.S. at 326, 123 S.Ct. 2325 (internal quotation marks omitted). Outside the context of higher education, "our precedents have identified only two" interests that meet this demanding standard: "remediating specific, identified instances of past discrimination that violated the Constitution or a statute," and "avoiding imminent and serious risks to human safety in prisons." ****2219** *Ante,* at 2161 – 2162 (opinion for the Court).

Within higher education, however, an entirely distinct set of rules emerged. Following *Bakke*, this Court declared that judges may simply "defer" to a school's assertion that "diversity is essential" to its "educational mission." *Grutter*, 539 U.S. at 328, 123 S.Ct. 2325. Not all schools, though—elementary and secondary schools apparently do not qualify for this deference. See *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701, 724–725, 127 S.Ct. 2738, 168 L.Ed.2d 508 (2007). Only colleges and universities, the Court explained, "occupy a special niche in our constitutional tradition." ***307**

Grutter, 539 U.S. at 329, 123 S.Ct. 2325. Yet even they (wielding their "special niche" authority) cannot simply assert an interest in diversity and discriminate as they please. *Fisher*, 579 U.S. at 381, 136 S.Ct. 2198. Instead, they may consider race only as a "plus" factor for the purpose of "attaining a critical mass of underrepresented minority students" or "a diverse student body." *Grutter*, 539 U.S. at 335–336, 123 S.Ct. 2325 (internal quotation marks omitted). At the same time, the Court cautioned, this practice "must have a logical end point." *Id.,* at 342, 123 S.Ct. 2325. And in the meantime, "outright racial balancing" and "quota system[s]" remain "patently unconstitutional." *Id.*, at 330, 334, 123 S.Ct. 2325. Nor may a college or university ever provide "mechanical, predetermined diversity bonuses." *Id*., at 337, 123 S.Ct. 2325 (internal quotation marks omitted). Only a "tip" or "plus" is constitutionally tolerable, and only for a limited time. *Id.*, at 338–339, 341, 123 S.Ct. 2325.

If you cannot follow all these twists and turns, you are not alone. See, *e.g., Fisher*, 579 U.S. at 401–437, 136 S.Ct. 2198 (Alito, J., dissenting); *Grutter*, 539 U.S. at 346–349, 123 S.Ct. 2325 (Scalia, J., joined by THOMAS, J., concurring in part and dissenting in part); 1 App. in No. 21–707, pp. 401–402 (testimony from UNC administrator: "[M]y understanding of the term 'critical mass' is that it's a ... I'm trying to decide if it's an analogy or a metaphor[.] I think it's an analogy.... I'm not even sure we would know what it is."); 3 App. in No. 20–1199, at 1137–1138 (similar testimony from a Harvard administrator). If the Court's post-*Bakke* higher-education precedents ever made sense, they are by now incoherent.

Recognizing as much, the Court today cuts through the kudzu. It ends university exceptionalism and returns this Court to the traditional rule that the Equal Protection Clause forbids the use of race in distinguishing between persons unless strict scrutiny's demanding standards can be met. In that way, today's decision wakes the echoes of Justice John Marshall Harlan: "The law regards man as man, and takes no account of his surroundings or of his color when ***308** his civil rights as guaranteed by the supreme law of the land are involved." *Plessy v. Ferguson*, 163 U.S. 537, 559, 16 S.Ct. 1138, 41 L.Ed. 256 (1896) (dissenting opinion).

B

If *Bakke* led to errors in interpreting the Equal Protection Clause, its first mistake was to take us there. These cases arise under Title VI and that statute is "more than a simple paraphrasing" of the Equal Protection Clause. 438 U.S. at 416, 98 S.Ct. 2733 (opinion of Stevens, J.). Title VI has "independent force, with language and emphasis in addition to that found in the Constitution." *Ibid.* That law deserves our respect and its terms provide us with all the direction we need.

Put the two provisions side by side. Title VI says: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation ****2220** in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." § 2000d. The Equal Protection Clause reads: "No State shall ... deny to any person within its jurisdiction the equal protection of the laws." Amdt. 14, § 1. That such differently worded provisions should mean the same thing is implausible on its face.

Consider just some of the obvious differences. The Equal Protection Clause operates on States. It does not purport to regulate the conduct of private parties. By contrast, Title VI applies to recipients of federal funds—covering not just many state actors, but many private actors too. In this way, Title VI reaches entities and organizations that the Equal Protection Clause does not.

In other respects, however, the relative scope of the two provisions is inverted. The Equal Protection Clause addresses all manner of distinctions between persons and this Court has held that it implies different degrees of judicial scrutiny for different kinds of classifications. So, for example, courts apply strict scrutiny for classifications based on race, color, and national origin; intermediate scrutiny for ***309** classifications based on sex; and rational-basis review for classifications based on more prosaic grounds. See, *e.g.*, *Fisher*, 579 U.S. at 376, 136 S.Ct. 2198; *Richmond v. J. A. Croson Co.*, 488 U.S. 469, 493–495, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989) (plurality opinion); *United States v. Virginia*, 518 U.S. 515, 555–556, 116 S.Ct. 2264, 135 L.Ed.2d 735 (1996); *Board of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 366–367, 121 S.Ct. 955, 148 L.Ed.2d 866 (2001). By contrast, Title VI targets only certain classifications—those based on race, color, or national

origin. And that law does not direct courts to subject these classifications to one degree of scrutiny or another. Instead, as we have seen, its rule is as uncomplicated as it is momentous. Under Title VI, it is *always* unlawful to discriminate among persons even in part because of race, color, or national origin.

In truth, neither Justice Powell's nor Justice Brennan's opinion in *Bakke* focused on the text of Title VI. Instead, both leapt almost immediately to its "voluminous legislative history," from which they proceeded to divine an implicit "congressional intent" to link the statute with the Equal Protection Clause. 438 U.S. at 284–285, 98 S.Ct. 2733 (opinion of Powell, J.); *id.,* at 328–336, 98 S.Ct. 2733 (joint opinion of Brennan, White, Marshall, and Blackmun, JJ.). Along the way, as Justice Stevens documented, both opinions did more than a little cherry-picking from the legislative record. See *id.*, at 413–417, 98 S.Ct. 2733. Justice Brennan went so far as to declare that "any claim that the use of racial criteria is barred by the plain language of the statute must fail in light of the remedial purpose of Title VI and its legislative history." *Id.,* at 340, 98 S.Ct. 2733. And once liberated from the statute's firm rule against discrimination based on race, both opinions proceeded to devise their own and very different arrangements in the name of the Equal Protection Clause.

The moves made in *Bakke* were not statutory interpretation. They were judicial improvisation. Under our Constitution, judges have never been entitled to disregard the plain terms of a valid congressional enactment based on surmise about unenacted legislative intentions. Instead, it has always ***310** been this Court's duty "to give effect, if possible, to every clause and word of a statute," *Montclair v. Ramsdell*, 107 U.S. 147, 152, 2 S.Ct. 391, 27 L.Ed. 431 (1883), and of the Constitution itself, see *Knowlton v. Moore*, 178 U.S. 41, 87, 20 S.Ct. 747, 44 L.Ed. 969 (1900). In this ****2221** country, "[o]nly the written word is the law, and all persons are entitled to its benefit." *Bostock*, 590 U. S., at ——, 140 S.Ct., at 1737. When judges disregard these principles and enforce rules "inspired only by extratextual sources and [their] own imaginations," they usurp a lawmaking function "reserved for the people's representatives." *Id*., at ——, 140 S.Ct., at 1738.

Today, the Court corrects course in its reading of the Equal Protection Clause. With that, courts should now also correct course in their treatment of Title VI. For years, they have read a solo opinion in *Bakke* like a statute while reading Title VI as a mere suggestion. A proper respect for the law demands the opposite. Title VI bears independent force beyond the Equal Protection Clause. Nothing in it grants special deference to university administrators. Nothing in it endorses racial discrimination to any degree or for any purpose. Title VI is more consequential than that.

*

In the aftermath of the Civil War, Congress took vital steps toward realizing the promise of equality under the law. As important as those initial efforts were, much work remained to be done—and much remains today. But by any measure, the Civil Rights Act of 1964 stands as a landmark on this journey and one of the Nation's great triumphs. We have no right to make a blank sheet of any of its provisions. And when we look to the clear and powerful command Congress set forth in that law, these cases all but resolve themselves. Under Title VI, it is never permissible " 'to say "yes" to one person ... but to say "no" to another person' " even in part " 'because of the color of his skin.' " *Bakke*, 438 U.S. at 418, 98 S.Ct. 2733 (opinion of Stevens, J.).

Justice KAVANAUGH, concurring.

***311** I join the Court's opinion in full. I add this concurring opinion to further explain why the Court's decision today is consistent with and follows from the Court's equal protection precedents, including the Court's precedents on race-based affirmative action in higher education.

Ratified in 1868 in the wake of the Civil War, the Equal Protection Clause of the Fourteenth Amendment provides: "No State shall ... deny to any person within its jurisdiction the equal protection of the laws." U. S. Const., Amdt. 14, § 1. In accord with the Fourteenth Amendment's text and history, this Court considers all racial classifications to be constitutionally suspect. See *Grutter v. Bollinger*, 539 U.S. 306, 326, 123 S.Ct. 2325, 156 L.Ed.2d 304 (2003); *Strauder v. West Virginia*, 100 U.S. 303, 306–308, 25 L.Ed. 664 (1880). As a result, the Court has long held that racial classifications by the government, including race-based affirmative action programs, are subject to strict judicial scrutiny.

Under strict scrutiny, racial classifications are constitutionally prohibited unless they are narrowly tailored to further a compelling governmental interest. *Grutter*, 539 U.S. at 326–327, 123 S.Ct. 2325. Narrow tailoring requires courts to examine, among other things, whether a racial classification is "necessary"—in other words, whether race-neutral alternatives could adequately achieve the governmental interest. *Id.,* at 327, 339–340, 123 S.Ct. 2325; *Richmond v. J. A. Croson Co.*, 488 U.S. 469, 507, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989).

Importantly, even if a racial classification is otherwise narrowly tailored to further a compelling governmental interest, a "deviation from the norm of equal treatment of all racial and ethnic groups" must be "a temporary matter"—or stated otherwise, ****2222** must be "limited in time." *Id.,* at 510, 109 S.Ct. 706 (plurality opinion of O'Connor, J.); *Grutter*, 539 U.S. at 342, 123 S.Ct. 2325.

In 1978, five Members of this Court held that race-based affirmative action in higher education did not violate the Equal Protection Clause or Title VI of the Civil Rights Act, ***312** so long as universities used race only as a factor in admissions decisions and did not employ quotas. See *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 325–326, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978) (joint opinion of Brennan, White, Marshall, and Blackmun, JJ.); *id.,* at 287, 315–320, 98 S.Ct. 2733 (opinion of Powell, J.). One Member of the Court's five-Justice majority, Justice Blackmun, added that race-based affirmative action should exist only as a temporary measure. He expressed hope that such programs would be "unnecessary" and a "relic of the past" by 1988—within 10 years "at the most," in his words—although he doubted that the goal could be achieved by then. *Id.,* at 403, 98 S.Ct. 2733 (opinion of Blackmun, J.).

In 2003, 25 years after *Bakke*, five Members of this Court again held that race-based affirmative action in higher education did not violate the Equal Protection Clause or Title VI. *Grutter*, 539 U.S. at 343, 123 S.Ct. 2325. This time, however, the Court also specifically indicated—despite the reservations of Justice Ginsburg and Justice Breyer—that race-based affirmative action in higher education would *not* be constitutionally justified after another 25 years, at least absent something not "expect[ed]." *Ibid.* And various Members of the Court wrote separate opinions explicitly referencing the Court's 25-year limit.

- Justice O'Connor's opinion for the Court stated: "We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today." *Ibid.*

- Justice THOMAS expressly concurred in "the Court's holding that racial discrimination in higher education admissions will be illegal in 25 years." *Id.,* at 351, 123 S.Ct. 2325 (opinion concurring in part and dissenting in part).

- Justice THOMAS, joined here by Justice Scalia, reiterated "the Court's holding" that race-based affirmative action in higher education "will be unconstitutional in 25 years" and "that in 25 years the practices of the Law ***313** School will be illegal," while also stating that "they are, for the reasons I have given, illegal now." *Id.,* at 375–376, 123 S.Ct. 2325.

- Justice Kennedy referred to "the Court's pronouncement that race-conscious admissions programs will be unnecessary 25 years from now." *Id.,* at 394, 123 S.Ct. 2325 (dissenting opinion).

- Justice Ginsburg, joined by Justice Breyer, acknowledged the Court's 25-year limit but questioned it, writing that "one may hope, but not firmly forecast, that over the next generation's span, progress toward nondiscrimination and genuinely equal opportunity will make it safe to sunset affirmative action." *Id.,* at 346, 123 S.Ct. 2325 (concurring opinion).

In allowing race-based affirmative action in higher education for another generation—and only for another generation—the Court in *Grutter* took into account competing considerations. The Court recognized the barriers that some minority applicants to universities still faced as of 2003, notwithstanding the progress made since *Bakke*. See *Grutter*, 539 U.S. at 343, 123 S.Ct. 2325. The Court stressed, however, that "there are serious problems of justice connected with the idea of preference ****2223** itself." *Id.,* at 341, 123 S.Ct. 2325 (internal quotation marks omitted). And the Court added that a "core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race." *Ibid.* (internal quotation marks omitted).

The *Grutter* Court also emphasized the equal protection principle that racial classifications, even when otherwise permissible, must be a " 'temporary matter,' " and "must be limited in time." *Id.,* at 342, 123 S.Ct. 2325 (quoting *Croson*, 488 U.S. at 510, 109 S.Ct. 706 (plurality opinion of O'Connor, J.)). The requirement of a time limit "reflects that racial classifications,

however compelling their goals, are potentially so dangerous that they may be employed no more broadly than the interest demands. ***314** Enshrining a permanent justification for racial preferences would offend this fundamental equal protection principle." *Grutter*, 539 U.S. at 342, 123 S.Ct. 2325.

Importantly, the *Grutter* Court saw "no reason to exempt race-conscious admissions programs from the requirement that all governmental use of race must have a logical end point." *Ibid.* The Court reasoned that the "requirement that all race-conscious admissions programs have a termination point assures all citizens that the deviation from the norm of equal treatment of all racial and ethnic groups is a temporary matter, a measure taken in the service of the goal of equality itself." *Ibid.* (internal quotation marks and alteration omitted). The Court therefore concluded that race-based affirmative action programs in higher education, like other racial classifications, must be "limited in time." *Ibid.*

The *Grutter* Court's conclusion that race-based affirmative action in higher education must be limited in time followed not only from fundamental equal protection principles, but also from this Court's equal protection precedents applying those principles. Under those precedents, racial classifications may not continue indefinitely. For example, in the elementary and secondary school context after *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954), the Court authorized race-based student assignments for several decades—but not indefinitely into the future. See, *e.g.*, *Board of Ed. of Oklahoma City Public Schools v. Dowell*, 498 U.S. 237, 247–248, 111 S.Ct. 630, 112 L.Ed.2d 715 (1991); *Pasadena City Bd. of Ed. v. Spangler*, 427 U.S. 424, 433–434, 436, 96 S.Ct. 2697, 49 L.Ed.2d 599 (1976); *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1, 31–32, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971); cf. *McDaniel v. Barresi*, 402 U.S. 39, 41, 91 S.Ct. 1287, 28 L.Ed.2d 582 (1971).

In those decisions, this Court ruled that the race-based "injunctions entered in school desegregation cases" could not "operate in perpetuity." *Dowell*, 498 U.S. at 248, 111 S.Ct. 630. Consistent with those decisions, the *Grutter* Court ruled that race-based affirmative action in higher education likewise could not operate in perpetuity.

***315** As of 2003, when *Grutter* was decided, many race-based affirmative action programs in higher education had been operating for about 25 to 35 years. Pointing to the Court's precedents requiring that racial classifications be "temporary," *Croson*, 488 U.S. at 510, 109 S.Ct. 706 (plurality opinion of O'Connor, J.), the petitioner in *Grutter*, joined by the United States, argued that race-based affirmative action in higher education could continue no longer. See Brief for Petitioner 21–22, 30–31, 33, 42, Brief for United States 26–27, in *Grutter* v. *Bollinger*, O. T. 2002, No. 02–241.

The *Grutter* Court rejected those arguments for ending race-based affirmative ****2224** action in higher education in 2003. But in doing so, the Court struck a careful balance. The Court ruled that narrowly tailored race-based affirmative action in higher education could continue for another generation. But the Court also explicitly rejected any "permanent justification for racial preferences," and therefore ruled that race-based affirmative action in higher education could continue *only* for another generation. 539 U.S. at 342–343, 123 S.Ct. 2325.

Harvard and North Carolina would prefer that the Court now ignore or discard *Grutter*'s 25-year limit on race-based affirmative action in higher education, or treat it as a mere aspiration. But the 25-year limit constituted an important part of Justice O'Connor's nuanced opinion for the Court in *Grutter*. Indeed, four of the separate opinions in *Grutter* discussed the majority opinion's 25-year limit, which belies any suggestion that the Court's reference to it was insignificant or not carefully considered.

In short, the Court in *Grutter* expressly recognized the serious issues raised by racial classifications—particularly permanent or long-term racial classifications. And the Court "assure[d] all citizens" throughout America that "the deviation from the norm of equal treatment" in higher education could continue for another generation, and only for another generation. *Ibid.* (internal quotation marks omitted).

***316** A generation has now passed since *Grutter*, and about 50 years have gone by since the era of *Bakke* and *DeFunis v. Odegaard*, 416 U.S. 312, 94 S.Ct. 1704, 40 L.Ed.2d 164 (1974), when race-based affirmative action programs in higher education largely began. In light of the Constitution's text, history, and precedent, the Court's decision today appropriately respects and abides by *Grutter*'s explicit temporal limit on the use of race-based affirmative action in higher education.[1]

Justice SOTOMAYOR, Justice KAGAN, and Justice JACKSON disagree with the Court's decision. I respect their views. They thoroughly recount the horrific history of slavery and Jim Crow in America, cf. *Bakke*, 438 U.S. at 395–402, 98 S.Ct.

2733 (opinion of Marshall, J.), as well as the continuing effects of that history on African Americans today. And they are of course correct that for the last five decades, *Bakke* and *Grutter* have allowed narrowly tailored race-based affirmative action in higher education.

But I respectfully part ways with my dissenting colleagues on the question of whether, under this Court's precedents, race-based affirmative action in higher education may extend indefinitely into the future. The dissents suggest that the answer is yes. But this Court's precedents make clear that the answer is no. See *Grutter*, 539 U.S. at 342–343, 123 S.Ct. 2325; *Dowell*, 498 U.S. at 247–248, 111 S.Ct. 630; *Croson*, 488 U.S. at 510, 109 S.Ct. 706 (plurality opinion of O'Connor, J.).

To reiterate: For about 50 years, many institutions of higher education have employed race-based affirmative action ***317** programs. ****2225** In the abstract, it might have been debatable how long those race-based admissions programs could continue under the "temporary matter"/"limited in time" equal protection principle recognized and applied by this Court. *Grutter*, 539 U.S. at 342, 123 S.Ct. 2325 (internal quotation marks omitted); cf. *Dowell*, 498 U.S. at 247–248, 111 S.Ct. 630. But in 2003, the *Grutter* Court applied that temporal equal protection principle and resolved the debate: The Court declared that race-based affirmative action in higher education could continue for another generation, and only for another generation, at least absent something unexpected. *Grutter*, 539 U.S. at 343, 123 S.Ct. 2325. As I have explained, the Court's pronouncement of a 25-year period—as both an extension of *and* an outer limit to race-based affirmative action in higher education—formed an important part of the carefully constructed *Grutter* decision. I would abide by that temporal limit rather than discarding it, as today's dissents would do.

To be clear, although progress has been made since *Bakke* and *Grutter*, racial discrimination still occurs and the effects of past racial discrimination still persist. Federal and state civil rights laws serve to deter and provide remedies for current acts of racial discrimination. And governments and universities still "can, of course, act to undo the effects of past discrimination in many permissible ways that do not involve classification by race." *Croson*, 488 U.S. at 526, 109 S.Ct. 706 (Scalia, J., concurring in judgment) (internal quotation marks omitted); see *id.*, at 509, 109 S.Ct. 706 (plurality opinion of O'Connor, J.) ("the city has at its disposal a whole array of race-neutral devices to increase the accessibility of city contracting opportunities to small entrepreneurs of all races"); *ante,* at 2175 – 2176; Brief for Petitioner 80–86; Reply Brief in No. 20–1199, pp. 25–26; Reply Brief in No. 21–707, pp. 23–26.

In sum, the Court's opinion today is consistent with and follows from the Court's equal protection precedents, and I join the Court's opinion in full.

Justice SOTOMAYOR, with whom Justice KAGAN and Justice JACKSON join,* dissenting.

***318** The Equal Protection Clause of the Fourteenth Amendment enshrines a guarantee of racial equality. The Court long ago concluded that this guarantee can be enforced through race-conscious means in a society that is not, and has never been, colorblind. In *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954), the Court recognized the constitutional necessity of racially integrated schools in light of the harm inflicted by segregation and the "importance of education to our democratic society." *Id.*, at 492–495, 74 S.Ct. 686. For 45 years, the Court extended *Brown*'s transformative legacy to the context of higher education, allowing colleges and universities to consider race in a limited way and for the limited purpose of promoting the important benefits of racial diversity. This limited use of race has helped equalize educational opportunities for all students of every race and background and has improved racial diversity on college campuses. Although progress has been slow and imperfect, race-conscious college admissions policies have advanced the Constitution's guarantee of equality and have promoted *Brown*'s vision of a Nation with more inclusive schools.

Today, this Court stands in the way and rolls back decades of precedent and momentous ****2226** progress. It holds that race can no longer be used in a limited way in college admissions to achieve such critical benefits. In so holding, the Court cements a superficial rule of colorblindness as a constitutional principle in an endemically segregated society where race has always mattered and continues to matter. The Court subverts the constitutional guarantee of equal protection by further entrenching racial inequality in education, the very foundation of our democratic government and pluralistic ***319** society. Because the Court's opinion is not grounded in law or fact and contravenes the vision of equality embodied in the Fourteenth

Amendment, I dissent.

I

A

Equal educational opportunity is a prerequisite to achieving racial equality in our Nation. From its founding, the United States was a new experiment in a republican form of government where democratic participation and the capacity to engage in self-rule were vital. At the same time, American society was structured around the profitable institution that was slavery, which the original Constitution protected. The Constitution initially limited the power of Congress to restrict the slave trade, Art. I, § 9, cl. 1, accorded Southern States additional electoral power by counting three-fifths of their enslaved population in apportioning congressional seats, § 2, cl. 3, and gave enslavers the right to retrieve enslaved people who escaped to free States, Art. IV, § 2, cl. 3. Because a foundational pillar of slavery was the racist notion that Black people are a subordinate class with intellectual inferiority, Southern States sought to ensure slavery's longevity by prohibiting the education of Black people, whether enslaved or free. See H. Williams, Self-Taught: African American Education in Slavery and Freedom 7, 203–213 (2005) (Self-Taught). Thus, from this Nation's birth, the freedom to learn was neither colorblind nor equal.

With time, and at the tremendous cost of the Civil War, abolition came. More than two centuries after the first African enslaved persons were forcibly brought to our shores, Congress adopted the Thirteenth Amendment to the Constitution, which abolished "slavery" and "involuntary servitude, except as a punishment for crime." § 1. "Like all great historical transformations," emancipation was a movement, "not a single event" owed to any single individual, institution, ***320** or political party. E. Foner, The Second Founding 21, 51–54 (2019) (The Second Founding).

The fight for equal educational opportunity, however, was a key driver. Literacy was an "instrument of resistance and liberation." Self-Taught 8. Education "provided the means to write a pass to freedom" and "to learn of abolitionist activities." *Id.*, at 7, 91 S.Ct. 1267. It allowed enslaved Black people "to disturb the power relations between master and slave," which "fused their desire for literacy with their desire for freedom." *Ibid*. Put simply, "[t]he very feeling of inferiority which slavery forced upon [Black people] fathered an intense desire to rise out of their condition by means of education." W. E. B. Du Bois, Black Reconstruction in America 1860–1880, 111 S.Ct. 1196, p. 638 (1935); see J. Anderson, The Education of Blacks in the South 1860–1935, p. 7 (1988). Black Americans thus insisted, in the words of Frederick Douglass, "that in a country governed by the people, like ours, education of the youth of all classes is vital to its welfare, prosperity, and to its existence." Address to the People of the United States (1883), in 4 P. Foner, The Life and Writings of Frederick Douglass 386 (1955). Black people's yearning for freedom of thought, and ****2227** for a more perfect Union with educational opportunity for all, played a crucial role during the Reconstruction era.

Yet emancipation marked the beginning, not the end, of that era. Abolition alone could not repair centuries of racial subjugation. Following the Thirteenth Amendment's ratification, the Southern States replaced slavery with "a system of 'laws which imposed upon [Black people] onerous disabilities and burdens, and curtailed their rights in the pursuit of life, liberty, and property to such an extent that their freedom was of little value.' " *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 390, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978) (opinion of Marshall, J.) (quoting *Slaughter-House Cases*, 16 Wall. 36, 70, 83 U.S. 36, 21 L.Ed. 394 (1873)). Those so-called "Black Codes" discriminated against Black people on ***321** the basis of race, regardless of whether they had been previously enslaved. See, *e.g.*, 1866 N. C. Sess. Laws pp. 99, 102.

Moreover, the criminal punishment exception in the Thirteenth Amendment facilitated the creation of a new system of forced labor in the South. Southern States expanded their criminal laws, which in turn "permitted involuntary servitude as a

punishment" for convicted Black persons. D. Blackmon, Slavery by Another Name: The Re-Enslavement of Black Americans From the Civil War to World War II, pp. 7, 53 (2009) (Slavery by Another Name). States required, for example, that Black people "sign a labor contract to work for a white employer or face prosecution for vagrancy." The Second Founding 48. State laws then forced Black convicted persons to labor in "plantations, mines, and industries in the South." *Id.*, at 50. This system of free forced labor provided tremendous benefits to Southern whites and was designed to intimidate, subjugate, and control newly emancipated Black people. See Slavery by Another Name 5–6, 53. The Thirteenth Amendment, without more, failed to equalize society.

Congress thus went further and embarked on months of deliberation about additional Reconstruction laws. Those efforts included the appointment of a Committee, the Joint Committee on Reconstruction, "to inquire into the condition of the Confederate States." Report of the Joint Committee on Reconstruction, S. Rep. No. 112, 39th Cong., 1st Sess., 1 (1866) (hereinafter Joint Comm. Rep.). Among other things, the Committee's Report to Congress documented the "deep-seated prejudice" against emancipated Black people in the Southern States and the lack of a "general disposition to place the colored race, constituting at least two-fifths of the population, upon terms even of civil equality." *Id.*, at 11. In light of its findings, the Committee proposed amending the Constitution to secure the equality of "rights, civil and political." *Id.*, at 7.

***322** Congress acted on that recommendation and adopted the Fourteenth Amendment. Proponents of the Amendment declared that one of its key goals was to "protec[t] the black man in his fundamental rights as a citizen with the same shield which it throws over the white man." Cong. Globe, 39th Cong., 1st Sess., 2766 (1866) (Cong. Globe) (statement of Sen. Howard). That is, the Amendment sought "to secure to a race recently emancipated, a race that through many generations [was] held in slavery, all the civil rights that the superior race enjoy." *Plessy v. Ferguson*, 163 U.S. 537, 555–556, 16 S.Ct. 1138, 41 L.Ed. 256 (1896) (Harlan, J., dissenting) (internal quotation marks omitted).

To promote this goal, Congress enshrined a broad guarantee of equality in the Equal Protection Clause of the Amendment. That Clause commands that "[n]o State shall ... deny to any person ****2228** within its jurisdiction the equal protection of the laws." Amdt. 14, § 1. Congress chose its words carefully, opting for expansive language that focused on equal protection and rejecting "proposals that would have made the Constitution explicitly color-blind." A. Kull, The Color-Blind Constitution 69 (1992); see also, *e.g.*, Cong. Globe 1287 (rejecting proposed language providing that "no State ... shall ... recognize any distinction between citizens ... on account of race or color"). This choice makes it clear that the Fourteenth Amendment does not impose a blanket ban on race-conscious policies.

Simultaneously with the passage of the Fourteenth Amendment, Congress enacted a number of race-conscious laws to fulfill the Amendment's promise of equality, leaving no doubt that the Equal Protection Clause permits consideration of race to achieve its goal. One such law was the Freedmen's Bureau Act, enacted in 1865 and then expanded in 1866, which established a federal agency to provide certain benefits to refugees and newly emancipated freedmen. See Act of Mar. 3, 1865, ch. 90, 13 Stat. 507; Act of July 16, 1866, ch. 200, 14 Stat. 173. For the Bureau, education "was ***323** the foundation upon which all efforts to assist the freedmen rested." E. Foner, Reconstruction: America's Unfinished Revolution 1863–1877, p. 144 (1988). Consistent with that view, the Bureau provided essential "funding for black education during Reconstruction." *Id.*, at 97.

Black people were the targeted beneficiaries of the Bureau's programs, especially when it came to investments in education in the wake of the Civil War. Each year surrounding the passage of the Fourteenth Amendment, the Bureau "educated approximately 100,000 students, nearly all of them black," and regardless of "degree of past disadvantage." E. Schnapper, Affirmative Action and the Legislative History of the Fourteenth Amendment, 71 Va. L. Rev. 753, 781 (1985). The Bureau also provided land and funding to establish some of our Nation's Historically Black Colleges and Universities (HBCUs). *Ibid.*; see also Brief for HBCU Leaders et al. as *Amici Curiae* 13 (HBCU Brief). In 1867, for example, the Bureau provided Howard University tens of thousands of dollars to buy property and construct its campus in our Nation's capital. 2 O. Howard, Autobiography 397–401 (1907). Howard University was designed to provide "special opportunities for a higher education to the newly enfranchised of the south," but it was available to all Black people, "whatever may have been their previous condition." Bureau Refugees, Freedmen and Abandoned Lands, Sixth Semi-Annual Report on Schools for Freedmen 60 (July 1, 1868).[1] The Bureau also "expended a total of $407,752.21 on black colleges, and only $3,000 on white colleges" from 1867 to 1870. Schnapper, 71 Va. L. Rev., at 798, n. 149.

***324** Indeed, contemporaries understood that the Freedmen's Bureau Act benefited Black people. Supporters defended the law by stressing its race-conscious approach. See, *e.g.*, Cong. Globe 632 (statement of Rep. Moulton) ("[T]he true object of

this bill is the amelioration of the condition of the colored people"); Joint Comm. Rep. 11 (reporting that "the Union men of the south" declared "with one voice" that the Bureau's efforts "protect[ed] the colored people"). Opponents argued that the Act ****2229** created harmful racial classifications that favored Black people and disfavored white Americans. See, *e.g.*, Cong. Globe 397 (statement of Sen. Willey) (the Act makes "a distinction on account of color between the two races"), 544 (statement of Rep. Taylor) (the Act is "legislation for a particular class of the blacks to the exclusion of all whites"), App. to Cong. Globe, 39th Cong., 1st Sess., 69–70 (statement of Rep. Rousseau) ("You raise a spirit of antagonism between the black race and the white race in our country, and the law-abiding will be powerless to control it"). President Andrew Johnson vetoed the bill on the basis that it provided benefits "to a particular class of citizens," 6 Messages and Papers of the Presidents 1789–1897, p. 425 (J. Richardson ed. 1897) (Messages & Papers) (A. Johnson to House of Rep. July 16, 1866), but Congress overrode his veto. Cong. Globe 3849–3850. Thus, rejecting those opponents' objections, the same Reconstruction Congress that passed the Fourteenth Amendment eschewed the concept of colorblindness as sufficient to remedy inequality in education.

Congress also debated and passed the Civil Rights Act of 1866 contemporaneously with the Fourteenth Amendment. The goal of that Act was to eradicate the Black Codes enacted by Southern States following ratification of the Thirteenth Amendment. See *id.*, at 474. Because the Black Codes focused on race, not just slavery-related status, the Civil Rights Act explicitly recognized that white citizens enjoyed certain rights that non-white citizens did not. Section 1 of the Act provided that all persons "of every race and ***325** color ... shall have the same right[s]" as those "enjoyed by white citizens." Act of Apr. 9, 1866, 14 Stat. 27. Similarly, Section 2 established criminal penalties for subjecting racial minorities to "different punishment ... by reason of ... color or race, than is prescribed for the punishment of white persons." *Ibid*. In other words, the Act was not colorblind. By using white citizens as a benchmark, the law classified by race and took account of the privileges enjoyed only by white people. As he did with the Freedmen's Bureau Act, President Johnson vetoed the Civil Rights Act in part because he viewed it as providing Black citizens with special treatment. See Messages and Papers 408, 413 (the Act is designed "to afford discriminating protection to colored persons," and its "distinction of race and color ... operate[s] in favor of the colored and against the white race"). Again, Congress overrode his veto. Cong. Globe 1861. In fact, Congress reenacted race-conscious language in the Civil Rights Act of 1870, two years after ratification of the Fourteenth Amendment, see Act of May 31, 1870, § 16, 16 Stat. 144, where it remains today, see 42 U.S.C. §§ 1981(a) and 1982 (Rev. Stat. §§ 1972, 1978).

Congress similarly appropriated federal dollars explicitly and solely for the benefit of racial minorities. For example, it appropriated money for " 'the relief of destitute colored women and children,' " without regard to prior enslavement. Act of July 28, 1866, 14 Stat. 317. Several times during and after the passage of the Fourteenth Amendment, Congress also made special appropriations and adopted special protections for the bounty and prize money owed to "colored soldiers and sailors" of the Union Army. 14 Stat. 357, Res. No. 46, June 15, 1866; Act of Mar. 3, 1869, ch. 122, 15 Stat. 301; Act of Mar. 3, 1873, 17 Stat. 528. In doing so, it rebuffed objections to these measures as "class legislation" "applicable to colored people and not ... to the white people." Cong. Globe, 40th Cong., 1st Sess., 79 (1867) (statement of Sen. Grimes). This history makes it "inconceivable" that race-conscious ***326** college admissions are unconstitutional. ****2230** *Bakke*, 438 U.S. at 398, 98 S.Ct. 2733 (opinion of Marshall, J.).[2]

B

The Reconstruction era marked a transformational point in the history of American democracy. Its vision of equal opportunity leading to an equal society "was short-lived," however, "with the assistance of this Court." *Id.*, at 391, 98 S.Ct. 2733. In a series of decisions, the Court "sharply curtailed" the "substantive protections" of the Reconstruction Amendments and the Civil Rights Acts. *Id.*, at 391–392, 98 S.Ct. 2733 (collecting cases). That endeavor culminated with the Court's shameful decision in *Plessy v. Ferguson*, 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256 (1896), which established that "equality of treatment" exists "when the races are provided substantially equal facilities, even though these facilities be separate." *Brown*, 347 U.S. at 488, 74 S.Ct. 686. Therefore, with this Court's approval, government-enforced segregation and its concomitant destruction of equal opportunity became the constitutional norm and infected every sector of our society, from

bathrooms to military units and, crucially, schools. See *Bakke*, 438 U.S. at 393–394, 98 S.Ct. 2733 (opinion of Marshall, J.); see also generally R. Rothstein, The Color of Law 17–176 (2017) (discussing various federal policies that promoted racial segregation).

In a powerful dissent, Justice Harlan explained in *Plessy* that the Louisiana law at issue, which authorized segregation in railway carriages, perpetuated a "caste" system. 163 U.S. at 559–560, 16 S.Ct. 1138. Although the State argued that the law ***327** "prescribe[d] a rule applicable alike to white and colored citizens," all knew that the law's purpose was not "to exclude white persons from railroad cars occupied by blacks," but "to exclude colored people from coaches occupied by or assigned to white persons." *Id.*, at 557, 16 S.Ct. 1138. That is, the law "proceed[ed] on the ground that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens." *Id.*, at 560, 16 S.Ct. 1138. Although "[t]he white race deems itself to be the dominant race ... in prestige, in achievements, in education, in wealth, and in power," Justice Harlan explained, there is "no superior, dominant, ruling class of citizens" in the eyes of the law. *Id.*, at 559, 16 S.Ct. 1138. In that context, Justice Harlan thus announced his view that "[o]ur constitution is color-blind." *Ibid.*

It was not until half a century later, in *Brown*, that the Court honored the guarantee of equality in the Equal Protection Clause and Justice Harlan's vision of a Constitution that "neither knows nor tolerates classes among citizens." *Ibid.* Considering the "effect[s] of segregation" and the role of education "in the light of its full development and its present place in American life throughout the Nation," *Brown* overruled *Plessy*. 347 U.S. at 492–495, 74 S.Ct. 686. The *Brown* Court held that "[s]eparate educational facilities are inherently unequal," and that such racial segregation deprives Black students "of the equal protection of the laws guaranteed by the Fourteenth Amendment." ****2231** *Id.*, at 494–495, 74 S.Ct. 686. The Court thus ordered segregated schools to transition to a racially integrated system of public education "with all deliberate speed," "ordering the immediate admission of [Black children] to schools previously attended only by white children." *Brown v. Board of Education*, 349 U.S. 294, 301, 75 S.Ct. 753, 99 L.Ed. 1083 (1955).

Brown was a race-conscious decision that emphasized the importance of education in our society. Central to the Court's holding was the recognition that, as Justice Harlan emphasized in *Plessy*, segregation perpetuates a caste system wherein Black children receive inferior educational opportunities ***328** "solely because of their race," denoting "inferiority as to their status in the community." 347 U.S. at 494, and n. 10, 74 S.Ct. 686. Moreover, because education is "the very foundation of good citizenship," segregation in public education harms "our democratic society" more broadly as well. *Id.*, at 493, 74 S.Ct. 686. In light of the harmful effects of entrenched racial subordination on racial minorities and American democracy, *Brown* recognized the constitutional necessity of a racially integrated system of schools where education is "available to all on equal terms." *Ibid.*

The desegregation cases that followed *Brown* confirm that the ultimate goal of that seminal decision was to achieve a system of integrated schools that ensured racial equality of opportunity, not to impose a formalistic rule of race-blindness. In *Green v. School Bd. of New Kent Cty.*, 391 U.S. 430, 88 S.Ct. 1689, 20 L.Ed.2d 716 (1968), for example, the Court held that the New Kent County School Board's "freedom of choice" plan, which allegedly allowed "every student, regardless of race, ... 'freely' [to] choose the school he [would] attend," was insufficient to effectuate "the command of [*Brown*]." *Id.*, at 437, 441–442, 88 S.Ct. 1689. That command, the Court explained, was that schools dismantle "well-entrenched dual systems" and transition "to a unitary, nonracial system of public education." *Id.*, at 435–436, 88 S.Ct. 1689. That the board "opened the doors of the former 'white' school to [Black] children and the ['Black'] school to white children" on a race-blind basis was not enough. *Id.*, at 437, 88 S.Ct. 1689. Passively eliminating race classifications did not suffice when *de facto* segregation persisted. *Id.*, at 440–442, 88 S.Ct. 1689 (noting that 85% of Black children in the school system were still attending an all-Black school). Instead, the board was "clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch." *Id.*, at 437–438, 88 S.Ct. 1689. Affirmative steps, this Court held, are constitutionally necessary when mere formal neutrality cannot achieve *Brown*'s promise of racial equality. See ***329** *Green*, 391 U.S. at 440–442, 88 S.Ct. 1689; see also *North Carolina Bd. of Ed. v. Swann*, 402 U.S. 43, 45–46, 91 S.Ct. 1284, 28 L.Ed.2d 586 (1971) (holding that North Carolina statute that forbade the use of race in school busing "exploits an apparently neutral form to control school assignment plans by directing that they be 'colorblind'; that requirement, against the background of segregation, would render illusory the promise of *Brown*"); *Dayton Bd. of Ed. v. Brinkman*, 443 U.S. 526, 538, 99 S.Ct. 2971, 61 L.Ed.2d 720 (1979) (school board "had to do more than abandon its prior discriminatory purpose"; it "had an affirmative responsibility" to integrate); *Keyes v. School Dist. No. 1, Denver*, 413 U.S. 189, 200, 93 S.Ct. 2686, 37 L.Ed.2d 548 (1973) ("[T]he State automatically assumes an affirmative duty" under *Brown* to eliminate ****2232** the vestiges of segregation).[3]

In so holding, this Court's post-*Brown* decisions rejected arguments advanced by opponents of integration suggesting that "restor[ing] race as a criterion in the operation of the public schools" was at odds with "the *Brown* decisions." Brief for Respondents in *Green* v. *School Bd. of New Kent Cty.*, O. T. 1967, No. 695, p. 6 (*Green* Brief). Those opponents argued that *Brown* only required the admission of Black students "to public schools on a racially nondiscriminatory basis." *Id.*, at 11 (emphasis deleted). Relying on Justice Harlan's dissent in *Plessy*, they argued that the use of race "is improper" because the " 'Constitution is colorblind.' " *Green* Brief 6, n. 6 (quoting *Plessy*, 163 U.S. at 559, 16 S.Ct. 1138 (Harlan, J., dissenting)). They also incorrectly claimed that their views aligned with those of the *Brown* litigators, arguing that the *Brown* plaintiffs "understood" that *Brown*'s "mandate" ***330** was colorblindness. *Green* Brief 17. This Court rejected that characterization of "the thrust of *Brown*." *Green*, 391 U.S. at 437, 88 S.Ct. 1689. It made clear that indifference to race "is not an end in itself " under that watershed decision. *Id.*, at 440, 88 S.Ct. 1689. The ultimate goal is racial equality of opportunity.

Those rejected arguments mirror the Court's opinion today. The Court claims that *Brown* requires that students be admitted " 'on a racially nondiscriminatory basis.' " *Ante*, at 2160. It distorts the dissent in *Plessy* to advance a colorblindness theory. *Ante*, at 2175 – 2176; see also *ante*, at 2219 (GORSUCH, J., concurring) ("[T]oday's decision wakes the echoes of Justice John Marshall Harlan [in *Plessy*]"); *ante*, at 2177 (THOMAS, J., concurring) (same). The Court also invokes the *Brown* litigators, relying on what the *Brown* "plaintiffs had argued." *Ante*, at 2160; *ante*, at 2194 - 2196, 2197, n. 7 (opinion of THOMAS, J.).

If there was a Member of this Court who understood the *Brown* litigation, it was Justice Thurgood Marshall, who "led the litigation campaign" to dismantle segregation as a civil rights lawyer and "rejected the hollow, race-ignorant conception of equal protection" endorsed by the Court's ruling today. Brief for NAACP Legal Defense and Educational Fund, Inc., et al. as *Amici Curiae* 9. Justice Marshall joined the *Bakke* plurality and "applaud[ed] the judgment of the Court that a university may consider race in its admissions process." 438 U.S. at 400, 98 S.Ct. 2733. In fact, Justice Marshall's view was that *Bakke*'s holding should have been even more protective of race-conscious college admissions programs in light of the remedial purpose of the Fourteenth Amendment and the legacy of racial inequality in our society. See *id.*, at 396–402, 98 S.Ct. 2733 (arguing that "a class-based remedy" should be constitutionally permissible in light of the hundreds of "years of class-based discrimination against [Black Americans]"). The Court's recharacterization of *Brown* is nothing but revisionist history and an affront to the legendary life of Justice ***331** Marshall, a great jurist who was a champion of true equal opportunity, not rhetorical flourishes about colorblindness.

****2233** C

Two decades after *Brown*, in *Bakke*, a plurality of the Court held that "the attainment of a diverse student body" is a "compelling" and "constitutionally permissible goal for an institution of higher education." 438 U.S. at 311–315, 98 S.Ct. 2733. Race could be considered in the college admissions process in pursuit of this goal, the plurality explained, if it is one factor of many in an applicant's file, and each applicant receives individualized review as part of a holistic admissions process. *Id.*, at 316–318, 98 S.Ct. 2733.

Since *Bakke*, the Court has reaffirmed numerous times the constitutionality of limited race-conscious college admissions. First, in *Grutter v. Bollinger*, 539 U.S. 306, 123 S.Ct. 2325, 156 L.Ed.2d 304 (2003), a majority of the Court endorsed the *Bakke* plurality's "view that student body diversity is a compelling state interest that can justify the use of race in university admissions," 539 U.S. at 325, 123 S.Ct. 2325, and held that race may be used in a narrowly tailored manner to achieve this interest, *id.*, at 333–344, 123 S.Ct. 2325; see also *Gratz v. Bollinger*, 539 U.S. 244, 268, 123 S.Ct. 2411, 156 L.Ed.2d 257 (2003) ("for the reasons set forth [the same day] in *Grutter*," rejecting petitioners' arguments that race can only be considered in college admissions "to remedy identified discrimination" and that diversity is " 'too open-ended, ill-defined, and indefinite to constitute a compelling interest' ").

Later, in the *Fisher* litigation, the Court twice reaffirmed that a limited use of race in college admissions is constitutionally permissible if it satisfies strict scrutiny. In *Fisher v. University of Texas at Austin*, 570 U.S. 297, 133 S.Ct. 2411, 186 L.Ed.2d

474 (2013) (*Fisher I*), seven Members of the Court concluded that the use of race in college admissions comports with the Fourteenth Amendment if it "is narrowly tailored to obtain the educational benefits of diversity." *Id.*, at 314, 337, 133 S.Ct. 2411. Several years later, in ***332** *Fisher v. University of Texas at Austin*, 579 U.S. 365, 376, 136 S.Ct. 2198, 195 L.Ed.2d 511 (2016) (*Fisher II*), the Court upheld the admissions program at the University of Texas under this framework. *Id.*, at 380–388, 136 S.Ct. 2198.

Bakke, *Grutter*, and *Fisher* are an extension of *Brown*'s legacy. Those decisions recognize that " 'experience lend[s] support to the view that the contribution of diversity is substantial.' " *Grutter*, 539 U.S. at 324, 123 S.Ct. 2325 (quoting *Bakke*, 438 U.S. at 313, 98 S.Ct. 2733). Racially integrated schools improve cross-racial understanding, "break down racial stereotypes," and ensure that students obtain "the skills needed in today's increasingly global marketplace ... through exposure to widely diverse people, cultures, ideas, and viewpoints." 539 U.S. at 330, 123 S.Ct. 2325. More broadly, inclusive institutions that are "visibly open to talented and qualified individuals of every race and ethnicity" instill public confidence in the "legitimacy" and "integrity" of those institutions and the diverse set of graduates that they cultivate. *Id.*, at 332, 123 S.Ct. 2325. That is particularly true in the context of higher education, where colleges and universities play a critical role in "maintaining the fabric of society" and serve as "the training ground for a large number of our Nation's leaders." *Id.*, at 331–332, 123 S.Ct. 2325. It is thus an objective of the highest order, a "compelling interest" indeed, that universities pursue the benefits of racial diversity and ensure that "the diffusion of knowledge and opportunity" is available to students of all races. *Id.*, at 328–333, 123 S.Ct. 2325.

This compelling interest in student body diversity is grounded not only in the Court's equal protection jurisprudence but ****2234** also in principles of "academic freedom," which " 'long [have] been viewed as a special concern of the First Amendment.' " *Id.*, at 324, 123 S.Ct. 2325 (quoting *Bakke*, 438 U.S. at 312, 98 S.Ct. 2733). In light of "the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment," this Court's precedents recognize the imperative nature of diverse student bodies on American college campuses. 539 U.S. at 329, 123 S.Ct. 2325. Consistent ***333** with the First Amendment, student body diversity allows universities to promote "th[e] robust exchange of ideas which discovers truth out of a multitude of tongues [rather] than through any kind of authoritative selection. " *Bakke*, 438 U.S. at 312, 98 S.Ct. 2733 (internal quotation marks omitted). Indeed, as the Court recently reaffirmed in another school case, "learning how to tolerate diverse expressive activities has always been 'part of learning how to live in a pluralistic society' " under our constitutional tradition. *Kennedy* v. *Bremerton School Dist.*, 597 U. S. ——, ——, 142 S.Ct. 2407, 2430–2431, 213 L.Ed.2d 755 (2022); cf. *Khorrami* v. *Arizona*, 598 U. S. ——, ——, 143 S.Ct. 22, 26–27, 214 L.Ed.2d 224 (2022) (GORSUCH, J., dissenting from denial of certiorari) (collecting research showing that larger juries are more likely to be racially diverse and "deliberate longer, recall information better, and pay greater attention to dissenting voices").

In short, for more than four decades, it has been this Court's settled law that the Equal Protection Clause of the Fourteenth Amendment authorizes a limited use of race in college admissions in service of the educational benefits that flow from a diverse student body. From *Brown* to *Fisher*, this Court's cases have sought to equalize educational opportunity in a society structured by racial segregation and to advance the Fourteenth Amendment's vision of an America where racially integrated schools guarantee students of all races the equal protection of the laws.

D

Today, the Court concludes that indifference to race is the only constitutionally permissible means to achieve racial equality in college admissions. That interpretation of the Fourteenth Amendment is not only contrary to precedent and the entire teachings of our history, see *supra*, at 2225 - 2234, but is also grounded in the illusion that racial inequality was a problem of a different generation. Entrenched racial inequality remains a reality today. That is true for society writ large and, more specifically, for Harvard and the University ***334** of North Carolina (UNC), two institutions with a long history of racial exclusion. Ignoring race will not equalize a society that is racially unequal. What was true in the 1860s, and again in 1954, is true today: Equality requires acknowledgment of inequality.

1

After more than a century of government policies enforcing racial segregation by law, society remains highly segregated. About half of all Latino and Black students attend a racially homogeneous school with at least 75% minority student enrollment.[4] The share of intensely segregated minority schools (*i.e.*, schools that enroll 90% to 100% racial minorities) has sharply increased. ****2235** [5] To this day, the U. S. Department of Justice continues to enter into desegregation decrees with schools that have failed to "eliminat[e] the vestiges of *de jure* segregation."[6]

Moreover, underrepresented minority students are more likely to live in poverty and attend schools with a high concentration of poverty.[7] When combined with residential segregation and school funding systems that rely heavily on local property taxes, this leads to racial minority students attending schools with fewer resources. See ***335** *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 72–86, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973) (Marshall, J., dissenting) (noting school funding disparities that result from local property taxation).[8] In turn, underrepresented minorities are more likely to attend schools with less qualified teachers, less challenging curricula, lower standardized test scores, and fewer extracurricular activities and advanced placement courses.[9] It is thus unsurprising that there are achievement gaps along racial lines, even after controlling for income differences.[10]

Systemic inequities disadvantaging underrepresented racial minorities exist beyond school resources. Students of color, particularly Black students, are disproportionately disciplined or suspended, interrupting their academic progress and increasing their risk of involvement with the criminal justice system.[11] Underrepresented minorities are less likely to have parents with a postsecondary education who may be familiar with the college application process.[12] Further, low-income children of color are less likely to attend ***336** preschool and other early childhood education programs that increase educational attainment.[13] All of these interlocked factors ****2236** place underrepresented minorities multiple steps behind the starting line in the race for college admissions.

In North Carolina, the home of UNC, racial inequality is deeply entrenched in K–12 education. State courts have consistently found that the State does not provide underrepresented racial minorities equal access to educational opportunities, and that racial disparities in public schooling have increased in recent years, in violation of the State Constitution. See, *e.g.*, *Hoke Cty. Bd. of Ed. v. State*, 2020 WL 13310241, *6, *13 (N. C. Super. Ct., Jan. 21, 2020); *Hoke Cty. Bd. of Ed. v. State*, 382 N.C. 386, 388–390, 879 S.E.2d 193, 197–198 (2022).

These opportunity gaps "result in fewer students from underrepresented backgrounds even applying to" college, particularly elite universities. Brief for Massachusetts Institute of Technology et al. as *Amici Curiae* 32. "Because talent lives everywhere, but opportunity does not, there are undoubtedly talented students with great academic potential who have simply not had the opportunity to attain the traditional indicia of merit that provide a competitive edge in the admissions process." Brief for Harvard Student and Alumni Organizations as *Amici Curiae* 16. Consistent with this reality, Latino and Black students are less likely to enroll in institutions of higher education than their white peers.[14]

Given the central role that education plays in breaking the cycle of racial inequality, these structural barriers reinforce ***337** other forms of inequality in communities of color. See E. Wilson, Monopolizing Whiteness, 134 Harv. L. Rev. 2382, 2416 (2021) ("[E]ducational opportunities ... allow for social mobility, better life outcomes, and the ability to participate equally in the social and economic life of the democracy"). Stark racial disparities exist, for example, in unemployment rates,[15] income levels,[16] wealth and homeownership,[17] and healthcare access.[18] See also *Schuette v. BAMN*, 572 U.S. 291, 380–381, 134 S.Ct. 1623, 188 L.Ed.2d 613 (2014) (SOTOMAYOR, J., dissenting) (noting the "persistent racial inequality in society"); *Gratz*, 539 U.S. at 299–301, 123 S.Ct. 2411 (Ginsburg, J., dissenting) (cataloging racial disparities in employment, poverty, healthcare, housing, consumer transactions, and education).

Put simply, society remains "inherently unequal." *Brown*, 347 U.S. at 495, 74 S.Ct. 686. Racial inequality runs deep to this

very day. That is particularly true in education, the " 'most vital civic institution for the preservation of a democratic system of government.' " *Plyler v. Doe*, 457 U.S. 202, 221, 223, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982). As I have explained before, only with eyes open to this reality can the Court "carry out the guarantee of equal ****2237** protection." *Schuette*, 572 U.S. at 381, 134 S.Ct. 1623 (dissenting opinion).

2

Both UNC and Harvard have sordid legacies of racial exclusion. Because "[c]ontext matters" when reviewing race-conscious college admissions programs, *Grutter*, 539 U.S. at 327, 123 S.Ct. 2325, this reality informs the exigency of respondents' current admissions policies and their racial diversity goals.

***338** i

For much of its history, UNC was a bastion of white supremacy. Its leadership included "slaveholders, the leaders of the Ku Klux Klan, the central figures in the white supremacy campaigns of 1898 and 1900, and many of the State's most ardent defenders of Jim Crow and race-based Social Darwinism in the twentieth century." 3 App. 1680. The university excluded all people of color from its faculty and student body, glorified the institution of slavery, enforced its own Jim Crow regulations, and punished any dissent from racial orthodoxy. *Id.*, at 1681–1683. It resisted racial integration after this Court's decision in *Brown*, and was forced to integrate by court order in 1955. 3 App. 1685. It took almost 10 more years for the first Black woman to enroll at the university in 1963. See Karen L. Parker Collection, 1963–1966, UNC Wilson Special Collections Library. Even then, the university admitted only a handful of underrepresented racial minorities, and those students suffered constant harassment, humiliation, and isolation. 3 App. 1685. UNC officials openly resisted racial integration well into the 1980s, years after the youngest Member of this Court was born.[19] *Id.*, at 1688–1690. During that period, Black students faced racial epithets and stereotypes, received hate mail, and encountered Ku Klux Klan rallies on campus. 2 *id.*, at 781–784; 3 *id.*, at 1689.

***339** To this day, UNC's deep-seated legacy of racial subjugation continues to manifest itself in student life. Buildings on campus still bear the names of members of the Ku Klux Klan and other white supremacist leaders. *Id.*, at 1683. Students of color also continue to experience racial harassment, isolation, and tokenism.[20] Plus, the student body remains predominantly white: approximately 72% of UNC students identify as white, while only 8% identify as Black. *Id.*, at 1647. These numbers do not reflect the diversity of the State, particularly Black North Carolinians, who make up 22% of the population. *Id.*, at 1648.

****2238** ii

UNC is not alone. Harvard, like other Ivy League universities in our country, "stood beside church and state as the third pillar of a civilization built on bondage." C. Wilder, Ebony & Ivy: Race, Slavery, and the Troubled History of America's Universities 11 (2013). From Harvard's founding, slavery and racial subordination were integral parts of the institution's

funding, intellectual production, and campus life. Harvard and its donors had extensive financial ties to, and profited from, the slave trade, the labor of enslaved people, and slavery-related investments. As Harvard now recognizes, the accumulation of this wealth was "vital to the University's growth" and establishment as an elite, national institution. Harvard & the Legacy of Slavery, Report by the President and Fellows of Harvard College 7 (2022) (Harvard Report). ***340** Harvard suppressed antislavery views, and enslaved persons "served Harvard presidents and professors and fed and cared for Harvard students" on campus. *Id.*, at 7, 15.

Exclusion and discrimination continued to be a part of campus life well into the 20th century. Harvard's leadership and prominent professors openly promoted " 'race science,' " racist eugenics, and other theories rooted in racial hierarchy. *Id.*, at 11. Activities to advance these theories "took place on campus," including "intrusive physical examinations" and "photographing of unclothed" students. *Ibid.* The university also "prized the admission of academically able Anglo-Saxon students from elite backgrounds—including wealthy white sons of the South." *Id.*, at 44. By contrast, an average of three Black students enrolled at Harvard each year during the five decades between 1890 and 1940. *Id.*, at 45. Those Black students who managed to enroll at Harvard "excelled academically, earning equal or better academic records than most white students," but faced the challenges of the deeply rooted legacy of slavery and racism on campus. *Ibid*. Meanwhile, a few women of color attended Radcliffe College, a separate and overwhelmingly white "women's annex" where racial minorities were denied campus housing and scholarships. *Id.*, at 51, 91 S.Ct. 1284. Women of color at Radcliffe were taught by Harvard professors, but "women did not receive Harvard degrees until 1963." *Ibid.*; see also S. Bradley, Upending the Ivory Tower: Civil Rights, Black Power, and the Ivy League 17 (2018) (noting that the historical discussion of racial integration at the Ivy League "is necessarily male-centric," given the historical exclusion of women of color from these institutions).

Today, benefactors with ties to slavery and white supremacy continue to be memorialized across campus through "statues, buildings, professorships, student houses, and the like." Harvard Report 11. Black and Latino applicants account for only 20% of domestic applicants to Harvard each ***341** year. App. to Pet. for Cert. in No. 20–1199, p. 112. "Even those students of color who beat the odds and earn an offer of admission" continue to experience isolation and alienation on campus. Brief for 25 Harvard Student and Alumni Organizations as *Amici Curiae* 30–31; 2 App. 823, 961. For years, the university has reported that inequities on campus remain. See, *e.g.*, 4 App. 1564–1601. For example, Harvard has reported that "far too many black students at Harvard experience feelings of isolation and marginalization," 3 *id.*, at 1308, and that "student survey data show[ed] that only half of Harvard undergraduates believe that the housing system fosters exchanges between students of different backgrounds," *id.*, at 1309.

* * *

****2239** These may be uncomfortable truths to some, but they are truths nonetheless. "Institutions can and do change," however, as societal and legal changes force them "to live up to [their] highest ideals." Harvard Report 56. It is against this historical backdrop that Harvard and UNC have reckoned with their past and its lingering effects. Acknowledging the reality that race has always mattered and continues to matter, these universities have established institutional goals of diversity and inclusion. Consistent with equal protection principles and this Court's settled law, their policies use race in a limited way with the goal of recruiting, admitting, and enrolling underrepresented racial minorities to pursue the well-documented benefits of racial integration in education.

II

The Court today stands in the way of respondents' commendable undertaking and entrenches racial inequality in higher education. The majority opinion does so by turning a blind eye to these truths and overruling decades of precedent, "content for now to disguise" its ruling as an application ***342** of "established law and move on." *Kennedy*, 597 U. S., at ——, 142 S.Ct., at 2450 (SOTOMAYOR, J., dissenting). As Justice THOMAS puts it, "*Grutter* is, for all intents and purposes, overruled." *Ante*, at 2207.

It is a disturbing feature of today's decision that the Court does not even attempt to make the extraordinary showing required by *stare decisis*. The Court simply moves the goalposts, upsetting settled expectations and throwing admissions programs nationwide into turmoil. In the end, however, it is clear why the Court is forced to change the rules of the game to reach its desired outcome: Under a faithful application of the Court's settled legal framework, Harvard and UNC's admissions programs are constitutional and comply with Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq*.[21]

***343** A

Answering the question whether Harvard's and UNC's policies survive strict scrutiny under settled law is straightforward, both because of the procedural posture ****2240** of these cases and because of the narrow scope of the issues presented by petitioner Students for Fair Admissions, Inc. (SFFA).[22]

These cases arrived at this Court after two lengthy trials. Harvard and UNC introduced dozens of fact witnesses, expert testimony, and documentary evidence in support of their admissions programs. Brief for Petitioner 20, 40. SFFA, by contrast, did not introduce a single fact witness and relied on the testimony of two experts. *Ibid*.

After making detailed findings of fact and conclusions of law, the District Courts entered judgment in favor of Harvard and UNC. See 397 F.Supp.3d 126, 133–206 (Mass. 2019) (*Harvard I*); 567 F.Supp.3d 580, 588–667 (MDNC 2021) (*UNC*). The First Circuit affirmed in the *Harvard* case, finding "no error" in the District Court's thorough opinion. 980 F.3d 157, 204 (2020) (*Harvard II*). SFFA then filed petitions for a writ of certiorari in both cases, which the Court granted. 595 U. S. ——, 142 S.Ct. 895, 211 L.Ed.2d 604 (2022).[23]

The Court granted certiorari on three questions: (1) whether the Court should overrule *Bakke*, *Grutter*, and *Fisher*; or, alternatively, (2) whether UNC's admissions program is narrowly tailored, and (3) whether Harvard's admissions ***344** program is narrowly tailored. See Brief for Petitioner in No. 20–1199, p. i; Brief for Respondent in No. 20–1199, p. i; Brief for University Respondents in No. 21–707, p. i. Answering the last two questions, which call for application of settled law to the facts of these cases, is simple: Deferring to the lower courts' careful findings of fact and credibility determinations, Harvard's and UNC's policies are narrowly tailored.

B

1

As to narrow tailoring, the only issue SFFA raises in the *UNC* case is that the university cannot use race in its admissions process because race-neutral alternatives would promote UNC's diversity objectives. That issue is so easily resolved in favor of UNC that SFFA devoted only three pages to it at the end of its 87-page brief. Brief for Petitioner 83–86.

The use of race is narrowly tailored unless "workable" and "available" race-neutral approaches exist, meaning race-neutral alternatives promote the institution's diversity goals and do so at " 'tolerable administrative expense.' " *Fisher I*, 570 U.S. at

312, 133 S.Ct. 2411 (quoting *Wygant v. Jackson Bd. of Ed.*, 476 U.S. 267, 280, n. 6, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986) (plurality opinion)). Narrow tailoring does not mean perfect tailoring. The Court's precedents make clear that "[n]arrow tailoring does not require exhaustion of every conceivable race-neutral alternative." *Grutter*, 539 U.S. at 339, 123 S.Ct. 2325. "Nor does it require a university to choose between maintaining a reputation for excellence or fulfilling a commitment to provide educational opportunities to members of all racial groups." *Ibid.*

As the District Court found after considering extensive expert testimony, SFFA's ****2241** proposed race-neutral alternatives do not meet those criteria. *UNC*, 567 F.Supp.3d at 648. All of SFFA's proposals are methodologically flawed because they rest on " 'terribly unrealistic' " assumptions about the applicant pools. *Id.*, at 643–645, 647. For example, as to ***345** one set of proposals, SFFA's expert "unrealistically assumed" that "all of the top students in the candidate pools he use[d] would apply, be admitted, and enroll." *Id.*, at 647. In addition, some of SFFA's proposals force UNC to "abandon its holistic approach" to college admissions, *id.*, at 643–645, n. 43, a result "in deep tension with the goal of educational diversity as this Court's cases have defined it," *Fisher II*, 579 U.S. at 386–387, 136 S.Ct. 2198. Others are "largely impractical—not to mention unprecedented—in higher education." 567 F.Supp.3d at 647. SFFA's proposed top percentage plans,[24] for example, are based on a made-up and complicated admissions index that requires UNC to "access ... real-time data for all high school students." *Ibid.* UNC is then supposed to use that index, which "would change every time any student took a standardized test," to rank students based on grades and test scores. *Ibid.* One of SFFA's top percentage plans would even "nearly erase the Native American incoming class" at UNC. *Id.*, at 646. The courts below correctly concluded that UNC is not required to adopt SFFA's unrealistic proposals to satisfy strict scrutiny.[25]

***346** 2

Harvard's admissions program is also narrowly tailored under settled law. SFFA argues that Harvard's program is not narrowly tailored because the university "has workable race-neutral alternatives," "does not use race as a mere plus," and "engages in racial balancing." Brief for Petitioner 75–83. As the First Circuit concluded, there was "no error" in the District Court's findings on any of these issues. *Harvard II*, 980 F.3d at 204.[26]

****2242** Like UNC, Harvard has already implemented many of SFFA's proposals, such as increasing recruitment efforts and financial aid for low-income students. *Id.*, at 193. Also like UNC, Harvard "carefully considered" other race-neutral ways to achieve its diversity goals, but none of them are "workable." *Id.*, at 193–194. SFFA's argument before this Court is that Harvard should adopt a plan designed by SFFA's expert for purposes of trial, which increases preferences for low-income applicants and eliminates the use of race and legacy preferences. *Id.*, at 193; Brief for Petitioner 81. Under SFFA's model, however, Black representation would plummet by about 32%, and the admitted share of applicants with high academic ratings would decrease, as would the share with high extracurricular and athletic ratings. 980 F.3d at 194. SFFA's proposal, echoed by Justice GORSUCH, *ante*, at 2214 – 2215, requires Harvard to "make sacrifices on almost every dimension important to its admissions process," ***347** 980 F.3d at 194, and forces it "to choose between a diverse student body and a reputation for academic excellence," *Fisher II*, 579 U.S. at 385, 136 S.Ct. 2198. Neither this Court's precedents nor common sense impose that type of burden on colleges and universities.

The courts below also properly rejected SFFA's argument that Harvard does not use race in the limited way this Court's precedents allow. The Court has explained that a university can consider a student's race in its admissions process so long as that use is "contextual and does not operate as a mechanical plus factor." *Id.*, at 375, 136 S.Ct. 2198. The Court has also repeatedly held that race, when considered as one factor of many in the context of holistic review, "can make a difference to whether an application is accepted or rejected." *Ibid.* After all, race-conscious admissions seek to improve racial diversity. Race cannot, however, be " 'decisive' for virtually every minimally qualified underrepresented minority applicant." *Gratz*, 539 U.S. at 272, 123 S.Ct. 2411 (quoting *Bakke*, 438 U.S. at 317, 98 S.Ct. 2733).

That is precisely how Harvard's program operates. In recent years, Harvard has received about 35,000 applications for a class with about 1,600 seats. 980 F.3d at 165. The admissions process is exceedingly competitive; it involves six different

application components. Those components include interviews with alumni and admissions officers, as well as consideration of a whole range of information, such as grades, test scores, recommendation letters, and personal essays, by several committees. *Id.*, at 165–166. Consistent with that "individualized, holistic review process," admissions officers may, but need not, consider a student's self-reported racial identity when assigning overall ratings. *Id.*, at 166, 169, 180. Even after so many layers of competitive review, Harvard typically ends up with about 2,000 tentative admits, more students than the 1,600 or so that the university can admit. *Id.*, at 170. To choose among those highly qualified candidates, Harvard considers "plus factors," which ***348** can help "tip an applicant into Harvard's admitted class." *Id.*, at 170, 191. To diversify its class, Harvard awards "tips" for a variety of reasons, including geographic factors, socioeconomic status, ethnicity, and race. *Ibid.*

There is "no evidence of any mechanical use of tips." *Id.*, at 180. Consistent with the Court's precedents, Harvard properly "considers race as part of a holistic review process," "values all types of diversity," "does not consider race exclusively," and "does not award a fixed amount of points to applicants because of their race." ****2243** *Id.*, at 190.[27] Indeed, Harvard's admissions process is so competitive and the use of race is so limited and flexible that, as "SFFA's own expert's analysis" showed, "Harvard rejects more than two-thirds of Hispanic applicants and slightly less than half of all African-American applicants who are among the top 10% most academically promising applicants." *Id.*, at 191.

The courts below correctly rejected SFFA's view that Harvard's use of race is unconstitutional because it impacts overall Hispanic and Black student representation by 45%. See Brief for Petitioner 79. That 45% figure shows that eliminating the use of race in admissions "would reduce African American representation ... from 14% to 6% and Hispanic representation from 14% to 9%." *Harvard II*, 980 F.3d at 180, 191. Such impact of Harvard's limited use of race on the makeup of the class is less than this Court has previously upheld as narrowly tailored. In *Grutter*, for example, eliminating the use of race would have reduced the underrepresented minority population by 72%, a much greater effect. ***349** 539 U.S. at 320, 123 S.Ct. 2325. And in *Fisher II*, the use of race helped increase Hispanic representation from 11% to 16.9% (a 54% increase) and African-American representation from 3.5% to 6.8% (a 94% increase). 579 U.S. at 384, 136 S.Ct. 2198.[28]

Finally, the courts below correctly concluded that Harvard complies with this Court's repeated admonition that colleges ****2244** and universities cannot define their diversity interest "as 'some specified percentage of a particular group merely because ***350** of its race or ethnic origin.' " *Fisher I*, 570 U.S. at 311, 133 S.Ct. 2411 (quoting *Bakke*, 438 U.S. at 307, 98 S.Ct. 2733). Harvard does not specify its diversity objectives in terms of racial quotas, and "SFFA did not offer expert testimony to support its racial balancing claim." *Harvard II*, 980 F.3d at 180, 186–187. Harvard's statistical evidence, by contrast, showed that the admitted classes across racial groups varied considerably year to year, a pattern "inconsistent with the imposition of a racial quota or racial balancing." *Harvard I*, 397 F.Supp.3d at 176–177; see *Harvard II*, 980 F.3d at 180, 188–189.

Similarly, Harvard's use of "one-pagers" containing "a snapshot of various demographic characteristics of Harvard's applicant pool" during the admissions review process is perfectly consistent with this Court's precedents. *Id.*, at 170–171, 189. Consultation of these reports, with no "specific number firmly in mind," "does not transform [Harvard's] program into a quota." *Grutter*, 539 U.S. at 335–336, 123 S.Ct. 2325. Rather, Harvard's ongoing review complies with the Court's command that universities periodically review the necessity of the use of race in their admissions programs. *Id.*, at 342, 123 S.Ct. 2325; *Fisher II*, 579 U.S. at 388, 136 S.Ct. 2198.

The Court ignores these careful findings and concludes that Harvard engages in racial balancing because its "focus on numbers is obvious." *Ante*, at 2171. Because SFFA failed to offer an expert and to prove its claim below, the majority is forced to reconstruct the record and conduct its own factual analysis. It thus relies on a single chart from SFFA's brief that truncates relevant data in the record. Compare *ibid.* (citing Brief for Petitioner in No. 201199, p. 23) with 4 App. in No. 20–1199, p. 1770. That chart cannot displace the careful factfinding by the District Court, which the First Circuit upheld on appeal under clear error review. See *Harvard II*, 980 F.3d at 180–182, 188–189.

In any event, the chart is misleading and ignores "the broader context" of the underlying data that it purports ***351** to summarize. *Id.*, at 188. As the First Circuit concluded, what the data actually show is that admissions have increased for all racial minorities, including Asian American students, whose admissions numbers have "increased roughly five-fold since 1980 and roughly two-fold since 1990." *Id.*, at 180, 188. The data also show that the racial shares of admitted applicants fluctuate more than the corresponding racial shares of total applicants, which is "the opposite of what one would expect if Harvard imposed a quota." *Id.*, at 188. Even looking at the Court's truncated period for the classes of 2009 to 2018, "the same pattern holds." *Ibid.* The fact that Harvard's racial shares of admitted applicants "varies relatively little in absolute

terms for [those classes] is unsurprising and reflects the fact that the racial makeup of Harvard's applicant pool also varies very little over this period." *Id.*, at 188–189. Thus, properly understood, the data show that Harvard "does not utilize quotas and does not engage in racial balancing." *Id.*, at 189.[29]

***352 **2245** III

The Court concludes that Harvard's and UNC's policies are unconstitutional because they serve objectives that are insufficiently measurable, employ racial categories that are imprecise and overbroad, rely on racial stereotypes and disadvantage nonminority groups, and do not have an end point. *Ante*, at 2165 - 2173, 2175 - 2176. In reaching this conclusion, the Court claims those supposed issues with respondents' programs render the programs insufficiently "narrow" under the strict scrutiny framework that the Court's precedents command. *Ante*, at 2166. In reality, however, "the Court today cuts through the kudzu" and overrules its "higher-education precedents" following *Bakke*. *Ante*, at 2219 (GORSUCH, J., concurring).

There is no better evidence that the Court is overruling the Court's precedents than those precedents themselves. "Every one of the arguments made by the majority can be found in the dissenting opinions filed in [the] cases" the majority now overrules. *Payne v. Tennessee*, 501 U.S. 808, 846, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991) (Marshall, J., dissenting); see, *e.g.*, *Grutter*, 539 U.S. at 354, 123 S.Ct. 2325 (THOMAS, J., concurring in part and dissenting in part) ("Unlike the majority, I seek to define with precision the interest being asserted"); *Fisher II*, 579 U.S. at 389, 136 S.Ct. 2198 (THOMAS, J., dissenting) (race-conscious admissions programs "res[t] on pernicious assumptions about race"); *id.*, at 403, 136 S.Ct. 2198 (ALITO, J., joined by ROBERTS, C. J., and THOMAS, J., dissenting) (diversity interests "are laudable goals, but they are not concrete or precise"); *id.*, at 413, 136 S.Ct. 2198 (race-conscious college admissions plan "discriminates against Asian-American students"); *id.*, at 414, 136 S.Ct. 2198 (race-conscious admissions plan is unconstitutional because it "does not specify what it means to be 'African-American,' 'Hispanic,' 'Asian American,' 'Native American,' or 'White' "); *id.*, at 419, 136 S.Ct. 2198 (race-conscious college admissions policies rest on "pernicious stereotype[s]").

Lost arguments are not grounds to overrule a case. When proponents of those arguments, greater now in number ***353** on the Court, return to fight old battles anew, it betrays an unrestrained disregard for precedent. It fosters the People's suspicions that "bedrock principles are founded ... in the proclivities of individuals" on this Court, not in the law, and it degrades "the integrity of our constitutional system of government." *Vasquez v. Hillery*, 474 U.S. 254, 265, 106 S.Ct. 617, 88 L.Ed.2d 598 (1986). Nowhere is the damage greater than in cases like these that touch upon matters of representation and institutional legitimacy.

The Court offers no justification, much less "a 'special justification,' " for its costly endeavor. *Dobbs* v. *Jackson Women's Health Organization*, 597 U. S. ——, ——, 142 S.Ct. 2228, 2334, 213 L.Ed.2d 545 (2022) (joint opinion of BREYER, SOTOMAYOR, and KAGAN, JJ., dissenting) (quoting *Gamble* v. *United States*, 587 U. S. ——, ——, 139 S.Ct. 1960, 1969, 204 L.Ed.2d 322 (2019)). Nor could it. There is no basis for overruling *Bakke*, *Grutter*, and ****2246** *Fisher*. The Court's precedents were correctly decided, the opinion today is not workable and creates serious equal protection problems, important reliance interests favor respondents, and there are no legal or factual developments favoring the Court's reckless course. See 597 U. S., at ——, 142 S.Ct., at 2334 (joint opinion of BREYER, SOTOMAYOR, and KAGAN, JJ., dissenting); *id.*, at —— – ——, 142 S.Ct., at 2306–2308 (KAVANAUGH, J., concurring). At bottom, the six unelected members of today's majority upend the status quo based on their policy preferences about what race in America should be like, but is not, and their preferences for a veneer of colorblindness in a society where race has always mattered and continues to matter in fact and in law.

A

1

A limited use of race in college admissions is consistent with the Fourteenth Amendment and this Court's broader equal protection jurisprudence. The text and history of the Fourteenth Amendment make clear that the Equal Protection Clause permits race-conscious measures. See *supra*, at 2225 - 2230. ***354** Consistent with that view, the Court has explicitly held that "race-based action" is sometimes "within constitutional constraints." *Adarand Constructors, Inc.* v. *Peña*, 515 U.S. 200, 237, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995). The Court has thus upheld the use of race in a variety of contexts. See, *e.g.*, *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701, 737, 127 S.Ct. 2738, 168 L.Ed.2d 508 (2007) ("[T]he obligation to disestablish a school system segregated by law can include race-conscious remedies—whether or not a court had issued an order to that effect"); *Johnson v. California*, 543 U.S. 499, 512, 125 S.Ct. 1141, 160 L.Ed.2d 949 (2005) (use of race permissible to further prison's interest in " 'security' " and " 'discipline' "); *Cooper v. Harris*, 581 U.S. 285, 291–293, 137 S.Ct. 1455, 197 L.Ed.2d 837 (2017) (use of race permissible when drawing voting districts in some circumstances).[30]

Tellingly, in sharp contrast with today's decision, the Court has allowed the use of race when that use burdens minority populations. In *United States v. Brignoni-Ponce*, 422 U.S. 873, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975), for example, the Court held that it is unconstitutional for border patrol agents to rely on a person's skin color as "a single factor" to justify a traffic stop based on reasonable suspicion, but it remarked that "Mexican appearance" could be "a relevant factor" out of many to justify such a stop "at the border and its functional equivalents." *Id.*, at 884–887, 95 S.Ct. 2574; see also *id.*, at 882, 95 S.Ct. 2574 (recognizing that "the border" includes entire metropolitan areas such as San Diego, El Paso, and the South Texas Rio Grande Valley).[31] The Court thus facilitated racial profiling of Latinos as a law enforcement tool and did not adopt a race-blind rule. The ***355** Court later extended this reasoning to border patrol agents selectively referring motorists for secondary ****2247** inspection at a checkpoint, concluding that "even if it be assumed that such referrals are made largely on the basis of apparent Mexican ancestry, [there is] no constitutional violation." *United States v. Martinez-Fuerte*, 428 U.S. 543, 562–563, 96 S.Ct. 3074, 49 L.Ed.2d 1116 (1976) (footnote omitted).

The result of today's decision is that a person's skin color may play a role in assessing individualized suspicion, but it cannot play a role in assessing that person's individualized contributions to a diverse learning environment. That indefensible reading of the Constitution is not grounded in law and subverts the Fourteenth Amendment's guarantee of equal protection.

2

The majority does not dispute that some uses of race are constitutionally permissible. See *ante*, at 2161 - 2162. Indeed, it agrees that a limited use of race is permissible in some college admissions programs. In a footnote, the Court exempts military academies from its ruling in light of "the potentially distinct interests" they may present. *Ante*, at 2166, n. 4. To the extent the Court suggests national security interests are "distinct," those interests cannot explain the Court's narrow exemption, as national security interests are also implicated at civilian universities. See *infra*, at 2260 – 2261, 358 U.S. 54, 79 S.Ct. 99, 3 L.Ed.2d 46. The Court also attempts to justify its carveout based on the fact that "[n]o military academy is a party to these cases." *Ante*, at 2166, n. 4. Yet the same can be said of many other institutions that are not parties here, including the religious universities supporting respondents, which the Court does not similarly exempt from its sweeping opinion. See Brief for Georgetown University et al. as *Amici Curiae* 18–29 (Georgetown Brief) (Catholic colleges and universities noting that they rely on the use of race in their holistic admissions to further not just their academic goals, but also their religious

missions); see also ***356** *Harvard II*, 980 F.3d at 187, n. 24 ("[S]chools that consider race are diverse on numerous dimensions, including in terms of religious affiliation, location, size, and courses of study offered"). The Court's carveout only highlights the arbitrariness of its decision and further proves that the Fourteenth Amendment does not categorically prohibit the use of race in college admissions.

The concurring opinions also agree that the Constitution tolerates some racial classifications. Justice GORSUCH agrees with the majority's conclusion that racial classifications are constitutionally permissible if they advance a compelling interest in a narrowly tailored way. *Ante*, at 2220. Justice KAVANAUGH, too, agrees that the Constitution permits the use of race if it survives strict scrutiny. *Ante*, at 2221 - 2222.[32]Justice THOMAS offers an "originalist defense of the colorblind Constitution," but his historical analysis leads to the inevitable conclusion that the Constitution is not, in fact, colorblind. *Ante*, at 2177. Like the majority opinion, Justice THOMAS agrees that race can be used to remedy past discrimination and "to equalize treatment against a concrete baseline of government-imposed inequality." ****2248** *Ante*, at 2187. He also argues that race can be used if it satisfies strict scrutiny more broadly, and he considers compelling interests those that prevent anarchy, curb violence, and segregate prisoners. *Ante*, at 2189 - 2190. Thus, although Justice THOMAS at times suggests that the Constitution only permits "directly remedial" measures that benefit "identified victims of discrimination," *ante*, at 2186, he agrees that the Constitution tolerates a much wider range of race-conscious measures.

***357** In the end, when the Court speaks of a "colorblind" Constitution, it cannot really mean it, for it is faced with a body of law that recognizes that race-conscious measures are permissible under the Equal Protection Clause. Instead, what the Court actually lands on is an understanding of the Constitution that is "colorblind" *sometimes*, when the Court so chooses. Behind those choices lie the Court's own value judgments about what type of interests are sufficiently compelling to justify race-conscious measures.

Overruling decades of precedent, today's newly constituted Court singles out the limited use of race in holistic college admissions. It strikes at the heart of *Bakke*, *Grutter*, and *Fisher* by holding that racial diversity is an "inescapably imponderable" objective that cannot justify race-conscious affirmative action, *ante*, at 2167, even though respondents' objectives simply "mirror the 'compelling interest' this Court has approved" many times in the past. *Fisher II*, 579 U.S. at 382, 136 S.Ct. 2198; see, *e.g.*, *UNC*, 567 F.Supp.3d at 598 ("the [university's admissions policy] repeatedly cites Supreme Court precedent as guideposts").[33] At bottom, without any new factual or legal justification, the Court overrides its longstanding holding that diversity in higher education is of compelling value.

To avoid public accountability for its choice, the Court seeks cover behind a unique measurability requirement of its own creation. None of this Court's precedents, however, requires that a compelling interest meet some threshold level ***358** of precision to be deemed sufficiently compelling. In fact, this Court has recognized as compelling plenty of interests that are equally or more amorphous, including the "intangible" interest in preserving "public confidence in judicial integrity," an interest that "does not easily reduce to precise definition." *Williams-Yulee v. Florida Bar*, 575 U.S. 433, 447, 454, 135 S.Ct. 1656, 191 L.Ed.2d 570 (2015) (ROBERTS, C. J., for the Court); see also, *e.g.*, *Ramirez* v. *Collier*, 595 U. S. ——, ——, 142 S.Ct. 1264, 1281, 212 L.Ed.2d 262 (2022) (ROBERTS, C. J., for the Court) ("[M]aintaining solemnity and decorum in the execution chamber" is a "compelling" interest); *United States v. Alvarez*, 567 U.S. 709, 725, 132 S.Ct. 2537, 183 L.Ed.2d 574 (2012) (plurality opinion) ("[P]rotecting the integrity of the Medal of Honor" is a "compelling interes[t]"); *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 126, 109 S.Ct. 2829, 106 L.Ed.2d 93 (1989) ("[P]rotecting the physical and psychological well-being of minors" is a "compelling interest"). Thus, although the Members of this majority pay lip service to respondents' "commendable" ****2249** and "worthy" racial diversity goals, *ante*, at 2166 – 2167, they make a clear value judgment today: Racial integration in higher education is not sufficiently important to them. "Today, the proclivities of individuals rule." *Dobbs*, 597 U. S., at ——, 142 S.Ct., at 2443 (dissenting opinion).

The majority offers no response to any of this. Instead, it attacks a straw man, arguing that the Court's cases recognize that remedying the effects of "societal discrimination" does not constitute a compelling interest. *Ante*, at 2172 – 2174. Yet as the majority acknowledges, while *Bakke* rejected that interest as insufficiently compelling, it upheld a limited use of race in college admissions to promote the educational benefits that flow from diversity. 438 U.S. at 311–315, 98 S.Ct. 2733. It is that narrower interest, which the Court has reaffirmed numerous times since *Bakke* and as recently as 2016 in *Fisher II*, see *supra*, at 2232 – 2233, that the Court overrules today.

B

The Court's precedents authorizing a limited use of race in college admissions are not just workable—they have been ***359** working. Lower courts have consistently applied them without issue, as exemplified by the opinions below and SFFA's and the Court's inability to identify any split of authority. Today, the Court replaces this settled framework with a set of novel restraints that create troubling equal protection problems and share one common purpose: to make it impossible to use race in a holistic way in college admissions, where it is much needed.

1

The Court argues that Harvard's and UNC's programs must end because they unfairly disadvantage some racial groups. According to the Court, college admissions are a "zero-sum" game and respondents' use of race unfairly "advantages" underrepresented minority students "at the expense of" other students. *Ante*, at 2169.

That is not the role race plays in holistic admissions. Consistent with the Court's precedents, respondents' holistic review policies consider race in a very limited way. Race is only one factor out of many. That type of system allows Harvard and UNC to assemble a diverse class on a multitude of dimensions. Respondents' policies allow them to select students with various unique attributes, including talented athletes, artists, scientists, and musicians. They also allow respondents to assemble a class with diverse viewpoints, including students who have different political ideologies and academic interests, who have struggled with different types of disabilities, who are from various socioeconomic backgrounds, who understand different ways of life in various parts of the country, and—yes—students who self-identify with various racial backgrounds and who can offer different perspectives because of that identity.

That type of multidimensional system benefits all students. In fact, racial groups that are not underrepresented tend to benefit disproportionately from such a system. Harvard's holistic system, for example, provides points to applicants who qualify as "ALDC," meaning "athletes, legacy applicants, ***360** applicants on the Dean's Interest List [primarily relatives of donors], and children of faculty or staff." *Harvard II*, 980 F.3d at 171 (noting also that "SFFA does not challenge the admission of this large group"). ALDC applicants are predominantly white: Around 67.8% are white, 11.4% are Asian American, 6% are Black, and 5.6% are Latino. *Ibid.* By contrast, only 40.3% of non-ALDC applicants are white, 28.3% are Asian American, 11% are ****2250** Black, and 12.6% are Latino. *Ibid.* Although "ALDC applicants make up less than 5% of applicants to Harvard," they constitute "around 30% of the applicants admitted each year." *Ibid.* Similarly, because of achievement gaps that result from entrenched racial inequality in K–12 education, see *supra*, at 2234 – 2237, a heavy emphasis on grades and standardized test scores disproportionately disadvantages underrepresented racial minorities. Stated simply, race is one small piece of a much larger admissions puzzle where most of the pieces disfavor underrepresented racial minorities. That is precisely why underrepresented racial minorities remain *under*represented. The Court's suggestion that an already advantaged racial group is "disadvantaged" because of a limited use of race is a myth.

The majority's true objection appears to be that a limited use of race in college admissions does, in fact, achieve what it is designed to achieve: It helps equalize opportunity and advances respondents' objectives by increasing the number of underrepresented racial minorities on college campuses, particularly Black and Latino students. This is unacceptable, the Court says, because racial groups that are not underrepresented "would be admitted in greater numbers" without these policies. *Ante*, at 2169. Reduced to its simplest terms, the Court's conclusion is that an increase in the representation of racial minorities at institutions of higher learning that were historically reserved for white Americans is an unfair and repugnant outcome that offends the Equal Protection Clause. It provides a license to discriminate ***361** against white Americans, the Court says, which requires the courts and state actors to "pic[k] the right races to benefit." *Ante*, at 2175.

Nothing in the Fourteenth Amendment or its history supports the Court's shocking proposition, which echoes arguments made by opponents of Reconstruction-era laws and this Court's decision in *Brown*. *Supra*, at 2225 – 2234. In a society where

opportunity is dispensed along racial lines, racial equality cannot be achieved without making room for underrepresented groups that for far too long were denied admission through the force of law, including at Harvard and UNC. Quite the opposite: A racially integrated vision of society, in which institutions reflect all sectors of the American public and where "the sons of former slaves and the sons of former slave owners [are] able to sit down together at the table of brotherhood," is precisely what the Equal Protection Clause commands. Martin Luther King "I Have a Dream" Speech (Aug. 28, 1963). It is "essential if the dream of one Nation, indivisible, is to be realized." *Grutter*, 539 U.S. at 332, 123 S.Ct. 2325.[34]

****2251** By singling out race, the Court imposes a special burden on racial minorities for whom race is a crucial component of their identity. Holistic admissions require "truly individualized ***362** consideration" of the whole person. *Id.*, at 334, 123 S.Ct. 2325. Yet, "by foreclosing racial considerations, colorblindness denies those who racially self-identify the full expression of their identity" and treats "racial identity as inferior" among all "other forms of social identity." E. Boddie, The Indignities of Colorblindness, 64 UCLA L. Rev. Discourse, 64, 67 (2016). The Court's approach thus turns the Fourteenth Amendment's equal protection guarantee on its head and creates an equal protection problem of its own.

There is no question that minority students will bear the burden of today's decision. Students of color testified at trial that racial self-identification was an important component of their application because without it they would not be able to present a full version of themselves. For example, Rimel Mwamba, a Black UNC alumna, testified that it was "really important" that UNC see who she is "holistically and how the color of [her] skin and the texture of [her] hair impacted [her] upbringing." 2 App. in No. 21–707, p. 1033. Itzel Vasquez-Rodriguez, who identifies as Mexican-American of Cora descent, testified that her ethnoracial identity is a "core piece" of who she is and has impacted "every experience" she has had, such that she could not explain her "potential contributions to Harvard without any reference" to it. 2 App. in No. 20–1199, at 906, 908. Sally Chen, a Harvard alumna who identifies as Chinese American, explained that being the child of Chinese immigrants was "really fundamental to explaining who" she is. *Id.*, at 968–969. Thang Diep, a Harvard alumnus, testified that his Vietnamese identity was "such a big part" of himself that he needed to discuss it in his application. *Id.*, at 949. And Sarah Cole, a Black Harvard alumna, emphasized that "[t]o try to not see [her] race is to try to not see [her] simply because there is no part of [her] experience, no part of [her] journey, no part of [her] life that has been untouched by [her] race." *Id.*, at 932.

In a single paragraph at the end of its lengthy opinion, the Court suggests that "nothing" in today's opinion prohibits ***363** universities from considering a student's essay that explains "how race affected [that student's] life." *Ante*, at 2176. This supposed recognition that universities can, in some situations, consider race in application essays is nothing but an attempt to put lipstick on a pig. The Court's opinion circumscribes universities' ability to consider race in any form by meticulously gutting respondents' asserted diversity interests. See *supra*, at 2247 – 2249. Yet, because the Court cannot escape the inevitable truth that race matters in students' lives, it announces a false promise to save face and appear attuned to reality. No one is fooled.

Further, the Court's demand that a student's discussion of racial self-identification be tied to individual qualities, such as "courage," "leadership," "unique ability," and "determination," only serves to perpetuate the false narrative that Harvard and UNC currently provide "preferences on the basis of race alone." *Ante*, at 2170, 2175 - 2176; see also *ante*, at 2169, n. 6 (claiming without support that "race alone ... explains the admissions decisions for hundreds if not thousands of applicants"). The Court's precedents already require that universities take race into account holistically, in a limited way, and based on the type of "individualized" and "flexible" assessment that the Court purports to favor. *Grutter*, 539 U.S. at 334, 123 S.Ct. 2325; see Brief for Students and Alumni of Harvard College as *Amici Curiae* 15–17 (Harvard College Brief) (describing how ****2252** the dozens of application files in the record "uniformly show that, in line with Harvard's 'whole-person' admissions philosophy, Harvard's admissions officers engage in a highly nuanced assessment of each applicant's background and qualifications"). After extensive discovery and two lengthy trials, neither SFFA nor the majority can point to a single example of an underrepresented racial minority who was admitted to Harvard or UNC on the basis of "race alone."

In the end, the Court merely imposes its preferred college application format on the Nation, not acting as a court of law ***364** applying precedent but taking on the role of college administrators to decide what is better for society. The Court's course reflects its inability to recognize that racial identity informs some students' viewpoints and experiences in unique ways. The Court goes as far as to claim that *Bakke*'s recognition that Black Americans can offer different perspectives than white people amounts to a "stereotype." *Ante*, at 2169 - 2170.

It is not a stereotype to acknowledge the basic truth that young people's experiences are shaded by a societal structure where race matters. Acknowledging that there is something special about a student of color who graduates valedictorian from a

predominantly white school is not a stereotype. Nor is it a stereotype to acknowledge that race imposes certain burdens on students of color that it does not impose on white students. "For generations, black and brown parents have given their children 'the talk'—instructing them never to run down the street; always keep your hands where they can be seen; do not even think of talking back to a stranger—all out of fear of how an officer with a gun will react to them." *Utah v. Strieff*, 579 U.S. 232, 254, 136 S.Ct. 2056, 195 L.Ed.2d 400 (2016) (SOTOMAYOR, J., dissenting). Those conversations occur regardless of socioeconomic background or any other aspect of a student's self-identification. They occur because of race. As Andrew Brennen, a UNC alumnus, testified, "running down the neighborhood ... people don't see [him] as someone that is relatively affluent; they see [him] as a black man." 2 App. in No. 21–707, at 951–952.

The absence of racial diversity, by contrast, actually contributes to stereotyping. "[D]iminishing the force of such stereotypes is both a crucial part of [respondents'] mission, and one that [they] cannot accomplish with only token numbers of minority students." *Grutter*, 539 U.S. at 333, 123 S.Ct. 2325. When there is an increase in underrepresented minority students on campus, "racial stereotypes lose their force" because diversity allows students to "learn there is no 'minority ***365** viewpoint' but rather a variety of viewpoints among minority students." *Id.*, at 319–320, 123 S.Ct. 2325. By preventing respondents from achieving their diversity objectives, it is the Court's opinion that facilitates stereotyping on American college campuses.

To be clear, today's decision leaves intact holistic college admissions and recruitment efforts that seek to enroll diverse classes without using racial classifications. Universities should continue to use those tools as best they can to recruit and admit students from different backgrounds based on all the other factors the Court's opinion does not, and cannot, touch. Colleges and universities can continue to consider socioeconomic diversity and to recruit and enroll students who are first-generation college applicants or who speak multiple languages, for example. Those factors are not "interchangeable" with race. *UNC*, 567 F.Supp.3d at 643; see, *e.g.*, 2 App. in No. 21–707, at 975–976 (Laura Ornelas, a UNC alumna, testifying that her Latina identity, socioeconomic status, ****2253** and first-generation college status are all important but different "parts to getting a full picture" of who she is and how she "see[s] the world"). At SFFA's own urging, those efforts remain constitutionally permissible. See Brief for Petitioner 81–86 (emphasizing "race-neutral" alternatives that Harvard and UNC should implement, such as those that focus on socioeconomic and geographic diversity, percentage plans, plans that increase community college transfers, and plans that develop partnerships with disadvantaged high schools); see also *ante*, at 2203 - 2204, 2204, 2205 - 2206 (THOMAS, J., concurring) (arguing universities can consider "[r]ace-neutral policies" similar to those adopted in States such as California and Michigan, and that universities can consider "status as a first-generation college applicant," "financial means," and "generational inheritance or otherwise"); *ante*, at 2225 (KAVANAUGH, J., concurring) (citing SFFA's briefs and concluding that universities can use "race-neutral" ***366** means); *ante*, at 2215, n. 4 (GORSUCH, J., concurring) ("recount[ing] what SFFA has argued every step of the way" as to "race-neutral tools").

The Court today also does not adopt SFFA's suggestion that college admissions should be a function of academic metrics alone. Using class rank or standardized test scores as the only admissions criteria would severely undermine multidimensional diversity in higher education. Such a system "would exclude the star athlete or musician whose grades suffered because of daily practices and training. It would exclude a talented young biologist who struggled to maintain above-average grades in humanities classes. And it would exclude a student whose freshman-year grades were poor because of a family crisis but who got herself back on track in her last three years of school, only to find herself just outside of the top decile of her class." *Fisher II*, 579 U.S. at 386, 136 S.Ct. 2198. A myopic focus on academic ratings "does not lead to a diverse student body." *Ibid.*[35]

2

As noted above, this Court suggests that the use of race in college admissions is unworkable because respondents' objectives are not sufficiently "measurable," "focused," "concrete," and "coherent." *Ante*, at 2166 - 2167, 2168, 2175 - 2176. How much more precision is required or how universities are supposed to meet the Court's measurability requirement, the Court's opinion does not say. That is exactly the point. The Court is not interested in crafting a workable framework that promotes racial diversity on college campuses. Instead, it announces a requirement designed to ensure all race-conscious ***367** plans

fail. Any increased level of precision runs the risk of violating the Court's admonition that colleges and universities operate their race-conscious admissions policies with no " 'specified percentage[s]' " and no "specific number[s] firmly in mind." *Grutter*, 539 U.S. at 324, 335, 123 S.Ct. 2325. Thus, the majority's holding puts schools in an untenable position. It creates a legal framework where race-conscious plans *must* be measured with precision but also *must not* be measured with precision. That holding is not meant to infuse clarity into the strict scrutiny framework; it is designed to render ****2254** strict scrutiny " 'fatal in fact.' " *Id.*, at 326, 123 S.Ct. 2325 (quoting *Adarand Constructors, Inc.*, 515 U.S. at 237, 115 S.Ct. 2097). Indeed, the Court gives the game away when it holds that, to the extent respondents are actually measuring their diversity objectives with any level of specificity (for example, with a "focus on numbers" or specific "numerical commitment"), their plans are unconstitutional. *Ante*, at 2171; see also *ante*, at 2191 (THOMAS, J., concurring) ("I highly doubt any [university] will be able to" show a "measurable state interest").

3

The Court also holds that Harvard's and UNC's race-conscious programs are unconstitutional because they rely on racial categories that are "imprecise," "opaque," and "arbitrary." *Ante*, at 2167 - 2168. To start, the racial categories that the Court finds troubling resemble those used across the Federal Government for data collection, compliance reporting, and program administration purposes, including, for example, by the U. S. Census Bureau. See, *e.g.*, 62 Fed. Reg. 58786–58790 (1997). Surely, not all " 'federal grant-in-aid benefits, drafting of legislation, urban and regional planning, business planning, and academic and social studies' " that flow from census data collection, *Department of Commerce* v. *New York*, 588 U. S. ——, ——, 139 S.Ct. 2551, 2561, 204 L.Ed.2d 978 (2019), are constitutionally suspect.

The majority presumes that it knows better and appoints itself as an expert on data collection methods, calling for a ***368** higher level of granularity to fix a supposed problem of overinclusiveness and underinclusiveness. Yet it does not identify a single instance where respondents' methodology has prevented any student from reporting their race with the level of detail they preferred. The record shows that it is up to students to choose whether to identify as one, multiple, or none of these categories. See *Harvard I*, 397 F.Supp.3d at 137; *UNC*, 567 F.Supp.3d at 596. To the extent students need to convey additional information, students can select subcategories or provide more detail in their personal statements or essays. See *Harvard I*, 397 F.Supp.3d at 137. Students often do so. See, *e.g.*, 2 App. in No. 20–1199, at 906–907 (student respondent discussing her Latina identity on her application); *id.*, at 949 (student respondent testifying he "wrote about [his] Vietnamese identity on [his] application"). Notwithstanding this Court's confusion about racial self-identification, neither students nor universities are confused. There is no evidence that the racial categories that respondents use are unworkable.[36]

4

Cherry-picking language from *Grutter*, the Court also holds that Harvard's and UNC's race-conscious programs are unconstitutional because they do not have a specific expiration date. *Ante*, at 2170 – 2173. This new durational requirement is also not grounded in law, facts, or common ****2255** sense. ***369** *Grutter* simply announced a general "expect[ation]" that "the use of racial preferences [would] no longer be necessary" in the future. 539 U.S. at 343, 123 S.Ct. 2325. As even SFFA acknowledges, those remarks were nothing but aspirational statements by the *Grutter* Court. Tr. of Oral Arg. in No. 21707, p. 56.

Yet this Court suggests that everyone, including the Court itself, has been misreading *Grutter* for 20 years. *Grutter*, according to the majority, requires that universities identify a specific "end point" for the use of race. *Ante*, at 2172. Justice KAVANAUGH, for his part, suggests that *Grutter* itself automatically expires in 25 years, after either "the college class of

2028" or "the college class of 2032." *Ante*, at 2224, n. 1. A faithful reading of this Court's precedents reveals that *Grutter* held nothing of the sort.

True, *Grutter* referred to "25 years," but that arbitrary number simply reflected the time that had elapsed since the Court "first approved the use of race" in college admissions in *Bakke*. *Grutter*, 539 U.S. at 343, 123 S.Ct. 2325. It is also true that *Grutter* remarked that "race-conscious admissions policies must be limited in time," but it did not do so in a vaccum, as the Court suggests. *Id*., at 342, 123 S.Ct. 2325. Rather than impose a fixed expiration date, the Court tasked universities with the responsibility of periodically assessing whether their race-conscious programs "are still necessary." *Ibid.* *Grutter* offered as examples sunset provisions, periodic reviews, and experimenting with "race-neutral alternatives as they develop." *Ibid.* That is precisely how this Court has previously interpreted *Grutter*'s command. See *Fisher II*, 579 U.S. at 388, 136 S.Ct. 2198 ("It is the University's ongoing obligation to engage in constant deliberation and continued reflection regarding its admissions policies").

Grutter's requirement that universities engage in periodic reviews so the use of race can end "as soon as practicable" is well grounded in the need to ensure that race is "employed no more broadly than the interest demands." ***370** 539 U.S. at 343, 123 S.Ct. 2325. That is, it is grounded in strict scrutiny. By contrast, the Court's holding is based on the fiction that racial inequality has a predictable cutoff date. Equality is an ongoing project in a society where racial inequality persists. See *supra*, at 2234 – 2239. A temporal requirement that rests on the fantasy that racial inequality will end at a predictable hour is illogical and unworkable. There is a sound reason why this Court's precedents have never imposed the majority's strict deadline: Institutions cannot predict the future. Speculating about a day when consideration of race will become unnecessary is arbitrary at best and frivolous at worst. There is no constitutional duty to engage in that type of shallow guesswork.[37]

Harvard and UNC engage in the ongoing review that the Court's precedents demand. They "use [their] data to scrutinize ****2256** the fairness of [their] admissions program[s]; to assess whether changing demographics have undermined the need for a race-conscious policy; and to identify the effects, both positive and negative, of the affirmative-action measures [they] dee[m] necessary." *Fisher II*, 579 U.S. at 388, 136 S.Ct. 2198. The Court holds, however, that respondents' attention to numbers amounts to unconstitutional racial balancing. *Ante*, at 2170 – 2172. But " '[s]ome attention to numbers' " is both necessary and permissible. *Grutter*, 539 U.S. at 336, 123 S.Ct. 2325 (quoting ***371** *Bakke*, 438 U.S. at 323, 98 S.Ct. 2733). Universities cannot blindly operate their limited race-conscious programs without regard for any quantitative information. "Increasing minority enrollment [is] instrumental to th[e] educational benefits" that respondents seek to achieve, *Fisher II*, 579 U.S. at 381, 136 S.Ct. 2198, and statistics, data, and numbers "have some value as a gauge of [respondents'] ability to enroll students who can offer underrepresented perspectives." *Id.*, at 383–384, 136 S.Ct. 2198. By removing universities' ability to assess the success of their programs, the Court obstructs these institutions' ability to meet their diversity goals.

5

Justice THOMAS, for his part, offers a multitude of arguments for why race-conscious college admissions policies supposedly "burden" racial minorities. *Ante*, at 2197. None of them has any merit.

He first renews his argument that the use of race in holistic admissions leads to the "inevitable" "underperformance" by Black and Latino students at elite universities "because they are less academically prepared than the white and Asian students with whom they must compete." *Fisher I*, 570 U.S. at 332, 133 S.Ct. 2411 (concurring opinion). Justice THOMAS speaks only for himself. The Court previously declined to adopt this so-called "mismatch" hypothesis for good reason: It was debunked long ago. The decades-old "studies" advanced by the handful of authors upon whom Justice THOMAS relies, *ante*, at 2197 – 2198, have "major methodological flaws," are based on unreliable data, and do not "meet the basic tenets of rigorous social science research." Brief for Empirical Scholars as *Amici Curiae* 3, 9–25. By contrast, "[m]any social scientists have studied the impact of elite educational institutions on student outcomes, and have found, among other things, that attending a more selective school is associated with higher graduation rates and higher earnings for [underrepresented minority] students—conclusions directly contrary to mismatch." *Id.*, at 7–9 (collecting studies). ***372** This extensive body of

research is supported by the most obvious data point available to this institution today: The three Justices of color on this Court graduated from elite universities and law schools with race-conscious admissions programs, and achieved successful legal careers, despite having different educational backgrounds than their peers. A discredited hypothesis that the Court previously rejected is no reason to overrule precedent.

Justice THOMAS claims that the weight of this evidence is overcome by a single more recent article published in 2016. *Ante*, at 2198, n. 8. That article, however, explains that studies supporting the mismatch hypothesis "yield misleading conclusions," "overstate the amount of mismatch," "preclude one from drawing any concrete conclusions," and rely on methodologically flawed assumptions that "lea[d] to an upwardly-biased estimate of mismatch." P. Arcidiacono & M. Lovenheim, Affirmative Action and the Quality-Fit Trade-off, 54 J. Econ. Lit. 3, 17, 20 (2016); see *id.*, at 6 ("economists should be very ****2257** skeptical of the mismatch hypothesis"). Notably, this refutation of the mismatch theory was coauthored by one of SFFA's experts, as Justice THOMAS seems to recognize.

Citing nothing but his own long-held belief, Justice THOMAS also equates affirmative action in higher education with segregation, arguing that "racial preferences in college admissions 'stamp [Black and Latino students] with a badge of inferiority.' " *Ante*, at 2198 (quoting *Adarand*, 515 U.S. at 241, 115 S.Ct. 2097 (THOMAS, J., concurring in part and concurring in judgment)). Studies disprove this sentiment, which echoes "tropes of stigma" that "were employed to oppose Reconstruction policies." A. Onwuachi-Willig, E. Houh, & M. Campbell, Cracking the Egg: Which Came First—Stigma or Affirmative Action? 96 Cal. L. Rev. 1299, 1323 (2008); see, *e.g.*, *id.*, at 1343–1344 (study of seven law schools showing that stigma results from "racial stereotypes that have ***373** attached historically to different groups, regardless of affirmative action's existence"). Indeed, equating state-sponsored segregation with race-conscious admissions policies that promote racial integration trivializes the harms of segregation and offends *Brown*'s transformative legacy. School segregation "has a detrimental effect" on Black students by "denoting the inferiority" of "their status in the community" and by " 'depriv[ing] them of some of the benefits they would receive in a racial[ly] integrated school system.' " 347 U.S. at 494, 74 S.Ct. 686. In sharp contrast, race-conscious college admissions ensure that higher education is "visibly open to" and "inclusive of talented and qualified individuals of every race and ethnicity." *Grutter*, 539 U.S. at 332, 123 S.Ct. 2325. These two uses of race are not created equal. They are not "equally objectionable." *Id.*, at 327, 123 S.Ct. 2325.

Relatedly, Justice THOMAS suggests that race-conscious college admissions policies harm racial minorities by increasing affinity-based activities on college campuses. *Ante*, at 2201. Not only is there no evidence of a causal connection between the use of race in college admissions and the supposed rise of those activities, but Justice THOMAS points to no evidence that affinity groups cause any harm. Affinity-based activities actually help racial minorities improve their visibility on college campuses and "decreas[e] racial stigma and vulnerability to stereotypes" caused by "conditions of racial isolation" and "tokenization." U. Jayakumar, Why Are All Black Students *Still* Sitting Together in the Proverbial College Cafeteria?, Higher Education Research Institute at UCLA (Oct. 2015); see also Brief for Respondent-Students in No. 21707, p. 42 (collecting student testimony demonstrating that "affinity groups beget important academic and social benefits" for racial minorities); 4 App. in No. 20–1199, at 1591 (Harvard Working Group on Diversity and Inclusion Report) (noting that concerns "that culturally specific spaces or affinity-themed housing will isolate" student minorities are ***374** misguided because those spaces allow students "to come together ... to deal with intellectual, emotional, and social challenges").

Citing no evidence, Justice THOMAS also suggests that race-conscious admissions programs discriminate against Asian American students. *Ante*, at 2199 – 2200. It is true that SFFA "allege[d]" that Harvard discriminates against Asian American students. *Ante*, at 2199. Specifically, SFFA argued that Harvard discriminates against Asian American applicants vis-à-vis white applicants through the use of the personal rating, an allegedly "highly subjective" component of the admissions process that is "susceptible to stereotyping and bias." *Harvard II*, 980 F.3d at 196; see Brief for ****2258** Professors of Economics as *Amici Curiae* 24. It is also true, however, that there was a lengthy trial to test those allegations, which SFFA lost. Justice THOMAS points to no legal or factual error below, precisely because there is none.

To begin, this part of SFFA's discrimination claim does not even fall under the strict scrutiny framework in *Grutter* and its progeny, which concerns the use of racial classifications. The personal rating is a facially race-*neutral* component of Harvard's admissions policy.[38] Therefore, even assuming for the sake of argument that Harvard engages in racial discrimination through the personal rating, there is no connection between that rating and the remedy that SFFA sought and that the majority grants today: ending the limited use of race in the entire admissions process. In any event, after assessing the credibility of fact witnesses and considering extensive documentary evidence and expert testimony, the courts below found "no discrimination against Asian Americans." *Harvard II*, 980 F.3d at 195, n. 34, 202; see *id.*, at 195–204.

***375** There is no question that the Asian American community continues to struggle against potent and dehumanizing stereotypes in our society. It is precisely because racial discrimination persists in our society, however, that the use of race in college admissions to achieve racially diverse classes is critical to improving cross-racial understanding and breaking down racial stereotypes. See *supra*, at 2233 - 2234. Indeed, the record shows that some Asian American applicants are actually "advantaged by Harvard's use of race," *Harvard II*, 980 F.3d at 191, and "eliminating consideration of race would significantly disadvantage at least some Asian American applicants," *Harvard I*, 397 F.Supp.3d at 194. Race-conscious holistic admissions that contextualize the racial identity of each individual allow Asian American applicants "who would be less likely to be admitted without a comprehensive understanding of their background" to explain "the value of their unique background, heritage, and perspective." *Id.*, at 195. Because the Asian American community is not a monolith, race-conscious holistic admissions allow colleges and universities to "consider the vast differences within [that] community." AALDEF Brief 4–14. Harvard's application files show that race-conscious holistic admissions allow Harvard to "valu[e] the diversity of Asian American applicants' experiences." Harvard College Brief 23.

Moreover, the admission rates of Asian Americans at institutions with race-conscious admissions policies, including at Harvard, have "been steadily increasing for decades." *Harvard II*, 980 F.3d at 198.[39] By contrast, Asian American enrollment declined at elite universities that are prohibited by state law from considering race. See AALDEF Brief 27; Brief for 25 Diverse, California-Focused Bar Associations et al. as *Amici Curiae* 19–20, 23. At bottom, race-conscious ***376** admissions benefit all students, including racial minorities. That includes the Asian American community.

Finally, Justice THOMAS belies reality by suggesting that "experts and elites" ****2259** with views similar to those "that motivated *Dred Scott* and *Plessy*" are the ones who support race conscious admissions. *Ante*, at 2197. The plethora of young students of color who testified in favor of race-consciousness proves otherwise. See *supra*, at 2250 – 2251; see also *infra*, at 2260 – 2262 (discussing numerous *amici* from many sectors of society supporting respondents' policies). Not a single student—let alone any racial minority—affected by the Court's decision testified in favor of SFFA in these cases.

C

In its "radical claim to power," the Court does not even acknowledge the important reliance interests that this Court's precedents have generated. *Dobbs*, 597 U. S., at ——, 142 S.Ct., at 2346 (dissenting opinion). Significant rights and expectations will be affected by today's decision nonetheless. Those interests supply "added force" in favor of *stare decisis*. *Hilton v. South Carolina Public Railways Comm'n*, 502 U.S. 197, 202, 112 S.Ct. 560, 116 L.Ed.2d 560 (1991).

Students of all backgrounds have formed settled expectations that universities with race-conscious policies "will provide diverse, cross-cultural experiences that will better prepare them to excel in our increasingly diverse world." Brief for Respondent-Students in No. 21–707, at 45; see Harvard College Brief 6–11 (collecting student testimony).

Respondents and other colleges and universities with race-conscious admissions programs similarly have concrete reliance interests because they have spent significant resources in an effort to comply with this Court's precedents. "Universities have designed courses that draw on the benefits of a diverse student body," "hired faculty whose research is enriched by the diversity of the student body," and "promoted their learning environments to prospective students ***377** who have enrolled based on the understanding that they could obtain the benefits of diversity of all kinds." Brief for Respondent in No. 20–1199, at 40–41 (internal quotation marks omitted). Universities also have "expended vast financial and other resources" in "training thousands of application readers on how to faithfully apply this Court's guardrails on the use of race in admissions." Brief for University Respondents in No. 21707, p. 44. Yet today's decision abruptly forces them "to fundamentally alter their admissions practices." *Id.*, at 45; see also Brief for Massachusetts Institute of Technology et al. as *Amici Curiae* 25–26; Brief for Amherst College et al. as *Amici Curiae* 23–25 (Amherst Brief). As to Title VI in particular, colleges and universities have relied on *Grutter* for decades in accepting federal funds. See Brief for United States as *Amicus Curiae* in No. 20–1199, p. 25 (United States Brief); Georgetown Brief 16.

The Court's failure to weigh these reliance interests "is a stunning indictment of its decision." *Dobbs*, 597 U. S., at ——, 142 S.Ct., at 2347 (dissenting opinion).

IV

The use of race in college admissions has had profound consequences by increasing the enrollment of underrepresented minorities on college campuses. This Court presupposes that segregation is a sin of the past and that race-conscious college admissions have played no role in the progress society has made. The fact that affirmative action in higher education "has worked and is continuing to work" is no reason to abandon the practice today. *Shelby County v. Holder*, 570 U.S. 529, 590, 133 S.Ct. 2612, 186 L.Ed.2d 651 (2013) (Ginsburg, J., dissenting) ("[It] is like throwing away your umbrella in a rainstorm because you are not getting wet").

****2260** Experience teaches that the consequences of today's decision will be destructive. The two lengthy trials below simply confirmed what we already knew: Superficial colorblindness in a society that systematically segregates opportunity will cause a sharp decline in the rates at which underrepresented ***378** minority students enroll in our Nation's colleges and universities, turning the clock back and undoing the slow yet significant progress already achieved. See *Schuette*, 572 U.S. at 384–390, 134 S.Ct. 1623 (SOTOMAYOR, J., dissenting) (collecting statistics from States that have banned the use of race in college admissions); see also Amherst Brief 13 (noting that eliminating the use of race in college admissions will take Black student enrollment at elite universities back to levels this country saw in the early 1960s).

After California amended its State Constitution to prohibit race-conscious college admissions in 1996, for example, "freshmen enrollees from underrepresented minority groups dropped precipitously" in California public universities. Brief for President and Chancellors of the University of California as *Amici Curiae* 4, 9, 11–13. The decline was particularly devastating at California's most selective campuses, where the rates of admission of underrepresented groups "dropped by 50% or more." *Id.*, at 4, 12. At the University of California, Berkeley, a top public university not just in California but also nationally, the percentage of Black students in the freshman class dropped from 6.32% in 1995 to 3.37% in 1998. *Id.*, at 12–13. Latino representation similarly dropped from 15.57% to 7.28% during that period at Berkeley, even though Latinos represented 31% of California public high school graduates. *Id.*, at 13. To this day, the student population at California universities still "reflect[s] a persistent inability to increase opportunities" for all racial groups. *Id.*, at 23. For example, as of 2019, the proportion of Black freshmen at Berkeley was 2.76%, well below the pre-constitutional amendment level in 1996, which was 6.32%. *Ibid*. Latinos composed about 15% of freshmen students at Berkeley in 2019, despite making up 52% of all California public high school graduates. *Id.*, at 24; see also Brief for University of Michigan as *Amicus Curiae* 21–24 (noting similar trends at the University of Michigan from 2006, the last admissions cycle before Michigan's ban on race-conscious ***379** admissions took effect, through present); *id.*, at 24–25 (explaining that the university's "experience is largely consistent with other schools that do not consider race as a factor in admissions," including, for example, the University of Oklahoma's most prestigious campus).

The costly result of today's decision harms not just respondents and students but also our institutions and democratic society more broadly. Dozens of *amici* from nearly every sector of society agree that the absence of race-conscious college admissions will decrease the pipeline of racially diverse college graduates to crucial professions. Those *amici* include the United States, which emphasizes the need for diversity in the Nation's military, see United States Brief 12–18, and in the federal workforce more generally, *id.*, at 19–20 (discussing various federal agencies, including the Federal Bureau of Investigation and the Office of the Director of National Intelligence). The United States explains that "the Nation's military strength and readiness depend on a pipeline of officers who are both highly qualified and racially diverse—and who have been educated in diverse environments that prepare them to lead increasingly diverse forces." *Id.*, at 12. That is true not just at the military service academies but "at civilian universities, including Harvard, that host Reserve Officers' Training ****2261** Corps (ROTC) programs and educate students who go on to become officers." *Ibid.* Top former military leaders agree. See Brief for Adm. Charles S. Abbot et al. as *Amici Curiae* 3 (noting that in *amici*'s "professional judgment, the status

quo—which permits service academies and civilian universities to consider racial diversity as one factor among many in their admissions practices—is essential to the continued vitality of the U. S. military").

Indeed, history teaches that racial diversity is a national security imperative. During the Vietnam War, for example, lack of racial diversity "threatened the integrity and performance of the Nation's military" because it fueled "perceptions ***380** of racial/ethnic minorities serving as 'cannon fodder' for white military leaders." Military Leadership Diversity Comm'n, From Representation to Inclusion: Diversity Leadership for the 21st-Century Military xvi, 15 (2011); see also, *e.g.*, R. Stillman, Racial Unrest in the Military: The Challenge and the Response, 34 Pub. Admin. Rev. 221, 221–222 (1974) (discussing other examples of racial unrest). Based on "lessons from decades of battlefield experience," it has been the "longstanding military judgment" across administrations that racial diversity "is essential to achieving a mission-ready" military and to ensuring the Nation's "ability to compete, deter, and win in today's increasingly complex global security environment." United States Brief 13 (internal quotation marks omitted). The majority recognizes the compelling need for diversity in the military and the national security implications at stake, see *ante*, at 2166, n. 4, but it ends race-conscious college admissions at civilian universities implicating those interests anyway.

Amici also tell the Court that race-conscious college admissions are critical for providing equitable and effective public services. State and local governments require public servants educated in diverse environments who can "identify, understand, and respond to perspectives" in "our increasingly diverse communities." Brief for Southern Governors as *Amici Curiae* 5–8 (Southern Governors Brief). Likewise, increasing the number of students from underrepresented backgrounds who join "the ranks of medical professionals" improves "healthcare access and health outcomes in medically underserved communities." Brief for Massachusetts et al. as *Amici Curiae* 10; see Brief for Association of American Medical Colleges et al. as *Amici Curiae* 5 (noting also that *all* physicians become better practitioners when they learn in a racially diverse environment). So too, greater diversity within the teacher workforce improves student academic achievement in primary public schools. Brief ***381** for Massachusetts et al. as *Amici Curiae* 15–17; see Brief for American Federation of Teachers as *Amicus Curiae* 8 ("[T]here are few professions with broader social impact than teaching"). A diverse pipeline of college graduates also ensures a diverse legal profession, which demonstrates that "the justice system serves the public in a fair and inclusive manner." Brief for American Bar Association as *Amicus Curiae* 18; see also Brief for Law Firm Antiracism Alliance as *Amicus Curiae* 1, 6 (more than 300 law firms in all 50 States supporting race-conscious college admissions in light of the "influence and power" that lawyers wield "in the American system of government").

Examples of other industries and professions that benefit from race-conscious college admissions abound. American businesses emphasize that a diverse workforce improves business performance, better serves a diverse consumer marketplace, and strengthens the overall American economy. Brief for Major American Business Enterprises as *Amici Curiae* 5–27. A ****2262** diverse pipeline of college graduates also improves research by reducing bias and increasing group collaboration. Brief for Individual Scientists as *Amici Curiae* 13–14. It creates a more equitable and inclusive media industry that communicates diverse viewpoints and perspectives. Brief for Multicultural Media, Telecom and Internet Council, Inc., et al. as *Amici Curiae* 6. It also drives innovation in an increasingly global science and technology industry. Brief for Applied Materials, Inc., et al. as *Amici Curiae* 11–20.

Today's decision further entrenches racial inequality by making these pipelines to leadership roles less diverse. A college degree, particularly from an elite institution, carries with it the benefit of powerful networks and the opportunity for socioeconomic mobility. Admission to college is therefore often the entry ticket to top jobs in workplaces where important decisions are made. The overwhelming majority ***382** of Members of Congress have a college degree.[40] So do most business leaders.[41] Indeed, many state and local leaders in North Carolina attended college in the UNC system. See Southern Governors Brief 8. More than half of judges on the North Carolina Supreme Court and Court of Appeals graduated from the UNC system, for example, and nearly a third of the Governor's cabinet attended UNC. *Ibid.* A less diverse pipeline to these top jobs accumulates wealth and power unequally across racial lines, exacerbating racial disparities in a society that already dispenses prestige and privilege based on race.

The Court ignores the dangerous consequences of an America where its leadership does not reflect the diversity of the People. A system of government that visibly lacks a path to leadership open to every race cannot withstand scrutiny "in the eyes of the citizenry." *Grutter*, 539 U.S. at 332, 123 S.Ct. 2325. "[G]ross disparity in representation" leads the public to wonder whether they can ever belong in our Nation's institutions, including this one, and whether those institutions work for them. Tr. of Oral Arg. in No. 21–707, p. 171 ("The Court is going to hear from 27 advocates in this sitting of the oral argument calendar, and two are women, even though women today are 50 percent or more of law school graduates. And I

think it would be reasonable for a woman to look at that and wonder, is that a path that's open to me, to be a Supreme Court advocate?" (remarks of Solicitor General Elizabeth Prelogar)).[42]

***383** By ending race-conscious college admissions, this Court closes the door of opportunity that the Court's precedents helped open to young students of every race. It creates a leadership pipeline that is less diverse than our increasingly diverse society, ****2263** reserving "positions of influence, affluence, and prestige in America" for a predominantly white pool of college graduates. *Bakke*, 438 U.S. at 401, 98 S.Ct. 2733 (opinion of Marshall, J.). At its core, today's decision exacerbates segregation and diminishes the inclusivity of our Nation's institutions in service of superficial neutrality that promotes indifference to inequality and ignores the reality of race.

* * *

True equality of educational opportunity in racially diverse schools is an essential component of the fabric of our democratic society. It is an interest of the highest order and a foundational requirement for the promotion of equal protection under the law. *Brown* recognized that passive race neutrality was inadequate to achieve the constitutional guarantee of racial equality in a Nation where the effects of segregation persist. In a society where race continues to matter, there is no constitutional requirement that institutions attempting to remedy their legacies of racial exclusion must operate with a blindfold.

Today, this Court overrules decades of precedent and imposes a superficial rule of race blindness on the Nation. The devastating impact of this decision cannot be overstated. The majority's vision of race neutrality will entrench racial ***384** segregation in higher education because racial inequality will persist so long as it is ignored.

Notwithstanding this Court's actions, however, society's progress toward equality cannot be permanently halted. Diversity is now a fundamental American value, housed in our varied and multicultural American community that only continues to grow. The pursuit of racial diversity will go on. Although the Court has stripped out almost all uses of race in college admissions, universities can and should continue to use all available tools to meet society's needs for diversity in education. Despite the Court's unjustified exercise of power, the opinion today will serve only to highlight the Court's own impotence in the face of an America whose cries for equality resound. As has been the case before in the history of American democracy, "the arc of the moral universe" will bend toward racial justice despite the Court's efforts today to impede its progress. Martin Luther King "Our God is Marching On!" Speech (Mar. 25, 1965).

Justice JACKSON, with whom Justice SOTOMAYOR and Justice KAGAN join, dissenting.[*]

Gulf-sized race-based gaps exist with respect to the health, wealth, and well-being of American citizens. They were created in the distant past, but have indisputably been passed down to the present day through the generations. Every moment these gaps persist is a moment in which this great country falls short of actualizing one of its foundational principles—the "self-evident" truth that all of us are created equal. Yet, today, the Court determines that holistic admissions programs like the one that the University of North Carolina (UNC) has operated, consistent with *Grutter v. Bollinger*, 539 U.S. 306, 123 S.Ct. 2325, 156 L.Ed.2d 304 (2003), are a problem with respect to achievement of that aspiration, rather than a viable solution ***385** (as has long been evident to historians, sociologists, and policymakers alike).

Justice SOTOMAYOR has persuasively established that nothing in the Constitution or Title VI prohibits institutions from taking race into account to ensure the racial diversity of admits in higher education. I join her opinion without qualification. ****2264** I write separately to expound upon the universal benefits of considering race in this context, in response to a suggestion that has permeated this legal action from the start. Students for Fair Admissions (SFFA) has maintained, both subtly and overtly, that it is *unfair* for a college's admissions process to consider race as one factor in a holistic review of its applicants. See, *e.g.*, Tr. of Oral Arg. 19.

This contention blinks both history and reality in ways too numerous to count. But the response is simple: Our country has never been colorblind. Given the lengthy history of state-sponsored race-based preferences in America, to say that anyone is now victimized if a college considers whether that legacy of discrimination has unequally advantaged its applicants fails to acknowledge the well-documented "intergenerational transmission of inequality" that still plagues our citizenry.[1]

It is *that* inequality that admissions programs such as UNC's help to address, to the benefit of us all. Because the majority's judgment stunts that progress without any basis in law, history, logic, or justice, I dissent.

I

A

Imagine two college applicants from North Carolina, John and James. Both trace their family's North Carolina roots to the year of UNC's founding in 1789. Both love their ***386** State and want great things for its people. Both want to honor their family's legacy by attending the State's flagship educational institution. John, however, would be the seventh generation to graduate from UNC. He is White. James would be the first; he is Black. Does the race of these applicants properly play a role in UNC's holistic merits-based admissions process?

To answer that question, "a page of history is worth a volume of logic." *New York Trust Co. v. Eisner*, 256 U.S. 345, 349, 41 S.Ct. 506, 65 L.Ed. 963 (1921). Many chapters of America's history appear necessary, given the opinions that my colleagues in the majority have issued in this case.

Justice Thurgood Marshall recounted the genesis:

> "Three hundred and fifty years ago, the Negro was dragged to this country in chains to be sold into slavery. Uprooted from his homeland and thrust into bondage for forced labor, the slave was deprived of all legal rights. It was unlawful to teach him to read; he could be sold away from his family and friends at the whim of his master; and killing or maiming him was not a crime. The system of slavery brutalized and dehumanized both master and slave." *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 387–388, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978).

Slavery should have been (and was to many) self-evidently dissonant with our avowed founding principles. When the time came to resolve that dissonance, eleven States chose slavery. With the Union's survival at stake, Frederick Douglass noted, Black Americans in the South "were almost the only reliable friends the nation had," and "but for their help ... the Rebels might have succeeded in breaking up the Union."[2] After the war, Senator John Sherman defended the proposed Fourteenth ****2265** Amendment in a manner that encapsulated ***387** our Reconstruction Framers' highest sentiments: "We are bound by every obligation, by [Black Americans'] service on the battlefield, by their heroes who are buried in our cause, by their patriotism in the hours that tried our country, we are bound to protect them and all their natural rights."[3]

To uphold that promise, the Framers repudiated this Court's holding in *Dred Scott v. Sandford*, 19 How. 393, 60 U.S. 393, 15 L.Ed. 691 (1857), by crafting Reconstruction Amendments (and associated legislation) that transformed our Constitution and society.[4] Even after this Second Founding—when the need to right historical wrongs should have been clear beyond cavil—opponents insisted that vindicating equality in this manner slighted White Americans. So, when the Reconstruction Congress passed a bill to secure all citizens "the same [civil] right[s]" as "enjoyed by white citizens," 14 Stat. 27, President Andrew Johnson vetoed it because it "discriminat[ed] ... in favor of the negro."[5]

That attitude, and the Nation's associated retreat from Reconstruction, made prophesy out of Congressman Thaddeus Stevens's fear that "those States will all ... keep up this discrimination, and crush to death the hated freedmen."[6] And this Court facilitated that retrenchment.[7] Not just in *Plessy v. Ferguson*, 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256 (1896), but "in almost every instance, the Court chose to restrict the scope of the second founding."[8] Thus, thirteen years pre-*Plessy*, in the *Civil Rights Cases*, 109 U.S. 3, 3 S.Ct. 18, 27 L.Ed. 835 (1883), our predecessors on this ***388** Court invalidated Congress's

attempt to enforce the Reconstruction Amendments via the Civil Rights Act of 1875, lecturing that "there must be some stage ... when [Black Americans] tak[e] the rank of a mere citizen, and ceas[e] to be the special favorite of the laws." *Id.*, at 25, 3 S.Ct.18. But Justice Harlan knew better. He responded: "What the nation, through Congress, has sought to accomplish in reference to [Black people] is—what had already been done in every State of the Union for the white race—to secure and protect rights belonging to them as freemen and citizens; nothing more." *Id.*, at 61, 3 S.Ct. 18 (dissenting opinion).

Justice Harlan dissented alone. And the betrayal that this Court enabled had concrete effects. Enslaved Black people had built great wealth, but only for enslavers.[9] No surprise, then, that freedmen leapt at the chance to control their own labor and to build their own financial security.[10] Still, White southerners often "simply refused to sell land to blacks," even when not ****2266** selling was economically foolish.[11] To bolster private exclusion, States sometimes passed laws forbidding such sales.[12] The inability to build wealth through that most American of means forced Black people into sharecropping roles, where they somehow always tended to find themselves in debt to the landowner when the growing season closed, with no hope of recourse against the ever-present cooking of the books.[13]

Sharecropping is but one example of race-linked obstacles that the law (and private parties) laid down to hinder the ***389** progress and prosperity of Black people. Vagrancy laws criminalized free Black men who failed to work for White landlords.[14] Many States barred freedmen from hunting or fishing to ensure that they could not live without entering *de facto* reenslavement as sharecroppers.[15] A cornucopia of laws (*e.g.*, banning hitchhiking, prohibiting encouraging a laborer to leave his employer, and penalizing those who prompted Black southerners to migrate northward) ensured that Black people could not freely seek better lives elsewhere.[16] And when statutes did not ensure compliance, state-sanctioned (and private) violence did.[17]

Thus emerged Jim Crow—a system that was, as much as anything else, a comprehensive scheme of economic exploitation to replace the Black Codes, which themselves had replaced slavery's form of comprehensive economic exploitation.[18] Meanwhile, as Jim Crow ossified, the Federal Government was "giving away land" on the western frontier, and with it "the opportunity for upward mobility and a more secure future," over the 1862 Homestead Act's three-quarter-century tenure.[19] Black people were exceedingly unlikely to be allowed to share in those benefits, which by one calculation may have advantaged approximately 46 million Americans living today.[20]

***390** Despite these barriers, Black people persisted. Their so-called Great Migration northward accelerated during and after the First World War.[21] Like clockwork, American cities responded with racially exclusionary zoning (and similar policies).[22] As a result, Black migrants had to pay disproportionately high prices for disproportionately subpar housing.[23] Nor did migration ****2267** make it more likely for Black people to access home ownership, as banks would not lend to Black people, and in the rare cases banks would fund home loans, exorbitant interest rates were charged.[24] With Black people still locked out of the Homestead Act giveaway, it is no surprise that, when the Great Depression arrived, race-based wealth, health, and opportunity gaps were the norm.[25]

Federal and State Governments' selective intervention further exacerbated the disparities. Consider, for example, the federal Home Owners' Loan Corporation (HOLC), created in 1933.[26] HOLC purchased mortgages threatened with foreclosure and issued new, amortized mortgages in their place.[27] Not only did this mean that recipients of these mortgages could gain equity while paying off the loan, successful full payment would make the recipient a homeowner.[28] Ostensibly to identify (and avoid) the riskiest recipients, the HOLC "created color-coded maps of every metropolitan area in the nation."[29] Green meant safe; red ***391** meant risky. And, regardless of class, every neighborhood with Black people earned the red designation.[30]

Similarly, consider the Federal Housing Administration (FHA), created in 1934, which insured highly desirable bank mortgages. Eligibility for this insurance required an FHA appraisal of the property to ensure a low default risk.[31] But, nationwide, it was FHA's established policy to provide "no guarantees for mortgages to African Americans, or to whites who might lease to African Americans," irrespective of creditworthiness.[32] No surprise, then, that "[b]etween 1934 and 1968, 98 percent of FHA loans went to white Americans," with whole cities (ones that had a disproportionately large number of Black people due to housing segregation) sometimes being deemed ineligible for FHA intervention on racial grounds.[33] The Veterans Administration operated similarly.[34]

One more example: the Federal Home Loan Bank Board "chartered, insured, and regulated savings and loan associations from the early years of the New Deal."[35] But it did "not oppose the denial of mortgages to African Americans until 1961" (and even then opposed discrimination ineffectively).[36]

The upshot of all this is that, due to government policy choices, "[i]n the suburban-shaping years between 1930 and 1960, fewer than one percent of all mortgages in the nation were issued to African Americans."[37] Thus, based on their race, Black people were "[l]ocked out of the greatest **2268 mass-based *392 opportunity for wealth accumulation in American history."[38]

For present purposes, it is significant that, in so excluding Black people, government policies affirmatively operated—one could say, affirmatively acted—to dole out preferences to those who, if nothing else, were not Black. Those past preferences carried forward and are reinforced today by (among other things) the benefits that flow to homeowners and to the holders of other forms of capital that are hard to obtain unless one already has assets.[39]

This discussion of how the existing gaps were formed is merely illustrative, not exhaustive. I will pass over Congress's repeated crafting of family-, worker-, and retiree-protective legislation to channel benefits to White people, thereby excluding Black Americans from what was otherwise "a revolution in the status of most working Americans."[40] I will also skip how the G. I. Bill's "creation of ... middle-class America" (by giving $95 billion to veterans and their families between 1944 and 1971) was "deliberately designed to accommodate Jim Crow."[41] So, too, will I bypass how Black people were prevented from partaking in the consumer credit market—a market that helped White people who could access it build and protect wealth.[42] Nor will time and space permit my elaborating how local officials' racial hostility meant that even those benefits that Black people could formally obtain were unequally distributed along racial lines.[43] And I could not possibly discuss every way in *393 which, in light of this history, facially race-blind policies *still* work race-based harms today (*e.g.*, racially disparate tax-system treatment; the disproportionate location of toxic-waste facilities in Black communities; or the deliberate action of governments at all levels in designing interstate highways to bisect and segregate Black urban communities).[44]

The point is this: Given our history, the origin of persistent race-linked gaps should be no mystery. It has never been a deficiency of Black Americans' desire or ability to, in Frederick Douglass's words, "stand on [their] own legs."[45] Rather, it was always simply what Justice Harlan recognized 140 years ago—the persistent and pernicious denial of "what had already been done in every State of the Union for the white race." *Civil Rights Cases*, 109 U.S. at 61, 3 S.Ct. 18 (dissenting opinion).

B

History speaks. In some form, it can be heard forever. The race-based gaps that first developed centuries ago are echoes from the past that still exist today. By all accounts, they are still stark.

Start with wealth and income. Just four years ago, in 2019, Black families' median **2269 wealth was approximately $24,000.[46] For White families, that number was approximately eight times as much (about $188,000).[47] These wealth disparities "exis[t] at every income and education level," so, "[o]n average, white families with college degrees *394 have over $300,000 more wealth than black families with college degrees."[48] This disparity has also accelerated over time—from a roughly $40,000 gap between White and Black household median net worth in 1993 to a roughly $135,000 gap in 2019.[49] Median income numbers from 2019 tell the same story: $76,057 for White households, $98,174 for Asian households, $56,113 for Latino households, and $45,438 for Black households.[50]

These financial gaps are unsurprising in light of the link between home ownership and wealth. Today, as was true 50 years ago, Black home ownership trails White home ownership by approximately 25 percentage points.[51] Moreover, Black Americans' homes (relative to White Americans') constitute a greater percentage of household wealth, yet tend to be worth less, are subject to higher effective property taxes, and generally lost more value in the Great Recession.[52]

From those markers of social and financial unwellness flow others. In most state flagship higher educational institutions, the percentage of Black undergraduates is lower than the percentage of Black high school graduates in that State.[53] Black Americans in their late twenties are about half as *395 likely as their White counterparts to have college degrees.[54] And

because lower family income and wealth force students to borrow more, those Black students who do graduate college find themselves four years out with about $50,000 in student debt—nearly twice as much as their White compatriots.[55]

As for postsecondary professional arenas, despite being about 13% of the population, Black people make up only about 5% of lawyers.[56] Such disparity also appears in the business realm: Of the roughly 1,800 chief executive officers to have appeared on the well-known Fortune 500 list, fewer than 25 have been Black (as of ****2270** 2022, only six are Black).[57] Furthermore, as the COVID–19 pandemic raged, Black-owned small businesses failed at dramatically higher rates than White-owned small businesses, partly due to the disproportionate denial of the forgivable loans needed to survive the economic downturn.[58]

Health gaps track financial ones. When tested, Black children have blood lead levels that are twice the rate of White children—"irreversible" contamination working irremediable harm on developing brains.[59] Black (and Latino) children with heart conditions are more likely to die than their White counterparts.[60] Race-linked mortality-rate disparity has also persisted, and is highest among infants.[61]

***396** So, too, for adults: Black men are twice as likely to die from prostate cancer as White men and have lower 5-year cancer survival rates.[62] Uterine cancer has spiked in recent years among all women—but has spiked highest for Black women, who die of uterine cancer at nearly twice the rate of "any other racial or ethnic group."[63] Black mothers are up to four times more likely than White mothers to die as a result of childbirth.[64] And COVID killed Black Americans at higher rates than White Americans.[65]

"Across the board, Black Americans experience the highest rates of obesity, hypertension, maternal mortality, infant mortality, stroke, and asthma."[66] These and other disparities—the predictable result of opportunity disparities—lead to at least 50,000 excess deaths a year for Black Americans vis-à-vis White Americans.[67] That is 80 million excess years of life lost from just 1999 through 2020.[68]

Amici tell us that "race-linked health inequities pervad[e] nearly every index of human health" resulting "in an overall reduced life expectancy for racial and ethnic minorities that cannot be explained by genetics."[69] Meanwhile—tying health and wealth together—while she lays dying, the typical Black American "pay[s] more for medical care and incur[s] more medical debt."[70]

C

We return to John and James now, with history in hand. It is hardly John's fault that he is the seventh generation to ***397** graduate from UNC. UNC should permit him to honor that legacy. Neither, however, was it James's (or his family's) fault that he would be the first. And UNC ought to be able to consider why.

****2271** Most likely, seven generations ago, when John's family was building its knowledge base and wealth potential on the university's campus, James's family was enslaved and laboring in North Carolina's fields. Six generations ago, the North Carolina "Redeemers" aimed to nullify the results of the Civil War through terror and violence, marauding in hopes of excluding all who looked like James from equal citizenship.[71] Five generations ago, the North Carolina Red Shirts finished the job.[72] Four (and three) generations ago, Jim Crow was so entrenched in the State of North Carolina that UNC "enforced its own Jim Crow regulations."[73] Two generations ago, North Carolina's Governor still railed against " 'integration for integration's sake' "—and UNC Black enrollment was minuscule.[74] So, at bare minimum, one generation ago, James's family was six generations behind because of their race, making John's six generations ahead.

These stories are not every student's story. But they are many students' stories. To demand that colleges ignore race in today's admissions practices—and thus disregard the fact that racial disparities may have mattered for where some applicants find themselves today—is not only an affront to the dignity of those students for whom race matters.[75] It also condemns our society to never escape the past that explains ***398** *how and why* race matters to the very concept of who "merits" admission.

Permitting (not requiring) colleges like UNC to assess merit fully, without blinders on, plainly advances (not thwarts) the Fourteenth Amendment's core promise. UNC considers race as one of many factors in order to best assess the entire unique import of John's and James's individual lives and inheritances *on an equal basis*. Doing so involves acknowledging (not ignoring) the seven generations' worth of historical privileges and disadvantages that each of these applicants was born with when his own life's journey started a mere 18 years ago.

II

Recognizing all this, UNC has developed a holistic review process to evaluate applicants for admission. Students must submit standardized test scores and other conventional information.[76] But applicants are *not* required to submit demographic information like gender and race.[77] UNC considers whatever information each applicant submits using a nonexhaustive list of 40 criteria grouped into eight categories: "academic performance, academic program, standardized testing, extracurricular activity, special talent, essay criteria, background, and personal criteria."[78]

Drawing on those 40 criteria, a UNC staff member evaluating John and James would consider, with respect to each, his "engagement outside the classroom; persistence of commitment; demonstrated capacity ****2272** for leadership; contributions to family, school, and community; work history; [and his] unique or unusual interests."[79] Relevant, too, would be his "relative advantage or disadvantage, as indicated by family income level, education history of family members, impact of ***399** parents/guardians in the home, or formal education environment; experience of growing up in rural or center-city locations; [and his] status as child or step-child of Carolina alumni."[80] The list goes on. The process is holistic, through and through.

So where does race come in? According to UNC's admissions-policy document, reviewers may also consider "the race or ethnicity of any student" (if that information is provided) in light of UNC's interest in diversity.[81] And, yes, "the race or ethnicity of *any* student may—or may not—receive a 'plus' in the evaluation process depending on the individual circumstances revealed in the student's application."[82] Stephen Farmer, the head of UNC's Office of Undergraduate Admissions, confirmed at trial (under oath) that UNC's admissions process operates in this fashion.[83]

Thus, to be crystal clear: *Every* student who chooses to disclose his or her race is eligible for such a race-linked plus, just as any student who chooses to disclose his or her unusual interests can be credited for what those interests might add to UNC. The record supports no intimation to the contrary. Eligibility is just that; a plus is never automatically awarded, never considered in numerical terms, and never automatically results in an offer of admission.[84] There are no race-based ***400** quotas in UNC's holistic review process.[85] In fact, during the admissions cycle, the school prevents anyone who knows the overall racial makeup of the admitted-student pool from reading any applications.[86]

More than that, every applicant is also eligible for a diversity-linked plus (beyond race) more generally.[87] And, notably, UNC understands diversity broadly, including "socioeconomic status, first-generation college status ... political beliefs, religious beliefs ... diversity of thoughts, experiences, ideas, and talents."[88]

A plus, by its nature, can certainly matter to an admissions case. But make no mistake: When an applicant chooses to disclose his or her race, UNC treats that aspect of identity on par with other aspects of applicants' identity that affect who they are (just like, say, where one grew up, or medical challenges one has faced).[89] ****2273** And race is considered alongside any other factor that sheds light on what attributes applicants will bring to the campus and whether they are likely to excel once there.[90] A reader of today's majority opinion could be forgiven for misunderstanding how UNC's program really works, or for missing that, under UNC's holistic review process, a White student could receive a diversity plus while a Black student might not.[91]

***401** UNC does not do all this to provide handouts to either John or James. It does this to ascertain who among its tens of thousands of applicants has the capacity to take full advantage of the opportunity to attend, and contribute to, this prestigious

institution, and thus merits admission.[92] And UNC has concluded that ferreting this out requires understanding the *full* person, which means taking seriously not just SAT scores or whether the applicant plays the trumpet, but also any way in which the applicant's race-linked experience bears on his capacity and merit. In this way, UNC is able to value what it means for James, whose ancestors received no race-based advantages, to make himself competitive for admission to a flagship school nevertheless. Moreover, recognizing this aspect of James's story does not preclude UNC from valuing John's legacy or any obstacles that his story reflects.

So, to repeat: UNC's program permits, but does not require, admissions officers to value both John's and James's love for their State, their high schools' rigor, and whether either has overcome obstacles that are indicative of their "persistence of commitment."[93] It permits, but does not require, them to value John's identity as a child of UNC alumni (or, perhaps, if things had turned out differently, as a first-generation ***402** White student from Appalachia whose family struggled to make ends meet during the Great Recession). And it permits, but does not require, them to value James's race—not in the abstract, but as an element of who he is, no less than his love for his State, his high school courses, and the obstacles he has overcome.

Understood properly, then, what SFFA caricatures as an unfair race-based preference cashes out, in a holistic system, to a personalized assessment of the advantages and disadvantages that every applicant might have received by accident of birth ****2274** plus all that has happened to them since. It ensures a full accounting of everything that bears on the individual's resilience and likelihood of enhancing the UNC campus. It also forecasts his potential for entering the wider world upon graduation and making a meaningful contribution to the larger, collective, societal goal that the Equal Protection Clause embodies (its guarantee that the United States of America offers genuinely equal treatment to every person, regardless of race).

Furthermore, and importantly, the fact that UNC's holistic process ensures a full accounting makes it far from clear that any particular applicant of color will finish ahead of any particular nonminority applicant. For example, as the District Court found, a higher percentage of the most academically excellent in-state Black candidates (as SFFA's expert defined academic excellence) were denied admission than similarly qualified White and Asian American applicants.[94] That, if ***403** nothing else, is indicative of a genuinely holistic process; it is evidence that, both in theory and in practice, UNC recognizes that race—like any other aspect of a person—may bear on where both John and James start the admissions relay, but will not fully determine whether either eventually crosses the finish line.

III

A

The majority seems to think that race blindness solves the problem of race-based disadvantage. But the irony is that requiring colleges to ignore the initial race-linked opportunity gap between applicants like John and James will inevitably widen that gap, not narrow it. It will delay the day that every American has an equal opportunity to thrive, regardless of race.

SFFA similarly asks us to consider how much longer UNC will be able to justify considering race in its admissions process. Whatever the answer to that question was yesterday, today's decision will undoubtedly extend the duration of our country's need for such race consciousness, because the justification for admissions programs that account for race is inseparable from the race-linked gaps in health, wealth, and well-being that still exist in our society (the closure of which today's decision will forestall).

***404** To be sure, while the gaps are stubborn and pernicious, Black people, and other minorities, have generally been doing

better. ****2275** [95] But those improvements have only been made possible because institutions like UNC have been willing to grapple forthrightly with the burdens of history. SFFA's complaint about the "indefinite" use of race-conscious admissions programs, then, is a non sequitur. These programs respond to deep-rooted, objectively measurable problems; their definite end will be when we succeed, together, in solving those problems.

Accordingly, while there are many perversities of today's judgment, the majority's failure to recognize that programs like UNC's carry with them the seeds of their own destruction is surely one of them. The ultimate goal of recognizing James's full story and (potentially) admitting him to UNC is to give him the necessary tools to contribute to closing the equity gaps discussed in Part I, *supra*, so that he, his progeny—and therefore all Americans—can compete without race mattering in the future. That intergenerational project is undeniably a worthy one.

In addition, and notably, that end is not fully achieved just because James is admitted. Schools properly care about preventing racial isolation on campus because research shows that it matters for students' ability to learn and succeed while in college if they live and work with at least some other people who look like them and are likely to have similar experiences related to that shared characteristic.[96] Equally critical, UNC's program ensures that students who don't share the same stories (like John and James) will interact in classes and on campus, and will thereby come to understand ***405** each other's stories, which *amici* tell us improves cognitive abilities and critical-thinking skills, reduces prejudice, and better prepares students for postgraduate life.[97]

Beyond campus, the diversity that UNC pursues for the betterment of its students and society is not a trendy slogan. It saves lives. For marginalized communities in North Carolina, it is critically important that UNC and other area institutions produce highly educated professionals of color. Research shows that Black physicians are more likely to accurately assess Black patients' pain tolerance and treat them accordingly (including, for example, prescribing them appropriate amounts of pain medication).[98] For high-risk Black newborns, having a Black physician more than doubles the likelihood that the baby will live, and not die.[99] Studies also confirm what common sense counsels: Closing wealth disparities through programs like UNC's—which, beyond diversifying the medical profession, open doors to every sort of opportunity—helps address the aforementioned health disparities (in the long run) as well.[100]

Do not miss the point that ensuring a diverse student body in higher education helps *everyone*, not just those who, due to ****2276** their race, have directly inherited distinct disadvantages with respect to their health, wealth, and well-being. *Amici* explain that students of every race will come to have a greater appreciation and understanding of civic virtue, democratic values, and our country's commitment to equality. ***406** [101] The larger economy benefits, too: When it comes down to the brass tacks of dollars and cents, ensuring diversity will, if permitted to work, help save hundreds of billions of dollars annually (by conservative estimates).[102]

Thus, we should be celebrating the fact that UNC, once a stronghold of Jim Crow, has now come to understand this. The flagship educational institution of a former Confederate State has embraced its constitutional obligation to afford genuine equal protection to applicants, and, by extension, to the broader polity that its students will serve after graduation. Surely that is progress for a university that once engaged in the kind of patently offensive race-dominated admissions process that the majority decries.

With its holistic review process, UNC now treats race as merely one aspect of an applicant's life, when race played a totalizing, all-encompassing, and singularly determinative role for applicants like James for most of this country's history: No matter what else was true about him, being Black meant he had no shot at getting in (the ultimate race-linked uneven playing field). Holistic programs like UNC's reflect the reality that Black students have only relatively recently been permitted to get into the admissions game at all. Such programs also reflect universities' clear-eyed optimism that, one day, race *will* no longer matter.

So much upside. Universal benefits ensue from holistic admissions programs that allow consideration of *all* factors material to merit (including race), and that thereby facilitate diverse student populations. Once trained, those UNC students who have thrived in the university's diverse learning ***407** environment are well equipped to make lasting contributions in a variety of realms and with a variety of colleagues, which, in turn, will steadily decrease the salience of race for future generations. Fortunately, UNC and other institutions of higher learning are already on this beneficial path. In fact, all that they have needed to continue moving this country forward (toward full achievement of our Nation's founding promises) is for this Court to get out of the way and let them do their jobs. To our great detriment, the majority cannot bring itself to do so.

B

The overarching reason the majority gives for becoming an impediment to racial progress—that its own conception of the Fourteenth Amendment's Equal Protection Clause leaves it no other option—has a wholly self-referential, two-dimensional flatness. The majority and concurring opinions rehearse this Court's idealistic vision of racial equality, from *Brown* forward, with appropriate lament for past indiscretions. See, *e.g.*, *ante*, at 2159 - 2160. But the race-linked gaps that the law (aided by this Court) previously founded and fostered—which indisputably define ****2277** our present reality—are strangely absent and do not seem to matter.

With let-them-eat-cake obliviousness, today, the majority pulls the ripcord and announces "colorblindness for all" by legal fiat. But deeming race irrelevant in law does not make it so in life. And having so detached itself from this country's actual past and present experiences, the Court has now been lured into interfering with the crucial work that UNC and other institutions of higher learning are doing to solve America's real-world problems.

No one benefits from ignorance. Although formal race-linked legal barriers are gone, race still matters to the lived experiences of all Americans in innumerable ways, and today's ruling makes things worse, not better. The best that can be said of the majority's perspective is that it proceeds (ostrich-like) from the hope that preventing consideration of ***408** race will end racism. But if that is its motivation, the majority proceeds in vain. If the colleges of this country are required to ignore a thing that matters, it will not just go away. It will take *longer* for racism to leave us. And, ultimately, ignoring race just makes it matter more.[103]

The only way out of this morass—for all of us—is to stare at racial disparity unblinkingly, and then do what evidence and experts tell us is required to level the playing field and march forward together, collectively striving to achieve true equality for all Americans. It is no small irony that the judgment the majority hands down today will forestall the end of race-based disparities in this country, making the colorblind world the majority wistfully touts much more difficult to accomplish.

***409**
* * *

As the Civil War neared its conclusion, General William T. Sherman and Secretary of War Edwin Stanton convened a meeting of Black leaders in Savannah, Georgia. During the meeting, someone asked Garrison Frazier, the group's spokesperson, what "freedom" meant to him. He answered, " 'placing us where we could reap the fruit of our own labor, and take care of ourselves ... to have land, and turn it and till it by our own labor.' "[104]

Today's gaps exist because that freedom was denied far longer than it was ever ****2278** afforded. Therefore, as Justice SOTOMAYOR correctly and amply explains, UNC's holistic review program pursues a righteous end—legitimate " 'because it is defined by the Constitution itself. The end is the maintenance of freedom.' " *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 443–444, 88 S.Ct. 2186, 20 L.Ed.2d 1189 (1968) (quoting Cong. Globe, 39th Cong., 1st Sess., 1118 (1866) (Rep. Wilson)).

Viewed from this perspective, beleaguered admissions programs such as UNC's are not pursuing a patently unfair, ends-justified ideal of a multiracial democracy at all. Instead, they are engaged in an earnest effort to secure a more functional one. The admissions rubrics they have constructed now recognize that an individual's "merit"—his ability to succeed in an institute of higher learning and ultimately contribute something to our society—cannot be fully determined without understanding that individual in full. There are no special favorites here.

UNC has thus built a review process that *more accurately* assesses merit than most of the admissions programs that have existed since this country's founding. Moreover, in so doing, universities like UNC create pathways to upward mobility for

long excluded and historically disempowered racial groups. Our Nation's history more than justifies this course of action. And our present reality indisputably establishes ***410** that such programs are still needed—for the general public good—because after centuries of state-sanctioned (and enacted) race discrimination, the aforementioned intergenerational race-based gaps in health, wealth, and well-being stubbornly persist.

Rather than leaving well enough alone, today, the majority is having none of it. Turning back the clock (to a time before the legal arguments and evidence establishing the soundness of UNC's holistic admissions approach existed), the Court indulges those who either do not know our Nation's history or long to repeat it. Simply put, the race-blind admissions stance the Court mandates from this day forward is unmoored from critical real-life circumstances. Thus, the Court's meddling not only arrests the noble generational project that America's universities are attempting, it also launches, in effect, a dismally misinformed sociological experiment.

Time will reveal the results. Yet the Court's own missteps are now both eternally memorialized and excruciatingly plain. For one thing—based, apparently, on nothing more than Justice Powell's initial say so—it drastically discounts the primary reason that the racial-diversity objectives it excoriates are needed, consigning race-related historical happenings to the Court's own analytical dustbin. Also, by latching onto arbitrary timelines and professing insecurity about missing metrics, the Court sidesteps unrefuted proof of the compelling benefits of holistic admissions programs that factor in race (hard to do, for there is plenty), simply proceeding as if no such evidence exists. Then, ultimately, the Court surges to vindicate equality, but Don Quixote style—pitifully perceiving itself as the sole vanguard of legal high ground when, in reality, its perspective is not constitutionally compelled and will hamper the best judgments of our world-class educational institutions about who they need to bring onto their campuses ***411** right now to benefit every American, no matter their race.[105]

****2279** The Court has come to rest on the bottom-line conclusion that racial diversity in higher education is only worth potentially preserving insofar as it might be needed to prepare Black Americans and other underrepresented minorities for success in the bunker, not the boardroom (a particularly awkward place to land, in light of the history the majority opts to ignore).[106] It would be deeply unfortunate if the Equal Protection Clause actually demanded this perverse, ahistorical, and counterproductive outcome. To impose this result in that Clause's name when it requires no such thing, and to thereby obstruct our collective progress toward the full realization of the Clause's promise, is truly a tragedy for us all.

All Citations

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Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

1 Justice JACKSON attempts to minimize the role that race plays in UNC's admissions process by noting that, from 2016–2021, the school accepted a lower "percentage of the most academically excellent in-state Black candidates"—that is, 65 out of 67 such applicants (97.01%)—than it did similarly situated Asian applicants—that is, 1118 out of 1139 such applicants (98.16%). *Post*, at 2274 (dissenting opinion); see also 3 App. in No. 21–707, pp. 1078–1080. It is not clear how the rejection of just two black applicants over five years could be "indicative of a genuinely holistic [admissions] process," as Justice JACKSON contends. *Post*, at 2274. And indeed it cannot be, as the *overall* acceptance rates of academically excellent applicants to UNC illustrates full well. According to SFFA's expert, over 80% of all black applicants in the top academic decile were admitted to UNC, while under 70% of white and Asian applicants in that decile were admitted. 3 App. in No. 21–707, at 1078–1083. In the second highest academic decile, the disparity is even starker: 83% of black applicants were admitted, while 58% of white applicants and 47% of Asian applicants were admitted. *Ibid.* And in the third highest decile, 77% of black applicants were admitted, compared to 48% of white applicants and 34% of Asian applicants. *Ibid.* The dissent does not dispute the accuracy of these figures. See *post*, at 2774, n. 94 (opinion of JACKSON, J.). And its contention that white and Asian students "receive a diversity plus" in UNC's race-based admissions system blinks reality. *Post*, at 2273.

The same is true at Harvard. See Brief for Petitioner 24 ("[A]n African American [student] in [the fourth lowest academic] decile has a higher chance of admission (12.8%) than an Asian American in the *top* decile (12.7%)." (emphasis added)); see also 4 App.

in No. 20–1199, p. 1793 (black applicants in the top four academic deciles are between four and ten times more likely to be admitted to Harvard than Asian applicants in those deciles).

2 Title VI provides that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d. "We have explained that discrimination that violates the Equal Protection Clause of the Fourteenth Amendment committed by an institution that accepts federal funds also constitutes a violation of Title VI." *Gratz v. Bollinger*, 539 U.S. 244, 276, n. 23, 123 S.Ct. 2411, 156 L.Ed.2d 257 (2003). Although Justice GORSUCH questions that proposition, no party asks us to reconsider it. We accordingly evaluate Harvard's admissions program under the standards of the Equal Protection Clause itself.

3 The first time we determined that a governmental racial classification satisfied "the most rigid scrutiny" was 10 years before *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954), in the infamous case *Korematsu v. United States*, 323 U.S. 214, 216, 65 S.Ct. 193, 89 L.Ed. 194 (1944). There, the Court upheld the internment of "all persons of Japanese ancestry in prescribed West Coast ... areas" during World War II because "the military urgency of the situation demanded" it. *Id.*, at 217, 223, 65 S.Ct. 193. We have since overruled *Korematsu*, recognizing that it was "gravely wrong the day it was decided." *Trump* v. *Hawaii*, 585 U. S. ——, ——, 138 S.Ct. 2392, 2448, 201 L.Ed.2d 775 (2018). The Court's decision in *Korematsu* nevertheless "demonstrates vividly that even the most rigid scrutiny can sometimes fail to detect an illegitimate racial classification" and that "[a]ny retreat from the most searching judicial inquiry can only increase the risk of another such error occurring in the future." *Adarand Constructors, Inc.* v. *Peña*, 515 U.S. 200, 236, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995) (internal quotation marks omitted).

The principal dissent, for its part, claims that the Court has also permitted "the use of race when that use burdens minority populations." *Post*, at 2246 (opinion of SOTOMAYOR, J.). In support of that claim, the dissent cites two cases that have nothing to do with the Equal Protection Clause. See *ibid.* (citing *United States v. Brignoni-Ponce*, 422 U.S. 873, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975) (Fourth Amendment case), and *United States v. Martinez-Fuerte*, 428 U.S. 543, 96 S.Ct. 3074, 49 L.Ed.2d 1116 (1976) (another Fourth Amendment case)).

4 The United States as *amicus curiae*contends that race-based admissions programs further compelling interests at our Nation's military academies. No military academy is a party to these cases, however, and none of the courts below addressed the propriety of race-based admissions systems in that context. This opinion also does not address the issue, in light of the potentially distinct interests that military academies may present.

5 For that reason, one dissent candidly advocates abandoning the demands of strict scrutiny. See *post*, at 2276, 2277 - 2278 (opinion of JACKSON, J.) (arguing the Court must "get out of the way," "leav[e] well enough alone," and defer to universities and "experts" in determining who should be discriminated against). An opinion professing fidelity to history (to say nothing of the law) should surely see the folly in that approach.

6 Justice JACKSON contends that race does not play a "determinative role for applicants" to UNC. *Post*, at 2276. But even the principal dissent acknowledges that race—and race alone—explains the admissions decisions for hundreds if not thousands of applicants to UNC each year. *Post*, at 2243, n. 28 (opinion of SOTOMAYOR, J.); see also *Students for Fair Admissions, Inc.* v. *University of N. C. at Chapel Hill*, No. 1:14–cv–954 (MDNC, Dec. 21, 2020), ECF Doc. 233, at 23–27 (UNC expert testifying that race explains 1.2% of in state and 5.1% of out of state admissions decisions); 3 App. in No. 21–707, at 1069 (observing that UNC evaluated 57,225 in state applicants and 105,632 out of state applicants from 2016–2021). The suggestion by the principal dissent that our analysis relies on extra-record materials, see *post*, at 2241,, n. 25 (opinion of SOTOMAYOR, J.), is simply mistaken.

7 The principal dissent claims that "[t]he fact that Harvard's racial shares of admitted applicants varies relatively little ... is unsurprising and reflects the fact that the racial makeup of Harvard's applicant pool also varies very little over this period." *Post*, at 2244 (opinion of SOTOMAYOR, J.) (internal quotation marks omitted). But that is exactly the point: Harvard must use precise

racial preferences year in and year out to maintain the unyielding demographic composition of its class. The dissent is thus left to attack the numbers themselves, arguing they were "handpicked" "from a truncated period." *Ibid.*, n. 29 (opinion of SOTOMAYOR, J.). As supposed proof, the dissent notes that the share of Asian students at Harvard varied significantly from 1980 to 1994—a 14-year period that ended nearly three decades ago. 4 App. in No. 20–1199, at 1770. But the relevance of that observation—handpicked and truncated as it is—is lost on us. And the dissent does not and cannot dispute that the share of black and Hispanic students at Harvard—"the primary beneficiaries" of its race-based admissions policy—has remained consistent for decades. 397 F.Supp.3d at 178; 4 App. in No. 20–1199, at 1770. For all the talk of holistic and contextual judgments, the racial preferences at issue here in fact operate like clockwork.

8 Perhaps recognizing as much, the principal dissent at one point attempts to press a different remedial rationale altogether, stating that both respondents "have sordid legacies of racial exclusion." *Post*, at 2237 (opinion of SOTOMAYOR, J.). Such institutions should perhaps be the very *last* ones to be allowed to make race-based decisions, let alone be accorded deference in doing so. In any event, neither university defends its admissions system as a remedy for past discrimination—their own or anyone else's. See Tr. of Oral Arg. in No. 21–707, at 90 ("[W]e're not pursuing any sort of remedial justification for our policy."). Nor has any decision of ours permitted a remedial justification for race-based college admissions. Cf. *Bakke*, 438 U.S. at 307, 98 S.Ct. 2733 (opinion of Powell, J.).

9 The principal dissent rebukes the Court for not considering adequately the reliance interests respondents and other universities had in *Grutter*. But as we have explained, *Grutter* itself limited the reliance that could be placed upon it by insisting, over and over again, that race-based admissions programs be limited in time. See *supra*, at 2164 - 2165. *Grutter* indeed went so far as to suggest a specific period of reliance—25 years—precluding the indefinite reliance interests that the dissent articulates. Cf. *post*, at 2221 - 2223 (KAVANAUGH, J., concurring). Those interests are, moreover, vastly overstated on their own terms. Three out of every five American universities do *not* consider race in their admissions decisions. See Brief for Respondent in No. 201199, p. 40. And several States—including some of the most populous (California, Florida, and Michigan)—have prohibited race-based admissions outright. See Brief for Oklahoma et al. as *Amici Curiae* 9, n. 6.

1 In fact, Indians would not be considered citizens until several decades later. Indian Citizenship Act of 1924, ch. 233, 43 Stat. 253 (declaring that all Indians born in the United States are citizens).

2 There is "some support" in the history of enactment for at least "four interpretations of the first section of the proposed amendment, and in particular of its Privileges [or] Immunities Clause: it would authorize Congress to enforce the Privileges and Immunities Clause of Article IV; it would forbid discrimination between citizens with respect to fundamental rights; it would establish a set of basic rights that all citizens must enjoy; and it would make the Bill of Rights applicable to the states." D. Currie, The Reconstruction Congress, 75 U. Chi. L. Rev. 383, 406 (2008) (citing sources). Notably, those four interpretations are all colorblind.

3 UNC asserts that the Freedmen's Bureau gave money to Berea College at a time when the school sought to achieve a 50–50 ratio of black to white students. Brief for University Respondents in No. 21707, p. 32. But, evidence suggests that, at the relevant time, Berea conducted its admissions without distinction by race. S. Wilson, Berea College: An Illustrated History 2 (2006) (quoting Berea's first president's statement that the school "would welcome 'all races of men, without distinction' ").

4 The Court has remarked that Title VI is coextensive with the Equal Protection Clause. See *Gratz v. Bollinger*, 539 U.S. 244, 276, n. 23, 123 S.Ct. 2411, 156 L.Ed.2d 257 (2003) ("We have explained that discrimination that violates the Equal Protection Clause of the Fourteenth Amendment committed by an institution that accepts federal funds also constitutes a violation of Title VI"); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 287, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978) (opinion of Powell, J.) ("Title VI ... proscribe[s] only those racial classifications that would violate the Equal Protection Clause"). As Justice GORSUCH points out, the language of Title VI makes no allowance for racial considerations in university admissions. See *post*, at 2208 – 2209 (concurring opinion). Though I continue to adhere to my view in *Bostock* v. *Clayton County*, 590 U. S. ——, —— – ——, 140 S.Ct. 1731, 1754–1784, 207 L.Ed.2d 218 (2020) (ALITO, J., dissenting), I agree with Justice GORSUCH's concurrence in this

case. The plain text of Title VI reinforces the colorblind view of the Fourteenth Amendment.

5 In fact, the Massachusetts Supreme Court in 1783 declared that slavery was abolished in Massachusetts by virtue of the newly enacted Constitution's provision of equality under the law. See *The Quock Walker Case*, in 1 H. Commager, Documents of American History 110 (9th ed. 1973) (Cushing, C. J.) ("[W]hatever sentiments have formerly prevailed in this particular or slid in upon us by the example of others, a different idea has taken place with the people of America, more favorable to the natural rights of mankind, and to that natural, innate desire of Liberty .... And upon this ground our Constitution of Government ... sets out with declaring that all men are born free and equal ... and in short is totally repugnant to the idea of being born slaves").

6 Briefing in a case consolidated with *Brown* stated the colorblind position forthrightly: Classifications "[b]ased [s]olely on [r]ace or [c]olor" "can never be" constitutional. Juris. Statement in *Briggs* v. *Elliott*, O. T. 1951, No. 273, pp. 20–21, 25, 29; see also Juris. Statement in *Davis* v. *County School Bd. of Prince Edward Cty.*, O. T. 1952, No. 191, p. 8 ("Indeed, we take the unqualified position that the Fourteenth Amendment has totally stripped the state of power to make race and color the basis for governmental action.... For this reason alone, we submit, the state separate school laws in this case must fall").

7 Indeed, the lawyers who litigated *Brown* were unwilling to take this bet, insisting on a colorblind legal rule. See, *e.g.*, Supp. Brief for Appellants on Reargument in Nos. 1, 2, and 4, and for Respondents in No. 10, in *Brown* v. *Board of Education*, O. T. 1953, p. 65 ("That the Constitution is color blind is our dedicated belief "); Brief for Appellants in *Brown* v. *Board of Education*, O. T. 1952, No. 1, p. 5 ("The Fourteenth Amendment precludes a state from imposing distinctions or classifications based upon race and color alone"). In fact, Justice Marshall viewed Justice Harlan's *Plessy* dissent as "a 'Bible' to which he turned during his most depressed moments"; no opinion "buoyed Marshall more in his pre-*Brown* days." In Memoriam: Honorable Thurgood Marshall, Proceedings of the Bar and Officers of the Supreme Court of the United States, p. X (1993) (remarks of Judge Motley).

8 Justice SOTOMAYOR rejects this mismatch theory as "debunked long ago," citing an *amicus* brief. *Post*, at 2256. But, in 2016, the Journal of Economic Literature published a review of mismatch literature—coauthored by a critic and a defender of affirmative action—which concluded that the evidence for mismatch was "fairly convincing." P. Arcidiacono & M. Lovenheim, Affirmative Action and the Quality-Fit Tradeoff, 54 J. Econ. Lit. 3, 20 (Arcidiacono & Lovenheim). And, of course, if universities wish to refute the mismatch theory, they need only release the data necessary to test its accuracy. See Brief for Richard Sander as *Amicus Curiae* 16–19 (noting that universities have been unwilling to provide the necessary data concerning student admissions and outcomes); accord, Arcidiacono & Lovenheim 20 ("Our hope is that better datasets soon will become available").

9 Justice SOTOMAYOR apparently believes that race-conscious admission programs can somehow increase the chances that members of certain races (blacks and Hispanics) are admitted without decreasing the chances of admission for members of other races (Asians). See *post*, at 2257 – 2258. This simply defies mathematics. In a zero-sum game like college admissions, any sorting mechanism that takes race into account in any way, see *post*, at 2277 – 2278 (opinion of JACKSON, J.) (defending such a system), has discriminated based on race to the benefit of some races and the detriment of others. And, the universities here admit that race is determinative in at least some of their admissions decisions. See, *e.g.*, Tr. of Oral Arg. in No. 20–1199, at 67; 567 F.Supp.3d 580, 633 (MDNC 2021); see also 397 F.Supp.3d 126, 178 (Mass. 2019) (noting that, for Harvard, "race is a determinative tip for" a significant percentage "of all admitted African American and Hispanic applicants"); *ante*, at 2156, n. 1 (describing the role that race plays in the universities' admissions processes).

10 Even beyond Asian Americans, it is abundantly clear that the university respondents' racial categories are vastly oversimplistic, as the opinion of the Court and Justice GORSUCH's concurrence make clear. See *ante*, at 2167 – 2168; *post*, at 2209 – 2211 (opinion of GORSUCH, J.). Their "affirmative action" programs do not help Jewish, Irish, Polish, or other "white" ethnic groups whose ancestors faced discrimination upon arrival in America, any more than they help the descendants of those Japanese-American citizens interned during World War II.

11 Again, universities may offer admissions preferences to students from disadvantaged backgrounds, and they need not withhold those preferences from students who happen to be members of racial minorities. Universities may not, however, assume that all members of certain racial minorities are disadvantaged.

12 Such black achievement in "racially isolated" environments is neither new nor isolated to higher education. See T. Sowell, Education: Assumptions Versus History 7–38 (1986). As I have previously observed, in the years preceding *Brown*, the "most prominent example of an exemplary black school was Dunbar High School," America's first public high school for black students. *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701, 763, 127 S.Ct. 2738, 168 L.Ed.2d 508 (2007) (concurring opinion). Known for its academics, the school attracted black students from across the Washington, D. C., area. "[I]n the period 1918–1923, Dunbar graduates earned fifteen degrees from Ivy League colleges, and ten degrees from Amherst, Williams, and Wesleyan." Sowell, Education: Assumptions Versus History, at 29. Dunbar produced the first black General in the U. S. Army, the first black Federal Court Judge, and the first black Presidential Cabinet member. A. Stewart, First Class: The Legacy of Dunbar 2 (2013). Indeed, efforts towards racial integration ultimately precipitated the school's decline. When the D. C. schools moved to a neighborhood-based admissions model, Dunbar was no longer able to maintain its prior admissions policies—and "[m]ore than 80 years of quality education came to an abrupt end." T. Sowell, Wealth, Poverty and Politics 194 (2016).

1 See also A. Qin, Aiming for an Ivy and Trying to Seem 'Less Asian,' N. Y. Times, Dec. 3, 2022, p. A18, col. 1 ("[T]he rumor that students can appear 'too Asian' has hardened into a kind of received wisdom within many Asian American communities," and "college admissions consultants [have] spoke[n] about trying to steer their Asian American clients away from so-called typically Asian activities such as Chinese language school, piano and Indian classical instruments.").

2 Though the matter did not receive much attention in the proceedings below, it appears that the Common Application has evolved in recent years to allow applicants to choose among more options to describe their backgrounds. The decisions below do not disclose how much Harvard or UNC made use of this further information (or whether they make use of it now). But neither does it make a difference. Title VI no more tolerates discrimination based on 60 racial categories than it does 6.

3 See also E. Bazelon, Why Is Affirmative Action in Peril? One Man's Decision, N. Y. Times Magazine, Feb. 15, 2023, p. 41 ("In the Ivy League, children whose parents are in the top 1 percent of the income distribution are 77 times as likely to attend as those whose parents are in the bottom 20 percent of the income bracket."); *ibid.* ("[A] common critique ... is that schools have made a bargain with economic elites of all races, with the exception of Asian Americans, who are underrepresented compared with their level of academic achievement.").

4 The principal dissent chides me for "reach[ing] beyond the factfinding below" by acknowledging SFFA's argument that other universities have employed various race-neutral tools. *Post,* at 2241, n. 25 (opinion of SOTOMAYOR, J.). Contrary to the dissent's suggestion, however, I do not purport to find facts about those practices; all I do here is recount what SFFA has argued every step of the way. See, *e.g.,* Brief for Petitioner 55, 66–67; 1 App. in No. 20–1199, pp. 415–416, 440; 2 App. in No. 21–707, pp. 551–552. Nor, of course, is it somehow remarkable to acknowledge the parties' arguments. The principal dissent itself recites SFFA's arguments about Harvard's and other universities' practices too. See, *e.g., post,* at 2241 – 2242, 2252 – 2253 (opinion of SOTOMAYOR, J.). In truth, it is the dissent that reaches beyond the factfinding below when it argues from studies recited in a dissenting opinion in a different case decided almost a decade ago. *Post,* at 2241, n. 25 (opinion of SOTOMAYOR, J.); see also *post,* at 2241 – 2242 (opinion of SOTOMAYOR, J.) (further venturing beyond the trial records to discuss data about employment, income, wealth, home ownership, and healthcare).

5 See Brief for Defense of Freedom Institute for Policy Studies as *Amicus Curiae* 11 (recruited athletes make up less than 1% of Harvard's applicant pool but represent more than 10% of the admitted class); P. Arcidiacono, J. Kinsler, & T. Ransom, Legacy and Athlete Preferences at Harvard, 40 J. Lab. Econ. 133, 141, n. 17 (2021) (recruited athletes were the only applicants admitted with the lowest possible academic rating and 79% of recruited athletes with the next lowest rating were admitted compared to 0.02% of

other applicants with the same rating).

6 The principal dissent suggests "some Asian American applicants are actually advantaged by Harvard's use of race." *Post,* at 2258 (opinion of SOTOMAYOR, J.) (internal quotation marks omitted). What is the dissent's basis for that claim? The district court's finding that "considering applicants' race *may* improve the admission chances of *some* Asian Americans *who connect their racial identities with particularly compelling narratives*." 397 F.Supp.3d at 178 (emphasis added). The dissent neglects to mention those key qualifications. Worse, it ignores completely the district court's further finding that "*overall*" Harvard's race-conscious admissions policy "results in fewer Asian American[s] ... being admitted." *Ibid*. (emphasis added). So much for affording the district court's "careful factfinding" the "deference it [is] owe[d]." *Post,* at 2241, n. 25 (opinion of SOTOMAYOR, J.).

7 See also, *e.g.*, Tr. of Oral Arg. in No. 20–1199, at 67, 84, 91; Tr. of Oral Arg. in No. 21–707, at 70–71, 81, 84, 91–92, 110.

8 Messages among UNC admissions officers included statements such as these: "[P]erfect 2400 SAT All 5 on AP one B in 11th [grade]." "Brown?!" "Heck no. Asian." "Of course. Still impressive."; "If it[']s brown and above a 1300 [SAT] put them in for [the] merit/Excel [scholarship]."; "I just opened a brown girl who's an 810 [SAT]."; "I'm going through this trouble because this is a bi-racial (black/white) male."; "[S]tellar academics for a Native Amer[ican]/African Amer[ican] kid." 3 App. in No. 21–707, pp. 1242–1251.

9 Left with no reply on the statute or its application to the facts, the principal dissent suggests that it violates "principles of party presentation" and abandons "judicial restraint" even to look at the text of Title VI. *Post*, at 2239, n. 21 (opinion of SOTOMAYOR, J.). It is a bewildering suggestion. SFFA sued Harvard and UNC under Title VI. And when a party seeks relief under a statute, our task is to apply the law's terms as a reasonable reader would have understood them when Congress enacted them. *Bostock* v. *Clayton County*, 590 U. S. ——, ——, 140 S.Ct. 1731, 1738–1739, 207 L.Ed.2d 218 (2020). To be sure, parties are free to frame their arguments. But they are not free to stipulate to a statute's meaning and no party may "waiv[e]" the proper interpretation of the law by "fail[ing] to invoke it." *EEOC v. FLRA*, 476 U.S. 19, 23, 106 S.Ct. 1678, 90 L.Ed.2d 19 (1986) (*per curiam*) (internal quotation marks omitted); see also *Young v. United States*, 315 U.S. 257, 258–259, 62 S.Ct. 510, 86 L.Ed. 832 (1942).

1 The Court's decision will first apply to the admissions process for the college class of 2028, which is the next class to be admitted. Some might have debated how to calculate *Grutter*'s 25-year period—whether it ends with admissions for the college class of 2028 or instead for the college class of 2032. But neither Harvard nor North Carolina argued that *Grutter*'s 25-year period ends with the class of 2032 rather than the class of 2028. Indeed, notwithstanding the 25-year limit set forth in *Grutter*, neither university embraced *any* temporal limit on race-based affirmative action in higher education, or identified any end date for its continued use of race in admissions. *Ante,* at 2170 – 2173.

* Justice JACKSON did not participate in the consideration or decision of the case in No. 20–1199 and joins this opinion only as it applies to the case in No. 21–707.

1 As Justice THOMAS acknowledges, the HBCUs, including Howard University, account for a high proportion of Black college graduates. *Ante*, at 2206 – 2207 (concurring opinion). That reality cannot be divorced from the history of anti-Black discrimination that gave rise to the HBCUs and the targeted work of the Freedmen's Bureau to help Black people obtain a higher education. See HBCU Brief 13–15.

2 By the time the Fourteenth Amendment was ratified by the States in 1868, "education had become a right of state citizenship in the constitution of every readmitted state," including in North Carolina. D. Black, The Fundamental Right to Education, 94 Notre Dame L. Rev. 1059, 1089 (2019); see also Brief for Black Women Scholars as *Amici Curiae* 9 ("The herculean efforts of Black

reformers, activists, and lawmakers during the Reconstruction Era forever transformed State constitutional law; today, thanks to the impact of their work, every State constitution contains language guaranteeing the right to public education").

3 The majority suggests that "it required a Second Founding to undo" programs that help ensure racial integration and therefore greater equality in education. *Ante*, at 2175. At the risk of stating the blindingly obvious, and as *Brown* recognized, the Fourteenth Amendment was intended to undo the effects of a world where laws systematically subordinated Black people and created a racial caste system. Cf. *Dred Scott v. Sandford*, 19 How. 393, 405, 60 U.S. 393, 15 L.Ed. 691 (1857). *Brown* and its progeny recognized the need to take affirmative, race-conscious steps to eliminate that system.

4 See GAO, Report to the Chairman, Committee on Education and Labor, House of Representatives, K–12 Education: Student Population Has Significantly Diversified, but Many Schools Remain Divided Along Racial, Ethnic, and Economic Lines 13 (GAO–22–104737, June 2022) (hereinafter GAO Report).

5 G. Orfield, E. Frankenberg, & J. Ayscue, Harming Our Common Future: America's Segregated Schools 65 Years After *Brown* 21 (2019).

6 *E.g.*, *Bennett* v. *Madison Cty. Bd. of Ed.*, No. 5:63–CV–613 (ND Ala., July 5, 2022), ECF Doc. 199, p. 19; *id.*, at 6 (requiring school district to ensure "the participation of black students" in advanced courses).

7 GAO Report 6, 13 (noting that 80% of predominantly Black and Latino schools have at least 75% of their students eligible for free or reduced-price lunch—a proxy for poverty).

8 See also L. Clark, Barbed Wire Fences: The Structural Violence of Education Law, 89 U. Chi. L. Rev. 499, 502, 512–517 (2022); Albert Shanker Institute, B. Baker, M. DiCarlo, & P. Greene, Segregation and School Funding: How Housing Discrimination Reproduces Unequal Opportunity 17–19 (Apr. 2022).

9 See Brief for 25 Harvard Student and Alumni Organizations as *Amici Curiae* 6–15 (collecting sources).

10 GAO Report 7; see also Brief for Council of the Great City Schools as *Amicus Curiae* 11–14 (collecting sources).

11 See J. Okonofua & J. Eberhardt, Two Strikes: Race and the Disciplining of Young Students, 26 Psychol. Sci. 617 (2015) (a national survey showed that "Black students are more than three times as likely to be suspended or expelled as their White peers"); Brief for Youth Advocates and Experts on Educational Access as *Amici Curiae* 14–15 (describing investigation in North Carolina of a public school district, which found that Black students were 6.1 times more likely to be suspended than white students).

12 See, *e.g.*, Dept. of Education, National Center for Education Statistics, Digest of Education Statistics (2021) (Table 104.70) (showing that 59% of white students and 78% of Asian students have a parent with a bachelor's degree or higher, while the same is true for only 25% of Latino students and 33% of Black students).

13 R. Crosnoe, K. Purtell, P. Davis-Kean, A. Ansari, & A. Benner, The Selection of Children From Low-Income Families into Preschool, 52 J. Developmental Psychology 11 (2016); A. Kenly & A. Klein, Early Childhood Experiences of Black Children in a Diverse Midwestern Suburb, 24 J. African American Studies 130, 136 (2020).

14 Dept. of Education, National Center for Education, Institute of Educational Science, The Condition of Education 2022, p. 24 (2020) (fig. 16).

15 ProQuest Statistical Abstract of the United States: 2023, p. 402 (Table 622) (noting Black and Latino adults are more likely to be unemployed).

16 *Id.*, at 173 (Table 259).

17 A. McCargo & J. Choi, Closing the Gaps: Building Black Wealth Through Homeownership (2020) (fig. 1).

18 Dept. of Commerce, Census Bureau, Health Insurance Coverage in the United States: 2021, p. 9 (fig. 5); *id.*, at 29 (Table C–1), https://www.census.gov/library/publications/2022/demo/p60-278.html (noting racial minorities, particularly Latinos, are less likely to have health insurance coverage).

19 In 1979, prompted by lawsuits filed by civil rights lawyers under Title VI, the U. S. Department of Health, Education, and Welfare "revoked UNC's federal funding for its continued noncompliance" with *Brown*. 3 App. 1688; see *Adams v. Richardson*, 351 F.Supp. 636, 637 (DC 1972); *Adams v. Califano*, 430 F.Supp. 118, 121 (DC 1977). North Carolina sued the Federal Government in response, and North Carolina Senator Jesse Helms introduced legislation to block federal desegregation efforts. 3 App. 1688. UNC praised those actions by North Carolina public officials. *Ibid.* The litigation ended in 1981, after the Reagan administration settled with the State. See *North Carolina* v. *Department of Education*, No. 79–217–CIV–5 (EDNC, July 17, 1981) (Consent Decree).

20 See 1 App. 20–21 (campus climate survey showing *inter alia* that "91 percent of students heard insensitive or disparaging racial remarks made by other students"); 2 *id.*, at 1037 (Black student testifying that a white student called him "the N word" and, on a separate occasion at a fraternity party, he was "told that no slaves were allowed in"); *id.*, at 955 (student testifying that he was "the only African American student in the class," which discouraged him from speaking up about racially salient issues); *id.*, at 762–763 (student describing that being "the only Latina" made it "hard to speak up" and made her feel "foreign" and "an outsider").

21 The same standard that applies under the Equal Protection Clause guides the Court's review under Title VI, as the majority correctly recognizes. See *ante*, at 2156 - 2157, n. 2; see also *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 325, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978) (Brennan, J., concurring). Justice GORSUCH argues that "Title VI bears independent force" and holds universities to an even higher standard than the Equal Protection Clause. *Ante*, at 2221. Because no party advances Justice GORSUCH's argument, see *ante*, at 2156 - 2157, n. 2, the Court properly declines to address it under basic principles of party presentation. See *United States* v. *Sineneng-Smith*, 590 U. S. ——, ——, 140 S.Ct. 1575, 1578–1579, 206 L.Ed.2d 866 (2020). Indeed, Justice GORSUCH's approach calls for even more judicial restraint. If petitioner could prevail under Justice GORSUCH's statutory analysis, there would be no reason for this Court to reach the constitutional question. See *Escambia County v. McMillan*, 466 U.S. 48, 51, 104 S.Ct. 1577, 80 L.Ed.2d 36 (1984) (*per curiam*). In a statutory case, moreover, *stare decisis* carries "enhanced force," as it would be up to Congress to "correct any mistake it sees" with "our interpretive decisions." *Kimble v. Marvel Entertainment, LLC*, 576 U.S. 446, 456, 135 S.Ct. 2401, 192 L.Ed.2d 463 (2015). Justice GORSUCH wonders why the dissent, like the majority, does not "engage" with his statutory arguments. *Ante*, at 2215 - 2216. The answer is simple: This Court plays "the role of neutral arbiter of matters the parties present." *Greenlaw v. United States*, 554 U.S. 237, 243, 128 S.Ct. 2559, 171

L.Ed.2d 399 (2008). Petitioner made a strategic litigation choice, and in our adversarial system, it is not up to this Court to come up with "wrongs to right" on behalf of litigants. *Id.*, at 244, 128 S.Ct. 2559 (internal quotation marks omitted).

22 SFFA is a 501(c)(3) nonprofit organization founded after this Court's decision in *Fisher I*, 570 U.S. 297, 133 S.Ct. 2411, 186 L.Ed.2d 474 (2013). App. to Pet. for Cert. in No. 20–1199, p. 10. Its original board of directors had three self-appointed members: Edward Blum, Abigail Fisher (the plaintiff in *Fisher*), and Richard Fisher. See *ibid.*

23 Bypassing the Fourth Circuit's opportunity to review the District Court's opinion in the *UNC* case, SFFA sought certiorari before judgment, urging that, "[p]aired with *Harvard*," the *UNC* case would "allow the Court to resolve the ongoing validity of race-based admissions under both Title VI and the Constitution." Pet. for Cert. in No. 21–707, p. 27.

24 Generally speaking, top percentage plans seek to enroll a percentage of the graduating high school students with the highest academic credentials. See, *e.g.*, *Fisher II*, 579 U.S. at 373, 136 S.Ct. 2198 (describing the University of Texas' Top Ten Percent Plan).

25 SFFA and Justice GORSUCH reach beyond the factfinding below and argue that universities in States that have banned the use of race in college admissions have achieved racial diversity through efforts such as increasing socioeconomic preferences, so UNC could do the same. Brief for Petitioner 85–86; *ante*, at 2214 - 2215. Data from those States disprove that theory. Institutions in those States experienced " 'an immediate and precipitous decline in the rates at which underrepresented-minority students applied ... were admitted ... and enrolled.' " *Schuette v. BAMN*, 572 U.S. 291, 384–390, 134 S.Ct. 1623, 188 L.Ed.2d 613 (2014) (SOTOMAYOR, J., dissenting); see *infra*, at 2260 – 2261, 358 U.S. 54, 79 S.Ct. 99, 3 L.Ed.2d 46. In addition, UNC "already engages" in race-neutral efforts focused on socioeconomic status, including providing "exceptional levels of financial aid" and "increased and targeted recruiting." *UNC*, 567 F.Supp.3d at 665.

Justice GORSUCH argues that he is simply "recount[ing] what SFFA has argued." *Ante*, at 2215, n. 4. That is precisely the point: SFFA's arguments were not credited by the court below. "[W]e are a court of review, not of first view." *Cutter v. Wilkinson*, 544 U.S. 709, 718, n. 7, 125 S.Ct. 2113, 161 L.Ed.2d 1020 (2005). Justice GORSUCH also suggests it is inappropriate for the dissent to respond to the majority by relying on materials beyond the findings of fact below. *Ante*, at 2215, n. 4. There would be no need for the dissent to do that if the majority stuck to reviewing the District Court's careful factfinding with the deference it owes to the trial court. Because the majority has made a different choice, the dissent responds.

26 SFFA also argues that Harvard discriminates against Asian American students. Brief for Petitioner 72–75. As explained below, this claim does not fit under *Grutter*'s strict scrutiny framework, and the courts below did not err in rejecting that claim. See *infra*, at 2257 – 2259, 358 U.S. 54, 79 S.Ct. 99, 3 L.Ed.2d 46.

27 Justice GORSUCH suggests that only "applicants of certain races may receive a 'tip' in their favor." *Ante*, at 2212. To the extent Justice GORSUCH means that some races are not eligible to receive a tip based on their race, there is no evidence in the record to support this statement. Harvard "does not explicitly prioritize any particular racial group over any other and permits its admissions officers to evaluate the racial and ethnic identity of every student in the context of his or her background and circumstances." *Harvard I*, 397 F.Supp.3d 126, 190, n. 56 (Mass. 2019).

28 Relying on a single footnote in the First Circuit's opinion, the Court claims that Harvard's program is unconstitutional because it "has led to an 11.1% decrease in the number of Asian-Americans admitted to Harvard." *Ante*, at 2168. The Court of Appeals, however, merely noted that the United States, at the time represented by a different administration, argued that "absent the consideration of race, [Asian American] representation would increase from 24% to 27%," an 11% increase. *Harvard II*, 980 F.3d at 191, n. 29. Taking those calculations as correct, the Court of Appeals recognized that such an impact from the use of race on the overall makeup of the class is consistent with the impact that this Court's precedents have tolerated. *Ibid.*

The Court also notes that "race is determinative for at least some—if not many—of the students" admitted at UNC. *Ante*, at 2169. The District Court in the *UNC* case found that "race plays a role in a very small percentage of decisions: 1.2% for in-state students and 5.1% for out-of-state students." 567 F.Supp.3d 580, 634 (MDNC 2021). The limited use of race at UNC thus has a smaller effect than at Harvard and is also consistent with the Court's precedents. In addition, contrary to the majority's suggestion, such effect does not prove that "race alone ... explains the admissions decisions for hundreds if not thousands of applicants to UNC each year." *Ante,* at 2169, n. 6. As the District Court found, UNC (like Harvard) "engages a highly individualized, holistic review of each applicant's file, which considers race flexibly as a 'plus factor' as one among many factors in its individualized consideration of each and every applicant." 567 F.Supp.3d at 662; see *id.,* at 658 (finding that UNC "rewards different kinds of diversity, and evaluates a candidate within the context of their lived experience"); *id.,* at 659 ("The parties stipulated, and the evidence shows, that readers evaluate applicants by taking into consideration dozens of criteria," and even SFFA's expert "concede[d] that the University's admissions process is individualized and holistic"). Stated simply, race is not "a defining feature of any individual application." *Id.,* at 662; see also *infra*, at 2251 - 2252.

29 The majority does not dispute that it has handpicked data from a truncated period, ignoring the broader context of that data and what the data reflect. Instead, the majority insists that its selected data prove that Harvard's "precise racial preferences" "operate like clockwork." *Ante*, at 2171, n. 7. The Court's conclusion that such racial preferences must be responsible for an "unyielding demographic composition of [the] class," *ibid.*, misunderstands basic principles of statistics. A number of factors (most notably, the demographic composition of the applicant pool) affect the demographic composition of the entering class. Assume, for example, that Harvard admitted students based solely on standardized test scores. If test scores followed a normal distribution (even with different averages by race) and were relatively constant over time, and if the racial shares of total applicants were also relatively constant over time, one would expect the same "unyielding demographic composition of [the] class." *Ibid.* That would be true even though, under that hypothetical scenario, Harvard does not consider race in admissions at all. In other words, the Court's inference that precise racial preferences must be the cause of relatively constant racial shares of admitted students is specious.

30 In the context of policies that "benefit rather than burden the minority," the Court has adhered to a strict scrutiny framework despite multiple Members of this Court urging that "the mandate of the Equal Protection Clause" favors applying a less exacting standard of review. *Schuette*, 572 U.S. at 373–374, 134 S.Ct. 1623 (SOTOMAYOR, J., dissenting) (collecting cases).

31 The Court's "dictum" that Mexican appearance can be one of many factors rested on now-outdated quantitative premises. *United States v. Montero-Camargo*, 208 F.3d 1122, 1132 (CA9 2000).

32 Justice KAVANAUGH agrees that the effects from the legacy of slavery and Jim Crow continue today, citing Justice Marshall's opinion in *Bakke*. *Ante*, at 2224 - 2225 (citing 438 U.S. at 395–402, 98 S.Ct. 2733). As explained above, Justice Marshall's view was that *Bakke* covered only a portion of the Fourteenth Amendment's sweeping reach, such that the Court's higher education precedents must be expanded, not constricted. See 438 U.S. at 395–402, 98 S.Ct. 2733 (opinion dissenting in part). Justice Marshall's reading of the Fourteenth Amendment does not support Justice KAVANAUGH's and the majority's opinions.

33 There is no dispute that respondents' compelling diversity objectives are "substantial, long-standing, and well documented." *UNC*, 567 F.Supp.3d at 655; *Harvard II*, 980 F.3d at 186–187. SFFA did not dispute below that respondents have a compelling interest in diversity. See *id.*, at 185; *Harvard I*, 397 F.Supp.3d at 133; Tr. of Oral Arg. in No. 21–707, p. 121. And its expert agreed that valuable educational benefits flow from diversity, including richer and deeper learning, reduced bias, and more creative problem solving. 2 App. in No. 21–707, p. 546. SFFA's counsel also emphatically disclaimed the issue at trial. 2 App. in No. 20–1199, p. 548 ("Diversity and its benefits are not on trial here").

34 The Court suggests that promoting the Fourteenth Amendment's vision of equality is a "radical" claim of judicial power and the equivalent of "pick[ing] winners and losers based on the color of their skin." *Ante*, at 2175. The law sometimes requires consideration of race to achieve racial equality. Just like drawing district lines that comply with the Voting Rights Act may require consideration of race along with other demographic factors, achieving racial diversity in higher education requires consideration of race along with "age, economic status, religious and political persuasion, and a variety of other demographic factors." *Shaw v.*

Reno, 509 U.S. 630, 646, 113 S.Ct. 2816, 125 L.Ed.2d 511 (1993) ("[R]ace consciousness does not lead inevitably to impermissible race discrimination"). Moreover, in ordering the admission of Black children to all-white schools "with all deliberate speed" in *Brown v. Board of Education*, 349 U.S. 294, 301, 75 S.Ct. 753, 99 L.Ed. 1083 (1955), this Court did not decide that the Black children should receive an "advantag[e] ... at the expense of" white children. *Ante*, at 2169. It simply enforced the Equal Protection Clause by leveling the playing field.

35 Today's decision is likely to generate a plethora of litigation by disappointed college applicants who think their credentials and personal qualities should have secured them admission. By inviting those challenges, the Court's opinion promotes chaos and incentivizes universities to convert their admissions programs into inflexible systems focused on mechanical factors, which will harm all students.

36 The Court suggests that the term "Asian American" was developed by respondents because they are "uninterested" in whether Asian American students "are adequately represented." *Ante*, at 2167; see also *ante*, at 2209 - 2210 (GORSUCH, J., concurring) (suggesting that "[b]ureaucrats" devised a system that grouped all Asian Americans into a single racial category). That argument offends the history of that term. "The term 'Asian American' was coined in the late 1960s by Asian American activists—mostly college students—to unify Asian ethnic groups that shared common experiences of race-based violence and discrimination and to advocate for civil rights and visibility." Brief for Asian American Legal Defense and Education Fund et al. as *Amici Curiae* 9 (AALDEF Brief).

37 Justice KAVANAUGH's reading, in particular, is quite puzzling. Unlike the majority, which concludes that respondents' programs should have an end point, Justice KAVANAUGH suggests that *Grutter* itself has an expiration date. He agrees that racial inequality persists, *ante*, at 2224 - 2225, but at the same time suggests that race-conscious affirmative action was only necessary in "another generation," *ante*, at 2222. He attempts to analogize expiration dates of court-ordered injunctions in desegregation cases, *ante*, at 2223, but an expiring injunction does not eliminate the underlying constitutional principle. His musings about different college classes, *ante*, at 2224, n. 1, are also entirely beside the point. Nothing in *Grutter*'s analysis turned on whether someone was applying for the class of 2028 or 2032. That reading of *Grutter* trivializes the Court's precedent by reducing it to an exercise in managing academic calendars. *Grutter* is no such thing.

38 Before 2018, Harvard's admissions procedures were silent on the use of race in connection with the personal rating. *Harvard II*, 980 F.3d at 169. Harvard later modified its instructions to say explicitly that " 'an applicant's race or ethnicity should not be considered in assigning the personal rating.' " *Ibid.*

39 At Harvard, "Asian American applicants are accepted at the same rate as other applicants and now make up more than 20% of Harvard's admitted classes," even though "only about 6% of the United States population is Asian American." *Harvard I*, 397 F.Supp.3d at 203.

40 K. Schaeffer, Pew Research Center, The Changing Face of Congress in 8 Charts (Feb. 7, 2023).

41 See J. Martelli & P. Abels, The Education of a Leader: Educational Credentials and Other Characteristics of Chief Executive Officers, J. of Educ. for Bus. 216 (2010); see also J. Moody, Where the Top Fortune 500 CEOs Attended College, U. S. News & World Report (June 16, 2021).

42 Racial inequality in the pipeline to this institution, too, will deepen. See J. Fogel, M. Hoopes, & G. Liu, Law Clerk Selection and Diversity: Insights From Fifty Sitting Judges of the Federal Courts of Appeals 7–8 (2022) (noting that from 2005 to 2017, 85% of Supreme Court law clerks were white, 9% were Asian American, 4% were Black, and 1.5% were Latino, and about half of all clerks during that period graduated from two law schools: Harvard and Yale); Brief for American Bar Association as *Amicus*

Curiae 25 (noting that more than 85% of lawyers, more than 70% of Article III judges, and more than 80% of state judges in the United States are white, even though white people represent about 60% of the population).

* Justice JACKSON did not participate in the consideration or decision of the case in No. 20–1199, and issues this opinion with respect to the case in No. 21–707.

1 M. Oliver & T. Shapiro, Black Wealth/White Wealth: A New Perspective on Racial Inequality 128 (1997) (Oliver & Shapiro) (emphasis deleted).

2 An Appeal to Congress for Impartial Suffrage, Atlantic Monthly (Jan. 1867), in 2 The Reconstruction Amendments: The Essential Documents 324 (K. Lash ed. 2021) (Lash).

3 Speech of Sen. John Sherman (Sept. 28, 1866) (Sherman), in *id*., at 276; see also W. Du Bois, Black Reconstruction in America 162 (1998) (Du Bois).

4 See Sherman 276; M. Curtis, No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights 48, 71–75, 91, 173 (1986).

5 Message Accompanying Veto of the Civil Rights Bill (Mar. 27, 1866), in Lash 145.

6 Speech Introducing the [Fourteenth] Amendment (May 8, 1866), in *id.*, at 159; see Du Bois 670–710.

7 E. Foner, The Second Founding 125–167 (2019) (Foner).

8 *Id*., at 128.

9 M. Baradaran, The Color of Money: Black Banks and the Racial Wealth Gap 9–11 (2017) (Baradaran).

10 Foner 179; see also Baradaran 15–16; I. Wilkerson, The Warmth of Other Suns: The Epic Story of America's Great Migration 37 (2010) (Wilkerson).

11 Baradaran 18.

12 *Ibid.*

13 R. Rothstein, The Color of Law: A Forgotten History of How Our Government Segregated America 154 (2017) (Rothstein); Baradaran 33–34; Wilkerson 53–55.

14 Baradaran 20–21; Du Bois 173–179, 694–696, 698–699; R. Goluboff, The Thirteenth Amendment and the Lost Origins of Civil Rights, 50 Duke L. J. 1609, 1656–1659 (2001) (Goluboff); Wilkerson 152 (noting persistence of this practice "well into the 1940s").

15 Baradaran 20.

16 Goluboff 1656–1659 (recounting presence of these practices well into the 20th century); Wilkerson 162–163.

17 Rothstein 154.

18 C. Black, The Lawfulness of the Segregation Decisions, 69 Yale L. J. 421, 424 (1960); Foner 47–48; Du Bois 179, 696; Baradaran 38–39.

19 T. Shanks, The Homestead Act: A Major Asset-Building Policy in American History, in Inclusion in the American Dream: Assets, Poverty, and Public Policy 23–25 (M. Sherraden ed. 2005) (Shanks); see also Baradaran 18.

20 Shanks 32–37; Oliver & Shapiro 37–38.

21 Wilkerson 8–10; Rothstein 155.

22 *Id.*, at 43–50; Baradaran 90–92.

23 *Ibid.*; Rothstein 172–173; Wilkerson 269–271.

24 Baradaran 90.

25 I. Katznelson, When Affirmative Action Was White: An Untold History of Racial Inequality in Twentieth-Century America 29–35 (2005) (Katznelson).

26 D. Massey & N. Denton, American Apartheid: Segregation and the Making of the Underclass 51–53 (1993); Oliver & Shapiro

16–18.

27 Rothstein 63.

28 *Id.*, at 63–64.

29 *Id.*, at 64; see Oliver & Shapiro 16–18; Baradaran 105.

30 Rothstein 64.

31 *Ibid.*

32 *Id.*, at 67.

33 Baradaran 108; see Rothstein 69–75.

34 *Id.*, at 9, 13, 70.

35 *Id.*, at 108.

36 *Ibid.*

37 R. Schragger, The Limits of Localism, 100 Mich. L. Rev. 371, 411, n. 144 (2001); see also Rothstein 182–183.

38 Oliver & Shapiro 18.

39 *Id.*, at 43–44; Baradaran 109, 253–254; A. Dickerson, Shining a Bright Light on the Color of Wealth, 120 Mich. L. Rev. 1085, 1100 (2022) (Dickerson).

40 Katznelson 53; see *id.*, at 22, 29, 42–48, 53–61; Rothstein 31, 155–156.

41 Katznelson 113–114; see *id.*, at 113–141; see also, *e.g.*, *id.*, at 139–140 (Black veterans, North and South, were routinely denied

loans that White veterans received); Rothstein 167.

42 Baradaran 112–113.

43 Katznelson 22–23; Rothstein 167.

44 *Id.*, at 54–56, 65, 127–131, 217; Stanford Institute for Economic Policy Research, Measuring and Mitigating Disparities in Tax Audits 1–7 (2023); Dickerson 1096–1097.

45 What the Black Man Wants: An Address Delivered in Boston, Massachusetts, on 26 January 1865, in 4 The Frederick Douglass Papers 68 (J. Blassingame & J. McKivigan eds. 1991).

46 Dickerson 1086 (citing data from 2019 Federal Reserve Survey of Consumer Finances); see also Rothstein 184 (reporting, in 2017, even lower median-wealth number of $11,000).

47 Dickerson 1086; see also Rothstein 184 (reporting even larger relative gap in 2017 of $134,000 to $11,000).

48 Baradaran 249; see also Dickerson 1089–1090; Oliver & Shapiro 94–95, 100–101, 110–111, 197.

49 See Brief for National Academy of Education as *Amicus Curiae* 14–15 (citing U. S. Census Bureau statistics).

50 *Id.*, at 14 (citing U. S. Census Bureau statistics); Rothstein 184 (reporting similarly stark White/Black income gap numbers in 2017). Early returns suggest that the COVID–19 pandemic exacerbated these disparities. See E. Derenoncourt, C. Kim, M. Kuhn, & M. Schularick, Wealth of Two Nations: The U. S. Racial Wealth Gap, 1860–2020, p. 22 (Fed. Reserve Bank of Minneapolis, Opportunity & Inclusive Growth Inst., Working Paper No. 59, June 2022) (Wealth of Two Nations); L. Bollinger & G. Stone, A Legacy of Discrimination: The Essential Constitutionality of Affirmative Action 103 (2023) (Bollinger & Stone).

51 *Id.*, at 87; Wealth of Two Nations 77–79.

52 *Id*., at 78, 89; Bollinger & Stone 94–95; Dickerson 1101.

53 Bollinger & Stone 99–100.

54 *Id.*, at 99, and n. 58.

55 Dickerson 1088; Bollinger & Stone 100, and n. 63.

56 ABA, Profile of the Legal Profession 33 (2020).

57 Bollinger & Stone 106; Brief for HR Policy Association as *Amicus Curiae* 18–19.

58 Dickerson 1102.

59 Rothstein 230.

60 Brief for Association of American Medical Colleges et al. as *Amici Curiae* 8 (AMC Brief).

61 C. Caraballo et al., Excess Mortality and Years of Potential Life Lost Among the Black Population in the U. S., 1999–2020, 329 JAMA 1662, 1663, 1667 (May 16, 2023) (Caraballo).

62 Bollinger & Stone 101.

63 S. Whetstone et al., Health Disparities in Uterine Cancer: Report From the Uterine Cancer Evidence Review Conference, 139 Obstetrics & Gynecology 645, 647–648 (2022).

64 AMC Brief 8–9.

65 Bollinger & Stone 101; Caraballo 1663–1665, 1668.

66 Bollinger & Stone 101 (footnotes omitted).

67 Caraballo 1667.

68 *Ibid.*

69 AMC Brief 9.

70 Bollinger & Stone 100.

71 See Report on the Alleged Outrages in the Southern States, S. Rep. No. 1, 42d Cong., 1st Sess., I–XXXII (1871).

72 See D. Tokaji, Realizing the Right To Vote: The Story of *Thornburg v. Gingles*, in Election Law Stories 133–139 (J. Douglas & E. Mazo eds. 2016); see Foner xxii.

73 3 App. 1683.

74 *Id.*, at 1687–1688.

75 See O. James, Valuing Identity, 102 Minn. L. Rev. 127, 162 (2017); P. Karlan & D. Levinson, Why Voting Is Different, 84 Cal. L. Rev. 1201, 1217 (1996).

76 567 F.Supp.3d 580, 595 (MDNC 2021).

77 *Id.*, at 596; 1 App. 348; Decl. of J. Rosenberg in No. 1:14–cv–954 (MDNC, Jan. 18, 2019), ECF Doc. 154–7, ¶10 (Rosenberg).

78 1 App. 350; see also 3 *id.*, at 1414–1415.

79 *Id.*, at 1414.

80 *Id.*, at 1415.

81 *Id.*, at 1416; see also 2 *id.*, at 706; Rosenberg ¶22.

82 3 App. 1416 (emphasis added); see also 2 *id.*, at 631–639.

83 567 F.Supp.3d at 591, 595; 2 App. 638 (Farmer, when asked how race could "b[e] a potential plus" for "students other than underrepresented minority students," pointing to a North Carolinian applicant, originally from Vietnam, who identified as "Asian and Montagnard"); *id.*, at 639 (Farmer stating that "the whole of [that student's] background was appealing to us when we evaluated her applicatio[n]," and noting how her "story reveals sometimes how hard it is to separate race out from other things that we know about a student. That was integral to that student's story. It was part of our understanding of her, and it played a role in

our deciding to admit her").

84 3 *id.*, at 1416; Rosenberg ¶25.

85 2 App. 631.

86 *Id.*, at 636–637, 713.

87 3 *id.*, at 1416; 2 *id.*, at 699–700.

88 *Id.*, at 699; see also Rosenberg ¶24.

89 2 App. 706, 708; 3 *id.*, at 1415–1416.

90 2 *id.*, at 706, 708; 3 *id.*, at 1415–1416.

91 A reader might miss this because the majority does not bother to drill down on how UNC's holistic admissions process operates. Perhaps that explains its failure to apprehend (by reviewing the evidence presented at trial) that everyone, no matter their race, is eligible for a diversity-linked plus. Compare *ante*, at 2156, and n. 1, with 3 App. 1416, and *supra*, at 2272. The majority also repeatedly mischaracterizes UNC's holistic admissions-review process as a "race-based admissions system," and insists that UNC's program involves "separating students on the basis of race" and "pick[ing only certain] races to benefit." *Ante*, at 2156, and n. 1, 2168, 2175. These claims would be concerning if they had any basis in the record. The majority appears to have misunderstood (or categorically rejected) the established fact that UNC treats race as merely one of the many aspects of an applicant that, in the real world, matter to understanding the whole person. Moreover, its holistic review process involves reviewing a wide variety of personal criteria, not just race. Every applicant competes against thousands of other applicants, each of whom has personal qualities that are taken into account and that other applicants do not—and could not—have. Thus, the elimination of the race-linked plus would *still* leave SFFA's members competing against thousands of other applicants to UNC, each of whom has potentially plus-conferring qualities that a given SFFA member does not.

92 See 3 App. 1409, 1414, 1416.

93 *Id.*, at 1414–1415.

94 See 567 F.Supp.3d at 617, 619; 3 App. 1078–1080. The majority cannot deny this factual finding. Instead, it conducts its own back-of-the-envelope calculations (its numbers appear nowhere in the District Court's opinion) regarding "the *overall* acceptance rates of academically excellent applicants to UNC," in an effort to trivialize the District Court's conclusion. *Ante*, at 2156, n. 1. I am inclined to stick with the District Court's findings over the majority's unauthenticated calculations. Even when the majority's ad hoc statistical analysis is taken at face value, it hardly supports what the majority wishes to intimate: that Black students are being admitted based on UNC's myopic focus on "race—and race alone." *Ante*, at 2169, n. 6. As the District Court observed, if

these Black students "were largely defined in the admissions process by their race, one would expect to find that *every*" such student "demonstrating academic excellence ... would be admitted." 567 F.Supp.3d at 619 (emphasis added). Contrary to the majority's narrative, "race does not even act as a tipping point for some students with otherwise exceptional qualifications." *Ibid.* Moreover, as the District Court also found, UNC does not even use the bespoke "academic excellence" metric that SFFA's expert " 'invented' " for this litigation. *Id.*, at 617, 619; see also *id.*, at 624–625. The majority's calculations of overall acceptance rates by race on *that* metric bear scant relationship to, and thus are no indictment of, how UNC's admissions process actually works (a recurring theme in its opinion).

95 See Bollinger & Stone 86, 103.

96 See, *e.g.*, Brief for University of Michigan as *Amicus Curiae* 6, 24; Brief for President and Chancellors of University of California as *Amici Curiae* 20–29; Brief for American Psychological Association et al. as *Amici Curiae* 14–16, 21–23 (APA Brief).

97 *Id.*, at 14–20, 23–27.

98 AMC Brief 4, 14; see also Brief for American Federation of Teachers as *Amicus Curiae* 10 (AFT Brief) (collecting further studies on the "tangible benefits" of patients' access to doctors who look like them).

99 AMC Brief 4.

100 National Research Council, New Horizons in Health: An Integrative Approach 100–111 (2001); Pollack et al., Should Health Studies Measure Wealth? A Systematic Review, 33 Am. J. Preventative Med. 250, 252, 261–263 (2007); see also Part I–B, *supra*.

101 See APA Brief 14–20, 23–27 (collecting studies); AFT Brief 11–12 (same); Brief for National School Boards Association et al. as *Amici Curiae* 6–11 (same); see also 567 F.Supp.3d at 592–593, 655–656 (factual findings in this case with respect to these benefits).

102 LaVeist et al., The Economic Burden of Racial, Ethnic, and Educational Health Inequities in the U. S., 329 JAMA 1682, 1683–1684, 1689, 1691 (May 16, 2023).

103 Justice THOMAS's prolonged attack, *ante*, at 2202 – 2206 (concurring opinion), responds to a dissent I did not write in order to assail an admissions program that is not the one UNC has crafted. He does not dispute any historical or present fact about the origins and continued existence of race-based disparity (nor could he), yet is somehow persuaded that these realities have no bearing on a fair assessment of "individual achievement," *ante*, at 2203. Justice THOMAS's opinion also demonstrates an obsession with race consciousness that far outstrips my or UNC's holistic understanding that race can be a factor that affects applicants' unique life experiences. How else can one explain his detection of "an organizing principle based on race," a claim that our society is "fundamentally racist," and a desire for Black "victimhood" or racial "silo[s]," *ante*, at 2202 – 2204, in this dissent's approval of an admissions program that advances all Americans' shared pursuit of true equality by treating race "on par with" other aspects of identity, *supra*, at 2272? Justice THOMAS ignites too many more straw men to list, or fully extinguish, here. The takeaway is that those who demand that no one think about race (a classic pink-elephant paradox) refuse to see, much less solve for, the elephant in the room—the race-linked disparities that continue to impede achievement of our great Nation's full potential. Worse still, by insisting that obvious truths be ignored, they prevent our problem-solving institutions from directly addressing the real import and impact of "social racism" and "government-imposed racism," *ante*, at 2205 (THOMAS, J., concurring), thereby

deterring our collective progression toward becoming a society where race no longer matters.

104 Foner 179.

105 Justice SOTOMAYOR has fully explained why the majority's analysis is legally erroneous and how UNC's holistic review program is entirely consistent with the Fourteenth Amendment. My goal here has been to highlight the interests at stake and to show that holistic admissions programs that factor in race are warranted, just, and universally beneficial. All told, the Court's myopic misunderstanding of what the Constitution permits will impede what experts and evidence tell us is required (as a matter of social science) to solve for pernicious race-based inequities that are themselves rooted in the persistent denial of equal protection. "[T]he potential consequences of the [majority's] approach, as measured against the Constitution's objectives ... provides further reason to believe that the [majority's] approach is legally unsound." *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701, 858, 127 S.Ct. 2738, 168 L.Ed.2d 508 (2007) (Breyer, J., dissenting). I fear that the Court's folly brings our Nation to the brink of coming "full circle" once again. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 402, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978) (opinion of Marshall, J.).

106 Compare *ante*, at 2166, n. 4, with *ante*, at 2166 – 2171, and *supra*, at 2264 – 2265, and nn. 2–3.

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86 S.Ct. 258
Supreme Court of the United States

SWIFT & COMPANY, Inc., et al., Appellants,
v.
Don J. WICKHAM, Commissioner of Agriculture and Markets of New York.

No. 9.
|
Argued Oct. 13, 1965.
|
Decided Nov. 22, 1965.

Synopsis

Action to enjoin commissioner of agriculture and markets of New York from enforcing New York's labeling provisions in respect to frozen stuffed turkeys. The Three-Judge United States District Court for the Southern District of New York, 230 F.Supp. 398, dismissed the complaint, and the plaintiffs took a direct appeal. The Supreme Court, Mr. Justice Harlan, held that three-judge courts are not required in supremacy clause cases involving only federal-state statutory conflicts.

Appeal dismissed for lack of jurisdiction.

Mr. Justice Douglas, Mr. Justice Black and Mr. Justice Clark dissented.

Attorneys and Law Firms

****259 *112** William J. Condon, New York City, for appellants.

Samuel A. Hirshowitz, New York City, for appellee.

Opinion

Mr. Justice HARLAN delivered the opinion of the Court.

Appellants, the Swift and Armour Companies, stuff, freeze, and package turkeys which they ship to retailers throughout the country for ultimate sale to consumers. Each package is labeled with the net weight of the particular bird (including stuffing) in conformity with a governing federal statute, the Poultry Products Inspection Act of 1957, 71 Stat. 441, 21 U.S.C. ss 451—469 (1964 ed.), and the regulations issued under its authority by the Secretary of Agriculture.[1] Many of these turkeys are ****260 *113** sold in New York. Section 193 of New York's Agriculture and Markets Law, McKinney's Consol.Laws, c. 69[2] has been interpreted through regulations and rulings to require that these packaged turkeys be sold with labels informing the public of the weight of the unstuffed bird as well as of the entire package. Because the amount of stuffing varies with each bird, the State thus seeks to help purchasers ascertain just how much fowl is included in each ready-for-the-oven turkey.

Swift and Armour requested permission of the Poultry Products Section of the Department of Agriculture to change their labels in order to conform with New York's requirements, but such permission was refused at the initial administrative level and no administrative review of that refusal was sought. Swift and Armour ***114** then brought this federal action to enjoin the Commissioner of Agriculture and Markets of New York from enforcing the State's labeling provisions, asserting that enforcement would violate the Commerce Clause and the Fourteenth Amendment of the Federal Constitution and overriding

requirements of the federal poultry enactment.

Pursuant to appellants' request, a three-judge district court was constituted under 28 U.S.C. s 2281 (1958 ed.), which provides for such a tribunal whenever the enforcement of a state statute is sought to be enjoined 'upon the ground of the unconstitutionality of such statute.' The District Court, unsure of its jurisdiction for reasons appearing below, dismissed the suit on the merits[3] acting both in a three-judge and single-judge capacity.[4] Appeals were lodged in the Court of Appeals for the Second Circuit from the single-judge determination, and in this Court from the three-judge decision in accordance with the direct appeal statute, 28 U.S.C. s 1253 (1964 ed.). The threshold question before us, the consideration of which we postponed to the merits (379 U.S. 997, 85 S.Ct. 716, 13 L.Ed.2d 700), is whether this Court, rather than the Court of Appeals, has jurisdiction to review the District Court determination, and this in turn depends on whether a three-judge court was required. We hold that it was not.

**261 At the outset, we agree with the District Court that the Commerce Clause and Fourteenth Amendment *115 claims alleged in the complaint are too insubstantial to support the jurisdiction of a three-judge court. It has long been held that no such court is called for when the alleged constitutional claim is insubstantial, Ex parte Poresky, 290 U.S. 30, 54 S.Ct. 3, 78 L.Ed. 152; California Water Service Co. v. City of Redding, 304 U.S. 252, 58 S.Ct. 865, 82 L.Ed. 1323. Since the only remaining basis but forth for enjoining enforcement of the state enactment was its asserted repugnancy to the federal statute, the District Court was quite right in concluding that the question of a three-judge court turned on the proper application of our 1962 decision in Kesler v. Department of Public Safety, 369 U.S. 153, 82 S.Ct. 807, 7 L.Ed.2d 641. There we decided that in suits to restrain the enforcement of a state statute allegedly in conflict with or in a field pre-empted by a federal statute, s 2281 comes into play only when the Supremacy Clause of the Federal Constitution is immediately drawn in question, but not when issues of federal or state statutory construction must first be decided even though the Supremacy Clause may ultimately be implicated. Finding itself unable to say with assurance whether its resolution of the merits of this case involved less statutory construction than had taken place in Kesler, the District Court was left with the puzzling question how much more statutory construction than occurred in Kesler is necessary to deprive three judges of their jurisdiction.

It might suffice to dispose of the three-judge court issue for us to hold, in agreement with what the District Court indicated, 230 F.Supp., at 410, that this case involves so much more statutory construction than did Kesler that a three-judge court was inappropriate. (We would indeed find it difficult to say that less or no more statutory construction was involved here than in Kesler and that therefore under that decision a three-judge court was necessary.) We think, however, that such a disposition of this important jurisdictional question would be *116 less than satisfactory, that candor compels us to say that we find the application of the Kesler rule as elusive as did the District Court, and that we would fall short in our responsibilities if we did not accept this opportunity to take a fresh look at the problem. We believe that considerations of stare decisis should not deter us from this course. Unless inexorably commanded by statute, a procedural principle of this importance should not be kept on the books in the name of stare decisis once it is proved to be unworkable in practice; the mischievous consequences to litigants and courts alike from the perpetuation of an unworkable rule are too great. For reasons given in this opinion, we have concluded that the Kesler doctrine in this area of s 2281 is unsatisfactory, and that Kesler should be pro tanto overruled. The overruling of a six-to-two decision[5] of such recent vintage, which was concurred in by two members of the majority in the present case,[6] and the opinion in support of which was written by an acknowledged expert in the field of federal jurisdiction, demands full explication of our reasons.

I.

The three-judge district court is a unique feature of our jurisprudence, created to alleviate a specific discontent within the federal system. The antecedent of s 2281 was a 1910 Act[7] passed **262 to assuage growing popular displeasure with the frequent grants of injunctions by federal courts against the operation of state legislation regulating railroads and utilities in particular.[8] The *117 federal courts of the early nineteenth century had occasionally issued injunctions at the behest of private litigants against state officials to prevent the enforcement of state statutes,[9] but such cases were rare and generally of a character that did not offend important state policies. The advent of the Granger and labor movements in the late nineteenth century,[10] and the acceleration of state social legislation especially through the creation of regulatory bodies met with opposition in the federal judiciary. In Chicago, M. & St. P.R. Co. v. State of Minnesota, 134 U.S. 418, 10 S.Ct. 462, 702, 33

L.Ed. 970, this Court held that the setting of rates not permitting a fair return violated the Due Process Clause of the Fourteenth Amendment. Ex parte Young, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714, established firmly the corollary that inferior federal courts could enjoin state officials from enforcing such unconstitutional state laws.

This confrontation between the uncertain contours of the Due Process Clause and developing state regulatory ***118** legislation, arising in district courts that were generally considered unsympathetic to the policies of the States, had severe repercussions. Efforts were made in Congress to limit in various ways the jurisdiction of federal courts in these sensitive areas.[11] State officials spoke out against the obstruction and delay occasioned by these federal injunction suits.[12] The sponsor of the bill establishing the three-judge procedure for these cases, Senator Overman of North Carolina, noted:
'(T)here are 150 cases of this kind now where one federal judge has tied the hands of the state officers, the governor, and the attorney-general * * *.
Whenever one judge stands up in a State and enjoins the governor and the attorney-general, the people resent it, and public sentiment is stirred, as it was in my State, when there was almost a rebellion, whereas ****263** if three judges declare that a state statute is unconstitutional the people would rest easy under it.' 45 Cong.Rec. 7256.[13]

***119** In such an atmosphere was this three-judge court procedure put on the statute books, and although subsequent Congresses have amended the statute[14] its basic structure remains intact.

II.

Section 2281 was designed to provide a more responsible forum for the litigation of suits which, if successful, would render void state statutes embodying important state policies. The statute provides for notification to the State of a pending suit, 28 U.S.C. s 2284(2) (1964 ed.), thus preventing ex parte injunctions common previously.[15] It provides for three judges, one of whom must be a circuit judge, 28 U.S.C. s 2284(1) (1964 ed.), to allow a more authoritative determination and less opportunity for individual predilection in sensitive and politically emotional areas. It authorizes direct review by this Court, 28 U.S.C. s 1253, as a means of accelerating a final determination on the merits; an important criticism of the pre-1910 procedure was directed at the ***120** length of time required to appeal through the circuit courts to the Supreme Court, and the consequent disruption of state tax and regulatory programs caused by the outstanding injunction.[16]

That this procedure must be used in any suit for an injunction against state officials on the ground that a state enactment is unconstitutional has been clear from the start. What yet remains unclear, in spite of decisions by this and other courts, is the scope of the phrase 'upon the ground of the unconstitutionality of such statute' when the complaint alleges not the traditional Due Process Clause, Equal Protection Clause, Commerce Clause, or Contract Clause arguments, but rather that the state statute or regulation in question is pre-empted by or in conflict with some federal statute or regulation thereunder. Any such pre-emption or conflict claim is of course grounded in the Supremacy Clause of the Constitution: if a state measure conflicts with a federal requirement, the state provision must give way. Gibbons v. Ogden, 9 Wheat. 1, 6 L.Ed. 23. The basic question involved in these cases, however, is never one of interpretation of the Federal ****264** Constitution but inevitably one of comparing two statutes. Whether one district judge or three must carry out this function is the question at hand.

The first decision of this Court casting light on the problem was Ex parte Buder, 271 U.S. 461, 46 S.Ct. 557, 70 L.Ed. 1036, in which the question presented was, as here, whether an appeal was properly taken directly from the District Court to the Supreme Court. At issue was whether a Missouri statute authorizing taxation of bank shares remained valid after the enactment of a federal statute which enlarged the scope of the States' power to tax national banks by permitting taxation of shares, or dividends, or ***121** income. Under the federal scheme, States were apparently expected to choose one of the three methods. Although the Missouri law applied the first basis of assessment, the District Court held that because the State did not explicitly choose among the three types of taxation, but instead relied on a prior statute, the assessment was void. Mr. Justice Brandeis, writing for a unanimous Court, held that this was not properly a three-judge court case '* * * because no

state statute was assailed as being repugnant to the federal Constitution.' 271 U.S., at 465, 46 S.Ct., at 558. Although the complaint in Buder did not explicitly invoke the Supremacy Clause, it should be noted that the defendants' answer asserted that if the federal statute was constitutional under the Tenth Amendment, then it would indeed be the "supreme law of the land' within the meaning and provisions of Article VI of the Constitution of the United States,' and thus controlling over the particular state statute unless that statute could be construed as consistent with the federal law. The District Court in Buder was thus clearly presented with the Supremacy Clause basis of the statutory conflict.

Ex parte Bransford, 310 U.S. 354, 60 S.Ct. 947, 84 L.Ed. 1249, raised a similar problem, also in the context of the validity of a state tax. The Court again held this type of federal-state confrontation outside the purview of the predecessor of s 2281:
'If such assessments are invalid, it is because they levy taxes upon property withdrawn from taxation by federal law or in a manner forbidden by the National Banking Act. The declaration of the supremacy clause gives superiority to valid federal acts over conflicting state statutes but this superiority for present purposes involves merely the construction of an act of Congress, not the constitutionality of the state enactment.' 310 U.S., at 358—359, 60 S.Ct. at 950:

***122** In a third case, Case v. Bowles, 327 U.S. 92, 66 S.Ct. 438, 90 L.Ed. 552, the question involved the proposed sale by the State of Washington of timber on stateowned land at a price violating the Federal Emergency Price Control Act of 1942. A federal district court enjoined the sale, and on appeal the State argued that the single judge lacked jurisdiction. This Court held otherwise: 'the complaint did not challenge the constitutionality of the State statute but alleged merely that its enforcement would violate the Emergency Price Control Act. Consequently a three-judge court is not required.' 327 U.S., at 97, 66 S.Ct., at 441.[17]
****265** The upshot of these decisions seems abundantly clear: Supremacy Clause cases are not within the purview of s 2281.[18] This distinction between cases involving claims ***123** that state statutes are unconstitutional within the scope of s 2281 and cases involving statutory preemption or conflict remained firm until Kesler v. Department of Public Safety, 369 U.S. 153, 82 S.Ct. 807, 7 L.Ed.2d 641, in which the plaintiff alleged a conflict between the federal bankruptcy laws and a state statute suspending the driving licenses of persons who are judgment debtors as a result of an adverse decision in an action involving the negligent operation of an automobile. It was argued that federal policy underlying the bankruptcy law overrode the State's otherwise legitimate exercise of its police power. Mr. Justice Frankfurter, for a majority, declared first that s 2281 made no distinction between the Supremacy Clause and other provisions of the Constitution as a ground for denying enforcement of a state statute, and second that Buder, Bransford, and Case could be distinguished on the ground that they presented no claims of unconstitutionality as such: 'If in immediate controversy is not the unconstitutionality of a state law but merely the construction of a state law or the federal law, the three-judge requirement does not become operative.' 369 U.S., at 157, 82 S.Ct., at 811. In the Kesler case itself, Mr. Justice Frankfurter said, there was no problem of statutory construction but only a 'constitutional question' whether the state enactment was pre-empted. After what can only be characterized as extensive statutory analysis (369 U.S., at 158—174, 82 S.Ct. at 811—820) the majority concluded that there had in fact been no pre-emption.[19]

***124** III.

In re-examining the Kesler rule the admonition that s 2281 is to be viewed 'not as a measure of broad social policy to be construed with great liberality, but as an enactment technical in the strict sense of the term and to be applied as such,' Phillips v. United States, 312 U.S. 246, 251, 61 S.Ct. 480, 483, 85 L.Ed. 800, should be kept in mind. The Kesler opinion itself reflects this admonition, for its rationalization of Buder, Bransford, and Case as being consistent with the view that Supremacy Clause cases are not excluded from 'the comprehensive language of s 2281,' 369 U.S., at 156, 82 S.Ct., at 810, is otherwise most difficult to explain.

As a procedural rule governing the distribution of judicial responsibility the test for applying s 2281 must be clearly formulated. The purpose of the three-judge scheme was in major part to expedite important litigation: it should not be interpreted in such a way that litigation, like the present one, is delayed while ****266** the proper composition of the tribunal is litigated. We are now convinced that the Kesler rule, distinguishing between cases in which substantial statutory construction is required and those in which the constitutional issue is 'immediately' apparent, is in practice unworkable. Not only has it

been uniformly criticized by commentators,[20] but lower courts have quite evidently sought to avoid dealing with its application[21] or have interpreted it with uncertainty.[22] As Judge Friendly's opinion for the court below demonstrates, in order to ascertain the ***125** correct forum, the merits must first be adjudicated in order to discover whether the court has 'engaged in so much more construction than in Kesler as to make that ruling inapplicable.' 230 F.Supp., at 410. Such a formulation, whatever its abstract justification, cannot stand as an every-day test for allocating litigation between district courts of one and three judges.

Two possible interpretations of s 2281 would provide a more practicable rule for three-judge court jurisdiction. The first is that Kesler might be extended to hold, as some of its language might be thought to indicate,[23] that all suits to enjoin the enforcement of a state statute, whatever the federal ground, must be channeled through three-judge courts. The second is that no such suits resting solely on 'supremacy' grounds fall within the statute.

The first alternative holds some attraction. First, it is relatively straightforward: a court need not distinguish among different constitutional grounds for the requested injunction; it need look only at the relief sought. Moreover, in those cases, as in that before us, in which an injunction is sought on several grounds, the proper forum would not depend on whether certain alleged constitutional grounds turn out to be insubstantial. Second, s 2281 speaks of 'unconstitutionality,' and, to be sure, any determination that a state statute is void for obstructing a federal statute does rest on the Supremacy Clause of the Federal Constitution. And, third, there is some policy justification for a wider rule. In a broad sense, what concerned the legislators who passed the progenitor of s 2281 was the voiding of state legislation by inferior federal courts. The sensibilities of the citizens, and ***126** perhaps more particularly of the state officials, were less likely to be offended, the Congress thought, by a judgment considered and handed down by three judges rather than by one judge. This rationale can be thought to be as applicable to a suit voiding state legislation on grounds of conflict with a federal statute as it is to an identical suit alleging a conflict with the Federal Constitution directly.

Persuasive as these considerations may be, we believe that the reasons supporting the second interpretation, that is, returning to the traditional Buder-Bransford-Case rule, should carry the day. This restrictive view of the application of s 2281 is more consistent with a discriminating reading of the statute itself than is the first and more embracing interpretation. The statute requires a three-judge court in order to restrain the enforcement of a state statute 'upon the ground of the unconstitutionality of ****267** such statute.' Since all federal actions to enjoin a state enactment rest ultimately on the Supremacy Clause,[24] the words 'upon the ground of the unconstitutionality of such statute' would appear to be superfluous unless they are read to exclude some types of such injunctive suits.[25] For a simple provision prohibiting the restraint of the enforcement of any state statute except by a three-judge court would manifestly have sufficed to embrace every such suit whatever its particular constitutional ground. It is thus quite permissible to read ***127** the phrase in question as one of limitation, signifying a congressional purpose to confine the three-judge court requirement to injunction suits depending directly upon a substantive provision of the Constitution, leaving cases of conflict with a federal statute (or treaty) to follow their normal course in a single-judge court. We do not suggest that this reading of s 2281 is compelled. We do say, however, that it is an entirely appropriate reading, and one that is supported by all the precedents in this Court until Kesler and by sound policy considerations.

An examination of the origins of the three-judge procedure does not suggest what the legislators would have thought about this particular problem, but it does show quite clearly what sort of cases were of concern to them. Their ire was aroused by the frequent grants of injunctions against the enforcement of progressive state regulatory legislation, usually on substantive due process grounds. (See pp. 261—263, supra.) Requiring the collective judgment of three judges and accelerating appeals to this Court were designed to safeguard important state interests. In contrast, a case involving an alleged incompatibility between state and federal statutes, such as the litigation before us, involves more confining legal analysis and can hardly be thought to raise the worrisome possibilities that economic or political predilections will find their way into a judgment. Moreover, those who enacted the three-judge court statute should not be deemed to have been insensitive to the circumstance that single-judge decisions in conflict and pre-emption cases were always subject to the corrective power of Congress, whereas a 'constitutional' decision by such a judge would be beyond that ready means of correction and could be dealt with only by constitutional amendment. The purpose of s 2281 to provide greater restraint and dignity at the district court level cannot well be thought generally applicable to cases that involve conflicts ***128** between state and federal statutes, in this instance determining whether the Department of Agriculture's regulations as applied to the labeling of total net weight on frozen stuffed turkeys necessarily renders invalid a New York statute requiring a supplemental net weight figure which excludes the stuffing.

Our decision that three-judge courts are not required in Supremacy Clause cases involving only federal-state statutory conflicts, in addition to being most consistent with the statute's structure, with pre-Kesler precedent, and with the section's historical purpose, is buttressed by important considerations of judicial administration. As Mr. Justice Frankfurther observed in ****268** Florida Lime & Avocado Growers, Inc. v. Jacobsen, 362 U.S. 73, 92—93, 80 S.Ct. 568, 579—580 (dissenting opinion):
'(T)he convening of a three-judge trial court makes for dislocation of the normal structure and functioning of the lower federal courts, particularly in the vast non-metropolitan regions; and direct review of District Court judgments by this Court not only expands this Court's obligatory jurisdiction but contradicts the dominant principle of having this Court review decisions only after they have gone through two judicial sieves * * *.'

Although the number of three-judge determinations each year should not be exaggerated,[26] this Court's concern for efficient operation of the lower federal courts persuades us to return to the Buder-Bransford-Case rule, ***129** thereby conforming with the constrictive view of the three-judge jurisdiction which this Court has traditionally taken. Ex parte Collins, 277 U.S. 565, 48 S.Ct. 585, 72 L.Ed. 990; Oklahoma Gas & Elec. Co. v. Oklahoma Packing Co., 292 U.S. 386, 54 S.Ct. 732, 78 L.Ed. 1318; Rorick v. Board of Commissioners, 307 U.S. 208, 59 S.Ct. 808, 83 L.Ed. 1242; Phillips v. United States, 312 U.S. 246, 61 S.Ct. 480, 85 L.Ed. 800.

We hold therefore that this appeal is not properly before us under 28 U.S.C. s 1253 and that appellate review lies in the Court of Appeals, where appellants' alternative appeal is now pending. The appeal is dismissed for lack of jurisdiction

It is so ordered.

Appeal dismissed.

Mr. Justice DOUGLAS, with whom Mr. Justice BLACK and Mr. Justice CLARK concur, dissenting.

Less than four years ago, this Court decided that a three-judge district court was required in suits brought under 28 U.S.C. s 2281, even though the alleged 'ground of the unconstitutionality' of the challenged statute was based upon a conflict between state and federal statutes. Kesler v. Department of Public Safety, 369 U.S. 153, 82 S.Ct. 807, 7 L.Ed.2d 641.

A state statute may violate the Equal Protection Clause of the Fourteenth Amendment or the Due Process Clause or some other express provision of the Constitution. If so a three-judge court is plainly required by 28 U.S.C. s 2281. But the issue of the 'unconstitutionality' of a state statute can be raised as clearly by a conflict between it and an Act of Congress as by a conflict between it and a provision of the Constitution. The Supremacy Clause, contained in Art. VI, cl. 2, of the Constitution, states as much in clear language:
'This Constitution, and the Laws of the United States which shall be made in Pursuance thereof * * * shall be the supreme Law of the Land; and the ***130** Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.'

An issue of the 'unconstitutionality' of a state statute is therefore presented whether the conflict is between a provision of the Constitution and a state enactment or between the latter and an Act of Congress. What Senator Overman, author of the three-judge provision, ****269** said of it in 1910 is as relevant to enjoining a state law on the ground of federal pre-emption as it is to enjoining it because it violates the Fourteenth Amendment:
'The point is, this amendment is for peace and good order in the State. Whenever one judge stands up in a State and enjoins the governor and the attorney-general, the people resent it, and public sentiment is stirred, as it was in my State, when there was almost a rebellion, whereas if three judges declare that a state statute is unconstitutional the people would rest easy under it. But let one little judge stand up against the whole State, and you find the people of the State rising up in rebellion. The whole purpose of the proposed statute is for peace and good order among the people of the States.' 45 Cong.Rec. 7256.

Some of the most heated controversies between State and Nation which this Court has supervised have involved questions whether there was a conflict between a state statute and a federal one or whether a federal Act was so inclusive as to pre-empt state action in the particular area. One of the earliest and most tumultuous was Cohens v. Commonwealth of Virginia, 6 Wheat. 264, 440, 5 L.Ed. 257, where the alleged unconstitutionality of a Virginia law was based on the argument that an Act of Congress, authorizing a lottery in the District of Columbia, barred Virginia from making it a criminal offense to sell lottery ***131** tickets within that State. The protest from the States was vociferous[1] even though the Court in the end construed the federal Act to keep it from operating in Virginia. Id., at 447. I therefore see no difference between a charge of 'unconstitutionality' of a state statute whether the conflict be between it and the Constitution or between it and a federal law. Neither the language of the Supremacy Clause nor reason nor history makes any difference plain.

Pre-emption or conflict of a state law with a federal one is a recurring theme[2] arising in various contexts. The storm against Cohens v. Commonwealth of Virginia was a protest against this Court's acting as referee in a federal-state contest involving pre-emption or a conflict between the ***132** laws of the two regimes. Congress has recently been concerned ****270** with the problem in another aspect of the matter,[3] when efforts were made to curb the doctrine of pre-emption by establishing standards for an interpretation of an Act of Congress.[4] The three-judge court is only another facet of the self-same problem.

The history of 28 U.S.C. s 2281, as related by the Court speaks of the concern of Congress over the power ***133** of one judge to bring a halt to an entire state regulatory scheme. That can—and will hereafter—happen in all cases of pre-emption or conflict where the Supremacy Clause is thought to require state policy to give way. A fairly recent example is Cloverleaf Butter Co. v. Patterson, 315 U.S. 148, 62 S.Ct. 491, 86 L.Ed. 754, where a federal court injunction in a pre-emption case suspended Alabama's program for control of renovated butter—a demonstrably important health measure. The Court in Florida Lime & Avocado Growers v. Jacobsen, 362 U.S. 73, 80 S.Ct. 568, 4 L.Ed.2d 568, where one of the issues was pre-emption or conflict between two statutory systems, emphasized that the interest of the States in being free from such injunctive interference at the instance of a single judge outweighed the additional burdens that such a rule imposed on the federal court system. On reflection I think that result better reflects congressional policy even though, as in Cohens v. Commonwealth of Virginia, the end result is only a matter of statutory construction.

On the basis of virtually no experience in applying that interpretation of the statute, a majority has now decided that the rule of Kesler is 'unworkable' and, therefore, that our previous interpretation of the statute must have been incorrect. I regret that I am unable to join in that decision. My objection is not that the Court has not given Kesler 'a more respectful burial,' Gideon v. Wainwright, 372 U.S. 335, 349, 83 S.Ct. 792, 799, 9 L.Ed.2d 799 (concurring opinion), but that the Court has engaged in unwarranted infanticide.

****271** Stare decisis is no immutable principle.[5] There are many occasions when this Court has overturned a prior decision, especially in matters involving an interpretation of the Constitution or where the problem of statutory construction had constitutional overtones.

An error in interpreting a federal statute may be easily remedied. If this Court has failed to perceive the intention ***134** of Congress, or has interpreted a statute in such a manner as to thwart the legislative purpose, Congress may change it. The lessons of experience are not learned by judges alone.

I am unable to find a justification for overturning a decision of this Court interpreting this Act of Congress, announced only on March 26, 1962.

If the Court were able to show that our decision in Kesler had thrown the lower courts into chaos, a fair case for its demise might be made out. The Court calls the rule 'unworkable.' But it is not enough to attach that label. The Court broadly asserts that 'lower courts have quite evidently sought to avoid dealing with its (Kesler's) application or have interpreted it with uncertainty.' For this proposition only three cases (in addition to the instant case) are cited. The Court's failure to provide more compelling documentation for its indictment of Kesler is not the result of less than meticulous scholarship, for so far as I have been able to discover, the truth of the matter is that there are no cases (not even the three cited) even remotely warranting the conclusion that Kesler is 'unworkable.'

Kesler was an attempt to harmonize our earlier cases. If the Kesler test is 'unworkable' as the Court asserts, we should nonetheless accept its basic premise:
'Neither the language of s 2281 nor the purpose which gave rise to it affords the remotest reason for carving out an unfrivolous claim of unconstitutionality because of the Supremacy Clause from the comprehensive language of s 2281.' 369

U.S., at 156, 82 S.Ct., at 810.

If there is overruling to be done, we should overrule Ex parte Buder, 271 U.S. 461, 46 S.Ct. 557, 70 L.Ed. 1036, and Ex parte Bransford, 310 U.S. 354, 60 S.Ct. 947, 84 L.Ed. 1249.

That the ground of unconstitutionality in many so-called Supremacy Clause cases is found only in the asserted conflict between federal and state statutes is, ***135** as I have said, no basis for distinguishing that class of cases from others in which three-judge courts are plainly required. While courts are, strictly speaking, engaging in statutory construction in such cases, the task of adjudication is much the same as in what all would concede to be constitutional adjudication. Though the purpose of Congress is the final touchstone, the interests which must be taken into account in either case are much the same, as Cohens v. Commonwealth of Virginia eloquently demonstrates.

The Court has decided, on no more than the gloomy predictions contained in a handful of law review articles, that Kesler would inevitably produce chaos in the federal courts, that the rule announced there is 'unworkable.' Those predictions have plainly not been borne out. If difficulties arise, Congress can cure them. Until Congress acts, I would let Kesler stand.

I therefore believe that a three-judge court was properly convened and that we should decide this appeal on the merits.

All Citations

382 U.S. 111, 86 S.Ct. 258, 15 L.Ed.2d 194

Footnotes

1 Section 457(b) declares:

'The use of any written, printed or graphic matter upon or accompanying any poultry product inspected or required to be inspected pursuant to the provisions of this chapter or the container thereof which is false or misleading in any particular is prohibited.'

Section 458(d) prohibits 'Using in commerce, or in a designated major consuming area, a false or misleading label on any poultry product.'

The Secretary of Agriculture is authorized by s 463 to issue regulations. 7 CFR s 81.125 requires containers to bear 'approved labels'; s 81.130(a)(3) declares that labels must include the net weight of the contents and that 'The net weight marked on containers of poultry products shall be the net weight of the poultry products and shall not include the weights of the wet or dry packaging materials and giblet wrapping materials.'

2 Section 193, subd. 3 provides:

'All food and food products offered for sale at retail and not in containers shall be sold or offered for sale by net weight, standard measure or numerical count under such regulations as may be prescribed by the commissioner.'

Net weight was not defined in the regulation, 1 NYCRR s 221.40 (now s 221.9(c)), but '(t)he Director of the Bureau of Weights and Measures of the Department testified that he interpreted the regulation, as applied to stuffed turkeys, to require statement of the net weight both of the unstuffed and of the stuffed bird, and that, when asked, he so advised local sealers of weights and measures.' Swift & Co. v. Wickham, 230 F.Supp. 398, 401 (1964).

3 The court below rejected appellants' Commerce Clause and Fourteenth Amendment arguments, held that there had been no federal pre-emption of this field of regulation, and, though implying strongly that the New York labeling requirements did not conflict with federal requirements, held that this question should first be passed upon at a higher federal administrative level.

4 The three-judge court dismissed the complaint 'certifying out of abundant caution' that the original district judge, also a member of the three-judge panel, 'individually arrived at the same conclusion.' 230 F.Supp., at 410. This procedure for minimizing prejudice

to litigants when the jurisdiction of a three-judge court is unclear has been used before, see Query v. United States, 316 U.S. 486, 62 S.Ct. 1122, 86 L.Ed. 1616.

5 Mr. Justice Whittaker took no part in the decision of the case.

6 Mr. Justice Brennan and the present writer were included in the Kesler majority.

7 Act of June 18, 1910, c. 309, s 17, 36 Stat. 557.

8 See Currie, The Three-Judge District Court in Constitutional Litigation, 32 U.Chi.L.Rev. 1, 3—9 (1964); Hutcheson, A Case for Three Judges, 47 Harv.L.Rev. 795 (1934); Warren, Federal and State Court Interference, 43 Harv.L.Rev. 345 (1930). For more contemporary accounts see, e.g., Baldwin, Presidential Address: The Progressive Unfolding of the Powers of the United States, VI Am.Pol.Sci.Rev. 1, 8—9 (1912); Scott, The Increased Control of State Activities by the Federal Courts, III Am.Pol.Sci.Rev. 347 (1909). Although various types of state legislation were being challenged in injunctive suits, see Lockwood, Maw, and Rosenberry, The Use of the Federal Injunction in Constitutional Litigation, 43 Harv.L.Rev. 426 (1930), most numerous and prominent were the railroad cases. Senator Overman noted that '* * * nine out of ten of the cases where application for an injunction has been made to test the constitutionality of state statutes have been railroad cases.' 45 Cong.Rec. 7254 (1910).

9 E.g., Spooner v. McConnell, 22 Fed.Cas. 939 (No. 13245) (1838).

10 See S. J. Buck, The Granger Movement, esp. 194—214, 231—237 (1913); Jackson, The Struggle for Judicial Supremacy 48—68 (1949); 2 Warren, The Supreme Court in United States History 574—599 (1935). For the related story of the use of the equity power in the labor field, see Frankfurter and Greene, The Labor Injunction (1930).

11 See Hutcheson, supra, at 803—804.

12 See, e.g., 45 Cong.Rec. 7253 (1910) (remarks of Senator Crawford). Although some litigation of this sort dragged on for as much as five years, ibid., it is not clear that most state courts were any more expeditious, see Lilienthal, The Federal Courts and State Regulation of Public Utilities, 43 Harv.L.Rev. 379, 417 and n. 176 (1930).

13 Senator Overman was probably referring to Southern R. Co. v. McNeill, 4 Cir., 155 F. 756 (1907). There, after an injunction had been sustained by the Circuit Court, the Governor publicly urged state officials to ignore it. The railway complained to the Court that 'these attacks on the part of the Governor and state officials against the company and its agents * * * had the effect of demoralizing the servants, agents, and employe s of the company to such an extent as to render it well nigh impossible for complainant to properly discharge the duties which it owed the public * * *.' Id., at 790—791.

14 The procedure was extended to cover challenges to orders of state administrative commissions in 1913, 37 Stat. 1013, 28 U.S.C. s 2281, and in 1925 suits for permanent injunctions were brought within its purview, 43 Stat. 938, 28 U.S.C. s 2281. Three-judge district courts are also required in certain suits arising under federal law. See Note, The Three-Judge District Court: Scope and Procedure Under Section 2281, 77 Harv.L.Rev. 299, 300—301 and n. 19 (1963).

15 See Hutcheson, supra, at 800—801. Senator Crawford of South Dakota told the Congress that when his State Legislature was debating a maximum rate law, the railway companies had already prepared motions for injunctions:

'The statute passed and was presented to the governor for his signature, and in less than an hour after he had signed the bill and it was filed in the office of the secretary of state a restraining order came by telegraph from a United States judge, enjoining the governor and the attorney-general and all the officers in the State from proceeding to enforce that statute.' 45 Cong.Rec. 7252 (1910).

16 See, id., at 7256 (remarks of Senator Crawford); note 12, supra.

17 This basic rule has been reiterated in other familiar cases where the facts did not require its application. See Query v. United States, 316 U.S. 486, 62 S.Ct. 1122, 86 L.Ed. 1616, where, however, a three-judge court was found necessary because other not insubstantial constitutional claims had been clearly asserted. In Florida Lime & Avocado Growers, Inc. v. Jacobsen, 362 U.S. 73, 80 S.Ct. 568, 4 L.Ed.2d 568, the majority held that if a state statute is sought to be enjoined on constitutional grounds (Commerce Clause, Equal Protection) it did not matter that a 'nonconstitutional' ground (pre-emption by the Federal Agricultural Marketing Agreement Act) was also asserted. Mr. Justice Frankfurter dissented, reasoning that the three-judge procedure should be read narrowly and that the mere availability of a 'non-constitutional' basis for enjoining the state statute should give jurisdiction to a single judge. Both majority and dissent assumed that an attack upon a state enactment on the ground that it was inconsistent with a federal statute was such a 'non-constitutional' ground.

18 None of these cases can be read to suggest that the result depends on whether or not the complaint specifically invokes the Supremacy Clause, for that clause is the inevitable underpinning for the striking down of a state enactment which is inconsistent with federal law. See the quotation from Bransford, supra, p. 264, a case in which the Supremacy Clause was not invoked in the complaint. See also the discussion of Ex parte Buder, supra, p. 264. Nor do any of these cases suggest that the issue turns on the amount of statutory construction involved, whether large, small, or simply of the character that entails laying the alleged conflicting statutes side by side.

19 In dissent it was stated that the Kesler opinion 'refutes the very test which it establishes.' 369 U.S., at 177, 82 S.Ct., at 821 (dissenting opinion of THE CHIEF JUSTICE). In addition, three Justices dissented in whole or in part from the conclusions derived from this statutory analysis.

20 See Currie, supra, at 61—64 (1964); Note, 77 Harv.L.Rev. 299, 313—315 (1963); Note, 49 Va.L.Rev. 538, 553—555 (1963); 76 Harv.L.Rev. 168 (1962); 15 Stan.L.Rev. 565 (1963); 1962 U.Ill.L.F. 467; 111 U.Pa.L.Rev. 113 (1962).

21 See Borden Co. v. Liddy, 8 Cir., 309 F.2d 871; American Travelers Club, Inc. v. Hostetter, D.C., 219 F.Supp. 95, 102, n. 7.

22 See, in addition to the case before us, Bartlett & Co. Grain v. State Corp. Comm'n of Kansas, D.C., 223 F.Supp. 975.

23 'Neither the language of s 2281 nor the purpose which gave rise to it affords the remotest reason for carving out an unfrivolous claim of unconstitutionality because of the Supremacy Clause from the comprehensive language of s 2281.' 369 U.S., at 156, 82 S.Ct. at 810.

24 Art. VI, cl. 2. 'This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.'

25 The 'unconstitutionality' clause of s 2281 can hardly be thought to encompass the voiding of a state statute for inconsistency with the state constitution. Cf. Florida Lime & Avocado Growers, Inc. v. Jacobsen, 362 U.S. 73, 80, 80 S.Ct. 568, 573.

26 The statistics are summarized in Note; 77 Harv.L.Rev. 299, 303—305 (1963); Note, 72 Yale L.J. 1646, 1654—1659 (1963). The most recent figures show that out of the 11,485 trials completed in district courts in fiscal 1965, only 147 were heard by three-judge courts. Of these 60 dealt with I.C.C. regulations, 35 with civil rights, and only 52 with state or local law. 1965 Dir.Adm.Off. U.S. Courts Ann.Rep. II—25, II—28.

1 See 1 Warren, The Supreme Court in United States History, p. 552 et seq. (1928).

'The Richmond Enquirer spoke of the opinion, 'so important in its consequences and so obnoxious in its doctrines,' and said that 'the very title of the case is enough to stir one's blood.' It feared that 'the Judiciary power, with a foot as noiseless as time and a spirit as greedy as the grave, is sweeping to their destruction the rights of the States. * * * These encroachments have increased, are increasing and ought to be diminished'; and it advocated a repeal of the fatal Section of the Judiciary Act as 'the most advisable and constitutional remedy for the evil.' A leading Ohio paper spoke of 'the alarming progress of the Supreme Court in subverting the Federalist principles of the Constitution and introducing on their ruins a mighty consolidated empire fitted for the sceptre of a great monarch'; and it continued: 'That the whole tenor of their decisions, when State-Rights have been involved, have had a direct tendency to reduce our governors to the condition of mere provincial satraps, and that a silent acquiescence in these decisions will bring us to this lamentable result, is to us as clear as mathematical demonstration. ""'' Id., at 552—553.

2 Thus the dissent in Cloverleaf Butter Co. v. Patterson, 315 U.S. 148, 179, 62 S.Ct. 491, 507, 86 L.Ed. 754, called that decision in favor of pre-emption 'purely destructive legislation.' And see Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 67 S.Ct. 1146, 91 L.Ed. 1447; Campbell v. Hussey, 368 U.S. 297, 82 S.Ct. 327, 7 L.Ed.2d 299; Cf. Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324, 84 S.Ct. 1293, 12 L.Ed.2d 350.

3 H.R. 3, 88th Cong., 1st Sess., in material part provided:

'No Act of Congress shall be construed as indicating an intent on the part of Congress to occupy the field in which such Act operates, to the exclusion of all State laws on the same subject matter, unless such Act contains an express provision to that effect, or unless there is a direct and positive conflict between such Act and a State law so that the two cannot be reconciled or consistently stand together.'

The first version of the bill was introduced in 1956. The House Committee on the Judiciary made numerous changes, limiting its application to the subject of subversion, and reported the bill out with a 'do pass' recommendation. H.R.Rep. No. 2576, 84th Cong., 2d Sess. The Senate version, S. 3143, was not so narrowed in Committee. S.Rep. No. 2230, 84th Cong., 2d Sess. The bill was not passed in either the House or the Senate.

H.R. 3 was again introduced in the Eighty-fifth Congress. The Judiciary Committee again recommended that the bill 'do pass,' but this time did not narrow its scope to the subject of subversion. See H.R.Rep. No. 1878, 85th Cong., 2d Sess. It was passed by the House on July 17, 1958.

H.R. 3, having once again been approved by the Judiciary Committee, H.R.Rep. No. 422, 86th Cong., 1st Sess., was approved by the House on June 24, 1959.

In the Eighty-seventh Congress, H.R. 3 was favorably reported out by the Judiciary Committee. H.R.Rep. No. 1820, 87th Cong.,

2d Sess., but was not acted upon by the full House.

4 The concern of Congress in this chapter of federal-state relations did not concern the three-judge court problem but the broader aspects envisaged by such cases as Commonwealth of Pennsylvania v. Nelson, 350 U.S. 497, 76 S.Ct. 477, 100 L.Ed. 640, Phillips Petroleum Co. v. State of Wisconsin, 347 U.S. 672, 74 S.Ct. 794, 98 L.Ed. 1035, Slochower v. Board of Education, 350 U.S. 551, 76 S.Ct. 637, 100 L.Ed. 692, Railway Employes v. Hanson, 351 U.S. 225, 76 S.Ct. 714, 100 L.Ed. 1112, and Cloverleaf Butter Co. v. Patterson, 315 U.S. 148, 62 S.Ct. 491, 86 L.Ed. 754. See H.R.Rep. No. 1820, 87th Cong., 2d Sess., p. 3 et seq.

5 See Radin, Case Law and Stare Decisis, 33 Col.L.Rev. 199 (1933).

124 S.Ct. 1978
Supreme Court of the United States

TENNESSEE, Petitioner,
v.
George LANE et al.

No. 02–1667.
|
Argued Jan. 13, 2004.
|
Decided May 17, 2004.

Synopsis
Background: Disabled citizens brought action against state under Title II of the Americans with Disabilities Act (ADA), seeking to vindicate their right of access to the courts. The United States District Court for the Middle District of Tennessee, Thomas A. Higgins, J., denied state's motion to dismiss. State appealed. On petition for rehearing, the Court of Appeals, 315 F.3d 680,affirmed and remanded. Certiorari was granted.

The United States Supreme Court, Justice Stevens, held that Title II of the ADA, as applied to cases implicating the fundamental right of access to the courts, constitutes a valid exercise of Congress' enforcement power under the Fourteenth Amendment.

Affirmed.

Justice Souter filed a concurring opinion in which Justice Ginsburg joined.

Justice Ginsburg filed a concurring opinion in which Justices Souter and Breyer joined.

Chief Justice Rehnquist filed a dissenting opinion in which Justices Kennedy and Thomas joined.

Justices Scalia and Thomas filed dissenting opinions.

****1979** *Syllabus*[*]
Respondent paraplegics filed this action for damages and equitable relief, alleging that Tennessee and a number of its counties had denied them physical access to that State's courts in violation of Title II of the Americans with Disabilities Act of 1990(ADA), which provides: "[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation or denied the benefits of the services, programs or activities of a public entity," 42 U.S.C. § 12132. After the District Court denied the State's motion to dismiss on Eleventh Amendment immunity grounds, the Sixth Circuit held the appeal in abeyance pending *Board of Trustees of Univ. of Ala. v. Garrett,* 531 U.S. 356, 121 S.Ct. 955, 148 L.Ed.2d 866. This Court later ruled in *Garrett* that the Eleventh Amendment bars private money damages actions for state violations of ADA Title I, which prohibits employment discrimination against the disabled. The en banc Sixth Circuit then issued its *Popovich* decision, in which it interpreted *Garrett* to bar private ADA suits against States based on equal protection principles, but not those relying on due process, and therefore permitted a Title II damages action to proceed despite the State's immunity claim. Thereafter, a Sixth Circuit panel affirmed the dismissal denial in this case, explaining that respondents' claims were not barred because they were based on due process principles. In response to a rehearing petition arguing that *Popovich* did not control because respondents' complaint did not allege due process violations, the panel filed an amended opinion, explaining

that due process protects the right of access to the courts, and that the evidence before Congress when it enacted Title II established, **1980 *inter alia,* that physical barriers in courthouses and courtrooms have had the effect of denying disabled people the opportunity for such access.

Held: As it applies to the class of cases implicating the fundamental right of access to the courts, Title II constitutes a valid exercise of Congress' authority under § 5 of the Fourteenth Amendment to enforce that Amendment's substantive guarantees. Pp. 1984–1994.

(a) Determining whether Congress has constitutionally abrogated a State's Eleventh Amendment immunity requires resolution of two predicate questions: (1) whether Congress unequivocally expressed its intent to abrogate; and (2), if so, whether it acted pursuant to a valid grant of *510 constitutional authority. *Kimel v. Florida Bd. of Regents,* 528 U.S. 62, 73, 120 S.Ct. 631, 145 L.Ed.2d 522. The first question is easily answered here, since the ADA specifically provides for abrogation. See § 12202. With regard to the second question, Congress can abrogate state sovereign immunity pursuant to a valid exercise of its power under § 5 of the Fourteenth Amendment. *E.g., Fitzpatrick v. Bitzer,* 427 U.S. 445, 456, 96 S.Ct. 2666, 49 L.Ed.2d 614. That power is not, however, unlimited. While Congress must have a wide berth in devising appropriate remedial and preventative measures for unconstitutional actions, those measures may not work a "substantive change in the governing law." *City of Boerne v. Flores,* 521 U.S. 507, 519, 117 S.Ct. 2157, 138 L.Ed.2d 624. In *Boerne,* the Court set forth the test for distinguishing between permissible remedial legislation and unconstitutional substantive redefinition: Section 5 legislation is valid if it exhibits "a congruence and proportionality" between an injury and the means adopted to prevent or remedy it. *Id.,* at 520, 117 S.Ct. 2157. Applying the *Boerne* test in *Garrett,* the Court concluded that ADA Title I was not a valid exercise of Congress' § 5 power because the historical record and the statute's broad sweep suggested that Title I's true aim was not so much enforcement, but an attempt to "rewrite" this Court's Fourteenth Amendment jurisprudence. 531 U.S., at 372–374, 121 S.Ct. 955. In view of significant differences between Titles I and II, however, *Garrett* left open the question whether Title II is a valid exercise of Congress' § 5 power, *id.,* at 360, n. 1, 121 S.Ct. 955. Pp. 1985–1988.

(b) Title II is a valid exercise of Congress' § 5 enforcement power. Pp. 1988–1994.

(1) The *Boerne* inquiry's first step requires identification of the constitutional rights Congress sought to enforce when it enacted Title II. *Garrett,* 531 U.S., at 365, 121 S.Ct. 955. Like Title I, Title II seeks to enforce the Fourteenth Amendment's prohibition on irrational disability discrimination. *Id.,* at 366, 121 S.Ct. 955. But it also seeks to enforce a variety of other basic constitutional guarantees, including some, like the right of access to the courts here at issue, infringements of which are subject to heightened judicial scrutiny. See, *e.g., Dunn v. Blumstein,* 405 U.S. 330, 336–337, 92 S.Ct. 995, 31 L.Ed.2d 274. Whether Title II validly enforces such constitutional rights is a question that "must be judged with reference to the historical experience which it reflects." *E.g., South Carolina v. Katzenbach,* 383 U.S. 301, 308, 86 S.Ct. 803, 15 L.Ed.2d 769. Congress enacted Title II against a backdrop of pervasive unequal treatment of persons with disabilities in the administration of state services and programs, including systematic deprivations of fundamental rights. The historical experience that Title II reflects is also documented in the decisions of this and other courts, which have identified unconstitutional treatment of disabled persons by state agencies in a variety of **1981 public programs and services. With respect to the particular services at issue, Congress learned that many individuals, in many States, were being excluded from courthouses and court proceedings by reason of their disabilities. *511 A Civil Rights Commission report before Congress showed that some 76% of public services and programs housed in state-owned buildings were inaccessible to and unusable by such persons. Congress also heard testimony from those persons describing the physical inaccessibility of local courthouses. And its appointed task force heard numerous examples of their exclusion from state judicial services and programs, including failure to make courtrooms accessible to witnesses with physical disabilities. The sheer volume of such evidence far exceeds the record in last Term's *Nevada Dept. of Human Resources v. Hibbs,* 538 U.S. 721, 728–733, 123 S.Ct. 1972, 155 L.Ed.2d 953, in which the Court approved the family-care leave provision of the Family and Medical Leave Act of 1993 as valid § 5 legislation. Congress' finding in the ADA that "discrimination against individuals with disabilities persists in such critical areas as ... access to public services," § 12101(a)(3), together with the extensive record of disability discrimination that underlies it, makes clear that inadequate provision of public services and access to public facilities was an appropriate subject for prophylactic legislation. Pp. 1988–1992.

(2) Title II is an appropriate response to this history and pattern of unequal treatment. Unquestionably, it is valid § 5 legislation as it applies to the class of cases implicating the accessibility of judicial services. Congress' chosen remedy for the pattern of exclusion and discrimination at issue, Title II's requirement of program accessibility, is congruent and proportional

to its object of enforcing the right of access to the courts. The long history of unequal treatment of disabled persons in the administration of judicial services has persisted despite several state and federal legislative efforts to remedy the problem. Faced with considerable evidence of the shortcomings of these previous efforts, Congress was justified in concluding that the difficult and intractable problem of disability discrimination warranted added prophylactic measures. *Hibbs,* 538 U.S., at 737, 123 S.Ct. 1972. The remedy Congress chose is nevertheless a limited one. Recognizing that failure to accommodate persons with disabilities will often have the same practical effect as outright exclusion, Congress required the States to take reasonable measures to remove architectural and other barriers to accessibility. § 12132. But Title II does not require States to employ any and all means to make judicial services accessible or to compromise essential eligibility criteria for public programs. It requires only "reasonable modifications" that would not fundamentally alter the nature of the service provided, and only when the individual seeking modification is otherwise eligible for the service. *Ibid.* Title II's implementing regulations make clear that the reasonable modification requirement can be satisfied in various ways, including less costly measures than structural changes. This duty to accommodate is perfectly consistent with the well-established due process principle that, within the limits of practicability, a State ***512** must afford to all individuals a meaningful opportunity to be heard in its courts. *Boddie v. Connecticut,* 401 U.S. 371, 379, 91 S.Ct. 780. A number of affirmative obligations flow from this principle. Cases such as *Boddie, Griffin v. Illinois,* 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891, and *Gideon v. Wainwright,* 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799, make clear that ordinary considerations of ****1982** cost and convenience alone cannot justify a State's failure to provide individuals with a meaningful right of access to the courts. Judged against this backdrop, Title II's affirmative obligation to accommodate is a reasonable prophylactic measure, reasonably targeted to a legitimate end. Pp. 1992–1994.

315 F.3d 680, affirmed.

STEVENS, J., delivered the opinion of the Court, in which O'CONNOR, SOUTER, GINSBURG, and BREYER, JJ., joined. SOUTER, J., filed a concurring opinion, in which GINSBURG, J., joined, *post,* p. 1995. GINSBURG, J., filed a concurring opinion, in which SOUTER and BREYER, JJ., joined, *post,* p. 1996. REHNQUIST, C. J., filed a dissenting opinion, in which KENNEDY and THOMAS, JJ., joined, *post,* p. 1997. SCALIA, J., *post,* p. 2007, and THOMAS, J., *post,* p. 2013, filed dissenting opinions.

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Opinion

Justice STEVENS delivered the opinion of the Court.

***513** Title II of the Americans with Disabilities Act of 1990 (ADA or Act), 104 Stat. 337, 42 U.S.C. §§ 12131–12165, provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs or activities of a public entity, or be subjected to discrimination by any such entity." § 12132. The question presented in this case is whether Title II exceeds Congress' power under § 5 of the Fourteenth Amendment.

I

In August 1998, respondents George Lane and Beverly Jones filed this action against the State of Tennessee and a number of Tennessee counties, alleging past and ongoing violations of Title II. Respondents, both of whom are paraplegics who use wheelchairs for mobility, claimed that they were denied access to, and the services of, the state court system by reason of their disabilities. Lane alleged that he was compelled to appear to answer a set of criminal charges on the second floor of a county courthouse that had no elevator. ***514** At his first appearance, Lane crawled up two flights of stairs to get to the courtroom. ****1983** When Lane returned to the courthouse for a hearing, he refused to crawl again or to be carried by officers to the courtroom; he consequently was arrested and jailed for failure to appear. Jones, a certified court reporter, alleged that she has not been able to gain access to a number of county courthouses, and, as a result, has lost both work and an opportunity to participate in the judicial process. Respondents sought damages and equitable relief.

The State moved to dismiss the suit on the ground that it was barred by the Eleventh Amendment. The District Court denied the motion without opinion, and the State appealed.[1] The United States intervened to defend Title II's abrogation of the States' Eleventh Amendment immunity. On April 28, 2000, after the appeal had been briefed and argued, the Court of Appeals for the Sixth Circuit entered an order holding the case in abeyance pending our decision in *Board of Trustees of Univ. of Ala. v. Garrett,* 531 U.S. 356, 121 S.Ct. 955, 148 L.Ed.2d 866 (2001).

In *Garrett,* we concluded that the Eleventh Amendment bars private suits seeking money damages for state violations of Title I of the ADA. We left open, however, the question whether the Eleventh Amendment permits suits for money damages under Title II. *Id.,* at 360, n. 1, 121 S.Ct. 955. Following the *Garrett* decision, the Court of Appeals, sitting en banc, heard argument in a Title II suit brought by a hearing-impaired litigant who sought money damages for the State's failure to accommodate his disability in a child custody proceeding. *Popovich v. Cuyahoga County Court,* 276 F.3d 808 (C.A.6 2002). A divided court permitted the suit to proceed ***515** despite the State's assertion of Eleventh Amendment immunity. The majority interpreted *Garrett* to bar private ADA suits against States based on equal protection principles, but not those that rely on due process principles. 276 F.3d, at 811–816. The minority concluded that Congress had not validly abrogated the States' Eleventh Amendment immunity for any Title II claims, *id.,* at 821, while the concurring opinion concluded that Title II validly abrogated state sovereign immunity with respect to both equal protection and due process claims, *id.,* at 818.

Following the en banc decision in *Popovich,* a panel of the Court of Appeals entered an order affirming the District Court's denial of the State's motion to dismiss in this case. Judgt. order reported at 2002 WL 1580210 (C.A.6 2002). The order explained that respondents' claims were not barred because they were based on due process principles. In response to a petition for rehearing arguing that *Popovich* was not controlling because the complaint did not allege due process violations, the panel filed an amended opinion. It explained that the Due Process Clause protects the right of access to the courts, and that the evidence before Congress when it enacted Title II "established that physical barriers in government buildings, including courthouses and in the courtrooms themselves, have had the effect of denying disabled people the opportunity to access vital services and to exercise fundamental rights guaranteed by the Due Process Clause." 315 F.3d 680, 682 (2003). Moreover, that "record demonstrated that public entities' failure to accommodate the needs of qualified persons with disabilities ****1984** may result directly from unconstitutional animus and impermissible stereotypes." *Id.,* at 683. The panel did not, however, categorically reject the State's submission. It instead noted that the case presented difficult questions that "cannot be clarified absent a factual record," and remanded for further proceedings. *Ibid.* We granted certiorari, 539 U.S. 941, 123 S.Ct. 2622, 156 L.Ed.2d 626 (2003), and now affirm.

***516** II

The ADA was passed by large majorities in both Houses of Congress after decades of deliberation and investigation into the

need for comprehensive legislation to address discrimination against persons with disabilities. In the years immediately preceding the ADA's enactment, Congress held 13 hearings and created a special task force that gathered evidence from every State in the Union. The conclusions Congress drew from this evidence are set forth in the task force and Committee Reports, described in lengthy legislative hearings, and summarized in the preamble to the statute.[2] Central among these conclusions was Congress' finding that

> "individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society." 42 U.S.C. § 12101(a)(7).

Invoking "the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce," the ADA is designed "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." §§ 12101(b)(1), (b)(4). It forbids discrimination against persons with disabilities in three major areas of public life: employment, which is covered by Title I of the statute; public ***517** services, programs, and activities, which are the subject of Title II; and public accommodations, which are covered by Title III.

Title II, §§ 12131–12134, prohibits any public entity from discriminating against "qualified" persons with disabilities in the provision or operation of public services, programs, or activities. The Act defines the term "public entity" to include state and local governments, as well as their agencies and instrumentalities. § 12131(1). Persons with disabilities are "qualified" if they, "with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, mee[t] the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." § 12131(2). Title II's enforcement provision incorporates by reference § 505 of the Rehabilitation Act of 1973, 92 Stat. 2982, as added, 29 U.S.C. § 794a, which ****1985** authorizes private citizens to bring suits for money damages. 42 U.S.C. § 12133.

III

The Eleventh Amendment renders the States immune from "any suit in law or equity, commenced or prosecuted ... by Citizens of another State, or by Citizens or Subjects of any Foreign State." Even though the Amendment "by its terms ... applies only to suits against a State by citizens of another State," our cases have repeatedly held that this immunity also applies to unconsented suits brought by a State's own citizens. *Garrett,* 531 U.S., at 363, 121 S.Ct. 955; *Kimel v. Florida Bd. of Regents,* 528 U.S. 62, 72–73, 120 S.Ct. 631, 145 L.Ed.2d 522 (2000). Our cases have also held that Congress may abrogate the State's Eleventh Amendment immunity. To determine whether it has done so in any given case, we "must resolve two predicate questions: first, whether Congress unequivocally expressed its intent to abrogate that immunity; and second, if it did, whether Congress acted pursuant to a valid grant of constitutional authority." *Id.,* at 73, 120 S.Ct. 631.

***518** The first question is easily answered in this case. The Act specifically provides: "A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this chapter." 42 U.S.C. § 12202. As in *Garrett,* see 531 U.S., at 363–364, 121 S.Ct. 955, no party disputes the adequacy of that expression of Congress' intent to abrogate the States' Eleventh Amendment immunity. The question, then, is whether Congress had the power to give effect to its intent.

In *Fitzpatrick v. Bitzer,* 427 U.S. 445, 96 S.Ct. 2666, 49 L.Ed.2d 614 (1976), we held that Congress can abrogate a State's sovereign immunity when it does so pursuant to a valid exercise of its power under § 5 of the Fourteenth Amendment to enforce the substantive guarantees of that Amendment. *Id.,* at 456, 96 S.Ct. 2666. This enforcement power, as we have often acknowledged, is a "broad power indeed." *Mississippi Univ. for Women v. Hogan,* 458 U.S. 718, 732, 102 S.Ct. 3331, 73 L.Ed.2d 1090 (1982), citing *Ex parte Virginia,* 100 U.S. 339, 346, 25 L.Ed. 676 (1880).[3] It includes "the authority both to remedy and to deter violation of rights guaranteed [by the Fourteenth Amendment] by prohibiting a somewhat broader swath

of conduct, including that which is not itself forbidden by the Amendment's text." *Kimel,* 528 U.S., at 81, 120 S.Ct. 631. We have thus repeatedly affirmed that "Congress may enact so-called prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct." *Nevada Dept. of Human Resources v. Hibbs,* 538 U.S. 721, 727–728, 123 S.Ct. 1972, 155 L.Ed.2d 953 (2003). See also ***519** *City of Boerne v. Flores,* 521 U.S. 507, 518, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997).[4] The ****1986** most recent affirmation of the breadth of Congress' § 5 power came in *Hibbs,* in which we considered whether a male state employee could recover money damages against the State for its failure to comply with the family-care leave provision of the Family and Medical Leave Act of 1993 (FMLA), 107 Stat. 6, 29 U.S.C. § 2601 *et seq.* We upheld the FMLA as a valid exercise of Congress' § 5 power to combat unconstitutional sex discrimination, even though there was no suggestion that the State's leave policy was adopted or applied with a discriminatory purpose that would render it unconstitutional under the rule of *Personnel Administrator of Mass. v. Feeney,* 442 U.S. 256, 99 S.Ct. 2282, 60 L.Ed.2d 870 (1979). ***520** When Congress seeks to remedy or prevent unconstitutional discrimination, § 5 authorizes it to enact prophylactic legislation proscribing practices that are discriminatory in effect, if not in intent, to carry out the basic objectives of the Equal Protection Clause.

Congress' § 5 power is not, however, unlimited. While Congress must have a wide berth in devising appropriate remedial and preventative measures for unconstitutional actions, those measures may not work a "substantive change in the governing law." *Boerne,* 521 U.S., at 519, 117 S.Ct. 2157. In *Boerne,* we recognized that the line between remedial legislation and substantive redefinition is "not easy to discern," and that "Congress must have wide latitude in determining where it lies." *Id.,* at 519–520, 117 S.Ct. 2157. But we also confirmed that "the distinction exists and must be observed," and set forth a test for so observing it: Section 5 legislation is valid if it exhibits "a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Id.,* at 520, 117 S.Ct. 2157.

In *Boerne,* we held that Congress had exceeded its § 5 authority when it enacted the Religious Freedom Restoration Act of 1993 (RFRA), 107 Stat. 1488, 42 U.S.C. § 2000bb *et seq.* We began by noting that Congress enacted RFRA "in direct response" to our decision in *Employment Div., Dept. of Human Resources of Ore. v. Smith,* 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990), for the stated purpose of "restor[ing]" a constitutional rule that *Smith* had rejected. ****1987** 521 U.S., at 512, 515, 117 S.Ct. 2157 (internal quotation marks omitted). Though the respondent attempted to defend the statute as a reasonable means of enforcing the Free Exercise Clause as interpreted in *Smith,* we concluded that RFRA was "so out of proportion" to that objective that it could be understood only as an attempt to work a "substantive change in constitutional protections." 521 U.S., at 529, 532, 117 S.Ct. 2157. Indeed, that was the very purpose of the law.

This Court further defined the contours of *Boerne's* "congruence and proportionality" test in *Florida Prepaid Postsecondary* ***521** *Ed. Expense Bd. v. College Savings Bank,* 527 U.S. 627, 119 S.Ct. 2199, 144 L.Ed.2d 575 (1999). At issue in that case was the validity of the Patent and Plant Variety Protection Remedy Clarification Act (hereinafter Patent Remedy Act), a statutory amendment Congress enacted in the wake of our decision in *Atascadero State Hospital v. Scanlon,* 473 U.S. 234, 105 S.Ct. 3142, 87 L.Ed.2d 171 (1985), to clarify its intent to abrogate state sovereign immunity from patent infringement suits. *Florida Prepaid,* 527 U.S., at 631–632, 119 S.Ct. 2199. Noting the virtually complete absence of a history of unconstitutional patent infringement on the part of the States, as well as the Act's expansive coverage, the Court concluded that the Patent Remedy Act's apparent aim was to serve the Article I concerns of "provid[ing] a uniform remedy for patent infringement and ... plac[ing] States on the same footing as private parties under that regime," and not to enforce the guarantees of the Fourteenth Amendment. *Id.,* at 647–648, 119 S.Ct. 2199. See also *Kimel,* 528 U.S. 62, 120 S.Ct. 631 (finding that the Age Discrimination in Employment Act exceeded Congress' § 5 powers under *Boerne*); *United States v. Morrison,* 529 U.S. 598, 120 S.Ct. 1740, 146 L.Ed.2d 658 (2000) (Violence Against Women Act).

Applying the *Boerne* test in *Garrett,* we concluded that Title I of the ADA was not a valid exercise of Congress' § 5 power to enforce the Fourteenth Amendment's prohibition on unconstitutional disability discrimination in public employment. As in *Florida Prepaid,* we concluded Congress' exercise of its prophylactic § 5 power was unsupported by a relevant history and pattern of constitutional violations. 531 U.S., at 368, 374, 121 S.Ct. 955. Although the dissent pointed out that Congress had before it a great deal of evidence of discrimination by the States against persons with disabilities, *id.,* at 379, 121 S.Ct. 955 (opinion of BREYER, J.), the Court's opinion noted that the "overwhelming majority" of that evidence related to "the provision of public services and public accommodations, which areas are addressed in Titles II and III," rather than Title I, *id.,* at 371, n. 7, 121 S.Ct. 955. We also noted that neither the ADA's legislative findings nor its legislative history reflected a concern that the States had been engaging in a pattern of ***522** unconstitutional employment discrimination. We emphasized that the House and Senate Committee Reports on the ADA focused on " '[d]iscrimination [in] ... *employment in the private sector,*' " and made no mention of discrimination in public employment. *Id.,* at 371–372, 121 S.Ct. 955 (quoting S.Rep. No.

101–116, p. 6 (1989), and H.R.Rep. No. 101–485, pt. 2, p. 28 (1990), U.S.Code Cong. & Admin.News 1990, pp. 303, 310) (emphasis in *Garrett*). Finally, we concluded that Title I's broad remedial scheme was insufficiently targeted to remedy or prevent unconstitutional discrimination in public employment. Taken together, the historical record and the broad sweep of the statute suggested that Title I's true aim was not so much to enforce the Fourteenth Amendment's prohibitions against disability discrimination in public employment as it was to "rewrite" this Court's Fourteenth Amendment ****1988** jurisprudence. 531 U.S., at 372–374, 121 S.Ct. 955.

In view of the significant differences between Titles I and II, however, *Garrett* left open the question whether Title II is a valid exercise of Congress' § 5 enforcement power. It is to that question that we now turn.

IV

The first step of the *Boerne* inquiry requires us to identify the constitutional right or rights that Congress sought to enforce when it enacted Title II. *Garrett,* 531 U.S., at 365, 121 S.Ct. 955. In *Garrett* we identified Title I's purpose as enforcement of the Fourteenth Amendment's command that "all persons similarly situated should be treated alike." *Cleburne v. Cleburne Living Center, Inc.,* 473 U.S. 432, 439, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985). As we observed, classifications based on disability violate that constitutional command if they lack a rational relationship to a legitimate governmental purpose. *Garrett,* 531 U.S., at 366, 121 S.Ct. 955 (citing *Cleburne,* 473 U.S., at 446, 105 S.Ct. 3249).

Title II, like Title I, seeks to enforce this prohibition on irrational disability discrimination. But it also seeks to enforce a variety of other basic constitutional guarantees, infringements of which are subject to more searching judicial ***523** review. See, *e.g., Dunn v. Blumstein,* 405 U.S. 330, 336–337, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972); *Shapiro v. Thompson,* 394 U.S. 618, 634, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969); *Skinner v. Oklahoma ex rel. Williamson,* 316 U.S. 535, 541, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942). These rights include some, like the right of access to the courts at issue in this case, that are protected by the Due Process Clause of the Fourteenth Amendment. The Due Process Clause and the Confrontation Clause of the Sixth Amendment, as applied to the States via the Fourteenth Amendment, both guarantee to a criminal defendant such as respondent Lane the "right to be present at all stages of the trial where his absence might frustrate the fairness of the proceedings." *Faretta v. California,* 422 U.S. 806, 819, n. 15, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). The Due Process Clause also requires the States to afford certain civil litigants a "meaningful opportunity to be heard" by removing obstacles to their full participation in judicial proceedings. *Boddie v. Connecticut,* 401 U.S. 371, 379, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971); *M.L.B. v. S.L. J.,* 519 U.S. 102, 117 S.Ct. 555, 136 L.Ed.2d 473 (1996). We have held that the Sixth Amendment guarantees to criminal defendants the right to trial by a jury composed of a fair cross section of the community, noting that the exclusion of "identifiable segments playing major roles in the community cannot be squared with the constitutional concept of jury trial." *Taylor v. Louisiana,* 419 U.S. 522, 530, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975). And, finally, we have recognized that members of the public have a right of access to criminal proceedings secured by the First Amendment. *Press—Enterprise Co. v. Superior Court of Cal., County of Riverside,* 478 U.S. 1, 8–15, 106 S.Ct. 2735, 92 L.Ed.2d 1 (1986).

Whether Title II validly enforces these constitutional rights is a question that "must be judged with reference to the historical experience which it reflects." *South Carolina v. Katzenbach,* 383 U.S. 301, 308, 86 S.Ct. 803, 15 L.Ed.2d 769 (1966). See also *Florida Prepaid,* 527 U.S., at 639–640, 119 S.Ct. 2199; *Boerne,* 521 U.S., at 530, 117 S.Ct. 2157. While § 5 authorizes Congress to enact reasonably prophylactic remedial legislation, the appropriateness of the remedy depends on the gravity of the harm it seeks to prevent. ***524** "Difficult and intractable problems often ****1989** require powerful remedies," *Kimel,* 528 U.S., at 88, 120 S.Ct. 631, but it is also true that "[s]trong measures appropriate to address one harm may be an unwarranted response to another, lesser one," *Boerne,* 521 U.S., at 530, 117 S.Ct. 2157.

It is not difficult to perceive the harm that Title II is designed to address. Congress enacted Title II against a backdrop of pervasive unequal treatment in the administration of state services and programs, including systematic deprivations of fundamental rights. For example, "[a]s of 1979, most States ... categorically disqualified 'idiots' from voting, without regard to individual capacity."[5] The majority of these laws remain on the books,[6] and have been the subject of legal challenge as recently as 2001.[7] Similarly, a number of States have prohibited and continue to prohibit persons with disabilities from

engaging in activities such as marrying[8] and serving as jurors.[9] The historical experience that Title II reflects is also documented in this Court's cases, which have identified unconstitutional treatment of disabled ***525** persons by state agencies in a variety of settings, including unjustified commitment, *e.g., Jackson v. Indiana,* 406 U.S. 715, 92 S.Ct. 1845, 32 L.Ed.2d 435 (1972); the abuse and neglect of persons committed to state mental health hospitals, *Youngberg v. Romeo,* 457 U.S. 307, 102 S.Ct. 2452, 73 L.Ed.2d 28 (1982);[10] and irrational discrimination in zoning decisions, *Cleburne v. Cleburne Living Center, Inc.,* 473 U.S. 432, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985). The decisions of other courts, too, document a pattern of unequal treatment in the administration of a wide range of public services, programs, and activities, including the penal system,[11] public education,[12] and voting.[13] Notably, ****1990** these decisions also demonstrate a pattern of unconstitutional treatment in the administration of justice.[14]

***526** This pattern of disability discrimination persisted despite several federal and state legislative efforts to address it. In the deliberations that led up to the enactment of the ADA, Congress identified important shortcomings in existing laws that rendered them "inadequate to address the pervasive problems of discrimination that people with disabilities are facing." S.Rep. No. 101–116, at 18. See also H.R.Rep. No. 101–485, pt. 2, at 47, U.S.Code Cong. & Admin.News 1990, pp. 303, 329.[15] It also uncovered further evidence of those shortcomings, in the form of hundreds of examples of unequal treatment of persons with disabilities by States and their political subdivisions. See *Garrett,* 531 U.S., at 379, 121 S.Ct. 955 (BREYER, J., dissenting). See also *id.,* at 391, 121 S.Ct. 955 (App. C to opinion of BREYER, J., dissenting). As the Court's opinion in *Garrett* observed, the "overwhelming majority" of these examples concerned discrimination in the administration of public programs and services. *Id.,* at 371, n. 7, 121 S.Ct. 955; Government's Lodging in *Garrett*, O.T.2000, No. 99–1240 (available in Clerk of Court's case file).

***527** With respect to the particular services at issue in this case, Congress learned that many individuals, in many States across the country, were being excluded from courthouses and court proceedings by reason of their disabilities. A report before Congress showed that some 76% of public services and programs housed in state-owned buildings were inaccessible to and unusable by persons with disabilities, even taking into account the possibility that the services and programs ****1991** might be restructured or relocated to other parts of the buildings. U.S. Commission on Civil Rights, Accommodating the Spectrum of Individual Abilities 39 (1983). Congress itself heard testimony from persons with disabilities who described the physical inaccessibility of local courthouses. Oversight Hearing on H.R. 4498 before the House Subcommittee on Select Education of the Committee on Education and Labor, 100th Cong., 2d Sess., 40–41, 48 (1988). And its appointed task force heard numerous examples of the exclusion of persons with disabilities from state judicial services and programs, including exclusion of persons with visual impairments and hearing impairments from jury service, failure of state and local governments to provide interpretive services for the hearing impaired, failure to permit the testimony of adults with developmental disabilities in abuse cases, and failure to make courtrooms accessible to witnesses with physical disabilities. Government's Lodging in *Garrett,* O.T.2000, No. 99–1240. See also Task Force on the Rights and Empowerment of Americans with Disabilities, From ADA to Empowerment (Oct. 12, 1990).[16]

***528** Given the sheer volume of evidence demonstrating the nature and extent of unconstitutional discrimination against persons with disabilities in the provision of public services, the dissent's contention that the record is insufficient to justify Congress' exercise of its prophylactic power is puzzling, to say the least. Just last Term in *Hibbs,* we approved the family-care leave provision of the FMLA as valid § 5 legislation based primarily on evidence of disparate provision of parenting leave, little of which concerned unconstitutional state conduct. ****1992** 538 U.S., at 728–733, 123 S.Ct. 1972.[17] We explained that ***529** because the FMLA was targeted at sex-based classifications, which are subject to a heightened standard of judicial scrutiny, "it was easier for Congress to show a pattern of state constitutional violations" than in *Garrett* or *Kimel,* both of which concerned legislation that targeted classifications subject to rational-basis review. 538 U.S., at 735–737, 123 S.Ct. 1972. Title II is aimed at the enforcement of a variety of basic rights, including the right of access to the courts at issue in this case, that call for a standard of judicial review at least as searching, and in some cases more searching, than the standard that applies to sex-based classifications. And in any event, the record of constitutional violations in this case—including judicial findings of unconstitutional state action, and statistical, legislative, and anecdotal evidence of the widespread exclusion of persons with disabilities from the enjoyment of public services—far exceeds the record in *Hibbs.*

The conclusion that Congress drew from this body of evidence is set forth in the text of the ADA itself: "[D]iscrimination against individuals with disabilities persists in such critical areas as ... education, transportation, communication, recreation, institutionalization, health services, voting, and *access to public services.*" 42 U.S.C. § 12101(a)(3) (emphasis added). This finding, together with the extensive record of disability discrimination that underlies it, makes clear beyond peradventure that inadequate provision of public services and access to public facilities was an appropriate subject for prophylactic legislation.

***530** V

The only question that remains is whether Title II is an appropriate response to this history and pattern of unequal treatment. At the outset, we must determine the scope of that inquiry. Title II—unlike RFRA, the Patent Remedy Act, and the other statutes we have reviewed for validity under § 5—reaches a wide array of official conduct in an effort to enforce an equally wide array of constitutional guarantees. Petitioner urges us both to examine the broad range of Title II's applications all at once, and to treat that breadth as a mark of the law's invalidity. According to petitioner, the fact that Title II applies not only to public education and voting-booth access but also to seating at state-owned hockey rinks indicates that Title II is not appropriately tailored to serve its objectives. But nothing in our case law requires us to consider Title II, with its wide variety of applications, as an undifferentiated whole.[18] Whatever might be said ****1993** about Title II's other applications, the question presented in this case is not whether Congress can ***531** validly subject the States to private suits for money damages for failing to provide reasonable access to hockey rinks, or even to voting booths, but whether Congress had the power under § 5 to enforce the constitutional right of access to the courts. Because we find that Title II unquestionably is valid § 5 legislation as it applies to the class of cases implicating the accessibility of judicial services, we need go no further. See *United States v. Raines,* 362 U.S. 17, 26, 80 S.Ct. 519, 4 L.Ed.2d 524 (1960).[19]

Congress' chosen remedy for the pattern of exclusion and discrimination described above, Title II's requirement of program accessibility, is congruent and proportional to its object of enforcing the right of access to the courts. The unequal treatment of disabled persons in the administration of judicial services has a long history, and has persisted despite several legislative efforts to remedy the problem of disability discrimination. Faced with considerable evidence of the shortcomings of previous legislative responses, Congress was justified in concluding that this "difficult and intractable proble[m]" warranted "added prophylactic measures in response." *Hibbs,* 538 U.S., at 737, 123 S.Ct. 1972 (internal quotation marks omitted).

The remedy Congress chose is nevertheless a limited one. Recognizing that failure to accommodate persons with disabilities will often have the same practical effect as outright exclusion, Congress required the States to take reasonable measures to remove architectural and other barriers to accessibility. 42 U.S.C. § 12131(2). But Title II does not require States to employ any and all means to make judicial ***532** services accessible to persons with disabilities, and it does not require States to compromise their essential eligibility criteria for public programs. It requires only "reasonable modifications" that would not fundamentally alter the nature of the service provided, and only when the individual seeking modification is otherwise eligible for the service. *Ibid.* As Title II's implementing regulations make clear, the reasonable modification requirement can be satisfied in a number of ways. In the case of facilities built or altered after 1992, the regulations require compliance with specific architectural accessibility standards. 28 CFR § 35.151 (2003). But in the case of older facilities, for which structural change is likely to be more difficult, a public entity may comply with Title II by adopting a variety of less costly measures, including relocating services to alternative, accessible sites and assigning aides to assist persons with disabilities in accessing services. § 35.150(b)(1). Only if ****1994** these measures are ineffective in achieving accessibility is the public entity required to make reasonable structural changes. *Ibid.* And in no event is the entity required to undertake measures that would impose an undue financial or administrative burden, threaten historic preservation interests, or effect a fundamental alteration in the nature of the service. §§ 35.150(a)(2), (a)(3).

This duty to accommodate is perfectly consistent with the well-established due process principle that, "within the limits of practicability, a State must afford to all individuals a meaningful opportunity to be heard" in its courts. *Boddie,* 401 U.S., at 379, 91 S.Ct. 780 (internal quotation marks and citation omitted).[20] Our cases have recognized a number of affirmative obligations that flow from this principle: the duty to waive ***533** filing fees in certain family-law and criminal cases,[21] the duty to provide transcripts to criminal defendants seeking review of their convictions,[22] and the duty to provide counsel to certain criminal defendants.[23] Each of these cases makes clear that ordinary considerations of cost and convenience alone cannot justify a State's failure to provide individuals with a meaningful right of access to the courts. Judged against this backdrop, Title II's affirmative obligation to accommodate persons with disabilities in the administration of justice cannot be said to be "so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior." *Boerne,* 521 U.S., at 532, 117 S.Ct. 2157; *Kimel,* 528 U.S., at 86, 120 S.Ct.

631.[24] It is, rather, a reasonable prophylactic measure, reasonably targeted to a legitimate end.

For these reasons, we conclude that Title II, as it applies to the class of cases implicating the fundamental right of access ***534** to the courts, constitutes a valid exercise of Congress' § 5 authority to enforce the guarantees of the Fourteenth Amendment. The judgment of the Court of Appeals is therefore affirmed.

It is so ordered.

****1995** Justice SOUTER, with whom Justice GINSBURG joins, concurring.

I join the Court's opinion subject to the same caveats about the Court's recent cases on the Eleventh Amendment and § 5 of the Fourteenth that I noted in *Nevada Dept. of Human Resources v. Hibbs,* 538 U.S. 721, 740, 123 S.Ct. 1972, 155 L.Ed.2d 953 (2003) (SOUTER, J., concurring).

Although I concur in the Court's approach applying the congruence-and-proportionality criteria to Title II of the Americans with Disabilities Act of 1990 as a guarantee of access to courts and related rights, I note that if the Court engaged in a more expansive enquiry as THE CHIEF JUSTICE suggests, *post,* at 2005 (dissenting opinion), the evidence to be considered would underscore the appropriateness of action under § 5 to address the situation of disabled individuals before the courts, for that evidence would show that the judiciary itself has endorsed the basis for some of the very discrimination subject to congressional remedy under § 5. *Buck v. Bell,* 274 U.S. 200, 47 S.Ct. 584, 71 L.Ed. 1000 (1927), was not grudging in sustaining the constitutionality of the once-pervasive practice of involuntarily sterilizing those with mental disabilities. See *id.,* at 207, 47 S.Ct. 584 ("It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind .... Three generations of imbeciles are enough"). Laws compelling sterilization were often accompanied by others indiscriminately requiring institutionalization, and prohibiting certain individuals with disabilities from marrying, from voting, from attending public schools, and even from appearing in public. ***535** One administrative action along these lines was judicially sustained in part as a justified precaution against the very sight of a child with cerebral palsy, lest he "produc[e] a depressing and nauseating effect" upon others. *State ex rel. Beattie v. Board of Ed. of Antigo,* 169 Wis. 231, 232, 172 N.W. 153 (1919) (approving his exclusion from public school).[1]

Many of these laws were enacted to implement the quondam science of eugenics, which peaked in the 1920's, yet the statutes and their judicial vindications sat on the books long after eugenics lapsed into discredit.[2] See U.S. Commission on Civil Rights, Accommodating the Spectrum of Individual Abilities 19–20 (1983). Quite apart from the fateful inspiration behind them, one pervasive fault of these provisions was their failure to reflect the "amount of flexibility and freedom" required to deal with "the wide variation in the abilities and needs" of people with disabilities. *Cleburne v. Cleburne Living Center, Inc.,* 473 U.S. 432, 445, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985). Instead, like other invidious discrimination, they classified people without regard to individual capacities, and by that lack of regard did great harm. In sustaining the application of Title II today, the Court takes a welcome step away from the judiciary's prior endorsement of blunt instruments imposing legal handicaps.

****1996** Justice GINSBURG, with whom Justice SOUTER and Justice BREYER join, concurring.

For the reasons stated by the Court, and mindful of Congress' objective in enacting the Americans with Disabilities ***536** Act—the elimination or reduction of physical and social structures that impede people with some present, past, or perceived impairments from contributing, according to their talents, to our Nation's social, economic, and civic life—I join the Court's opinion.

The Americans with Disabilities Act of 1990 (ADA or Act), 42 U.S.C. §§ 12101–12213, is a measure expected to advance equal-citizenship stature for persons with disabilities. See Bagenstos, Subordination, Stigma, and "Disability," 86 Va. L.Rev. 397, 471 (2000) (ADA aims both to "guarante[e] a baseline of equal citizenship by protecting against stigma and systematic exclusion from public and private opportunities, and [to] protec[t] society against the loss of valuable talents"). As the

Court's opinion relates, see *ante,* at 1984, the Act comprises three parts, prohibiting discrimination in employment (Title I), public services, programs, and activities (Title II), and public accommodations (Title III). This case concerns Title II, which controls the conduct of administrators of public undertakings.

Including individuals with disabilities among people who count in composing "We the People," Congress understood in shaping the ADA, would sometimes require not blindfolded equality, but responsiveness to difference; not indifference, but accommodation. Central to the Act's primary objective, Congress extended the statute's range to reach all government activities, § 12132 (Title II), and required "reasonable modifications to [public actors'] rules, policies, or practices," §§ 12131(2)–12132 (Title II). See also § 12112(b)(5) (defining discrimination to include the failure to provide "reasonable accommodations") (Title I); § 12182(b)(2)(A)(ii) (requiring "reasonable modifications in [public accommodations'] policies, practices, or procedures") (Title III); Bagenstos, *supra,* at 435 (ADA supporters sought "to eliminate the practices that combine with physical and mental conditions to create what we call 'disability.' The society-wide universal access rules serve this function on the macro level, and the requirements ***537** of individualized accommodation and modification fill in the gaps on the micro level." (footnote omitted)).

In *Olmstead v. L. C.,* 527 U.S. 581, 119 S.Ct. 2176, 144 L.Ed.2d 540 (1999), this Court responded with fidelity to the ADA's accommodation theme when it held a State accountable for failing to provide community residential placements for people with disabilities. The State argued in *Olmstead* that it had acted impartially, for it provided no community placements for individuals without disabilities. *Id.,* at 598, 119 S.Ct. 2176. Congress, the Court observed, advanced in the ADA "a more comprehensive view of the concept of discrimination," *ibid.,* one that embraced failures to provide "reasonable accommodations," *id.,* at 601, 119 S.Ct. 2176. The Court today is similarly faithful to the Act's demand for reasonable accommodation to secure access and avoid exclusion.

Legislation calling upon all government actors to respect the dignity of individuals with disabilities is entirely compatible with our Constitution's commitment to federalism, properly conceived. It seems to me not conducive to a harmonious federal system to require Congress, before it exercises authority under § 5 of the Fourteenth Amendment, essentially to indict each State for disregarding the equal-citizenship stature of persons with disabilities. ****1997** But see *post,* at 2012 (SCALIA, J., dissenting) ("Congress may impose prophylactic § 5 legislation only upon those particular States in which there has been an identified history of relevant constitutional violations."); *Nevada Dept. of Human Resources v. Hibbs,* 538 U.S. 721, 743, 123 S.Ct. 1972, 155 L.Ed.2d 953 (2003) (SCALIA, J., dissenting) (to be controlled by § 5 legislation, State "can demand that *it* be shown to have been acting in violation of the Fourteenth Amendment" (emphasis in original)). Members of Congress are understandably reluctant to condemn their own States as constitutional violators, complicit in maintaining the isolated and unequal status of persons with disabilities. I would not disarm a National Legislature for resisting an ***538** adversarial approach to lawmaking better suited to the courtroom.

As the Court's opinion documents, see *ante,* at 1989–1992, Congress considered a body of evidence showing that in diverse parts of our Nation, and at various levels of government, persons with disabilities encounter access barriers to public facilities and services. That record, the Court rightly holds, at least as it bears on access to courts, sufficed to warrant the barrier-lowering, dignity-respecting national solution the People's representatives in Congress elected to order.

Chief Justice REHNQUIST, with whom Justice KENNEDY and Justice THOMAS join, dissenting.

In *Board of Trustees of Univ. of Ala. v. Garrett,* 531 U.S. 356, 121 S.Ct. 955, 148 L.Ed.2d 866 (2001), we held that Congress did not validly abrogate States' Eleventh Amendment immunity when it enacted Title I of the Americans with Disabilities Act of 1990 (ADA or Act), 42 U.S.C. §§ 12111–12117. Today, the Court concludes that Title II of that Act, §§ 12131–12165, does validly abrogate that immunity, at least insofar "as it applies to the class of cases implicating the fundamental right of access to the courts." *Ante,* at 1994. Because today's decision is irreconcilable with *Garrett* and the well-established principles it embodies, I dissent.

The Eleventh Amendment bars private lawsuits in federal court against an unconsenting State. *E.g., Nevada Dept. of Human Resources v. Hibbs,* 538 U.S. 721, 726, 123 S.Ct. 1972, 155 L.Ed.2d 953 (2003); *Garrett, supra,* at 363, 121 S.Ct. 955; *Kimel*

v. Florida Bd. of Regents, 528 U.S. 62, 73, 120 S.Ct. 631, 145 L.Ed.2d 522 (2000). Congress may overcome States' sovereign immunity and authorize such suits only if it unmistakably expresses its intent to do so, and only if it "acts pursuant to a valid exercise of its power under § 5 of the Fourteenth Amendment." *Hibbs, supra,* at 726, 123 S.Ct. 1972. While the Court correctly holds that Congress satisfied the first prerequisite, *ante,* at 1985, I disagree with its conclusion that Title II is valid § 5 enforcement legislation.

***539** Section 5 of the Fourteenth Amendment grants Congress the authority "to enforce, by appropriate legislation," the familiar substantive guarantees contained in § 1 of that Amendment. U.S. Const., Amdt. 14, § 1 ("No State shall ... deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws"). Congress' power to enact " 'appropriate' " enforcement legislation is not limited to "mere legislative repetition" of this Court's Fourteenth Amendment jurisprudence. *Garrett, supra,* at 365, 121 S.Ct. 955. Congress may "remedy" and "deter" state violations of constitutional rights by "prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text." *Hibbs,* 538 U.S., at 727, 123 S.Ct. 1972 (internal quotation ****1998** marks omitted). Such "prophylactic" legislation, however, "must be an appropriate remedy for identified constitutional violations, not 'an attempt to substantively redefine the States' legal obligations.' " *Id.,* at 727–728, 123 S.Ct. 1972 (quoting *Kimel, supra,* at 88, 120 S.Ct. 631); *City of Boerne v. Flores,* 521 U.S. 507, 525, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997) (enforcement power is "corrective or preventive, not definitional"). To ensure that Congress does not usurp this Court's responsibility to define the meaning of the Fourteenth Amendment, valid § 5 legislation must exhibit " 'congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.' " *Hibbs, supra,* at 728, 123 S.Ct. 1972 (quoting *City of Boerne, supra,* at 520, 117 S.Ct. 2157). While the Court today pays lipservice to the " 'congruence and proportionality' " test, see *ante,* at 1986, it applies it in a manner inconsistent with our recent precedents.

In *Garrett,* we conducted the three-step inquiry first enunciated in *City of Boerne* to determine whether Title I of the ADA satisfied the congruence-and-proportionality test. A faithful application of that test to Title II reveals that it too " 'substantively redefine[s],' " rather than permissibly enforces, the rights protected by the Fourteenth Amendment. *Hibbs, supra,* at 728, 123 S.Ct. 1972.

***540** The first step is to "identify with some precision the scope of the constitutional right at issue." *Garrett, supra,* at 365, 121 S.Ct. 955. This task was easy in *Garrett, Hibbs, Kimel*, and *City of Boerne* because the statutes in those cases sought to enforce only one constitutional right. In *Garrett,* for example, the statute addressed the equal protection right of disabled persons to be free from unconstitutional employment discrimination. 531 U.S., at 365, 121 S.Ct. 955. See also *Hibbs, supra,* at 728, 123 S.Ct. 1972 ("The [Family and Medical Leave Act of 1993 (FMLA)] aims to protect the right to be free from gender-based discrimination in the workplace"); *Kimel, supra,* at 83, 120 S.Ct. 631 (right to be free from unconstitutional age discrimination in employment); *City of Boerne, supra,* at 529, 117 S.Ct. 2157 (right of free exercise of religion). The scope of that right, we explained, is quite limited; indeed, the Equal Protection Clause permits a State to classify on the basis of disability so long as it has a rational basis for doing so. *Garrett, supra,* at 366–368, 121 S.Ct. 955 (discussing *Cleburne v. Cleburne Living Center, Inc.,* 473 U.S. 432, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985)); see also *ante,* at 1988.

In this case, the task of identifying the scope of the relevant constitutional protection is more difficult because Title II purports to enforce a panoply of constitutional rights of disabled persons: not only the equal protection right against irrational discrimination, but also certain rights protected by the Due Process Clause. *Ante,* at 1988. However, because the Court ultimately upholds Title II "as it applies to the class of cases implicating the fundamental right of access to the courts," *ante,* at 1994, the proper inquiry focuses on the scope of those due process rights. The Court cites four access-to-the-courts rights that Title II purportedly enforces: (1) the right of the criminal defendant to be present at all critical stages of the trial, *Faretta v. California,* 422 U.S. 806, 819, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975); (2) the right of litigants to have a "meaningful opportunity to be heard" in judicial proceedings, *Boddie v. Connecticut,* 401 U.S. 371, 379, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971); (3) the right of the criminal defendant to trial by a jury composed ***541** of a fair cross section of the community, ****1999** *Taylor v. Louisiana,* 419 U.S. 522, 530, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975); and (4) the public right of access to criminal proceedings, *Press—Enterprise Co. v. Superior Court of Cal., County of Riverside,* 478 U.S. 1, 8–15, 106 S.Ct. 2735, 92 L.Ed.2d 1 (1986). *Ante,* at 1988.

Having traced the "metes and bounds" of the constitutional rights at issue, the next step in the congruence-and-proportionality inquiry requires us to examine whether Congress "identified a history and pattern" of violations of these constitutional rights by the States with respect to the disabled. *Garrett,* 531 U.S., at 368, 121 S.Ct. 955. This step is crucial to determining whether Title II is a legitimate attempt to remedy or prevent actual constitutional

violations by the States or an illegitimate attempt to rewrite the constitutional provisions it purports to enforce. Indeed, "Congress' § 5 authority is appropriately exercised *only* in response to state transgressions." *Ibid.* (emphasis added). But the majority identifies nothing in the legislative record that shows Congress was responding to widespread violations of the due process rights of disabled persons.

Rather than limiting its discussion of constitutional violations to the due process rights on which it ultimately relies, the majority sets out on a wide-ranging account of societal discrimination against the disabled. *Ante,* at 1988–1990. This digression recounts historical discrimination against the disabled through institutionalization laws, restrictions on marriage, voting, and public education, conditions in mental hospitals, and various other forms of unequal treatment in the administration of public programs and services. Some of this evidence would be relevant if the Court were considering the constitutionality of the statute as a whole; but the Court rejects that approach in favor of a narrower "as-applied" inquiry.[1] We discounted much the same type of outdated, generalized evidence in *Garrett* as unsupportive of ***542** Title I's ban on employment discrimination. 531 U.S., at 368–372, 121 S.Ct. 955; see also *City of Boerne,* 521 U.S., at 530, 117 S.Ct. 2157 (noting that the "legislative record lacks ... modern instances of ... religious bigotry"). The evidence here is likewise irrelevant to Title II's purported enforcement of due process access-to-the-courts rights.

Even if it were proper to consider this broader category of evidence, much of it does not concern *unconstitutional* action by the *States.* The bulk of the Court's evidence concerns discrimination by nonstate governments, rather than the States themselves.[2] We have repeatedly held that such evidence is irrelevant to the inquiry whether Congress has validly abrogated Eleventh Amendment immunity, a privilege enjoyed only by the sovereign States. *Garrett, supra,* at 368–369, 121 S.Ct. 955; *Florida Prepaid Postsecondary Ed. Expense Bd. v. College Savings Bank,* 527 U.S. 627, 640, 119 S.Ct. 2199, 144 L.Ed.2d 575 (1999); *Kimel,* 528 U.S., at 89, 120 S.Ct. 631. Moreover, the majority today cites the same congressional task force evidence we rejected in *Garrett.* ****2000** *Ante,* at 1990 (citing *Garrett, supra,* at 379, 121 S.Ct. 955 (BREYER, J., dissenting), and 531 U.S., at 391–424, 121 S.Ct. 955 (App. C to opinion of BREYER, J., dissenting) (chronicling instances of "unequal treatment" in the "administration of public programs")). As in *Garrett,* this "unexamined, anecdotal" evidence does not suffice. 531 U.S., at 370, 121 S.Ct. 955. Most of the brief anecdotes do not involve States at all, and those that do are not sufficiently detailed to determine whether the instances of "unequal treatment" were irrational, and thus unconstitutional under our decision in *Cleburne. Garrett, supra,* at 370–371, 121 S.Ct. 955. ***543** Therefore, even outside the "access to the courts" context, the Court identifies few, if any, constitutional violations perpetrated by the States against disabled persons.[3]

With respect to the due process "access to the courts" rights on which the Court ultimately relies, Congress' failure to identify a pattern of actual constitutional violations by the States is even more striking. Indeed, there is *nothing* in the legislative record or statutory findings to indicate that disabled persons were systematically denied the right to be present at criminal trials, denied the meaningful opportunity to be heard in civil cases, unconstitutionally excluded from jury service, or denied the right to attend criminal trials.[4]

The Court's attempt to disguise the lack of congressional documentation with a few citations to judicial decisions cannot retroactively provide support for Title II, and in any event, fails on its own terms. See, *e.g.*, *Garrett*, 531 U.S., at 368, 121 S.Ct. 955 ("[W]e examine whether *Congress* identified a history and pattern" of constitutional violations); *ibid.* ("The *legislative record* (3)27 fails to show that *Congress* did in fact identify ***544** a pattern" of constitutional violations (emphases added)). Indeed, because this type of constitutional violation occurs in connection with litigation, it is particularly telling that the majority is able to identify only *two* reported cases finding that a disabled person's federal constitutional rights were violated.[5] See *ante*, at 1990, n. 14 (citing *Ferrell v. Estelle*, 568 F.2d 1128, 1132–1133 (C.A.5), opinion withdrawn as moot, 573 F.2d 867 (1978); *People v. Rivera*, 125 Misc.2d 516, 528, 480 N.Y.S.2d 426, 434 (Sup.Ct.1984)).[6]

****2001** Lacking any real evidence that Congress was responding to actual due process violations, the majority relies primarily on three items to justify its decision: (1) a 1983 U.S. Civil Rights Commission Report showing that 76% of "public services and programs housed in state-owned buildings were inaccessible" to persons with disabilities, *ante,* at 1990; (2) testimony before a House subcommittee regarding the "physical inaccessibility" of local courthouses, *ante,* at 1991; and (3) evidence submitted to Congress' designated ADA task ***545** force that purportedly contains "numerous examples of the exclusion of persons with disabilities from state judicial services and programs." *Ibid.*

On closer examination, however, the Civil Rights Commission's finding consists of a single conclusory sentence in its report, and it is far from clear that its finding even includes courthouses. The House subcommittee report, for its part, contains the testimony of *two* witnesses, neither of whom reported being denied the right to be present at constitutionally protected court

proceedings.[7] Indeed, the witnesses' testimony, like the U.S. Commission on Civil Rights Report, concerns only physical barriers to access, and does not address whether States either provided means to overcome those barriers or alternative locations for proceedings involving disabled persons. Cf. n. 4, *supra* (describing alternative means of access offered to respondent Lane).

Based on the majority's description, *ante,* at 1990–1991, the report of the ADA Task Force on the Rights and Empowerment of Americans with Disabilities sounds promising. But the report itself says nothing about any disabled person being denied access to court. The Court thus apparently relies solely on a general citation to the Government's Lodging in *Garrett,* O.T.2000, No. 99–1240, which, amidst thousands of pages, contains only a few anecdotal handwritten reports of physically inaccessible courthouses, again with no mention of whether States provided alternative means of access. This evidence, moreover, was submitted not to Congress, but only to the task force, which itself made no ***546** findings regarding disabled persons' access to judicial proceedings. Cf. *Garrett,* 531 U.S., at 370–371, 121 S.Ct. 955 (rejecting anecdotal task force evidence for similar reasons). As we noted in *Garrett,* "had Congress truly understood this [task force] information as reflecting a pattern of unconstitutional behavior by the States, one would expect some mention of ****2002** that conclusion in the Act's legislative findings." *Id.,* at 371, 121 S.Ct. 955. Yet neither the legislative findings, nor even the Committee Reports, contain a single mention of the seemingly vital topic of access to the courts.[8] Cf. *ibid.; Florida Prepaid,* 527 U.S., at 641, 119 S.Ct. 2199 (observing that Senate Report on Patent and Plant Variety Protection Remedy Clarification Act (Patent Remedy Act) "contains no evidence that unremedied patent infringement by States had become a problem of national import"). To the contrary, the Senate Report on the ADA observed that "[a]ll states currently mandate accessibility in newly constructed state-owned public buildings." S.Rep. No. 101–116, p. 92 (1989).

Even if the anecdotal evidence and conclusory statements relied on by the majority could be properly considered, the mere existence of an architecturally "inaccessible" courthouse—*i.e.,* one a disabled person cannot utilize without assistance—does not state a constitutional violation. A violation of due process occurs only when a person is actually denied the constitutional right to access a given judicial proceeding. We have never held that a person has a *constitutional* right to make his way into a courtroom without any ***547** external assistance. Indeed, the fact that the State may need to assist an individual to attend a hearing has no bearing on whether the individual successfully exercises his due process right to be present at the proceeding. Nor does an "inaccessible" courthouse violate the Equal Protection Clause, unless it is irrational for the State not to alter the courthouse to make it "accessible." But financial considerations almost always furnish a rational basis for a State to decline to make those alterations. See *Garrett,* 531 U.S., at 372, 121 S.Ct. 955 (noting that it would be constitutional for an employer to "conserve scarce financial resources" by hiring employees who can use existing facilities rather than making the facilities accessible to disabled employees). Thus, evidence regarding inaccessible courthouses, because it is not evidence of constitutional violations, provides no basis to abrogate States' sovereign immunity.

The near-total lack of actual constitutional violations in the congressional record is reminiscent of *Garrett,* wherein we found that the same type of minimal anecdotal evidence "f[e]ll far short of even suggesting the pattern of unconstitutional [state action] on which § 5 legislation must be based." *Id.,* at 370, 121 S.Ct. 955. See also *Kimel,* 528 U.S., at 91, 120 S.Ct. 631 ("Congress' failure to uncover any significant pattern of unconstitutional discrimination here confirms that Congress had no reason to believe that broad prophylactic legislation was necessary"); *Florida Prepaid, supra,* at 645, 119 S.Ct. 2199 ("The legislative record thus suggests that the Patent Remedy Act did not respond to a history of 'widespread and persisting deprivation of constitutional rights' of the sort Congress has faced in enacting proper prophylactic § 5 legislation" (quoting *City of Boerne,* 521 U.S., at 526, 117 S.Ct. 2157)).

****2003** The barren record here should likewise be fatal to the majority's holding that Title II is valid legislation enforcing due process rights that involve access to the courts. This conclusion gains even more support when Title II's nonexistent record of constitutional violations is compared with legislation ***548** that we have sustained as valid § 5 enforcement legislation. See, *e.g., Hibbs,* 538 U.S., at 729–732, 123 S.Ct. 1972 (tracing the extensive legislative record documenting States' gender discrimination in employment leave policies); *South Carolina v. Katzenbach,* 383 U.S. 301, 312–313, 86 S.Ct. 803, 15 L.Ed.2d 769 (1966) (same with respect to racial discrimination in voting rights). Accordingly, Title II can only be understood as a congressional attempt to "rewrite the Fourteenth Amendment law laid down by this Court," rather than a legitimate effort to remedy or prevent state violations of that Amendment. *Garrett, supra,* at 374, 121 S.Ct. 955.[9]

The third step of our congruence-and-proportionality inquiry removes any doubt as to whether Title II is valid § 5 legislation. At this stage, we ask whether the rights and remedies created by Title II are congruent and proportional to the constitutional rights it purports to enforce and the record of constitutional violations adduced by Congress. *Hibbs, supra,* at 737–739, 123

S.Ct. 1972; *Garrett, supra,* at 372–373, 121 S.Ct. 955.

Title II provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination ***549** by any such entity." 42 U.S.C. § 12132. A disabled person is considered "qualified" if he "meets the essential eligibility requirements" for the receipt of the entity's services or participation in the entity's programs, "*with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services.*" § 12131(2) (emphasis added). The ADA's findings make clear that Congress believed it was attacking "discrimination" in all areas of public services, as well as the "discriminatory effects" of "architectural, transportation, and communication barriers." §§ 12101(a)(3), (a)(5). In sum, Title II requires, on pain of money damages, special accommodations for disabled persons in virtually every interaction they have with the State.

"Despite subjecting States to this expansive liability," the broad terms of Title II "d[o] nothing to limit the coverage of the Act to cases involving arguable constitutional violations." *Florida Prepaid,* 527 U.S., at 646, 119 S.Ct. 2199. By requiring ****2004** special accommodation and the elimination of programs that have a disparate impact on the disabled, Title II prohibits far more state conduct than does the equal protection ban on irrational discrimination. We invalidated Title I's similar requirements in *Garrett,* observing that "[i]f special accommodations for the disabled are to be required, they have to come from positive law and not through the Equal Protection Clause." 531 U.S., at 368, 121 S.Ct. 955; *id.,* at 372–373, 121 S.Ct. 955 (contrasting Title I's reasonable accommodation and disparate-impact provisions with the Fourteenth Amendment's requirements). Title II fails for the same reason. Like Title I, Title II may be laudable public policy, but it cannot be seriously disputed that it is also an attempt to legislatively "redefine the States' legal obligations" under the Fourteenth Amendment. *Kimel, supra,* at 88, 120 S.Ct. 631.

The majority, however, claims that Title II also vindicates fundamental rights protected by the Due Process Clause— ***550** in addition to access to the courts—that are subject to heightened Fourteenth Amendment scrutiny. *Ante,* at 1988 (citing *Dunn v. Blumstein,* 405 U.S. 330, 336–337, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972) (voting); *Shapiro v. Thompson,* 394 U.S. 618, 634, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969) (right to move to a new jurisdiction); *Skinner v. Oklahoma ex rel. Williamson,* 316 U.S. 535, 541, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942) (marriage and procreation)). But Title II is not tailored to provide prophylactic protection of these rights; instead, it applies to any service, program, or activity provided by any entity. Its provisions affect transportation, health, education, and recreation programs, among many others, all of which are accorded only rational-basis scrutiny under the Equal Protection Clause. A requirement of accommodation for the disabled at a state-owned amusement park or sports stadium, for example, bears no permissible prophylactic relationship to enabling disabled persons to exercise their fundamental constitutional rights. Thus, as with Title I in *Garrett,* the Patent Remedy Act in *Florida Prepaid,* the Age Discrimination in Employment Act of 1967 in *Kimel,* and the RFRA in *City of Boerne,* all of which we invalidated as attempts to substantively redefine the Fourteenth Amendment, it is unlikely "that many of the [state actions] affected by [Title II] have [any] likelihood of being unconstitutional." *City of Boerne, supra,* at 532, 117 S.Ct. 2157. Viewed as a whole, then, there is little doubt that Title II of the ADA does not validly abrogate state sovereign immunity.[10]

***551** The majority concludes that Title II's massive overbreadth can be cured by considering the statute only "as it applies to the class of cases implicating the accessibility of judicial services." *Ante,* at 1993 ****2005** (citing *United States v. Raines,* 362 U.S. 17, 26, 80 S.Ct. 519, 4 L.Ed.2d 524 (1960)). I have grave doubts about importing an "as applied" approach into the § 5 context. While the majority is of course correct that this Court normally only considers the application of a statute to a particular case, the proper inquiry under *City of Boerne* and its progeny is somewhat different. In applying the congruence-and-proportionality test, we ask whether Congress has attempted to statutorily redefine the constitutional rights protected by the Fourteenth Amendment. This question can only be answered by measuring the breadth of a statute's coverage against the scope of the constitutional rights it purports to enforce and the record of violations it purports to remedy.

In conducting its as-applied analysis, however, the majority posits a hypothetical statute, never enacted by Congress, that applies only to courthouses. The effect is to rig the congruence-and-proportionality test by artificially constricting the scope of the statute to closely mirror a recognized constitutional right. But Title II is not susceptible of being carved up in this manner; it applies indiscriminately to all "services," "programs," or "activities" of any "public entity." Thus, the majority's approach is not really an assessment of whether Title II is "appropriate *legislation* " at all, U.S. Const., Amdt. 14, § 5 (emphasis added), but a test of whether the Court can conceive of a hypothetical statute narrowly tailored enough to constitute valid prophylactic legislation.

Our § 5 precedents do not support this as-applied approach. In each case, we measured the full breadth of the statute or relevant provision that Congress enacted against ***552** the scope of the constitutional right it purported to enforce. If we had arbitrarily constricted the scope of the statutes to match the scope of a core constitutional right, those cases might have come out differently. In *Garrett,* for example, Title I might have been upheld "as applied" to irrational employment discrimination; or in *Florida Prepaid,* the Patent Remedy Act might have been upheld "as applied" to intentional, uncompensated patent infringements. It is thus not surprising that the only authority cited by the majority is *Raines, supra,* a case decided long before we enunciated the congruence-and-proportionality test.[11]

I fear that the Court's adoption of an as-applied approach eliminates any incentive for Congress to craft § 5 legislation for the purpose of remedying or deterring actual constitutional violations. Congress can now simply rely on the courts to sort out which hypothetical applications of an undifferentiated statute, such as Title II, may be enforced against the States. All the while, States will be subjected to substantial litigation in a piecemeal attempt to vindicate their Eleventh Amendment rights. The majority's as-applied approach ****2006** simply cannot be squared with either our recent precedent or the proper role of the Judiciary.

***553** Even in the limited courthouse-access context, Title II does not properly abrogate state sovereign immunity. As demonstrated in depth above, Congress utterly failed to identify any evidence that disabled persons were denied constitutionally protected access to judicial proceedings. Without this predicate showing, Title II, even if we were to hypothesize that it applies only to courthouses, cannot be viewed as a congruent and proportional response to state constitutional violations. *Garrett,* 531 U.S., at 368, 121 S.Ct. 955 ("Congress' § 5 authority is appropriately exercised only in response to state transgressions").

Moreover, even in the courthouse-access context, Title II requires substantially more than the Due Process Clause. Title II subjects States to private lawsuits if, *inter alia,* they fail to make "reasonable modifications" to facilities, such as removing "architectural ... barriers." 42 U.S.C. §§ 12131(2), 12132. Yet the statute is not limited to occasions when the failure to modify results, or will likely result, in an actual due process violation—*i.e.,* the inability of a disabled person to participate in a judicial proceeding. Indeed, liability is triggered if an inaccessible building results in a disabled person being "subjected to discrimination"—a term that presumably encompasses any sort of inconvenience in accessing the facility, for whatever purpose. § 12132.

The majority's reliance on *Boddie v. Connecticut,* 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971), and other cases in which we held that due process requires the State to waive filing fees for indigent litigants, is unavailing. While these cases support the principle that the State must remove financial requirements that in fact prevent an individual from exercising his constitutional rights, they certainly do not support a statute that subjects a State to liability for failing to make a vast array of special accommodations, *without regard for whether the failure to accommodate results in a constitutional wrong.*

***554** In this respect, Title II is analogous to the Patent Remedy Act at issue in *Florida Prepaid.* That statute subjected States to monetary liability for any act of patent infringement. 527 U.S., at 646–647, 119 S.Ct. 2199. Thus, "Congress did nothing to limit" the Patent Remedy Act's coverage "to cases involving arguable [due process] violations," such as when the infringement was nonnegligent or uncompensated. *Ibid.* Similarly here, Congress has authorized private damages suits against a State for merely maintaining a courthouse that is not readily accessible to the disabled, without regard to whether a disabled person's due process rights are ever violated. Accordingly, even as applied to the "access to the courts" context, Title II's "indiscriminate scope offends [the congruence-and-proportionality] principle," particularly in light of the lack of record evidence showing that inaccessible courthouses cause actual due process violations. *Id.,* at 647, 119 S.Ct. 2199.[12]

****2007** For the foregoing reasons, I respectfully dissent.

Justice SCALIA, dissenting.

Section 5 of the Fourteenth Amendment provides that Congress "shall have power to enforce, by appropriate legislation, the provisions" of that Amendment—including, of course, the Amendment's Equal Protection and Due Process Clauses. In *Katzenbach v. Morgan,* 384 U.S. 641, 86 S.Ct. 1717, 16 L.Ed.2d 828 (1966), we ***555** decided that Congress could, under

this provision, forbid English literacy tests for Puerto Rican voters in New York State who met certain educational criteria. Though those tests were not themselves in violation of the Fourteenth Amendment, we held that § 5 authorizes prophylactic legislation—that is, "legislation that proscribes facially constitutional conduct," *Nevada Dept. of Human Resources v. Hibbs,* 538 U.S. 721, 728, 123 S.Ct. 1972, 155 L.Ed.2d 953 (2003), when Congress determines such proscription is desirable " 'to make the amendments fully effective,' " *Morgan, supra,* at 648, 86 S.Ct. 1717 (quoting *Ex parte Virginia,* 100 U.S. 339, 345, 25 L.Ed. 676 (1880)). We said that "the measure of what constitutes 'appropriate legislation' under § 5 of the Fourteenth Amendment" is the flexible "necessary and proper" standard of *M'Culloch v. Maryland,* 4 Wheat. 316, 342, 421, 4 L.Ed. 579 (1819). *Morgan,* 384 U.S., at 651, 86 S.Ct. 1717. We described § 5 as "a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment." *Ibid.*

The *Morgan* opinion followed close upon our decision in *South Carolina v. Katzenbach,* 383 U.S. 301, 86 S.Ct. 803, 15 L.Ed.2d 769 (1966), which had upheld prophylactic application of the similarly worded "enforce" provision of the Fifteenth Amendment (§ 2) to challenged provisions of the Voting Rights Act of 1965. But the Fourteenth Amendment, unlike the Fifteenth, is not limited to denial of the franchise and not limited to the denial of other rights on the basis of race. In *City of Boerne v. Flores,* 521 U.S. 507, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997), we confronted Congress's inevitable expansion of the Fourteenth Amendment, as interpreted in *Morgan,* beyond the field of racial discrimination.[1] There Congress had sought, in the Religious Freedom Restoration ***556** Act of 1993, 107 Stat. 1488, 42 U.S.C. § 2000bb *et seq.,* to impose upon the States an interpretation of the First Amendment's Free Exercise Clause that this Court had explicitly rejected. To avoid placing in congressional hands effective power to rewrite the Bill of Rights through the medium of § 5, we formulated the "congruence and proportionality" test for determining what legislation is "appropriate." When Congress enacts prophylactic legislation, we said, there must be "proportionality or congruence between the means adopted and the legitimate end to be achieved." 521 U.S., at 533, 117 S.Ct. 2157.

I joined the Court's opinion in *Boerne* with some misgiving. I have generally rejected tests based on such malleable standards as "proportionality," because ****2008** they have a way of turning into vehicles for the implementation of individual judges' policy preferences. See, *e.g., Ewing v. California,* 538 U.S. 11, 31–32, 123 S.Ct. 1179, 155 L.Ed.2d 108 (2003) (SCALIA, J., concurring in judgment) (declining to apply a "proportionality" test to the Eighth Amendment's ban on cruel and unusual punishment); *Stenberg v. Carhart,* 530 U.S. 914, 954–956, 120 S.Ct. 2597, 147 L.Ed.2d 743 (2000) (SCALIA, J., dissenting) (declining to apply the "undue burden" standard of *Planned Parenthood of Southeastern Pa. v. Casey,* 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992)); *BMW of North America, Inc. v. Gore,* 517 U.S. 559, 599, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996) (SCALIA, J., dissenting) (declining to apply a "reasonableness" test to punitive damages under the Due Process Clause). Even so, I signed on to the "congruence and proportionality" test in *Boerne,* and adhered to it in later cases: *Florida Prepaid Postsecondary Ed. Expense Bd. v. College Savings Bank,* 527 U.S. 627, 119 S.Ct. 2199, 144 L.Ed.2d 575 (1999), where we held that the provisions of the Patent and Plant Variety Protection Remedy Clarification Act, 35 U.S.C. §§ 271(h), 296(a), were " 'so out of proportion to a supposed remedial or preventive object that [they] cannot be understood as responsive to, or designed to prevent, unconstitutional behavior,' " 527 U.S., at 646, 119 S.Ct. 2199 (quoting *Boerne, supra,* at 532, 117 S.Ct. 2157); *Kimel v. Florida Bd. of Regents,* 528 U.S. 62, 120 S.Ct. 631, 145 L.Ed.2d 522 (2000), where we held that ***557** the Age Discrimination in Employment Act of 1967, 81 Stat. 602, as amended, 29 U.S.C. § 621 *et seq.* (1994 ed. and Supp. III), imposed on state and local governments requirements "disproportionate to any unconstitutional conduct that conceivably could be targeted by the Act," 528 U.S., at 83, 120 S.Ct. 631; *United States v. Morrison,* 529 U.S. 598, 120 S.Ct. 1740, 146 L.Ed.2d 658 (2000), where we held that a provision of the Violence Against Women Act of 1994, 42 U.S.C. § 13981, lacked congruence and proportionality because it was "not aimed at proscribing discrimination by officials which the Fourteenth Amendment might not itself proscribe," 529 U.S., at 626, 120 S.Ct. 1740; and *Board of Trustees of Univ. of Ala. v. Garrett,* 531 U.S. 356, 121 S.Ct. 955, 148 L.Ed.2d 866 (2001), where we said that Title I of the Americans with Disabilities Act of 1990(ADA), 104 Stat. 330, 42 U.S.C. §§ 12111–12117, raised "the same sort of concerns as to congruence and proportionality as were found in *City of Boerne,*" 531 U.S., at 372, 121 S.Ct. 955.

But these cases were soon followed by *Nevada Dept. of Human Resources v. Hibbs,* in which the Court held that the Family and Medical Leave Act of 1993, 107 Stat. 9, 29 U.S.C. § 2612 *et seq.,* which required States to provide their employees up to 12 work weeks of unpaid leave (for various purposes) annually, was "congruent and proportional to its remedial object [of preventing sex discrimination], and can be understood as responsive to, or designed to prevent, unconstitutional behavior." 538 U.S., at 740, 123 S.Ct. 1972 (internal quotation marks omitted). I joined Justice KENNEDY's dissent, which established (conclusively, I thought) that Congress had identified no unconstitutional state action to which the statute could conceivably be a proportional response. And now we have today's decision, holding that Title II of the ADA is congruent and

proportional to the remediation of constitutional violations, in the face of what seems to me a compelling demonstration of the opposite by THE CHIEF JUSTICE's dissent.

I yield to the lessons of experience. The "congruence and proportionality" standard, like all such flabby tests, is a ****2009 *558** standing invitation to judicial arbitrariness and policy-driven decisionmaking. Worse still, it casts this Court in the role of Congress's taskmaster. Under it, the courts (and ultimately this Court) must regularly check Congress's homework to make sure that it has identified sufficient constitutional violations to make its remedy congruent and proportional. As a general matter, we are ill advised to adopt or adhere to constitutional rules that bring us into constant conflict with a coequal branch of Government. And when conflict is unavoidable, we should not come to do battle with the United States Congress armed only with a test ("congruence and proportionality") that has no demonstrable basis in the text of the Constitution and cannot objectively be shown to have been met or failed. As I wrote for the Court in an earlier case, "low walls and vague distinctions will not be judicially defensible in the heat of interbranch conflict." *Plaut v. Spendthrift Farm, Inc.,* 514 U.S. 211, 239, 115 S.Ct. 1447, 131 L.Ed.2d 328 (1995).

I would replace "congruence and proportionality" with another test—one that provides a clear, enforceable limitation supported by the text of § 5. Section 5 grants Congress the power "to *enforce,* by appropriate legislation," the other provisions of the Fourteenth Amendment. U.S. Const., Amdt. 14 (emphasis added). *Morgan* notwithstanding, one does not, within any normal meaning of the term, "enforce" a prohibition by issuing a still broader prohibition directed to the same end. One does not, for example, "enforce" a 55–mile–per–hour speed limit by imposing a 45–mile–per–hour speed limit—even though that is indeed directed to the same end of automotive safety and will undoubtedly result in many fewer violations of the 55–mile–per–hour limit. And one does not "enforce" the right of access to the courts at issue in this case, see *ante,* at 1993, by requiring that disabled persons be provided access to *all* of the "services, programs, or activities" furnished or conducted by the State, 42 U.S.C. § 12132. That is simply not what the power to enforce means—or ever ***559** meant. The 1860 edition of Noah Webster's American Dictionary of the English Language, current when the Fourteenth Amendment was adopted, defined "enforce" as: "To put in execution; to cause to take effect; as, to *enforce* the laws." *Id.,* at 396. See also J. Worcester, Dictionary of the English Language 484 (1860) ("To put in force; to cause to be applied or executed; as, 'To *enforce* a law' "). Nothing in § 5 allows Congress to go *beyond* the provisions of the Fourteenth Amendment to proscribe, prevent, or "remedy" conduct that does not *itself* violate any provision of the Fourteenth Amendment. So-called "prophylactic legislation" is reinforcement rather than enforcement.

Morgan asserted that this commonsense interpretation "would confine the legislative power ... to the insignificant role of abrogating only those state laws that the judicial branch was prepared to adjudge unconstitutional, or of merely informing the judgment of the judiciary by particularizing the 'majestic generalities' of § 1 of the Amendment." 384 U.S., at 648–649, 86 S.Ct. 1717. That is not so. One must remember "that in 1866 the lower federal courts had no general jurisdiction of cases alleging a deprivation of rights secured by the Constitution." R. Berger, Government By Judiciary 247 (2d ed.1997). If, just after the Fourteenth Amendment was ratified, a State had enacted a law imposing racially discriminatory literacy tests (different questions for different races) a citizen prejudiced by such a test would have had no means of asserting his constitutional right to be free of it. Section 5 authorizes Congress to create a cause of action through which the citizen may vindicate ****2010** his Fourteenth Amendment rights. One of the first pieces of legislation passed under Congress's § 5 power was the Ku Klux Klan Act of April 20, 1871, 17 Stat. 13, entitled "*An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes.*" Section 1 of that Act, later codified as Rev. Stat. § 1979, 42 U.S.C. § 1983, authorized a cause of action against "any person who, under ***560** color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States." 17 Stat. 13. Section 5 would also authorize measures that do not restrict the States' substantive scope of action but impose requirements directly related to the *facilitation* of "enforcement"—for example, reporting requirements that would enable violations of the Fourteenth Amendment to be identified.[2] But what § 5 does *not* authorize is so-called "prophylactic" measures, prohibiting primary conduct that is itself not forbidden by the Fourteenth Amendment.

The major impediment to the approach I have suggested is *stare decisis.* A lot of water has gone under the bridge since *Morgan,* and many important and well-accepted measures, such as the Voting Rights Act, assume the validity of *Morgan* and *South Carolina.* As Prof. Archibald Cox put it in his Supreme Court Foreword: "The etymological meaning of section 5 may favor the narrower reading. Literally, 'to enforce' means to compel performance of the obligations imposed; but the linguistic argument lost much of its force once the *South Carolina* and *Morgan* cases decided that the power to enforce embraces any measure appropriate to effectuating the performance of the state's constitutional duty." Foreword: Constitutional

Adjudication and the Promotion of Human Rights, 80 Harv. L.Rev. 91, 110–111 (1966).

***561** However, *South Carolina* and *Morgan,* all of our later cases except *Hibbs* that give an expansive meaning to "enforce" in § 5 of the Fourteenth Amendment, and all of our earlier cases that even suggest such an expansive meaning in dicta, involved congressional measures that were directed exclusively against, or were used in the particular case to remedy, *racial discrimination.* See *Oregon v. Mitchell,* 400 U.S. 112, 91 S.Ct. 260, 27 L.Ed.2d 272 (1970) (see discussion *infra*); *Ex parte Virginia,* 100 U.S. 339, 25 L.Ed. 676 (1880) (dictum in a case involving a statute that imposed criminal penalties for officials' racial discrimination in jury selection); *Strauder v. West Virginia,* 100 U.S. 303, 311–312, 25 L.Ed. 664 (1880) (dictum in a case involving a statute that permitted removal to federal court of a black man's claim that his jury had been selected in a racially discriminatory manner); *Virginia v. Rives,* 100 U.S. 313, 318, 25 L.Ed. 667 (1880) (dictum in a racial discrimination case involving the same statute). See also ****2011** *City of Rome v. United States,* 446 U.S. 156, 173–178, 100 S.Ct. 1548, 64 L.Ed.2d 119 (1980) (upholding as valid legislation under § 2 of the Fifteenth Amendment the most sweeping provisions of the Voting Rights Act of 1965); *Jones v. Alfred H. Mayer Co.,* 392 U.S. 409, 439–441, 88 S.Ct. 2186, 20 L.Ed.2d 1189 (1968) (upholding a law, 42 U.S.C. § 1982, banning public or private racial discrimination in the sale and rental of property as appropriate legislation under § 2 of the Thirteenth Amendment).

Giving § 5 more expansive scope with regard to measures directed against racial discrimination by the States accords to practices that are distinctively violative of the principal purpose of the Fourteenth Amendment a priority of attention that this Court envisioned from the beginning, and that has repeatedly been reflected in our opinions. In the *Slaughter–House Cases,* 16 Wall. 36, 81, 21 L.Ed. 394 (1873), the Court's first confrontation with the Fourteenth Amendment, we said the following with respect to the Equal Protection Clause:

> "We doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to ***562** come within the purview of this provision. It is so clearly a provision for that race and that emergency, that a strong case would be necessary for its application to any other."

Racial discrimination was the practice at issue in the early cases (cited in *Morgan*) that gave such an expansive description of the effects of § 5. See 384 U.S., at 648, 86 S.Ct. 1717 (citing *Ex parte Virginia*); 384 U.S., at 651, 86 S.Ct. 1717 (citing *Strauder v. West Virginia* and *Virginia v. Rives*).[3] In those early days, bear in mind, the guarantee of equal protection had not been extended beyond race to sex, age, and the many other categories it now covers. Also still to be developed were the incorporation doctrine (which holds that the Fourteenth Amendment incorporates and applies against the States the Bill of Rights, see *Duncan v. Louisiana,* 391 U.S. 145, 147–148, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968)) and the doctrine of so-called "substantive due process" (which holds that the Fourteenth Amendment's Due Process Clause protects unenumerated liberties, see generally ***563** *Lawrence v. Texas,* 539 U.S. 558, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003); *Planned Parenthood of Southeastern Pa. v. Casey,* 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992)). Thus, the Fourteenth Amendment did not include the many guarantees that it now provides. In such a seemingly limited context, it did not appear to be a massive expansion of ****2012** congressional power to interpret § 5 broadly. Broad interpretation was particularly appropriate with regard to racial discrimination, since that was the principal evil against which the Equal Protection Clause was directed, and the principal constitutional prohibition that some of the States stubbornly ignored. The former is still true, and the latter remained true at least as late as *Morgan.*

When congressional regulation has not been targeted at racial discrimination, we have given narrower scope to § 5. In *Oregon v. Mitchell,* 400 U.S. 112, 91 S.Ct. 260, 27 L.Ed.2d 272 (1970), the Court upheld, under § 2 of the Fifteenth Amendment, that provision of the Voting Rights Act Amendments of 1970, 84 Stat. 314, which barred literacy tests and similar voter-eligibility requirements—classic tools of the racial discrimination in voting that the Fifteenth Amendment forbids; but found to be *beyond* the § 5 power of the Fourteenth Amendment the provision that lowered the voting age from 21 to 18 in state elections. See 400 U.S., at 124–130, 91 S.Ct. 260 (opinion of Black, J.); *id.,* at 153–154, 91 S.Ct. 260 (Harlan, J., concurring in part and dissenting in part); *id.,* at 293–296, 91 S.Ct. 260 (Stewart, J., joined by Burger, C. J., and Blackmun, J., concurring in part and dissenting in part). A third provision, which forbade States from disqualifying voters by reason of residency requirements, was also upheld—but only a minority of the Justices believed that § 5 was adequate authority. Justice Black's opinion in that case described exactly the line I am drawing here, suggesting that Congress's enforcement power is broadest when directed "to the goal of eliminating discrimination on account of race." *Id.,* at 130, 91 S.Ct. 260. And of course the *results* reached in *Boerne, Florida Prepaid, Kimel, Morrison*, and *Garrett* are consistent with the narrower compass afforded congressional ***564** regulation that does not protect against or prevent racial discrimination.

Thus, principally for reasons of *stare decisis,* I shall henceforth apply the permissive *McCulloch* standard to congressional

measures designed to remedy racial discrimination by the States. I would not, however, abandon the requirement that Congress may impose prophylactic § 5 legislation only upon those particular States in which there has been an identified history of relevant constitutional violations. See *Hibbs,* 538 U.S., at 741–743, 123 S.Ct. 1972 (SCALIA, J., dissenting); *Morrison,* 529 U.S., at 626–627, 120 S.Ct. 1740; *Morgan,* 384 U.S., at 666–667, 669, 670–671, 86 S.Ct. 1717 (Harlan, J., dissenting).[4] I would also adhere to the requirement that the prophylactic remedy predicated upon such state violations must be directed against the States or state actors rather than the public at large. See *Morrison, supra,* at 625–626, 120 S.Ct. 1740. And I would not, of course, permit any congressional measures that violate other ****2013** provisions of the Constitution. When those requirements have been met, however, I shall leave it to Congress, under constraints no tighter than those of the Necessary and Proper Clause, to decide what measures are appropriate under § 5 to prevent or remedy racial discrimination by the States.

***565** I shall also not subject to "congruence and proportionality" analysis congressional action under § 5 that is *not* directed to racial discrimination. Rather, I shall give full effect to that action when it consists of "enforcement" of the provisions of the Fourteenth Amendment, within the broad but not unlimited meaning of that term I have described above. When it goes beyond enforcement to prophylaxis, however, I shall consider it ultra vires. The present legislation is plainly of the latter sort.

* * *

Requiring access for disabled persons to all public buildings cannot remotely be considered a means of "enforcing" the Fourteenth Amendment. The considerations of long accepted practice and of policy that sanctioned such distortion of language where state racial discrimination is at issue do not apply in this field of social policy far removed from the principal object of the Civil War Amendments. "The seductive plausibility of single steps in a chain of evolutionary development of a legal rule is often not perceived until a third, fourth, or fifth 'logical' extension occurs. Each step, when taken, appeared a reasonable step in relation to that which preceded it, although the aggregate or end result is one that would never have been seriously considered in the first instance. This kind of gestative propensity calls for the 'line drawing' familiar in the judicial, as in the legislative process: 'thus far but not beyond.' " *United States v. 12 200—ft. Reels of Super 8MM. Film,* 413 U.S. 123, 127, 93 S.Ct. 2665, 37 L.Ed.2d 500 (1973) (Burger, C. J., for the Court) (footnote omitted). It is past time to draw a line limiting the uncontrolled spread of a well-intentioned textual distortion. For these reasons, I respectfully dissent from the judgment of the Court.

Justice THOMAS, dissenting.

I join THE CHIEF JUSTICE's dissent. I agree that Title II of the Americans with Disabilities Act of 1990 cannot be a ***566** congruent and proportional remedy to the States' alleged practice of denying disabled persons access to the courts. Not only did Congress fail to identify any evidence of such a practice when it enacted the ADA, *ante,* at 1998–2003, Title II regulates far more than the provision of access to the courts, *ante,* at 2003–2006. Because I joined the dissent in *Nevada Dept. of Human Resources v. Hibbs,* 538 U.S. 721, 123 S.Ct. 1972, 155 L.Ed.2d 953 (2003), and continue to believe that *Hibbs* was wrongly decided, I write separately only to disavow any reliance on *Hibbs* in reaching this conclusion.

All Citations

541 U.S. 509, 124 S.Ct. 1978, 158 L.Ed.2d 820, 15 A.D. Cases 865, 28 NDLR P 65, 04 Cal. Daily Op. Serv. 4207, 2004 Daily Journal D.A.R. 5854, 17 Fla. L. Weekly Fed. S 299, 17 Fla. L. Weekly Fed. S 997

Footnotes

[*] The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience

of the reader. See *United States v. Detroit Timber & Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

1 In *Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.,* 506 U.S. 139, 113 S.Ct. 684, 121 L.Ed.2d 605 (1993), we held that "States and state entities that claim to be 'arms of the State' may take advantage of the collateral order doctrine to appeal a district court order denying a claim of Eleventh Amendment immunity." *Id.,* at 147, 113 S.Ct. 684.

2 See 42 U.S.C. § 12101; Task Force on the Rights and Empowerment of Americans with Disabilities, From ADA to Empowerment 16 (Oct. 12, 1990); S.Rep. No. 101–116 (1989); H.R.Rep. No. 101–485 (1990), U.S.Code Cong. & Admin.News 1990, p. 267; H.R. Conf. Rep. No. 101–558 (1990); H.R. Conf. Rep. No. 101–596 (1990), U.S.Code Cong. & Admin.News 1990, p. 565; cf. *Board of Trustees of Univ. of Ala. v. Garrett,* 531 U.S. 356, 389–390, 121 S.Ct. 955, 148 L.Ed.2d 866 (2001) (App. A to opinion of BREYER, J., dissenting) (listing congressional hearings).

3 In *Ex parte Virginia,* we described the breadth of Congress' § 5 power as follows:

"Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power." 100 U.S., at 345–346. See also *City of Boerne v. Flores,* 521 U.S. 507, 517–518, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997).

4 In *Boerne,* we observed:

"Legislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into 'legislative spheres of autonomy previously reserved to the States.' *Fitzpatrick v. Bitzer,* 427 U.S. 445, 455, 96 S.Ct. 2666, 49 L.Ed.2d 614 (1976). For example, the Court upheld a suspension of literacy tests and similar voting requirements under Congress' parallel power to enforce the provisions of the Fifteenth Amendment, see U.S. Const., Amdt. 15, § 2, as a measure to combat racial discrimination in voting, *South Carolina v. Katzenbach,* 383 U.S. 301, 308, 86 S.Ct. 803, 15 L.Ed.2d 769 (1966), despite the facial constitutionality of the tests under *Lassiter v. Northampton County Bd. of Elections,* 360 U.S. 45, 79 S.Ct. 985, 3 L.Ed.2d 1072 (1959). We have also concluded that other measures protecting voting rights are within Congress' power to enforce the Fourteenth and Fifteenth Amendments, despite the burdens those measures placed on the States. *South Carolina v. Katzenbach, supra* (upholding several provisions of the Voting Rights Act of 1965); *Katzenbach v. Morgan,* [384 U.S. 641, 86 S.Ct. 1717, 16 L.Ed.2d 828 (1966)] (upholding ban on literacy tests that prohibited certain people schooled in Puerto Rico from voting); *Oregon v. Mitchell,* 400 U.S. 112, 91 S.Ct. 260, 27 L.Ed.2d 272 (1970) (upholding 5–year nationwide ban on literacy tests and similar voting requirements for registering to vote); *City of Rome v. United States,* 446 U.S. 156, 161, 100 S.Ct. 1548, 64 L.Ed.2d 119 (1980) (upholding 7–year extension of the Voting Rights Act's requirement that certain jurisdictions preclear any change to a " 'standard, practice, or procedure with respect to voting' "); see also *James Everard's Breweries v. Day,* 265 U.S. 545, 44 S.Ct. 628, 68 L.Ed. 1174 (1924) (upholding ban on medical prescription of intoxicating malt liquors as appropriate to enforce Eighteenth Amendment ban on manufacture, sale, or transportation of intoxicating liquors for beverage purposes)." *Id.,* at 518, 117 S.Ct. 2157.

5 *Cleburne v. Cleburne Living Center, Inc.,* 473 U.S. 432, 464, and n. 14, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985) (Marshall, J., concurring in judgment in part and dissenting in part) (citing Note, Mental Disability and the Right to Vote, 88 Yale L.J. 1644 (1979)).

6 See Schriner, Ochs, & Shields, Democratic Dilemmas: Notes on the ADA and Voting Rights of People with Cognitive and Emotional Impairments, 21 Berkeley J. Emp. & Lab. L. 437, 456–472, tbl. II (2000) (listing state laws concerning the voting rights of persons with mental disabilities).

7 See *Doe v. Rowe,* 156 F.Supp.2d 35 (D.Me.2001).

8 *E.g.,* D.C.Code § 46–403 (West 2001) (declaring illegal and void the marriage of "an idiot or of a person adjudged to be a lunatic"); Ky.Rev.Stat. Ann. § 402.990(2) (West 1992 Cumulative Service) (criminalizing the marriage of persons with mental disabilities); Tenn.Code Ann. § 36–3–109 (1996) (forbidding the issuance of a marriage license to "imbecile[s]").

9 *E.g.,* Mich. Comp. Laws Ann. § 729.204 (West 2002) (persons selected for inclusion on jury list may not be "infirm or decrepit"); Tenn.Code Ann. § 22–2–304(c) (1994) (authorizing judges to excuse "mentally and physically disabled" persons from jury service).

10 The undisputed findings of fact in *Pennhurst State School and Hospital v. Halderman,* 451 U.S. 1, 101 S.Ct. 1531, 67 L.Ed.2d 694 (1981), provide another example of such mistreatment. See *id.,* at 7, 101 S.Ct. 1531 ("Conditions at Pennhurst are not only dangerous, with the residents often physically abused or drugged by staff members, but also inadequate for the 'habilitation' of the retarded").

11 *E.g., LaFaut v. Smith,* 834 F.2d 389, 394 (C.A.4 1987) (paraplegic inmate unable to access toilet facilities); *Schmidt v. Odell,* 64 F.Supp.2d 1014 (D.Kan.1999) (double amputee forced to crawl around the floor of jail). See also, *e.g., Key v. Grayson,* 179 F.3d 996 (C.A.6 1999) (deaf inmate denied access to sex offender therapy program allegedly required as precondition for parole).

12 *E.g., New York State Assn. for Retarded Children, Inc. v. Carey,* 466 F.Supp. 487, 504 (E.D.N.Y.1979) (segregation of mentally retarded students with hepatitis B); *Mills v. Board of Ed. of District of Columbia,* 348 F.Supp. 866 (D.D.C. 1972) (exclusion of mentally retarded students from public school system). See also, *e.g., Robertson v. Granite City Community Unit School Dist. No. 9,* 684 F.Supp. 1002 (S.D.Ill.1988) (elementary-school student with AIDS excluded from attending regular education classes or participating in extracurricular activities); *Thomas v. Atascadero Unified School Dist.,* 662 F.Supp. 376 (C.D.Cal.1986) (kindergarten student with AIDS excluded from class).

13 *E.g., Doe v. Rowe,* 156 F.Supp.2d 35 (D.Me.2001) (disenfranchisement of persons under guardianship by reason of mental illness). See also, *e.g., New York ex rel. Spitzer v. County of Delaware,* 82 F.Supp.2d 12 (N.D.N.Y.2000) (mobility-impaired voters unable to access county polling places).

14 *E.g., Ferrell v. Estelle,* 568 F.2d 1128, 1132–1133 (C.A.5) (deaf criminal defendant denied interpretive services), opinion withdrawn as moot, 573 F.2d 867 (C.A.5 1978); *State v. Schaim,* 65 Ohio St.3d 51, 64, 600 N.E.2d 661, 672 (1992) (same); *People v. Rivera,* 125 Misc.2d 516, 528, 480 N.Y.S.2d 426, 434 (Sup.Ct.1984) (same). See also, *e.g., Layton v. Elder,* 143 F.3d 469, 470–472 (C.A.8 1998) (mobility-impaired litigant excluded from a county quorum court session held on the second floor of an inaccessible courthouse); *Matthews v. Jefferson,* 29 F.Supp.2d 525, 533–534 (W.D.Ark.1998) (wheelchair-bound litigant had to be carried to the second floor of an inaccessible courthouse, from which he was unable to leave to use restroom facilities or obtain a meal, and no arrangements were made to carry him downstairs at the end of the day); *Pomerantz v. County of Los Angeles,* 674 F.2d 1288, 1289 (C.A.9 1982) (blind persons categorically excluded from jury service); *Galloway v. Superior Court of District of Columbia,* 816 F.Supp. 12 (D.D.C. 1993) (same); *DeLong v. Brumbaugh,* 703 F.Supp. 399, 405 (W.D.Pa.1989) (deaf individual excluded from jury service); *People v. Green,* 148 Misc.2d 666, 669, 561 N.Y.S.2d 130, 133 (Cty.Ct.1990) (prosecutor exercised peremptory strike against prospective juror solely because she was hearing impaired).

15 For a comprehensive discussion of the shortcomings of state disability discrimination statutes, see Colker & Milani, The

Post-*Garrett* World: Insufficient State Protection against Disability Discrimination, 53 Ala. L.Rev. 1075 (2002).

16 THE CHIEF JUSTICE dismisses as "irrelevant" the portions of this evidence that concern the conduct of nonstate governments. *Post,* at 1999–2000 (dissenting opinion). This argument rests on the mistaken premise that a valid exercise of Congress' § 5 power must always be predicated solely on evidence of constitutional violations by the States themselves. To operate on that premise in this case would be particularly inappropriate because this case concerns the provision of judicial services, an area in which local governments are typically treated as "arm [s] of the State" for Eleventh Amendment purposes, *Mt. Healthy City Bd. of Ed. v. Doyle,* 429 U.S. 274, 280, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977), and thus enjoy precisely the same immunity from unconsented suit as the States. See, *e.g., Callahan v. Philadelphia,* 207 F.3d 668, 670–674 (C.A.3 2000) (municipal court is an "arm of the State" entitled to Eleventh Amendment immunity); *Kelly v. Municipal Courts,* 97 F.3d 902, 907–908 (C.A.7 1996) (same); *Franceschi v. Schwartz,* 57 F.3d 828, 831 (C.A.9 1995) (same). Cf. *Garrett,* 531 U.S., at 368–369, 121 S.Ct. 955.

In any event, our cases have recognized that evidence of constitutional violations on the part of nonstate governmental actors is relevant to the § 5 inquiry. To be sure, evidence of constitutional violations by the States themselves is particularly important when, as in *Florida Prepaid Postsecondary Ed. Expense Bd. v. College Savings Bank,* 527 U.S. 627, 119 S.Ct. 2199, 144 L.Ed.2d 575 (1999), *Kimel v. Florida Bd. of Regents,* 528 U.S. 62, 120 S.Ct. 631, 145 L.Ed.2d 522 (2000), and *Garrett,* the sole purpose of reliance on § 5 is to place the States on equal footing with private actors with respect to their amenability to suit. But much of the evidence in *South Carolina v. Katzenbach,* 383 U.S. 301, 312–315, 86 S.Ct. 803, 15 L.Ed.2d 769 (1966), to which THE CHIEF JUSTICE favorably refers, *post,* at 2003, involved the conduct of county and city officials, rather than the States. Moreover, what THE CHIEF JUSTICE calls an "extensive legislative record documenting States' gender discrimination in employment leave policies" in *Nevada Dept. of Human Resources v. Hibbs,* 538 U.S. 721, 123 S.Ct. 1972, 155 L.Ed.2d 953 (2003), *post,* at 2003, in fact contained little specific evidence of a pattern of unconstitutional discrimination on the part of the States. Indeed, the evidence before the Congress that enacted the FMLA related primarily to the practices of private-sector employers and the Federal Government. See *Hibbs,* 538 U.S., at 730–735, 123 S.Ct. 1972. See also *id.,* at 745–750, 123 S.Ct. 1972 (KENNEDY, J., dissenting).

17 Specifically, we relied on (1) a Senate Report citation to a Bureau of Labor Statistics survey revealing disparities in private-sector provision of parenting leave to men and women; (2) submissions from two sources at a hearing on the Parental and Medical Leave Act of 1986, a predecessor bill to the FMLA, that public-sector parental leave polices " 'diffe[r] little' " from private-sector policies; (3) evidence that 15 States provided women up to one year of extended maternity leave, while only 4 States provided for similarly extended paternity leave; and (4) a House Report's quotation of a study that found that failure to implement uniform standards for parenting leave would " 'leav[e] Federal employees open to discretionary and possibly unequal treatment,' " H.R.Rep. No. 103–8, pt. 2, p. 11 (1993). *Hibbs,* 538 U.S., at 728–733, 123 S.Ct. 1972.

18 Contrary to THE CHIEF JUSTICE, *post*, at 2005, neither *Garrett* nor *Florida Prepaid* lends support to the proposition that the *Boerne* test requires courts in all cases to "measur[e] the full breadth of the statute or relevant provision that Congress enacted against the scope of the constitutional right it purported to enforce." In fact, the decision in *Garrett*, which severed Title I of the ADA from Title II for purposes of the § 5 inquiry, demonstrates that courts need not examine "the full breadth of the statute" all at once. Moreover, *Garrett* and *Florida Prepaid*, like all of our other recent § 5 cases, concerned legislation that narrowly targeted the enforcement of a single constitutional right; for that reason, neither speaks to the issue presented in this case.

Nor is THE CHIEF JUSTICE's approach compelled by the nature of the *Boerne* inquiry. The answer to the question *Boerne* asks—whether a piece of legislation attempts substantively to redefine a constitutional guarantee—logically focuses on the manner in which the legislation operates to enforce that particular guarantee. It is unclear what, if anything, examining Title II's application to hockey rinks or voting booths can tell us about whether Title II substantively redefines the right of access to the courts.

19 In *Raines,* a State subject to suit under the Civil Rights Act of 1957 contended that the law exceeded Congress' power to enforce the Fifteenth Amendment because it prohibited "any person," and not just state actors, from interfering with voting rights. We rejected that argument, concluding that "if the complaint here called for an application of the statute clearly constitutional under the Fifteenth Amendment, that should have been an end to the question of constitutionality." 362 U.S., at 24–25, 80 S.Ct. 519.

20 Because this case implicates the right of access to the courts, we need not consider whether Title II's duty to accommodate exceeds what the Constitution requires in the class of cases that implicate only *Cleburne*'*s* prohibition on irrational discrimination. See *Garrett,* 531 U.S., at 372, 121 S.Ct. 955.

21 *Boddie v. Connecticut,* 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971) (divorce filing fee); *M.L.B. v. S.L. J.,* 519 U.S. 102, 117 S.Ct. 555, 136 L.Ed.2d 473 (1996) (record fee in parental rights termination action); *Smith v. Bennett,* 365 U.S. 708, 81 S.Ct. 895, 6 L.Ed.2d 39 (1961) (filing fee for habeas petitions); *Burns v. Ohio,* 360 U.S. 252, 79 S.Ct. 1164, 3 L.Ed.2d 1209 (1959) (filing fee for direct appeal in criminal case).

22 *Griffin v. Illinois,* 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891 (1956).

23 *Gideon v. Wainwright,* 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963) (trial counsel for persons charged with felony offenses); *Douglas v. California,* 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963) (counsel for direct appeals as of right).

24 THE CHIEF JUSTICE contends that Title II cannot be understood as remedial legislation because it "subjects a State to liability for failing to make a vast array of special accommodations, *without regard for whether the failure to accommodate results in a constitutional wrong.*" *Post,* at 2006 (emphasis in original). But as we have often acknowledged, Congress "is not confined to the enactment of legislation that merely parrots the precise wording of the Fourteenth Amendment," and may prohibit "a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text." *Kimel,* 528 U.S., at 81, 120 S.Ct. 631. Cf. *Hibbs,* 538 U.S. 721, 123 S.Ct. 1972 (upholding the FMLA as valid remedial legislation without regard to whether failure to provide the statutorily mandated 12 weeks' leave results in a violation of the Fourteenth Amendment).

1 See generally *Cleburne v. Cleburne Living Center, Inc.,* 473 U.S. 432, 463–464, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985) (Marshall, J., concurring in judgment in part and dissenting in part); Burgdorf & Burgdorf, A History of Unequal Treatment: The Qualifications of Handicapped Persons As A "Suspect Class" Under the Equal Protection Clause, 15 Santa Clara Law. 855 (1975); Brief for United States 17–19.

2 As the majority opinion shows, some of them persist to this day, *ante,* at 1989–1990, to say nothing of their lingering effects on society.

1 For further discussion of the propriety of this approach, see *infra,* at 2004–2005.

2 *E.g., ante,* at 1989 (citing *Cleburne v. Cleburne Living Center, Inc.,* 473 U.S. 432, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985) (irrational discrimination by city zoning board)); *ante,* at 1990, n. 13 (citing *New York ex rel. Spitzer v. County of Delaware,* 82 F.Supp.2d 12 (N.D.N.Y.2000) (ADA lawsuit *brought by State* against a county)); *ante,* at 1989–1990, n. 12 (citing four cases concerning local school boards' unconstitutional actions); *ante,* at 1989, n. 11 (citing one case involving conditions in federal prison and another involving a county jail inmate); *ante,* at 1990 (referring to "hundreds of examples of unequal treatment ... by States *and their political subdivisions* " (emphasis added)).

3 The majority obscures this fact by repeatedly referring to congressional findings of "discrimination" and "unequal treatment." Of course, generic findings of discrimination and unequal treatment *vel non* are insufficient to show a pattern of *constitutional* violations where rational-basis scrutiny applies. *Board of Trustees of Univ. of Ala. v. Garrett,* 531 U.S. 356, 370, 121 S.Ct. 955,

148 L.Ed.2d 866 (2001).

4 Certainly, respondents Lane and Jones were not denied these constitutional rights. The majority admits that Lane was able to attend the initial hearing of his criminal trial. *Ante,* at 1982. Lane was arrested for failing to appear at his second hearing only after he refused assistance from officers dispatched by the court to help him to the courtroom. *Ante,* at 1982. The court conducted a preliminary hearing in the first-floor library to accommodate Lane's disability, App. to Pet. for Cert. 16, and later offered to move all further proceedings in the case to a handicapped-accessible courthouse in a nearby town. In light of these facts, it can hardly be said that the State violated Lane's right to be present at his trial; indeed, it made affirmative attempts to secure that right. Respondent Jones, a disabled court reporter, does not seriously contend that she suffered a constitutional injury.

5 As two Justices noted in *Garrett,* if the States were violating the due process rights of disabled persons, "one would have expected to find in decisions of the courts ... extensive litigation and discussion of the constitutional violations." 531 U.S., at 376, 121 S.Ct. 955 (KENNEDY, J., joined by O'CONNOR, J., concurring).

6 The balance of the Court's citations refer to cases arising *after* enactment of the ADA or do not contain findings of federal constitutional violations. *Ante,* at 1990, n. 14 (citing *Layton v. Elder,* 143 F.3d 469 (C.A.8 1998) (post-ADA case finding ADA violations only); *Matthews v. Jefferson,* 29 F.Supp.2d 525 (W.D.Ark.1998) (same); *Galloway v. Superior Court,* 816 F.Supp. 12 (D.D.C. 1993) (same); *State v. Schaim,* 65 Ohio St.3d 51, 600 N.E.2d 661 (1992) (remanded for hearing on constitutional issue); *People v. Green,* 148 Misc.2d 666, 561 N.Y.S.2d 130 (Cty. Ct.1990) (finding violation of state constitution only); *DeLong v. Brumbaugh,* 703 F.Supp. 399 (W.D.Pa.1989) (statute upheld against facial constitutional challenge; Rehabilitation Act of 1973 violations only); *Pomerantz v. Los Angeles County,* 674 F.2d 1288 (C.A.9 1982) (Rehabilitation Act of 1973 claim; challenged jury-service statute later amended)). Accordingly, they offer no support whatsoever for the notion that Title II is a valid response to documented constitutional violations.

7 Oversight Hearing on H.R. 4498 before the House Subcommittee on Select Education of the Committee on Education and Labor, 100th Cong., 2d Sess., 40–41 (1988) (statement of Emeka Nwojke) (explaining that he encountered difficulties appearing in court due to physical characteristics of the courthouse and courtroom and the rudeness of court employees); *id.,* at 48 (statement of Ellen Telker) (blind attorney "know[s] of at least one courthouse in New Haven where the elevators do not have tactile markings").

8 The majority rather peculiarly points to Congress' finding that " 'discrimination against individuals with disabilities persists in such critical areas as ... *access to public services* ' " as evidence that Congress sought to vindicate the due process rights of disabled persons. *Ante,* at 1992 (quoting 42 U.S.C. § 12101(a)(3) (emphasis added by the Court)). However, one does not usually refer to the right to attend a judicial proceeding as "access to [a] public servic[e]." Given the lack of any concern over courthouse accessibility issues in the legislative history, it is highly unlikely that this legislative finding obliquely refers to state violations of the due process rights of disabled persons to attend judicial proceedings.

9 The Court correctly explains that " 'it [i]s easier for Congress to show a pattern of state constitutional violations' " when it targets state action that triggers a higher level of constitutional scrutiny. *Ante,* at 1992 (quoting *Nevada Dept. of Human Resources v. Hibbs,* 538 U.S. 721, 736, 123 S.Ct. 1972, 155 L.Ed.2d 953 (2003)). However, this Court's precedents attest that Congress may not dispense with the required showing altogether simply because it purports to enforce due process rights. See *Florida Prepaid Postsecondary Ed. Expense Bd. v. College Savings Bank,* 527 U.S. 627, 645–646, 119 S.Ct. 2199, 144 L.Ed.2d 575 (1999) (invalidating Patent Remedy Act, which purported to enforce the Due Process Clause, because Congress failed to identify a record of constitutional violations); *City of Boerne v. Flores,* 521 U.S. 507, 530–531, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997) (same with respect to Religious Freedom Restoration Act of 1993 (RFRA)). As the foregoing discussion demonstrates, that is precisely what the Court has sanctioned here. Because the record is utterly devoid of proof that Congress was responding to state violations of due process access-to-the-courts rights, this case is controlled by *Florida Prepaid* and *City of Boerne,* rather than *Hibbs.*

10 Title II's all-encompassing approach to regulating public services contrasts starkly with the more closely tailored laws we have upheld as legitimate prophylactic § 5 legislation. In *Hibbs,* for example, the FMLA was "narrowly targeted" to remedy widespread gender discrimination in the availability of family leave. 538 U.S., at 738–739, 123 S.Ct. 1972 (distinguishing *City of Boerne, Kimel v. Florida Bd. of Regents,* 528 U.S. 62, 120 S.Ct. 631, 145 L.Ed.2d 522 (2000), and *Garrett* on this ground). Similarly, in cases involving enforcement of the Fifteenth Amendment, we upheld "limited remedial scheme[s]" that were narrowly tailored to address massive evidence of discrimination in voting. *Garrett,* 531 U.S., at 373, 121 S.Ct. 955 (discussing *South Carolina v. Katzenbach,* 383 U.S. 301, 86 S.Ct. 803, 15 L.Ed.2d 769 (1966)). Unlike these statutes, Title II's "indiscriminate scope ... is particularly incongruous in light of the scant support for the predicate unconstitutional conduct that Congress intended to remedy." *Florida Prepaid,* 527 U.S., at 647, 119 S.Ct. 2199.

11 *Raines* is inapposite in any event. The Court there considered the constitutionality of the Civil Rights Act of 1957—a statute designed to enforce the Fifteenth Amendment—whose narrowly tailored substantive provisions could "unquestionably" be applied to state actors (like the respondents therein). 362 U.S., at 25, 26, 80 S.Ct. 519. The only question presented was whether the statute was facially invalid because it might be read to constrain nonstate actors as well. *Id.,* at 20, 80 S.Ct. 519. The Court upheld the statute as applied to respondents and declined to entertain the facial challenge. *Id.,* at 24–26, 80 S.Ct. 519. The situation in this case is much different: The very question presented is whether Title II's indiscriminate substantive provisions can constitutionally be applied to the petitioner State. *Raines* thus provides no support for avoiding this question by conjuring up an imaginary statute with substantive provisions that might pass the congruence-and-proportionality test.

12 The majority's invocation of *Hibbs* to justify Title II's overbreadth is unpersuasive. See *ante,* at 1994, n. 24. The *Hibbs* Court concluded that "in light of the evidence before Congress" the FMLA's 12–week family-leave provision was necessary to "achiev[e] Congress' remedial object." 538 U.S., at 748, 123 S.Ct. 1972. The Court found that the legislative record included not only evidence of state constitutional violations, but evidence that a provision merely enforcing the Equal Protection Clause would actually perpetuate the gender stereotypes Congress sought to eradicate because employers could simply eliminate family leave entirely. *Ibid.* Without comparable evidence of constitutional violations and the necessity of prophylactic measures, the Court has no basis on which to uphold Title II's special-accommodation requirements.

1 Congress had previously attempted such an extension in the Voting Rights Act Amendments of 1970, 84 Stat. 318, which sought to lower the voting age in state elections from 21 to 18. This extension was rejected, but in three separate opinions, none of which commanded a majority of the Court. See *infra,* at 2012.

2 Professor Tribe's treatise gives some examples of such measures that facilitate enforcement in the context of the Fifteenth Amendment:

"The Civil Rights Act of 1957, 71 Stat. 634, authorized the Attorney General to seek injunctions against interference with the right to vote on racial grounds. The Civil Rights Act of 1960, 74 Stat. 86, permitted joinder of states as parties defendant, gave the Attorney General access to local voting records, and authorized courts to register voters in areas of systemic discrimination. The Civil Rights Act of 1964, 78 Stat. 241, expedited the hearing of voting cases before three-judge courts...." L. Tribe, American Constitutional Law 931, n. 5 (3d ed.2000).

3 A later case cited in *Morgan, James Everard's Breweries v. Day,* 265 U.S. 545, 558–563, 44 S.Ct. 628, 68 L.Ed. 1174 (1924), applied the more flexible standard of *M'Culloch v. Maryland,* 4 Wheat. 316, 4 L.Ed. 579 (1819), to the Eighteenth Amendment, which, in § 1, forbade "the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States ... for beverage purposes" and provided, in § 2, that "Congress and the several States shall have concurrent power to enforce this article by appropriate legislation." Congress had provided, in the Supplemental Prohibition Act of 1921, § 2, 42 Stat. 222, that "only spirituous and vinous liquor may be prescribed for medicinal purposes." That was challenged as unconstitutional because it went beyond the regulation of intoxicating liquors for beverage purposes, and hence beyond "enforcement." In an opinion citing none of the Thirteenth, Fourteenth, and Fifteenth Amendment cases discussed in text, the Court held that the *M'Culloch v. Maryland* test applied. Unlike what is at issue here, that case did not involve a power to control the States in respects not otherwise permitted by the Constitution. The only consequence of the Federal Government's going beyond "enforcement" narrowly defined was its arguable incursion upon powers left to the States—which is essentially the

same issue that *M'Culloch* addressed.

[4] Dicta in one of our earlier cases seemed to suggest that even *nonprophylactic* provisions could not be adopted under § 5 except in response to a State's constitutional violations:

"When the State has been guilty of no violation of [the Fourteenth Amendment's] provisions; when it has not made or enforced any law abridging the privileges or immunities of citizens of the United States; when no one of its departments has deprived any person of life, liberty, or property without due process of law, or denied to any person within its jurisdiction the equal protection of the laws; when, on the contrary, the laws of the State, as enacted by its legislative, and construed by its judicial, and administered by its executive departments, recognize and protect the rights of all persons, the amendment imposes no duty and confers no power upon Congress." *United States v. Harris,* 106 U.S. 629, 639, 1 S.Ct. 601, 27 L.Ed. 290 (1883).

I do not see the textual basis for this interpretation.

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106 S.Ct. 2752
Supreme Court of the United States

Lacy H. THORNBURG, et al., Appellants
v.
Ralph GINGLES et al.

No. 83–1968
|
Argued Dec. 4, 1985.
|
Decided June 30, 1986.

Synopsis

Action was brought challenging use of multimember districts in North Carolina legislative apportionment. The United States District Court for the Eastern District of North Carolina, 590 F.Supp. 345, found the plan to violate the Voting Rights Act and state officials appealed. The Supreme Court, Justice Brennan, J., held that: (1) plaintiffs claiming impermissive vote dilution must demonstrate that voting devices resulted in unequal access to electoral process; (2) use of multimember districts does not impede the ability of minority voters to elect representatives of their choice unless a bloc voting majority will usually be able to defeat candidates supported by a politically cohesive, geographically insular minority; (3) District Court applied proper standard in determining whether there was racial polarization and voting; (4) legal concept of racially polarized voting incorporates neither causation nor intent; (5) some electoral success by minority group does not foreclose successful section 2 claim; (6) finding of impermissible dilution was supported by the evidence; but (7) claim of dilution with respect to one multimember district was defeated by evidence that last six elections resulted in proportional representation for black residents.

Affirmed in part and reversed in part.

Justice White filed a concurring opinion.

Justice O'Connor filed an opinion concurring in the judgment in which Chief Justice Burger, Justice Powell, and Justice Rehnquist joined.

Justice Stevens filed an opinion concurring in part and dissenting in part in which Justice Marshall and Justice Blackmun joined.

****2755 *30** *Syllabus*[*]

In 1982, the North Carolina General Assembly enacted a legislative redistricting plan for the State's Senate and House of Representatives. Appellees, black citizens of North Carolina who are registered to vote, brought suit in Federal District Court, challenging one single-member district and six multimember districts on the ground, *inter alia,* that the redistricting plan impaired black citizens' ability to elect representatives of their choice in violation of § 2 of the Voting Rights Act of 1965. After appellees brought suit, but before trial, § 2 was amended, largely in response to *Mobile v. Bolden,* 446 U.S. 55, 100 S.Ct. 1490, 64 L.Ed.2d 47, to make clear that a violation of § 2 could be proved by showing discriminatory effect alone, rather than having to show a discriminatory purpose, and to establish as the relevant legal standard the "results test." Section 2(a), as amended, prohibits a State or political subdivision from imposing any voting qualifications or prerequisites to voting, or any standards, practices, or procedures that result in the denial or abridgment of the right of any citizen to vote on account of race or color. Section 2(b), as amended, provides that § 2(a) is violated where the "totality of circumstances" reveals that

"the political processes leading to nomination or election ... are not equally open to participation by members of a [protected class] ... in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice," and that the extent to which members of a protected class have been elected to office is one circumstance that may be considered. The District Court applied the "totality of circumstances" test set forth in § 2(b) and held that the redistricting plan violated § 2(a) because it resulted in the dilution of black citizens' votes in all of the ****2756** disputed districts. Appellants, the Attorney General of North Carolina and others, took a direct appeal to this Court with respect to five of the multimember districts.

Held: The judgment is affirmed in part and reversed in part.

590 F.Supp. 345, affirmed in part and reversed in part.

Justice BRENNAN delivered the opinion of the Court with respect to Parts I, II, III–A, III–B, IV–A, and V, concluding that:

***31** 1. Minority voters who contend that the multimember form of districting violates § 2 must prove that the use of a multimember electoral structure operates to minimize or cancel out their ability to elect their preferred candidates. While many or all of the factors listed in the Senate Report may be relevant to a claim of vote dilution through submergence in multimember districts, unless there is a conjunction of the following circumstances, the use of multimember districts generally will not impede the ability of minority voters to elect representatives of their choice. Stated succinctly, a bloc voting majority must *usually* be able to defeat candidates supported by a politically cohesive, geographically insular minority group. The relevance of the existence of racial bloc voting to a vote dilution claim is twofold: to ascertain whether minority group members constitute a politically cohesive unit and to determine whether whites vote sufficiently as a bloc usually to defeat the minority's preferred candidate. Thus, the question whether a given district experiences legally significant racial bloc voting requires discrete inquiries into minority and white voting practices. A showing that a significant number of minority group members usually vote for the same candidates is one way of proving the political cohesiveness necessary to a vote dilution claim, and consequently establishes minority bloc voting within the meaning of § 2. And, in general, a white bloc vote that normally will defeat the combined strength of minority support plus white "crossover" votes rises to the level of legally significant white bloc voting. Because loss of political power through vote dilution is distinct from the mere inability to win a particular election, a pattern of racial bloc voting that extends over a period of time is more probative of a claim that a district experiences significant polarization than are the results of a single election. In a district where elections are shown usually to be polarized, the fact that racially polarized voting is not present in one election or a few elections does not necessarily negate the conclusion that the district experiences legally significant bloc voting. Furthermore, the success of a minority candidate in a particular election does not necessarily prove that the district did not experience polarized voting in that election. Here, the District Court's approach, which tested data derived from three election years in each district in question, and which revealed that blacks strongly supported black candidates, while, to the black candidates' usual detriment, whites rarely did, satisfactorily addresses each facet of the proper standard for legally significant racial bloc voting. Pp. 2762–2772.

2. The language of § 2 and its legislative history plainly demonstrate that proof that some minority candidates have been elected does not foreclose a § 2 claim. Thus, the District Court did not err, as a matter of law, in refusing to treat the fact that some black candidates have ***32** succeeded as dispositive of appellees' § 2 claims. Where multimember districting generally works to dilute the minority vote, it cannot be defended on the ground that it sporadically and serendipitously benefits minority voters. Pp. 2779–2780.

3. The clearly-erroneous test of Federal Rule of Civil Procedure 52(a) is the appropriate standard for appellate review of ultimate findings of vote dilution. As both amended § 2 and its legislative history make clear, in evaluating a statutory claim of vote dilution through districting, the trial court is to consider the "totality of the circumstances" and to determine, based upon a practical evaluation of the past and ****2757** present realities, whether the political process is equally open to minority voters. In this case, the District Court carefully considered the totality of the circumstances and found that in each district racially polarized voting; the legacy of official discrimination in voting matters, education, housing, employment, and health services; and the persistence of campaign appeals to racial prejudice acted in concert with the multimember districting scheme to impair the ability of geographically insular and politically cohesive groups of black voters to participate equally in the political process and to elect candidates of their choice. Pp. 2780–2782.

Justice BRENNAN, joined by Justice MARSHALL, Justice BLACKMUN, and Justice STEVENS, concluded in Part III–C

that for purposes of § 2, the legal concept of racially polarized voting, as it relates to claims of vote dilution—that is, when it is used to prove that the minority group is politically cohesive and that white voters will usually be able to defeat the minority's preferred candidates—refers only to the existence of a correlation between the race of voters and the selection of certain candidates. Plaintiffs need not prove causation or intent in order to prove a prima facie case of racial bloc voting, and defendants may not rebut that case with evidence of causation or intent. Pp. 2772–2779.

Justice BRENNAN, joined by Justice WHITE, concluded in Part IV–B, that the District Court erred, as a matter of law, in ignoring the significance of the sustained success black voters have experienced in House District 23. The persistent proportional representation for black residents in that district in the last six elections is inconsistent with appellees' allegation that black voters' ability in that district to elect representatives of their choice is not equal to that enjoyed by the white majority. Pp. 2780–2781.

Justice O'CONNOR, joined by THE CHIEF JUSTICE, Justice POWELL, and Justice REHNQUIST, concluded that:

1. Insofar as statistical evidence of divergent racial voting patterns is admitted solely to establish that the minority group is politically cohesive and to assess its prospects for electoral success, such a showing cannot be rebutted by evidence that the divergent voting patterns may ***33** be explained by causes other than race. However, evidence of the reasons for divergent voting patterns can in some circumstances be relevant to the overall vote dilution inquiry, and there is no rule against consideration of all evidence concerning voting preferences other than statistical evidence of racial voting patterns. Pp. 2766–2767.

2. Consistent and sustained success by candidates preferred by minority voters is presumptively inconsistent with the existence of a § 2 violation. The District Court erred in assessing the extent of black electoral success in House District 39 and Senate District 22, as well as in House District 23. Except in House District 23, despite these errors the District Court's ultimate conclusion of vote dilution is not clearly erroneous. But in House District 23 appellees failed to establish a violation of § 2. Pp. 2766–2769.

BRENNAN, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, III–A, III–B, IV–A, and V, in which WHITE, MARSHALL, BLACKMUN, and STEVENS, JJ., joined, an opinion with respect to Part III–C, in which MARSHALL, BLACKMUN, and STEVENS, JJ., joined, and an opinion with respect to Part IV–B, in which WHITE, J., joined. WHITE, J., filed a concurring opinion, *post,* p. ——. O'CONNOR, J., filed an opinion concurring in the judgment, in which BURGER, C.J., and POWELL and REHNQUIST, JJ., joined, *post,* p. ——. STEVENS, J., filed an opinion concurring in part and dissenting in part, in which MARSHALL and BLACKMUN, JJ., joined, *post,* p. ——.

Attorneys and Law Firms

Lacy H. Thornburg, Attorney General of North Carolina, pro se, argued the cause for appellants. With him on the briefs were Jerris Leonard, Kathleen Heenan McGuan, James Wallace, Jr., Deputy Attorney General for Legal Affairs, and Tiare B. Smiley and Norma S. Harrell, Assistant Attorneys General.

Solicitor General Fried argued the cause for the United States as amicus curiae urging reversal. With him on the brief were Assistant Attorney General Reynolds and Deputy Assistant Attorney General Cooper.

Julius LeVonne Chambers argued the cause for appellees. With him on the briefs for appellees Gingles et al. were Eric Schnapper, C. Lani Guinier, and Leslie J. Winner. C. Allen Foster, Kenneth J. Gumbiner, Robert N. ***34** Hunter, Jr., and Arthur J. Donaldson filed briefs for appellees Eaglin et al.*

* Daniel J. Popeo and George C. Smith filed a brief for the Washington Legal Foundation as amicus curiae urging reversal.

Briefs of amici curiae urging affirmance were filed for the American Civil Liberties Union Foundation, Inc., et al. by Cynthia Hill, Maureen T. Thornton, Laughlin McDonald, and Neil Bradley; for Common Cause by William T. Lake; for the Lawyer's Committee for Civil Rights Under Law et al. by James Robertson, Harold R. Tyler, Jr., Norman Redlich, William L. Robinson, Frank R. Parker, Samuel Rabinove, and Richard T. Foltin; for James G. Martin, Governor of North Carolina, by Victor S. Friedman; for Legal Services of North Carolina by David H. Harris, Jr., Susan M. Perry, Richard Taylor, and Julian

Pierce; for the Republican National Committee by Roger Allan Moore and Michael A. Hess; and for Senator Dennis DeConcini et al. by Walter J. Rockler.

Opinion

****2758** Justice BRENNAN announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, III–A, III–B, IV–A, and V, and an opinion with respect to Part III–C, in which Justice MARSHALL, Justice BLACKMUN, and Justice STEVENS join, and an opinion with respect to Part IV–B, in which Justice WHITE joins.

This case requires that we construe for the first time § 2 of the Voting Rights Act of 1965, as amended June 29, 1982. 42 U.S.C. § 1973. The specific question to be decided is whether the three-judge District Court, convened in the Eastern District of North Carolina pursuant to 28 U.S.C. § 2284(a) and 42 U.S.C. § 1973c, correctly held that the use in a legislative redistricting plan of multimember districts in five North Carolina legislative districts violated § 2 by impairing the opportunity of black voters "to participate in the political process and to elect representatives of their choice." § 2(b), 96 Stat. 134.

I

BACKGROUND

In April 1982, the North Carolina General Assembly enacted a legislative redistricting plan for the State's Senate ***35** and House of Representatives. Appellees, black citizens of North Carolina who are registered to vote, challenged seven districts, one single-member[1] and six multimember[2] districts, alleging that the redistricting scheme impaired black citizens' ability to elect representatives of their choice in violation of the Fourteenth and Fifteenth Amendments to the United States Constitution and of § 2 of the Voting Rights Act.[3]

After appellees brought suit, but before trial, Congress amended § 2. The amendment was largely a response to this Court's plurality opinion in *Mobile v. Bolden,* 446 U.S. 55, 100 S.Ct. 1490, 64 L.Ed.2d 47 (1980), which had declared that, in order to establish a violation either of § 2 or of the Fourteenth or Fifteenth Amendments, minority voters must prove that a contested electoral mechanism was intentionally adopted or maintained by state officials for a discriminatory purpose. Congress substantially revised § 2 to make clear that a violation could be proved by showing discriminatory effect alone and to establish as the relevant legal standard the "results test," applied by this Court in *White v. Regester,* 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973), and by other federal courts before *Bolden, supra.* S.Rep. No. 97–417, 97th Cong.2nd Sess. 28 (1982), U.S.Code Cong. & Admin.News 1982, pp. 177, 205 (hereinafter S.Rep.).

***36** Section 2, as amended, 96 Stat. 134, reads as follows:

> "(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the ****2759** guarantees set forth in section 4(f)(2), as provided in subsection (b).
>
> "(b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided,* That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." Codified at 42 U.S.C. § 1973.

The Senate Judiciary Committee majority Report accompanying the bill that amended § 2, elaborates on the circumstances that might be probative of a § 2 violation, noting the following "typical factors":[4]

> "1. the extent of any history of official discrimination in the state or political subdivision that touched the right of ***37** the members of the minority group to register, to vote, or otherwise to participate in the democratic process;
>
> "2. the extent to which voting in the elections of the state or political subdivision is racially polarized;
>
> "3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;
>
> "4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;
>
> "5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;
>
> "6. whether political campaigns have been characterized by overt or subtle racial appeals;
>
> "7. the extent to which members of the minority group have been elected to public office in the jurisdiction.
>
> "Additional factors that in some cases have had probative value as part of plaintiffs' evidence to establish a violation are:
>
> "whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group.
>
> "whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous." S.Rep., at 28–29, U.S.Code Cong. & Admin.News 1982, pp. 206–207.

The District Court applied the "totality of the circumstances" test set forth in § 2(b) to appellees' statutory claim, and, relying principally on the factors outlined in the Senate ***38** Report, held that the redistricting scheme violated § 2 because it resulted in the dilution of black citizens' votes in all seven disputed districts. In light of this conclusion, the court did not reach appellees' constitutional claims. *Gingles v. Edmisten,* 590 F.Supp. 345 (EDNC 1984).

Preliminarily, the court found that black citizens constituted a distinct population and registered-voter minority in each challenged ****2760** district. The court noted that at the time the multimember districts were created, there were concentrations of black citizens within the boundaries of each that were sufficiently large and contiguous to constitute effective voting majorities in single-member districts lying wholly within the boundaries of the multimember districts. With respect to the challenged single-member district, Senate District No. 2, the court also found that there existed a concentration of black citizens within its boundaries and within those of adjoining Senate District No. 6 that was sufficient in numbers and in contiguity to constitute an effective voting majority in a single-member district. The District Court then proceeded to find that the following circumstances combined with the multimember districting scheme to result in the dilution of black citizens' votes.

First, the court found that North Carolina had officially discriminated against its black citizens with respect to their exercise of the voting franchise from approximately 1900 to 1970 by employing at different times a poll tax, a literacy test, a prohibition against bullet (single-shot) voting[5] ***39** and designated seat plans[6] for multimember districts. The court observed that even after the removal of direct barriers to black voter registration, such as the poll tax and literacy test, black voter registration remained relatively depressed; in 1982 only 52.7% of age-qualified blacks statewide were registered to vote, whereas 66.7% of whites were registered. The District Court found these statewide depressed levels of black voter registration to be present in all of the disputed districts and to be traceable, at least in part, to the historical pattern of statewide official discrimination.

Second, the court found that historic discrimination in education, housing, employment, and health services had resulted in a lower socioeconomic status for North Carolina blacks as a group than for whites. The court concluded that this lower status both gives rise to special group interests and hinders blacks' ability to participate effectively in the political process and to elect representatives of their choice.

Third, the court considered other voting procedures that may operate to lessen the opportunity of black voters to elect candidates of their choice. It noted that North Carolina has a majority vote requirement for primary elections and, while acknowledging that no black candidate for election to the State General Assembly had failed to win solely because of this requirement, the court concluded that it nonetheless presents a continuing practical impediment to the opportunity of black voting minorities to elect candidates of their choice. The court also remarked on the fact that North Carolina does not have a subdistrict residency requirement for members of the General Assembly elected from multimember ***40** districts, a requirement which the court found could offset to some extent the disadvantages minority voters often experience in multimember districts.

Fourth, the court found that white candidates in North Carolina have encouraged ****2761** voting along color lines by appealing to racial prejudice. It noted that the record is replete with specific examples of racial appeals, ranging in style from overt and blatant to subtle and furtive, and in date from the 1890's to the 1984 campaign for a seat in the United States Senate. The court determined that the use of racial appeals in political campaigns in North Carolina persists to the present day and that its current effect is to lessen to some degree the opportunity of black citizens to participate effectively in the political processes and to elect candidates of their choice.

Fifth, the court examined the extent to which blacks have been elected to office in North Carolina, both statewide and in the challenged districts. It found, among other things, that prior to World War II, only one black had been elected to public office in this century. While recognizing that "it has now become possible for black citizens to be elected to office at all levels of state government in North Carolina," 590 F.Supp., at 367, the court found that, in comparison to white candidates running for the same office, black candidates are at a disadvantage in terms of relative probability of success. It also found that the overall rate of black electoral success has been minimal in relation to the percentage of blacks in the total state population. For example, the court noted, from 1971 to 1982 there were at any given time only two-to-four blacks in the 120-member House of Representatives—that is, only 1.6% to 3.3% of House members were black. From 1975 to 1983 there were at any one time only one or two blacks in the 50-member State Senate—that is, only 2% to 4% of State Senators were black. By contrast, at the time of the District Court's opinion, blacks constituted about 22.4% of the total state population.

***41** With respect to the success in this century of black candidates in the contested districts, see also Appendix B to opinion, *post,* p. ——, the court found that only one black had been elected to House District 36—after this lawsuit began. Similarly, only one black had served in the Senate from District 22, from 1975–1980. Before the 1982 election, a black was elected only twice to the House from District 39 (part of Forsyth County); in the 1982 contest two blacks were elected. Since 1973 a black citizen had been elected each 2-year term to the House from District 23 (Durham County), but no black had been elected to the Senate from Durham County. In House District 21 (Wake County), a black had been elected twice to the House, and another black served two terms in the State Senate. No black had ever been elected to the House or Senate from the area covered by House District No. 8, and no black person had ever been elected to the Senate from the area covered by Senate District No. 2.

The court did acknowledge the improved success of black candidates in the 1982 elections, in which 11 blacks were elected to the State House of Representatives, including 5 blacks from the multimember districts at issue here. However, the court pointed out that the 1982 election was conducted after the commencement of this litigation. The court found the circumstances of the 1982 election sufficiently aberrational and the success by black candidates too minimal and too recent in relation to the long history of complete denial of elective opportunities to support the conclusion that black voters' opportunities to elect representatives of their choice were not impaired.

Finally, the court considered the extent to which voting in the challenged districts was racially polarized. Based on statistical evidence presented by expert witnesses, supplemented to some degree by the testimony of lay witnesses, the court found that all of the challenged districts exhibit severe and persistent racially polarized voting.

***42** Based on these findings, the court declared the contested portions of the 1982 redistricting plan violative of § 2 and

enjoined appellants from conducting elections pursuant to those portions of the plan. Appellants, the Attorney General of North Carolina and others, took a direct appeal to ****2762** this Court, pursuant to 28 U.S.C. § 1253, with respect to five of the multimember districts—House Districts 21, 23, 36, and 39, and Senate District 22. Appellants argue, first, that the District Court utilized a legally incorrect standard in determining whether the contested districts exhibit racial bloc voting to an extent that is cognizable under § 2. Second, they contend that the court used an incorrect definition of racially polarized voting and thus erroneously relied on statistical evidence that was not probative of polarized voting. Third, they maintain that the court assigned the wrong weight to evidence of some black candidates' electoral success. Finally, they argue that the trial court erred in concluding that these multimember districts result in black citizens having less opportunity than their white counterparts to participate in the political process and to elect representatives of their choice. We noted probable jurisdiction, 471 U.S. 1064, 105 S.Ct. 2137, 85 L.Ed.2d 495 (1985), and now affirm with respect to all of the districts except House District 23. With regard to District 23, the judgment of the District Court is reversed.

II

SECTION 2 AND VOTE DILUTION THROUGH USE OF MULTIMEMBER DISTRICTS

An understanding both of § 2 and of the way in which multimember districts can operate to impair blacks' ability to elect representatives of their choice is prerequisite to an evaluation of appellants' contentions. First, then, we review amended § 2 and its legislative history in some detail. Second, we explain the theoretical basis for appellees' claim of vote dilution.

***43** A

SECTION 2 AND ITS LEGISLATIVE HISTORY

Subsection 2(a) prohibits all States and political subdivisions from imposing *any* voting qualifications or prerequisites to voting, or any standards, practices, or procedures which result in the denial or abridgment of the right to vote of any citizen who is a member of a protected class of racial and language minorities. Subsection 2(b) establishes that § 2 has been violated where the "totality of the circumstances" reveal that "the political processes leading to nomination or election ... are not equally open to participation by members of a [protected class] ... in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." While explaining that "[t]he extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered" in evaluating an alleged violation, § 2(b) cautions that "nothing in [§ 2] establishes a right to have members of a protected class elected in numbers equal to their proportion in the population."

The Senate Report which accompanied the 1982 amendments elaborates on the nature of § 2 violations and on the proof required to establish these violations.[7] First and foremost, the Report dispositively rejects the position of the plurality in *Mobile v. Bolden,* 446 U.S. 55, 100 S.Ct. 1490, 64 L.Ed.2d 47 (1980), which ***44** required proof that the contested electoral practice or mechanism was adopted or maintained with the intent to discriminate against minority ****2763** voters.[8] See, *e.g.,* S.Rep., at 2, 15–16, 27. The intent test was repudiated for three principal reasons—it is "unnecessarily divisive because it involves charges of racism on the part of individual officials or entire communities," it places an "inordinately difficult" burden of proof on plaintiffs, and it "asks the wrong question." *Id.,* at 36, U.S.Code Cong. & Admin.News 1982, p. 214. The "right" question, as the Report emphasizes repeatedly, is whether "as a result of the challenged practice or structure plaintiffs do not have an equal opportunity to participate in the political processes and to elect candidates of their choice."[9] *Id.,* at 28, U.S.Code Cong. & Admin.News 1982, p. 206. See also *id.,* at 2, 27, 29, n. 118, 36.

In order to answer this question, a court must assess the impact of the contested structure or practice on minority electoral

opportunities "on the basis of objective factors." *Id.,* at 27, U.S.Code Cong. & Admin.News 1982, p. 205. The Senate Report specifies factors which typically may be relevant to a § 2 claim: the history of voting-related discrimination in the State or political subdivision; the extent to which voting in the elections of the State or political ***45** subdivision is racially polarized; the extent to which the State or political subdivision has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group, such as unusually large election districts, majority vote requirements, and prohibitions against bullet voting; the exclusion of members of the minority group from candidate slating processes; the extent to which minority group members bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process; the use of overt or subtle racial appeals in political campaigns; and the extent to which members of the minority group have been elected to public office in the jurisdiction. *Id.,* at 28–29; see also *supra,* at ——. The Report notes also that evidence demonstrating that elected officials are unresponsive to the particularized needs of the members of the minority group and that the policy underlying the State's or the political subdivision's use of the contested practice or structure is tenuous may have probative value. *Id.,* at 29. The Report stresses, however, that this list of typical factors is neither comprehensive nor exclusive. While the enumerated factors will often be pertinent to certain types of § 2 violations, particularly to vote dilution claims,[10] other factors may also be relevant and may be considered. *Id.,* at 29–30. Furthermore, the Senate Committee observed that "there is no requirement that any particular number of factors be proved, or that a majority of them point one way or the other." *Id.,* at 29, U.S.Code Cong. & Admin.News 1982, p. 207. Rather, ****2764** the Committee determined that "the question whether the political processes are 'equally open' depends upon a searching practical evaluation of the 'past and present reality,' " *id.,* at 30, U.S.Code Cong. & Admin.News 1982, p. 208 (footnote omitted), and on a "functional" view of the political process. *Id.,* at 30, n. 120, U.S.Code Cong. & Admin.News 1982, p. 208.

***46** Although the Senate Report espouses a flexible, fact-intensive test for § 2 violations, it limits the circumstances under which § 2 violations may be proved in three ways. First, electoral devices, such as at-large elections, may not be considered *per se* violative of § 2. Plaintiffs must demonstrate that, under the totality of the circumstances, the devices result in unequal access to the electoral process. *Id.,* at 16. Second, the conjunction of an allegedly dilutive electoral mechanism and the lack of proportional representation alone does not establish a violation. *Ibid.* Third, the results test does not assume the existence of racial bloc voting; plaintiffs must prove it. *Id.,* at 33.

B

VOTE DILUTION THROUGH THE USE OF MULTIMEMBER DISTRICTS

Appellees contend that the legislative decision to employ multimember, rather than single-member, districts in the contested jurisdictions dilutes their votes by submerging them in a white majority,[11] thus impairing their ability to elect representatives of their choice.[12]

***47** The essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives. This Court has long recognized that multimember districts and at-large voting schemes may " 'operate to minimize or cancel out the voting strength of racial [minorities in] the voting population.' "[13] ****2765** ***48** *Burns v. Richardson,* 384 U.S. 73, 88, 86 S.Ct. 1286, 1294, 16 L.Ed.2d 376 (1966) (quoting *Fortson v. Dorsey,* 379 U.S. 433, 439, 85 S.Ct. 498, 501, 13 L.Ed.2d 401 (1965)). See also *Rogers v. Lodge,* 458 U.S. 613, 617, 102 S.Ct. 3272, 3275, 73 L.Ed.2d 1012 (1982); *White v. Regester,* 412 U.S., at 765, 93 S.Ct., at 2339; *Whitcomb v. Chavis,* 403 U.S. 124, 143, 91 S.Ct. 1858, 1869, 29 L.Ed.2d 363 (1971). The theoretical basis for this type of impairment is that where minority and majority voters consistently prefer different candidates, the majority, by virtue of its numerical superiority, will regularly defeat the choices of minority voters.[14] See, *e.g.,* Grofman, Alternatives, in Representation and Redistricting Issues 113–114. Multimember districts and at-large election schemes, however, are not *per se* violative of minority voters' rights. S.Rep., at 16. Cf. *Rogers v. Lodge, supra,* 458 U.S., at 617, 102 S.Ct., at 3275; *Regester, supra,* 412 U.S., at 765, 93 S.Ct., at 2339; *Whitcomb, supra,* 403 U.S., at 142, 91 S.Ct., at 1868. Minority voters who contend that the multimember form of districting violates § 2, must prove that the use of a multimember electoral structure operates to minimize or cancel out their ability to elect their preferred

candidates. See, *e.g.,* S.Rep., at 16.

While many or all of the factors listed in the Senate Report may be relevant to a claim of vote dilution through submergence in multimember districts, unless there is a conjunction of the following circumstances, the use of multimember districts generally will not impede the ability of minority voters to elect representatives of their choice.[15] Stated succinctly, ***49** a ****2766** bloc voting majority must *usually* be able to defeat candidates supported by a politically cohesive, geographically insular minority group. Bonapfel 355; Blacksher & Menefee 34; Butler 903; Carpeneti 696–699; Davidson, Minority Vote Dilution: An Overview (hereinafter Davidson), in Minority Vote Dilution 4; Grofman, Alternatives 117. Cf. *Bolden,* 446 U.S., at 105, n. 3, 100 S.Ct., at 1520, n. 3 (MARSHALL, J., dissenting) ("It is obvious ***50** that the greater the degree to which the electoral minority is homogeneous and insular and the greater the degree that bloc voting occurs along majority-minority lines, the greater will be the extent to which the minority's voting power is diluted by multimember districting"). These circumstances are necessary preconditions for multimember districts to operate to impair minority voters' ability to elect representatives of their choice for the following reasons. First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district.[16] If it is not, as would be the case in a substantially integrated district, the *multi-member form* of the district cannot be responsible for minority voters' inability to elect its candidates.[17] Cf. ***51** *Rogers,* 458 U.S., at 616, 102 S.Ct., at 3275. See also, Blacksher & Menefee 51–56, 58; Bonapfel 355; Carpeneti 696; Davidson 4; Jewell 130. Second, the minority group must be able to show that it is politically cohesive. If the minority group is not politically cohesive, it cannot be said that the selection of a multimember electoral structure thwarts distinctive minority group interests. Blacksher & Menefee 51–55, 58–60, and n. 344; Carpeneti 696–697; Davidson 4. Third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it—in the absence of special circumstances, such as the minority candidate running unopposed, see, *infra,* at ——, and n. 26—usually ****2767** to defeat the minority's preferred candidate. See, *e.g.,* Blacksher & Menefee 51, 53, 56–57, 60. Cf. *Rogers, supra,* at 616–617, 102 S.Ct., at 3274–3275; *Whitcomb,* 403 U.S., at 158–159, 91 S.Ct., at 1877; *McMillan v. Escambia County, Fla.,* 748 F.2d 1037, 1043 (CA5 1984). In establishing this last circumstance, the minority group demonstrates that submergence in a white multimember district impedes its ability to elect its chosen representatives.

Finally, we observe that the usual predictability of the majority's success distinguishes structural dilution from the mere loss of an occasional election. Cf. *Davis v. Bandemer,* 478 U.S. 109, 131–133, 139–140, 106 S.Ct. 2797, ——, 92 L.Ed.2d 85 (1986) (opinion of WHITE, J.); *Bolden, supra,* 446 U.S., at 111, n. 7, 100 S.Ct., at 1523, n. 7 (MARSHALL, J., dissenting); *Whitcomb, supra,* 403 U.S., at 153, 91 S.Ct., at 1874. See also Blacksher & Menefee 57, n. 333; Note, Geometry and Geography: Racial Gerrymandering and the Voting Rights Act, 94 Yale L.J. 189, 200, n. 66 (1984) (hereinafter Note, Geometry and Geography).

***52** III

RACIALLY POLARIZED VOTING

Having stated the general legal principles relevant to claims that § 2 has been violated through the use of multimember districts, we turn to the arguments of appellants and of the United States as *amicus curiae* addressing racially polarized voting.[18] First, we describe the District Court's treatment of racially polarized voting. Next, we consider appellants' claim that the District Court used an incorrect legal standard to determine whether racial bloc voting in the contested districts was sufficiently severe to be cognizable as an element of a § 2 claim. Finally, we consider appellants' contention that the trial court employed an incorrect definition of racially polarized voting and thus erroneously relied on statistical evidence that was not probative of racial bloc voting.

A

THE DISTRICT COURT'S TREATMENT OF RACIALLY POLARIZED VOTING

The investigation conducted by the District Court into the question of racial bloc voting credited some testimony of lay witnesses, but relied principally on statistical evidence presented by appellees' expert witnesses, in particular that offered by Dr. Bernard Grofman. Dr. Grofman collected and evaluated data from 53 General Assembly primary and general elections involving black candidacies. These elections were held over a period of three different election years in the six originally challenged multimember districts.[19] Dr. Grofman subjected the data to two complementary methods of analysis—extreme case analysis and bivariate ecological ***53** regression analysis[20] —in order to determine whether blacks and whites in these districts differed in their voting behavior. These analytic techniques yielded data concerning the voting patterns of the two races, including estimates of the percentages of members of each race who voted for black candidates.

The court's initial consideration of these data took the form of a three-part inquiry: did the data reveal any correlation between ****2768** the race of the voter and the selection of certain candidates; was the revealed correlation statistically significant; and was the difference in black and white voting patterns "substantively significant"? The District Court found that blacks and whites generally preferred different candidates and, on that basis, found voting in the districts to be racially correlated.[21] The court accepted Dr. Grofman's expert opinion that the correlation between the race of the voter and the voter's choice of certain candidates was statistically significant.[22] Finally, adopting Dr. Grofman's terminology, see ***54** Tr. 195, the court found that in all but 2 of the 53 elections[23] the degree of racial bloc voting was "so marked as to be substantively significant, in the sense that the results of the individual election would have been different depending upon whether it had been held among only the white voters or only the black voters." 590 F.Supp., at 368.

The court also reported its findings, both in tabulated numerical form and in written form, that a high percentage of black voters regularly supported black candidates and that most white voters were extremely reluctant to vote for black candidates. The court then considered the relevance to the existence of legally significant white bloc voting of the fact that black candidates have won some elections. It determined that in most instances, special circumstances, such as incumbency and lack of opposition, rather than a diminution in usually severe white bloc voting, accounted for these candidates' success. The court also suggested that black voters' reliance on bullet voting was a significant factor in their successful efforts to elect candidates of their choice. Based on all of the evidence before it, the trial court concluded that each of the districts experienced racially polarized voting "in a persistent and severe degree." *Id.,* at 367.

B

THE DEGREE OF BLOC VOTING THAT IS LEGALLY SIGNIFICANT UNDER § 2

1

Appellants' Arguments

North Carolina and the United States argue that the test used by the District Court to determine whether voting patterns in the disputed districts are racially polarized to an extent cognizable under § 2 will lead to results that are inconsistent with congressional intent. North Carolina maintains ***55** that the court considered legally significant racially polarized voting to occur whenever "less than 50% of the white voters cast a ballot for the black candidate." Brief for Appellants 36. Appellants also argue that racially polarized voting is legally significant only when it always results in the defeat of black candidates. *Id.,* at 39–40.

The United States, on the other hand, isolates a single line in the court's opinion and identifies it as the court's complete test. According to the United States, the District Court adopted a standard under which legally significant racial bloc voting is

deemed to exist whenever " 'the results of the individual election would have been different depending upon whether it had been held among only the white voters or only the black voters in the election.' " **2769 Brief for United States as *Amicus Curiae* 29 (quoting 590 F.Supp., at 368). We read the District Court opinion differently.

2

The Standard for Legally Significant Racial Bloc Voting

The Senate Report states that the "extent to which voting in the elections of the state or political subdivision is racially polarized," S.Rep., at 29, U.S.Code Cong. & Admin.News 1982, p. 206, is relevant to a vote dilution claim. Further, courts and commentators agree that racial bloc voting is a key element of a vote dilution claim. See, *e.g., Escambia County, Fla.,* 748 F.2d, at 1043; *United States v. Marengo County Comm'n,* 731 F.2d 1546, 1566 (CA11), appeal dism'd and cert. denied, 469 U.S. 976, 105 S.Ct. 375, 83 L.Ed.2d 311 (1984); *Nevett v. Sides,* 571 F.2d 209, 223 (CA5 1978), cert. denied, 446 U.S. 951, 100 S.Ct. 2916, 64 L.Ed.2d 807 (1980); *Johnson v. Halifax County,* 594 F.Supp. 161, 170 (EDNC 1984); Blacksher & Menefee; Engstrom & Wildgen, 465, 469; Parker 107; Note, Geometry and Geography 199. Because, as we explain below, the extent of bloc voting necessary to demonstrate that a minority's ability to elect its preferred representatives is impaired varies according to several factual circumstances, the degree of bloc voting which constitutes the threshold of legal significance will vary *56 from district to district. Nonetheless, it is possible to state some general principles and we proceed to do so.

The purpose of inquiring into the existence of racially polarized voting is twofold: to ascertain whether minority group members constitute a politically cohesive unit and to determine whether whites vote sufficiently as a bloc usually to defeat the minority's preferred candidates. See *supra,* at ——. Thus, the question whether a given district experiences legally significant racially polarized voting requires discrete inquiries into minority and white voting practices. A showing that a significant number of minority group members usually vote for the same candidates is one way of proving the political cohesiveness necessary to a vote dilution claim, Blacksher & Menefee 59–60, and n. 344, and, consequently, establishes minority bloc voting within the context of § 2. And, in general, a white bloc vote that normally will defeat the combined strength of minority support plus white "crossover" votes rises to the level of legally significant white bloc voting. *Id.,* at 60. The amount of white bloc voting that can generally "minimize or cancel," S.Rep., at 28, U.S.Code Cong. & Admin.News 1982, p. 205; *Regester,* 412 U.S., at 765, 93 S.Ct., at 2339, black voters' ability to elect representatives of their choice, however, will vary from district to district according to a number of factors, including the nature of the allegedly dilutive electoral mechanism; the presence or absence of other potentially dilutive electoral devices, such as majority vote requirements, designated posts, and prohibitions against bullet voting; the percentage of registered voters in the district who are members of the minority group; the size of the district; and, in multimember districts, the number of seats open and the number of candidates in the field.[24] See, *e.g.,* Butler 874–876; Davidson 5; Jones, The Impact of Local Election Systems on Black Political Representation, 11 Urb.Aff.Q. 345 (1976); United States Commission *57 on Civil Rights, The Voting Rights Act: Unfulfilled Goals 38–41 (1981).

Because loss of political power through vote dilution is distinct from the mere inability to win a particular election, *Whitcomb,* 403 U.S., at 153, 91 S.Ct., at 1874, a pattern of racial bloc voting that extends over a period of time is more probative of a claim that a district experiences legally significant polarization than are the results of a single election.[25] Blacksher & Menefee 61; Note, Geometry and Geography **2770 200, n. 66 ("Racial polarization should be seen as an attribute not of a single election, but rather of a polity viewed over time. The concern is necessarily temporal and the analysis historical because the evil to be avoided is the subordination of minority groups in American politics, not the defeat of individuals in particular electoral contests"). Also for this reason, in a district where elections are shown usually to be polarized, the fact that racially polarized voting is not present in one or a few individual elections does not necessarily negate the conclusion that the district experiences legally significant bloc voting. Furthermore, the success of a minority candidate in a particular election does not necessarily prove that the district did not experience polarized voting in that election; special circumstances, such as the absence of an opponent, incumbency, or the utilization of bullet voting, may explain minority electoral success in a polarized contest.[26]

As must be apparent, the degree of racial bloc voting that is cognizable as an element of a § 2 vote dilution claim will ***58** vary according to a variety of factual circumstances. Consequently, there is no simple doctrinal test for the existence of legally significant racial bloc voting. However, the foregoing general principles should provide courts with substantial guidance in determining whether evidence that black and white voters generally prefer different candidates rises to the level of legal significance under § 2.

3

Standard Utilized by the District Court

The District Court clearly did not employ the simplistic standard identified by North Carolina—legally significant bloc voting occurs whenever less than 50% of the white voters cast a ballot for the black candidate. Brief for Appellants 36. And, although the District Court did utilize the measure of " 'substantive significance" that the United States ascribes to it—" 'the results of the individual election would have been different depending on whether it had been held among only the white voters or only the black voters,' " Brief for United States as *Amicus Curiae* 29 (quoting 590 F.Supp., at 368)—the court did not reach its ultimate conclusion that the degree of racial bloc voting present in each district is *legally* significant through mechanical reliance on this standard.[27] While the court did not phrase the standard for legally significant racial bloc voting exactly as we do, a fair reading of the court's opinion reveals that the court's analysis conforms to our view of the proper legal standard.

The District Court's findings concerning black support for black candidates in the five multimember districts at issue ***59** here clearly establish the political cohesiveness of black voters. As is apparent from the District Court's tabulated findings, reproduced in Appendix A to opinion, *post,* p. ——, black voters' support for black candidates was overwhelming in almost every election. In all but 5 of 16 primary elections, black support for black candidates ranged between 71% and 92%; and in the general elections, black support for black Democratic candidates ranged between 87% and 96%.

****2771** In sharp contrast to its findings of strong black support for black candidates, the District Court found that a substantial majority of white voters would rarely, if ever, vote for a black candidate. In the primary elections, white support for black candidates ranged between 8% and 50%, and in the general elections it ranged between 28% and 49%. See *ibid.* The court also determined that, on average, 81.7% of white voters did not vote for any black candidate in the primary elections. In the general elections, white voters almost always ranked black candidates either last or next to last in the multicandidate field, except in heavily Democratic areas where white voters consistently ranked black candidates last among the Democrats, if not last or next to last among all candidates. The court further observed that approximately two-thirds of white voters did not vote for black candidates in general elections, even after the candidate had won the Democratic primary and the choice was to vote for a Republican or for no one.[28]

***60** While the District Court did not state expressly that the percentage of whites who refused to vote for black candidates in the contested districts would, in the usual course of events, result in the defeat of the minority's candidates, that conclusion is apparent both from the court's factual findings and from the rest of its analysis. First, with the exception of House District 23, see *infra,* at ——, the trial court's findings clearly show that black voters have enjoyed only minimal and sporadic success in electing representatives of their choice. See Appendix B to opinion, *post,* p. ——. Second, where black candidates won elections, the court closely examined the circumstances of those elections before concluding that the success of these blacks did not negate other evidence, derived from all of the elections studied in each district, that legally significant racially polarized voting exists in each district. For example, the court took account of the benefits incumbency and running essentially unopposed conferred on some of the successful black candidates,[29] as well as of the ***61** very different order of preference blacks and whites assigned black candidates,[30] in ****2772** reaching its conclusion that legally significant racial polarization exists in each district.

We conclude that the District Court's approach, which tested data derived from three election years in each district, and

which revealed that blacks strongly supported black candidates, while, to the black candidates' usual detriment, whites rarely did, satisfactorily addresses each facet of the proper legal standard.

C

EVIDENCE OF RACIALLY POLARIZED VOTING

1

Appellants' Argument

North Carolina and the United States also contest the evidence upon which the District Court relied in finding that voting patterns in the challenged districts were racially polarized. They argue that the term "racially polarized voting" must, as a matter of law, refer to voting patterns for which the *principal cause* is race. They contend that the District Court utilized a legally incorrect definition of racially polarized voting by relying on bivariate statistical analyses which merely demonstrated a *correlation* between the race of the voter and the level of voter support for certain candidates, but which did not prove that race was the primary determinant of voters' choices. According to appellants and the United States, only multiple regression analysis, which can take account of other variables which might also explain voters' choices, such as "party affiliation, age, religion, income [,] incumbency, education, campaign expenditures," Brief for ***62** Appellants 42, "media use measured by cost, ... name, identification, or distance that a candidate lived from a particular precinct," Brief for United States as *Amicus Curiae* 30, n. 57, can prove that race was the primary determinant of voter behavior.[31]

Whether appellants and the United States believe that it is the voter's race or the candidate's race that must be the primary determinant of the voter's choice is unclear; indeed, their catalogs of relevant variables suggest both.[32] Age, religion, income, and education seem most relevant to the voter; incumbency, campaign expenditures, name identification, and media use are pertinent to the candidate; and party affiliation could refer both to the voter and the candidate. In either case, we disagree: For purposes of § 2, the legal concept of racially polarized voting incorporates neither causation nor intent. It means simply that the race of voters correlates with the selection of a certain candidate or candidates; that is, it refers to the situation where different races (or minority language groups) vote in blocs for different candidates. Grofman, Migalski, & Noviello 203. As we demonstrate *infra,* appellants' theory of racially polarized voting would thwart the goals Congress sought to achieve when it amended § 2 and would prevent courts from performing the "functional" analysis of the political process, S.Rep., at 30, n. 119, U.S.Code Cong. & Admin.News 1982, p. 208, and the "searching practical evaluation of the 'past ***63** and present reality,' " *id.,* at 30, U.S.Code Cong. & Admin.News 1982, p. 208 (footnote omitted), mandated by the Senate Report.

2

Causation Irrelevant to Section 2 Inquiry

The first reason we reject appellants' argument that racially polarized voting refers ****2773** to voting patterns that are in some way *caused by race,* rather than to voting patterns that are merely *correlated with the race of the voter,* is that the reasons black and white voters vote differently have no relevance to the central inquiry of § 2. By contrast, the correlation between race of voter and the selection of certain candidates is crucial to that inquiry.

Both § 2 itself and the Senate Report make clear that the critical question in a § 2 claim is whether the use of a contested electoral practice or structure results in members of a protected group having less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. See, *e.g.,* S.Rep., at 2, 27, 28, 29, n. 118, 36. As we explained, *supra,* at ——, multimember districts may impair the ability of blacks to elect representatives of their choice where blacks vote sufficiently as a bloc as to be able to elect their preferred candidates in a black majority, single-member district and where a white majority votes sufficiently as a bloc usually to defeat the candidates chosen by blacks. It is the *difference* between the choices made by blacks and whites—not the reasons for that difference—that results in blacks having less opportunity than whites to elect their preferred representatives. Consequently, we conclude that under the "results test" of § 2, only the correlation between race of voter and selection of certain candidates, not the causes of the correlation, matters.

The irrelevance to a § 2 inquiry of the reasons why black and white voters vote differently supports, by itself, our rejection of appellants' theory of racially polarized voting. However, their theory contains other equally serious flaws ***64** that merit further attention. As we demonstrate below, the addition of irrelevant variables distorts the equation and yields results that are indisputably incorrect under § 2 and the Senate Report.

3

Race of Voter as Primary Determinant of Voter Behavior

Appellants and the United States contend that the legal concept of "racially polarized voting" refers not to voting patterns that are merely *correlated with the voter's race,* but to voting patterns that are *determined primarily by the voter's race,* rather than by the voter's other socioeconomic characteristics.

The first problem with this argument is that it ignores the fact that members of geographically insular racial and ethnic groups frequently share socioeconomic characteristics, such as income level, employment status, amount of education, housing and other living conditions, religion, language, and so forth. See, *e.g.,* Butler 902 (Minority group "members' shared concerns, including political ones, are ... a function of group status, and as such are largely involuntary.... As a group blacks are concerned, for example, with police brutality, substandard housing, unemployment, etc., because these problems fall disproportionately upon the group"); S. Verba & N. Nie, Participation in America 151–152 (1972) ("Socioeconomic status ... is closely related to race. Blacks in American society are likely to be in lower-status jobs than whites, to have less education, and to have lower incomes"). Where such characteristics are shared, race or ethnic group not only denotes color or place of origin, it also functions as a shorthand notation for common social and economic characteristics. Appellants' definition of racially polarized voting is even more pernicious where shared characteristics are causally related to race or ethnicity. The opportunity to achieve high employment status and income, for example, is often influenced by the presence or absence of racial or ethnic discrimination. A definition of racially polarized voting which ***65** holds that black bloc voting does not exist when black voters' choice of certain candidates is most strongly influenced by the fact that the voters have low incomes ****2774** and menial jobs—when the reason most of those voters have menial jobs and low incomes is attributable to past or present racial discrimination—runs counter to the Senate Report's instruction to conduct a searching and practical evaluation of past and present reality, S.Rep., at 30, and interferes with the purpose of the Voting Rights Act to eliminate the negative effects of past discrimination on the electoral opportunities of minorities. *Id.,* at 5, 40.

Furthermore, under appellants' theory of racially polarized voting, even uncontrovertible evidence that candidates strongly preferred by black voters are *always* defeated by a bloc voting white majority would be dismissed for failure to prove racial polarization whenever the black and white populations could be described in terms of other socioeconomic characteristics.

To illustrate, assume a racially mixed, urban multimember district in which blacks and whites possess the same socioeconomic characteristics that the record in this case attributes to blacks and whites in Halifax County, a part of Senate District 2. The annual mean income for blacks in this district is $10,465, and 47.8% of the black community lives in poverty. More than half—51.5%—of black adults over the age of 25 have only an eighth-grade education or less. Just over half of

black citizens reside in their own homes; 48.9% live in rental units. And, almost a third of all black households are without a car. In contrast, only 12.6% of the whites in the district live below the poverty line. Whites enjoy a mean income of $19,042. White residents are better educated than blacks—only 25.6% of whites over the age of 25 have only an eighth-grade education or less. Furthermore, only 26.2% of whites live in rental units, and only 10.2% live in households with no vehicle available. 1 App., Ex–44. As is the case in Senate District 2, blacks in this ***66** hypothetical urban district have never been able to elect a representative of their choice.

According to appellants' theory of racially polarized voting, proof that black and white voters in this hypothetical district regularly choose different candidates and that the blacks' preferred candidates regularly lose could be rejected as not probative of racial bloc voting. The basis for the rejection would be that blacks chose a certain candidate, not principally because of their race, but principally because this candidate best represented the interests of residents who, because of their low incomes, are particularly interested in government-subsidized health and welfare services; who are generally poorly educated, and thus share an interest in job training programs; who are, to a greater extent than the white community, concerned with rent control issues; and who favor major public transportation expenditures. Similarly, whites would be found to have voted for a different candidate, not principally because of their race, but primarily because that candidate best represented the interests of residents who, due to their education and income levels, and to their property and vehicle ownership, favor gentrification, low residential property taxes, and extensive expenditures for street and highway improvements.

Congress could not have intended that courts employ this definition of racial bloc voting. First, this definition leads to results that are inconsistent with the effects test adopted by Congress when it amended § 2 and with the Senate Report's admonition that courts take a "functional" view of the political process, S.Rep. 30, n. 119, U.S.Code Cong. & Admin.News 1982, p. 208, and conduct a searching and practical evaluation of reality. *Id.,* at 30. A test for racially polarized voting that denies the fact that race and socioeconomic characteristics are often closely correlated permits neither a practical evaluation of reality nor a functional analysis of vote dilution. And, contrary to Congress' intent in adopting the "results test," appellants' proposed definition could result in the inability of minority voters to establish a critical ***67** element of a vote dilution claim, even though both races engage in "monolithic" bloc voting, *id.,* at 33, U.S.Code Cong. & Admin.News ****2775** 1982, p. 211, and generations of black voters have been unable to elect a representative of their choice.

Second, appellants' interpretation of "racially polarized voting" creates an irreconcilable tension between their proposed treatment of socioeconomic characteristics in the bloc voting context and the Senate Report's statement that "the extent to which members of the minority group ... bear the effects of discrimination in such areas as education, employment and health" may be relevant to a § 2 claim. *Id.,* at 29, U.S.Code Cong. & Admin.News 1982, p. 206. We can find no support in either logic or the legislative history for the anomalous conclusion to which appellants' position leads—that Congress intended, on the one hand, that proof that a minority group is predominately poor, uneducated, and unhealthy should be considered a factor tending to prove a § 2 violation; but that Congress intended, on the other hand, that proof that the same socioeconomic characteristics greatly influence black voters' choice of candidates should destroy these voters' ability to establish one of the most important elements of a vote dilution claim.

4

Race of Candidate as Primary Determinant of Voter Behavior

North Carolina's and the United States' suggestion that racially polarized voting means that voters select or reject candidates *principally* on the basis of the *candidate's race* is also misplaced.

First, both the language of § 2 and a functional understanding of the phenomenon of vote dilution mandate the conclusion that the race of the candidate *per se* is irrelevant to racial bloc voting analysis. Section 2(b) states that a violation is established if it can be shown that members of a protected minority group "have less opportunity than other members of the electorate to ... elect representatives *of their choice.*" ***68** Emphasis added.) Because both minority and majority voters often

select members of their own race as their preferred representatives, it will frequently be the case that a black candidate is the choice of blacks, while a white candidate is the choice of whites. Cf. Letter to the Editor from Chandler Davidson, 17 New Perspectives 38 (Fall 1985). Indeed, the facts of this case illustrate that tendency—blacks preferred black candidates, whites preferred white candidates. Thus, as a matter of convenience, we and the District Court may refer to the preferred representative of black voters as the "black candidate" and to the preferred representative of white voters as the "white candidate." Nonetheless, the fact that race of voter and race of candidate is often correlated is not directly pertinent to a § 2 inquiry. Under § 2, it is the *status* of the candidate as the *chosen representative of a particular racial group,* not the race of the candidate, that is important.

An understanding of how vote dilution through submergence in a white majority works leads to the same conclusion. The essence of a submergence claim is that minority group members prefer certain candidates whom they could elect were it not for the interaction of the challenged electoral law or structure with a white majority that votes as a significant bloc for different candidates. Thus, as we explained in Part III, *supra,* the existence of racial bloc voting is relevant to a vote dilution claim in two ways. Bloc voting by blacks tends to prove that the black community is politically cohesive, that is, it shows that blacks prefer certain candidates whom they could elect in a single-member, black majority district. Bloc voting by a white majority tends to prove that blacks will generally be unable to elect representatives of their choice. Clearly, only the race of the voter, not the race of the candidate, is relevant to vote dilution analysis. See, *e.g.,* Blacksher & Menefee 59–60; Grofman, Should Representatives be Typical?, in Representation and Redistricting Issues 98; Note, Geometry and Geography 207.

***69 **2776** Second, appellants' suggestion that racially polarized voting refers to voting patterns where whites vote for white candidates because they prefer members of their own race or are hostile to blacks, as opposed to voting patterns where whites vote for white candidates because the white candidates spent more on their campaigns, utilized more media coverage, and thus enjoyed greater name recognition than the black candidates, fails for another, independent reason. This argument, like the argument that the race of the voter must be the primary determinant of the voter's ballot, is inconsistent with the purposes of § 2 and would render meaningless the Senate Report factor that addresses the impact of low socioeconomic status on a minority group's level of political participation.

Congress intended that the Voting Rights Act eradicate inequalities in political opportunities that exist due to the vestigial effects of past purposeful discrimination. S.Rep., at 5, 40; H.R.Rep. No. 97–227, p. 31 (1981). Both this Court and other federal courts have recognized that political participation by minorities tends to be depressed where minority group members suffer effects of prior discrimination such as inferior education, poor employment opportunities, and low incomes. See, *e.g., White v. Regester,* 412 U.S., at 768–769, 93 S.Ct., at 2340–2341; *Kirksey v. Board of Supervisors of Hinds County, Miss.,* 554 F.2d 139, 145–146 (CA5) (en banc), cert. denied, 434 U.S. 968, 98 S.Ct. 512, 54 L.Ed.2d 454 (1977). See also S. Verba & N. Nie, Participation in America 152 (1972). The Senate Report acknowledges this tendency and instructs that "the extent to which members of the minority group ... bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process," S.Rep., at 29, U.S.Code Cong. & Admin.News 1982, p. 206 (footnote omitted), is a factor which may be probative of unequal opportunity to participate in the political process and to elect representatives. Courts and commentators have recognized further that candidates generally must spend more money in order to win ***70** election in a multimember district than in a single-member district. See, *e.g., Graves v. Barnes,* 343 F.Supp. 704, 720–721 (WD Tex.1972), aff'd in part and rev'd in part *sub nom. White v. Regester, supra.* Berry & Dye 88; Davidson & Fraga, Nonpartisan Slating Groups in an At-Large Setting, in Minority Vote Dilution 122–123; Derfner 554, n. 126; Jewell 131; Karnig, Black Representation on City Councils, 12 Urb.Aff.Q. 223, 230 (1976). If, because of inferior education and poor employment opportunities, blacks earn less than whites, they will not be able to provide the candidates of their choice with the same level of financial support that whites can provide theirs. Thus, electoral losses by candidates preferred by the black community may well be attributable in part to the fact that their white opponents outspent them. But, the fact is that, in this instance, the economic effects of prior discrimination have combined with the multimember electoral structure to afford blacks less opportunity than whites to participate in the political process and to elect representatives of their choice. It would be both anomalous and inconsistent with congressional intent to hold that, on the one hand, the effects of past discrimination which hinder blacks' ability to participate in the political process tend to prove a § 2 violation, while holding on the other hand that, where these same effects of past discrimination deter whites from voting for blacks, blacks cannot make out a crucial element of a vote dilution claim. Accord, *Escambia County,* 748 F.2d, at 1043 (" '[T]he failure of the blacks to solicit white votes may be caused by the effects of past discrimination' ") (quoting *United States v. Dallas County Comm'n,* 739 F.2d 1529, 1536 (CA11 1984)); *United States v. Marengo County Comm'n,* 731 F.2d, at 1567.

5

Racial Animosity as Primary Determinant of Voter Behavior

Finally, we reject the suggestion that racially polarized voting refers only to ****2777** white bloc voting which is caused by ***71** white voters' *racial hostility* toward black candidates.[33] To accept this theory would frustrate the goals Congress sought to achieve by repudiating the intent test of *Mobile v. Bolden,* 446 U.S. 55, 100 S.Ct. 1490, 64 L.Ed.2d 47 (1980), and would prevent minority voters who have clearly been denied an opportunity to elect representatives of their choice from establishing a critical element of a vote dilution claim.

In amending § 2, Congress rejected the requirement announced by this Court in *Bolden, supra,* that § 2 plaintiffs must prove the discriminatory intent of state or local governments in adopting or maintaining the challenged electoral mechanism.[34] Appellants' suggestion that the discriminatory intent of individual white voters must be proved in order to make out a § 2 claim must fail for the very reasons Congress rejected the intent test with respect to governmental bodies. See Engstrom, The Reincarnation of the Intent Standard: Federal Judges and At-Large Election Cases, 28 How. L.J. 495 (1985).

The Senate Report states that one reason the Senate Committee abandoned the intent test was that "the Committee ... heard persuasive testimony that the intent test is unnecessarily divisive because it involves charges of racism on the part of individual officials or entire communities." S.Rep., at 36, U.S.Code Cong. & Admin.News 1982, p. 214. The Committee found the testimony of Dr. Arthur S. ***72** Flemming, Chairman of the United States Commission on Civil Rights, particularly persuasive. He testified:

> " '[Under an intent test] [l]itigators representing excluded minorities will have to explore the motivations of individual council members, mayors, and other citizens. The question would be whether their decisions were motivated by invidious racial considerations. Such inquiries can only be divisive, threatening to destroy any existing racial progress in a community. It is the intent test, not the results test, that would make it necessary to brand individuals as racist in order to obtain judicial relief.' " *Ibid.* (footnote omitted).

The grave threat to racial progress and harmony which Congress perceived from requiring proof that racism caused the adoption or maintenance of a challenged electoral mechanism is present to a much greater degree in the proposed requirement that plaintiffs demonstrate that racial animosity determined white voting patterns. Under the old intent test, plaintiffs might succeed by proving only that a limited number of elected officials were racist; under the new intent test plaintiffs would be required to prove that most of the white community is racist in order to obtain judicial relief. It is difficult to imagine a more racially divisive requirement.

A second reason Congress rejected the old intent test was that in most cases it placed an "inordinately difficult burden" on § 2 plaintiffs. *Ibid.* The new intent test would be equally, if not more, burdensome. In order to prove that a *specific factor*—racial hostility—*determined* white voters' ballots, it would be necessary to demonstrate that other potentially relevant ****2778** *causal factors,* such as socioeconomic characteristics and candidate expenditures, do not correlate better than racial animosity with white voting behavior. As one commentator has explained:

> ***73** "Many of the[se] independent variables ... would be all but impossible for a social scientist to operationalize as interval-level independent variables for use in a multiple regression equation, whether on a step-wise basis or not. To conduct such an extensive statistical analysis as this implies, moreover, can become prohibitively expensive.
>
> "Compared to this sort of effort, proving discriminatory intent in the adoption of an at-large election system is both simple and inexpensive." McCrary, Discriminatory Intent: The Continuing Relevance of "Purpose" Evidence in Vote-Dilution Lawsuits, 28 How. L.J. 463, 492 (1985) (footnote omitted).

The final and most dispositive reason the Senate Report repudiated the old intent test was that it "asks the wrong question." S.Rep., at 36, U.S.Code Cong. & Admin.News 1982, p. 214. Amended § 2 asks instead "whether minorities have equal

access to the process of electing their representatives." *Ibid.*

Focusing on the discriminatory intent of the voters, rather than the behavior of the voters, also asks the wrong question. All that matters under § 2 and under a functional theory of vote dilution is voter behavior, not its explanations. Moreover, as we have explained in detail, *supra,* requiring proof that racial considerations actually *caused* voter behavior will result—contrary to congressional intent—in situations where a black minority that functionally has been totally excluded from the political process will be unable to establish a § 2 violation. The Senate Report's remark concerning the old intent test thus is pertinent to the new test: The requirement that a "court ... make a separate ... finding of intent, after accepting the proof of the factors involved in the *White* [*v. Regester,* 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314] analysis ... [would] seriously clou[d] the prospects of eradicating the remaining instances of racial discrimination in American elections." *Id.,* at 37, U.S.Code Cong. & Admin.News 1982, p. 215. We therefore decline to adopt such a requirement.

***74** 6

Summary

In sum, we would hold that the legal concept of racially polarized voting, as it relates to claims of vote dilution, refers only to the existence of a correlation between the race of voters and the selection of certain candidates. Plaintiffs need not prove causation or intent in order to prove a prima facie case of racial bloc voting and defendants may not rebut that case with evidence of causation or intent.

IV

THE LEGAL SIGNIFICANCE OF SOME BLACK CANDIDATES' SUCCESS

A

North Carolina and the United States maintain that the District Court failed to accord the proper weight to the success of some black candidates in the challenged districts. Black residents of these districts, they point out, achieved improved representation in the 1982 General Assembly election.[35] They also note that blacks in House District 23 have enjoyed proportional representation consistently since 1973 and that blacks in the other districts have occasionally enjoyed nearly ****2779** proportional representation.[36] This electoral ***75** success demonstrates conclusively, appellants and the United States argue, that blacks in those districts do not have "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b). Essentially, appellants and the United States contend that if a racial minority gains proportional or nearly proportional representation in a single election, that fact alone precludes, as a matter of law, finding a § 2 violation.

Section 2(b) provides that "[t]he extent to which members of a protected class have been elected to office ... is one circumstance which may be considered." 42 U.S.C. § 1973(b). The Senate Committee Report also identifies the extent to which minority candidates have succeeded as a pertinent factor. S.Rep., at 29. However, the Senate Report expressly states that "the election of a few minority candidates does not 'necessarily foreclose the possibility of dilution of the black vote,' " noting that if it did, "the possibility exists that the majority citizens might evade [§ 2] by manipulating the election of a 'safe' minority candidate." *Id.,* at 29, n. 115, U.S.Code Cong. & Admin.News 1982, p. 207, quoting *Zimmer v. McKeithen,* 485 F.2d 1297, 1307 (CA5 1973) (en banc), aff'd *sub nom. East Carroll Parish School Board v. Marshall,* 424 U.S. 636, 96 S.Ct.

1083, 47 L.Ed.2d 296 (1976) (*per curiam*). The Senate Committee decided, instead, to " 'require an independent consideration of the record.' " S.Rep., at 29, n. 115, U.S.Code Cong. & Admin.News 1982, p. 207. The Senate Report also emphasizes that the question whether "the political processes are 'equally open' depends upon a searching practical evaluation of the 'past and present reality.' " *Id.,* at 30, U.S.Code Cong. & Admin.News 1982, p. 208 (footnote omitted). Thus, the language of § 2 and its legislative history plainly demonstrate that proof that some minority candidates have been elected does not foreclose a § 2 claim.

Moreover, in conducting its "independent consideration of the record" and its "searching practical evaluation of the 'past ***76** and present reality,' " the District Court could appropriately take account of the circumstances surrounding recent black electoral success in deciding its significance to appellees' claim. In particular, as the Senate Report makes clear, *id.,* at 29, n. 115, the court could properly notice the fact that black electoral success increased markedly in the 1982 election—an election that occurred after the instant lawsuit had been filed—and could properly consider to what extent "the pendency of this very litigation [might have] worked a one-time advantage for black candidates in the form of unusual organized political support by white leaders concerned to forestall single-member districting."[37] 590 F.Supp., at 367, n. 27.

Nothing in the statute or its legislative history prohibited the court from viewing with some caution black candidates' success in the 1982 election, and from deciding on the basis of all the relevant circumstances to accord greater weight to blacks' relative lack of success over the course of several recent elections. Consequently, we hold that the District Court did not err, as ****2780** a matter of law, in refusing to treat the fact that some black candidates have succeeded as dispositive of appellees' § 2 claim. Where multimember districting generally works to dilute the minority vote, it cannot be defended on the ground that it sporadically and serendipitously benefits minority voters.

***77** B

The District Court did err, however, in ignoring the significance of the *sustained* success black voters have experienced in House District 23. In that district, the last six elections have resulted in proportional representation for black residents. This persistent proportional representation is inconsistent with appellees' allegation that the ability of black voters in District 23 to elect representatives of their choice is not equal to that enjoyed by the white majority.

In some situations, it may be possible for § 2 plaintiffs to demonstrate that such sustained success does not accurately reflect the minority group's ability to elect its preferred representatives,[38] but appellees have not done so here. Appellees presented evidence relating to black electoral success in the last three elections; they failed utterly, though, to offer any explanation for the success of black candidates in the previous three elections. Consequently, we believe that the District Court erred, as a matter of law, in ignoring the sustained success black voters have enjoyed in House District 23, and would reverse with respect to that District.

V

ULTIMATE DETERMINATION OF VOTE DILUTION

Finally, appellants and the United States dispute the District Court's ultimate conclusion that the multimember districting scheme at issue in this case deprived black voters of an equal opportunity to participate in the political process and to elect representatives of their choice.

A

As an initial matter, both North Carolina and the United States contend that the District Court's ultimate conclusion that the challenged multimember districts operate to dilute ***78** black citizens' votes is a mixed question of law and fact subject to *de novo* review on appeal. In support of their proposed standard of review, they rely primarily on *Bose Corp. v. Consumers Union of U.S., Inc.,* 466 U.S. 485, 104 S.Ct. 1949, 80 L.Ed.2d 502 (1984), a case in which we reconfirmed that, as a matter of constitutional law, there must be independent appellate review of evidence of "actual malice" in defamation cases. Appellants and the United States argue that because a finding of vote dilution under amended § 2 requires the application of a rule of law to a particular set of facts it constitutes a legal, rather than factual, determination. Reply Brief for Appellants 7; Brief for United States as *Amicus Curiae* 18–19. Neither appellants nor the United States cite our several precedents in which we have treated the ultimate finding of vote dilution as a question of fact subject to the clearly-erroneous standard of Rule 52(a). See, *e.g., Rogers v. Lodge,* 458 U.S., at 622–627, 102 S.Ct., at 3278–3281; *City of Rome v. United States,* 446 U.S. 156, 183, 100 S.Ct. 1548, 1564, 64 L.Ed.2d 119 (1980); *White v. Regester,* 412 U.S., at 765–770, 93 S.Ct., at 2339–2341. Cf. *Anderson v. Bessemer City,* 470 U.S. 564, 573, 105 S.Ct. 1504, 1511, 84 L.Ed.2d 518 (1985).

In *Regester, supra,* we noted that the District Court had based its conclusion that minority voters in two multimember districts in Texas had less opportunity to participate in the political process than majority voters on the totality of the circumstances and stated that

> ****2781** "we are not inclined to overturn these findings, representing as they do a blend of history and an intensely local appraisal of the design and impact of the ... multimember district in the light of past and present reality, political and otherwise." *Id.,* 412 U.S., at 769–770, 93 S.Ct., at 2341.

Quoting this passage from *Regester* with approval, we expressly held in *Rogers v. Lodge, supra,* that the question whether an at-large election system was maintained for discriminatory purposes and subsidiary issues, which include whether that system had the effect of diluting the minority vote, were questions of fact, reviewable under Rule 52(a)'s ***79** clearly-erroneous standard. 458 U.S., at 622–623, 102 S.Ct., at 3278–3279. Similarly, in *City of Rome v. United States,* we declared that the question whether certain electoral structures had a "discriminatory effect," in the sense of diluting the minority vote, was a question of fact subject to clearly-erroneous review. 446 U.S., at 183, 100 S.Ct., at 1565.

We reaffirm our view that the clearly-erroneous test of Rule 52(a) is the appropriate standard for appellate review of a finding of vote dilution. As both amended § 2 and its legislative history make clear, in evaluating a statutory claim of vote dilution through districting, the trial court is to consider the "totality of the circumstances" and to determine, based "upon a searching practical evaluation of the 'past and present reality,' " S.Rep., at 30, U.S.Code Cong. & Admin.News 1982, p. 208 (footnote omitted), whether the political process is equally open to minority voters. " 'This determination is peculiarly dependent upon the facts of each case,' " *Rogers, supra,* 458 U.S., at 621, 102 S.Ct., at 3277, quoting *Nevett v. Sides,* 571 F.2d 209, 224 (CA5 1978), and requires "an intensely local appraisal of the design and impact" of the contested electoral mechanisms. 458 U.S., at 622, 102 S.Ct., at 3278. The fact that amended § 2 and its legislative history provide legal standards which a court must apply to the facts in order to determine whether § 2 has been violated does not alter the standard of review. As we explained in *Bose,* Rule 52(a) "does not inhibit an appellate court's power to correct errors of law, including those that may infect a so-called mixed finding of law and fact, or a finding of fact that is predicated on a misunderstanding of the governing rule of law." 466 U.S., at 501, 104 S.Ct., at 1960, citing *Pullman-Standard v. Swint,* 456 U.S. 273, 287, 102 S.Ct. 1781, 1789, 72 L.Ed.2d 66 (1982); *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.,* 456 U.S. 844, 855, n. 15, 102 S.Ct. 2182, 2189, n. 15, 72 L.Ed.2d 606 (1982). Thus, the application of the clearly-erroneous standard to ultimate findings of vote dilution preserves the benefit of the trial court's particular familiarity with the indigenous political reality without endangering the rule of law.

***80** B

The District Court in this case carefully considered the totality of the circumstances and found that in each district racially polarized voting; the legacy of official discrimination in voting matters, education, housing, employment, and health services; and the persistence of campaign appeals to racial prejudice acted in concert with the multimember districting scheme to impair the ability of geographically insular and politically cohesive groups of black voters to participate equally in the political process and to elect candidates of their choice. It found that the success a few black candidates have enjoyed in these districts is too recent, too limited, and, with regard to the 1982 elections, perhaps too aberrational, to disprove its conclusion.

Excepting House District 23, with respect to which the District Court committed legal error, see *supra,* at ——, we affirm the District Court's judgment. We cannot say that the District Court, composed of local judges who are well acquainted with the political realities of the State, clearly erred in concluding that use of a multimember electoral structure has caused black voters in the districts other than House District 23 ****2782** to have less opportunity than white voters to elect representatives of their choice.

The judgment of the District Court is

Affirmed in part and reversed in part.

APPENDIX A TO OPINION OF BRENNAN, J.

Percentages of Votes Cast by Black and White Voters for

Black Candidates in the Five Contested Districts

Senate District 22

	Primary		**General**	
	White	**Black**	**White**	**Black**
1978 (Alexander)	47	87	41	94
1980 (Alexander)	23	78	n/a	n/a
1982 (Polk)	32	83	33	94

House District 21

	Primary		**General**	

	White	Black	White	Black
1978 (Blue)	21	76	n/a	n/a
1980 (Blue)	31	81	44	90
1982 (Blue)	39	82	45	91

House District 23

	Primary		General	
	White	**Black**	**White**	**Black**
1978 Senate				
Barns (Repub.)	n/a	n/a	17	5
1978 House				
Clement	10	89	n/a	n/a
Spaulding	16	92	37	89

	Primary		General	
	White	**Black**	**White**	**Black**
1980 House				
Spaulding	n/a	n/a	49	90
1982 House				

Clement	26	32	n/a	n/a
Spaulding	37	90	43	89

House District 36

	Primary		General	
	White	**Black**	**White**	**Black**
1980 (Maxwell)	22	71	28	92
1982 (Berry)	50	79	42	92
1982 (Richardson)	39	71	29	88

House District 39

	Primary		General	
	White	**Black**	**White**	**Black**
1978 House				
Kennedy, H.	28	76	32	93
Norman	8	29	n/a	n/a

Ross	17	53	n/a	n/a
Sumter (Repub.)	n/a	n/a	33	25
1980 House				
Kennedy, A.	40	86	32	96
Norman	18	36	n/a	n/a
1980 Senate				
Small	12	61	n/a	n/a
1982 House				
Hauser	25	80	42	87
Kennedy, A.	36	87	46	94

590 F. Supp., at 369-371.

APPENDIX B TO OPINION OF BRENNAN, J.

Black Candidates Elected From 7 Originally Contested Districts

District	**Prior to**						
(No. Seats)	**1972**	**1972**	**1974**	**1976**	**1978**	**1980**	**1982**
House 8 (4)	0	0	0	0	0	0	0
House 21 (6)	0	0	0	0	0	1	1
House 23 (3)	0	1	1	1	1	1	1
House 36 (8)	0	0	0	0	0	0	1
House 39 (5)	0	0	1	1	0	0	2

Senate 2 (2)	0	0	0	0	0	0	0
Senate 22 (4)	0	0	1	1	1	0	0

See Brief for Appellees, table printed between pages 8 and 9; App. 93-94.

***82 **2783** Justice WHITE, concurring.

I join Parts I, II, III–A, III–B, IV–A, and V of the Court's opinion and agree with Justice BRENNAN's opinion as to Part IV–B. I disagree with Part III–C of Justice BRENNAN's opinion.

***83** Justice BRENNAN states in Part III–C that the crucial factor in identifying polarized voting is the race of the voter and that the race of the candidate is irrelevant. Under this test, there is polarized voting if the majority of white voters vote for different candidates than the majority of the blacks, regardless of the race of the candidates. I do not agree. Suppose an eight-member multimember district that is 60% white and 40% black, the blacks being geographically located so that two safe black single-member districts could be drawn. Suppose further that there are six white and two black Democrats running against six white and two black Republicans. Under Justice BRENNAN's test, there would be polarized voting and a likely § 2 violation if all the Republicans, including the two blacks, are elected, and 80% of the blacks in the predominantly black areas vote Democratic. I take it that there would also be a violation in a single-member district that is 60% black, but enough of the blacks vote with the whites to elect a black candidate who is not the choice of the majority of black voters. This is interest-group politics rather than a rule hedging against racial discrimination. I doubt that this is what Congress had in mind in amending § 2 as it did, and it seems quite at odds with the discussion in *Whitcomb v. Chavis,* 403 U.S. 124, 149–160, 91 S.Ct. 1858, 1872–1878, 29 L.Ed.2d 363 (1971). Furthermore, on the facts of this case, there is no need to draw the voter/candidate distinction. The District Court did not and reached the correct result except, in my view, with respect to District 23.

Justice O'CONNOR, with whom THE CHIEF JUSTICE, Justice POWELL, and Justice REHNQUIST join, concurring in the judgment.

In this case, we are called upon to construe § 2 of the Voting Rights Act of 1965, as amended June 29, 1982. Amended § 2 is intended to codify the "results" test employed in *Whitcomb v. Chavis,* 403 U.S. 124, 91 S.Ct. 1858, 29 L.Ed.2d 363 (1971), and *White v. Regester,* 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973), and to reject the "intent" test propounded in the plurality opinion in ***84** *Mobile v. Bolden,* 446 U.S. 55, 100 S.Ct. 1490, 64 L.Ed.2d 47 (1980). S.Rep. No. 97–417, pp. 27–28 (1982) (hereinafter S.Rep.). Whereas *Bolden* required members of a racial minority who ****2784** alleged impairment of their voting strength to prove that the challenged electoral system was created or maintained with a discriminatory purpose and led to discriminatory results, under the results test, "plaintiffs may choose to establish discriminatory results without proving any kind of discriminatory purpose." S.Rep., at 28, U.S.Code Cong. & Admin.News 1982, p. 206. At the same time, however, § 2 unequivocally disclaims the creation of a right to proportional representation. This disclaimer was essential to the compromise that resulted in passage of the amendment. See *id.,* at 193–194 (additional views of Sen. Dole).

In construing this compromise legislation, we must make every effort to be faithful to the balance Congress struck. This is not an easy task. We know that Congress intended to allow vote dilution claims to be brought under § 2, but we also know that Congress did not intend to create a right to proportional representation for minority voters. There is an inherent tension between what Congress wished to do and what it wished to avoid, because any theory of vote dilution must necessarily rely to some extent on a measure of minority voting strength that makes some reference to the proportion between the minority group and the electorate at large. In addition, several important aspects of the "results" test had received little attention in this

Court's cases or in the decisions of the Courts of Appeals employing that test on which Congress also relied. See *id.,* at 32. Specifically, the legal meaning to be given to the concepts of "racial bloc voting" and "minority voting strength" had been left largely unaddressed by the courts when § 2 was amended.

The Court attempts to resolve all these difficulties today. First, the Court supplies definitions of racial bloc voting and minority voting strength that will apparently be applicable in all cases and that will dictate the structure of vote dilution litigation. Second, the Court adopts a test, based on the ***85** level of minority electoral success, for determining when an electoral scheme has sufficiently diminished minority voting strength to constitute vote dilution. Third, although the Court does not acknowledge it expressly, the combination of the Court's definition of minority voting strength and its test for vote dilution results in the creation of a right to a form of proportional representation in favor of all geographically and politically cohesive minority groups that are large enough to constitute majorities if concentrated within one or more single-member districts. In so doing, the Court has disregarded the balance struck by Congress in amending § 2 and has failed to apply the results test as described by this Court in *Whitcomb* and *White.*

I

In order to explain my disagreement with the Court's interpretation of § 2, it is useful to illustrate the impact that alternative districting plans or types of districts typically have on the likelihood that a minority group will be able to elect candidates it prefers, and then to set out the critical elements of a vote dilution claim as they emerge in the Court's opinion.

Consider a town of 1,000 voters that is governed by a council of four representatives, in which 30% of the voters are black, and in which the black voters are concentrated in one section of the city and tend to vote as a bloc. It would be possible to draw four single-member districts, in one of which blacks would constitute an overwhelming majority. The black voters in this district would be assured of electing a representative of their choice, while any remaining black voters in the other districts would be submerged in large white majorities. This option would give the minority group roughly proportional representation.

Alternatively, it would usually be possible to draw four single-member districts in *two* of which black voters constituted much narrower majorities of about 60%. The black ***86** voters in these districts would often be able to elect the representative of their choice in each of these two districts, ****2785** but if even 20% of the black voters supported the candidate favored by the white minority in those districts the candidates preferred by the majority of black voters might lose. This option would, depending on the circumstances of a particular election, sometimes give the minority group more than proportional representation, but would increase the risk that the group would not achieve even roughly proportional representation.

It would also usually be possible to draw four single-member districts in each of which black voters constituted a minority. In the extreme case, black voters would constitute 30% of the voters in each district. Unless approximately 30% of the white voters in this extreme case backed the minority candidate, black voters in such a district would be unable to elect the candidate of their choice in an election between only two candidates even if they unanimously supported him. This option would make it difficult for black voters to elect candidates of their choice even with significant white support, and all but impossible without such support.

Finally, it would be possible to elect all four representatives in a single at-large election in which each voter could vote for four candidates. Under this scheme, white voters could elect all the representatives even if black voters turned out in large numbers and voted for one and only one candidate. To illustrate, if only four white candidates ran, and each received approximately equal support from white voters, each would receive about 700 votes, whereas black voters could cast no more than 300 votes for any one candidate. If, on the other hand, eight white candidates ran, and white votes were distributed less evenly, so that the five least favored white candidates received fewer than 300 votes while three others received 400 or more, it would be feasible for blacks to elect one representative with 300 votes even without substantial white support. If even 25% of the white voters ***87** backed a particular minority candidate, and black voters voted only for that candidate, the candidate

would receive a total of 475 votes, which would ensure victory unless white voters also concentrated their votes on four of the eight remaining candidates, so that each received the support of almost 70% of white voters. As these variations show, the at-large or multimember district has an inherent tendency to submerge the votes of the minority. The minority group's prospects for electoral success under such a district heavily depend on a variety of factors such as voter turnout, how many candidates run, how evenly white support is spread, how much white support is given to a candidate or candidates preferred by the minority group, and the extent to which minority voters engage in "bullet voting" (which occurs when voters refrain from casting all their votes to avoid the risk that by voting for their lower ranked choices they may give those candidates enough votes to defeat their higher ranked choices, see *ante,* at 2760, n. 5).

There is no difference in principle between the varying effects of the alternatives outlined above and the varying effects of alternative single-district plans and multimember districts. The type of districting selected and the way in which district lines are drawn can have a powerful effect on the likelihood that members of a geographically and politically cohesive minority group will be able to elect candidates of their choice.

Although § 2 does not speak in terms of "vote dilution," I agree with the Court that proof of vote dilution can establish a violation of § 2 as amended. The phrase "vote dilution," in the legal sense, simply refers to the impermissible discriminatory effect that a multimember or other districting plan has when it operates "to cancel out or minimize the voting strength of racial groups." *White,* 412 U.S., at 765, 93 S.Ct., at 2339. See also *Fortson v. Dorsey,* 379 U.S. 433, 439, 85 S.Ct. 498, 501, 13 L.Ed.2d 401 (1965). This definition, however, conceals some very formidable difficulties. Is the "voting strength" of a racial group to be assessed solely ***88** with reference to its ****2786** prospects for electoral success, or should courts look at other avenues of political influence open to the racial group? Insofar as minority voting strength is assessed with reference to electoral success, how should undiluted minority voting strength be measured? How much of an impairment of minority voting strength is necessary to prove a violation of § 2? What constitutes racial bloc voting and how is it proved? What weight is to be given to evidence of actual electoral success by minority candidates in the face of evidence of racial bloc voting?

The Court resolves the first question summarily: minority voting strength *is* to be assessed solely in terms of the minority group's ability to elect candidates it prefers. *Ante,* at ——— – ———. Under this approach, the essence of a vote dilution claim is that the State has created single-member or multimember districts that unacceptably impair the minority group's ability to elect the candidates its members prefer.

In order to evaluate a claim that a particular multimember district or single-member district has diluted the minority group's voting strength to a degree that violates § 2, however, it is also necessary to construct a measure of "undiluted" minority voting strength. "[T]he phrase [vote dilution] itself suggests a norm with respect to which the fact of dilution may be ascertained." *Mississippi Republican Executive Committee v. Brooks,* 469 U.S. 1002, 1012, 105 S.Ct. 416, 422, 83 L.Ed.2d 343 (1984) (REHNQUIST, J., dissenting from summary affirmance). Put simply, in order to decide whether an electoral system has made it harder for minority voters to elect the candidates they prefer, a court must have an idea in mind of how hard it "should" be for minority voters to elect their preferred candidates under an acceptable system.

Several possible measures of "undiluted" minority voting strength suggest themselves. First, a court could simply use proportionality as its guide: if the minority group constituted 30% of the voters in a given area, the court would regard the minority group as having the potential to elect 30% ***89** of the representatives in that area. Second, a court could posit some alternative districting plan as a "normal" or "fair" electoral scheme and attempt to calculate how many candidates preferred by the minority group would probably be elected under that scheme. There are, as we have seen, a variety of ways in which even single-member districts could be drawn, and each will present the minority group with its own array of electoral risks and benefits; the court might, therefore, consider a range of acceptable plans in attempting to estimate "undiluted" minority voting strength by this method. Third, the court could attempt to arrive at a plan that would maximize feasible minority electoral success, and use this degree of predicted success as its measure of "undiluted" minority voting strength. If a court were to employ this third alternative, it would often face hard choices about what would truly "maximize" minority electoral success. An example is the scenario described above, in which a minority group could be concentrated in one completely safe district or divided among two districts in each of which its members would constitute a somewhat precarious majority.

The Court today has adopted a variant of the third approach, to wit, undiluted minority voting strength means the maximum feasible minority voting strength. In explaining the elements of a vote dilution claim, the Court first states that "the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a

single-member district." *Ante,* at 2766. If not, apparently the minority group has no cognizable claim that its ability to elect the representatives of its choice has been impaired.[1] Second, "the minority group must ****2787** be able ***90** to show that it is politically cohesive," that is, that a significant proportion of the minority group supports the same candidates. *Ante,* at ——. Third, the Court requires the minority group to "demonstrate that the white majority votes sufficiently as a bloc to enable it—in the absence of special circumstances ...—usually to defeat the minority's preferred candidate." *Ibid.* If these three requirements are met, "the minority group demonstrates that submergence in a white multimember district impedes its ability to elect its chosen representatives." *Ibid.* That is to say, the minority group has proved vote dilution in violation of § 2.

The Court's definition of the elements of a vote dilution claim is simple and invariable: a court should calculate minority voting strength by assuming that the minority group is concentrated in a single-member district in which it constitutes a voting majority. Where the minority group is not large enough, geographically concentrated enough, or politically cohesive enough for this to be possible, the minority group's claim fails. Where the minority group meets these requirements, the representatives that it could elect in the hypothetical district or districts in which it constitutes a ***91** majority will serve as the measure of its undiluted voting strength. Whatever plan the State actually adopts must be assessed in terms of the effect it has on this undiluted voting strength. If this is indeed the single, universal standard for evaluating undiluted minority voting strength for vote dilution purposes, the standard is applicable whether what is challenged is a multimember district or a particular single-member districting scheme.

The Court's statement of the elements of a vote dilution claim also supplies an answer to another question posed above: *how much* of an impairment of undiluted minority voting strength is necessary to prove vote dilution. The Court requires the minority group that satisfies the threshold requirements of size and cohesiveness to prove that it will *usually* be unable to elect as many representatives of its choice under the challenged districting scheme as its undiluted voting strength would permit. This requirement, then, constitutes the true test of vote dilution. Again, no reason appears why this test would not be applicable to a vote dilution claim challenging single-member as well as multimember districts.

This measure of vote dilution, taken in conjunction with the Court's standard for measuring undiluted minority voting strength, creates what amounts to a right to *usual, roughly* proportional representation on the part of sizable, compact, cohesive minority groups. If, under a particular multimember or single-member district plan, qualified minority groups usually cannot elect the representatives they would be likely to elect under the most favorable single-member districting plan, then § 2 is violated. Unless minority success under the challenged electoral system regularly approximates this rough version of proportional representation, that system dilutes minority voting strength and violates § 2.

****2788** To appreciate the implications of this approach, it is useful to return to the illustration of a town with four council representatives given above. Under the Court's approach, if the ***92** black voters who constitute 30% of the town's voting population do not usually succeed in electing one representative of their choice, then regardless of whether the town employs at-large elections or is divided into four single-member districts, its electoral system violates § 2. Moreover, if the town had a black voting population of 40%, on the Court's reasoning the black minority, so long as it was geographically and politically cohesive, would be entitled usually to elect two of the four representatives, since it would normally be possible to create two districts in which black voters constituted safe majorities of approximately 80%.

To be sure, the Court also requires that plaintiffs prove that racial bloc voting by the white majority interacts with the challenged districting plan so as usually to defeat the minority's preferred candidate. In fact, however, this requirement adds little that is not already contained in the Court's requirements that the minority group be politically cohesive and that its preferred candidates usually lose. As the Court acknowledges, under its approach, "in general, a white bloc vote that normally will defeat the combined strength of minority support plus white 'crossover' votes rises to the level of legally significant white bloc voting." *Ante,* at 2770. But this is to define legally significant bloc voting by the racial majority in terms of the extent of the racial minority's electoral success. If the minority can prove that it could constitute a majority in a single-member district, that it supported certain candidates, and that those candidates have not usually been elected, then a finding that there is "legally significant white bloc voting" will necessarily follow. Otherwise, by definition, those candidates would usually have won rather than lost.

As shaped by the Court today, then, the basic contours of a vote dilution claim require no reference to most of the "*Zimmer* factors" that were developed by the Fifth Circuit to implement *White* 's results test and which were highlighted in the Senate Report. S.Rep., at 28–29; see ***93** *Zimmer v. Mc* Keithen, 485 F.2d 1297 (CA5 1973) (en banc), aff'd *sub nom. East Carroll Parish School Board v. Marshall,* 424 U.S. 636, 96 S.Ct. 1083, 47 L.Ed.2d 296 (1976) *(per curiam).* If a minority group is

politically and geographically cohesive and large enough to constitute a voting majority in one or more single-member districts, then unless white voters usually support the minority's preferred candidates in sufficient numbers to enable the minority group to elect as many of those candidates as it could elect in such hypothetical districts, it will routinely follow that a vote dilution claim can be made out, and the multimember district will be invalidated. There is simply no need for plaintiffs to establish "the history of voting-related discrimination in the State or political subdivision," *ante,* at ——, or "the extent to which the State or political subdivision has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group," *ante,* at —— or "the exclusion of members of the minority group from candidate slating processes," *ante,* at —— or "the extent to which minority group members bear the effects of past discrimination in areas such as education, employment, and health," *ibid.,* or "the use of overt or subtle racial appeals in political campaigns," *ibid.,* or that "elected officials are unresponsive to the particularized needs of the members of the minority group." *Ibid.*. Of course, these other factors may be supportive of such a claim, because they may strengthen a court's confidence that minority voters will be unable to overcome the relative disadvantage at which they are placed by a particular districting plan, or suggest a more general lack of opportunity to participate in the political process. But the fact remains that electoral success has now emerged, under the Court's standard, as the linchpin of vote dilution claims, and ****2789** that the elements of a vote dilution claim create an entitlement to roughly proportional representation within the framework of single-member districts.

***94** II

In my view, the Court's test for measuring minority voting strength and its test for vote dilution, operating in tandem, come closer to an absolute requirement of proportional representation than Congress intended when it codified the results test in § 2. It is not necessary or appropriate to decide in this case whether § 2 requires a uniform measure of undiluted minority voting strength in every case, nor have appellants challenged the standard employed by the District Court for assessing undiluted minority voting strength.

In this case, the District Court seems to have taken an approach quite similar to the Court's in making its preliminary assessment of undiluted minority voting strength:

> "At the time of the creation of these multi-member districts, there were concentrations of black citizens within the boundaries of each that were sufficient in numbers and contiguity to constitute effective voting majorities in single-member districts lying wholly within the boundaries of the multi-member districts, which single-member districts would satisfy all constitutional requirements of population and geographical configuration." *Gingles v. Edmisten,* 590 F.Supp. 345, 358–359 (EDNC1984).

The Court goes well beyond simply sustaining the District Court's decision to employ this measure of undiluted minority voting strength as a reasonable one that is consistent with § 2. In my view, we should refrain from deciding in this case whether a court must invariably posit as its measure of "undiluted" minority voting strength single-member districts in which minority group members constitute a majority. There is substantial doubt that Congress intended "undiluted minority voting strength" to mean "maximum feasible minority voting strength." Even if that is the appropriate definition in some circumstances, there is no indication that Congress intended to mandate a single, universally applicable ***95** standard for measuring undiluted minority voting strength, regardless of local conditions and regardless of the extent of past discrimination against minority voters in a particular State or political subdivision. Since appellants have not raised the issue, I would assume that what the District Court did here was permissible under § 2, and leave open the broader question whether § 2 *requires* this approach.

What appellants *do* contest is the propriety of the District Court's standard for vote dilution. Appellants claim that the District Court held that "[a]lthough blacks had achieved considerable success in winning state legislative seats in the challenged districts, their failure to consistently attain the number of seats *that numbers alone would presumptively give them* (*i.e.,* in proportion to their presence in the population)," standing alone, constituted a violation of § 2. Brief for Appellants 20 (emphasis in original). This holding, appellants argue, clearly contravenes § 2's proviso that "nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." 42

U.S.C. § 1973.

I believe appellants' characterization of the District Court's holding is incorrect. In my view, the District Court concluded that there was a severe diminution in the prospects for black electoral success in each of the challenged districts, as compared to single-member districts in which blacks could constitute a majority, and that this severe diminution was in large part attributable to the interaction of the multimember form of the district with persistent racial bloc voting on the part of the white majorities in those districts. See 590 F.Supp., at 372.[2] The District Court attached ****2790** great weight ***96** to this circumstance as one part of its ultimate finding that "the creation of each of the multi-member districts challenged in this action results in the black registered voters of that district being submerged as a voting minority in the district and thereby having less opportunity than do other members of the electorate to participate in the political process and to elect representatives of their choice." *Id.,* at 374. But the District Court's extensive opinion clearly relies as well on a variety of the other *Zimmer* factors, as the Court's thorough summary of the District Court's findings indicates. See *ante,* at —— – ——.

If the District Court had held that the challenged multi-member districts violated § 2 solely because blacks had not consistently attained seats in proportion to their presence in the population, its holding would clearly have been inconsistent with § 2's disclaimer of a right to proportional representation. Surely Congress did not intend to say, on the one hand, that members of a protected class have no right to proportional representation, and on the other, that any consistent failure to achieve proportional representation, without more, violates § 2. A requirement that minority representation usually be proportional to the minority group's proportion in the population is not quite the same as a right to strict proportional representation, but it comes so close to such a right as to be inconsistent with § 2's disclaimer and with the results test that is codified in § 2. In the words of Senator Dole, the architect of the compromise that resulted in passage of the amendments to § 2:

> "The language of the subsection explicitly rejects, as did *White* and its progeny, the notion that members of a protected class have a right to be elected in numbers equal to their proportion of the population. The extent to which members of a protected class have been elected under the challenged practice or structure is just one factor, among the totality of circumstances to be considered, ***97** and is not dispositive." S.Rep., at 194, U.S.Code Cong. & Admin.News 1982, p. 364 (additional views of Sen. Dole).

On the same reasoning, I would reject the Court's test for vote dilution. The Court measures undiluted minority voting strength by reference to the possibility of creating single-member districts in which the minority group would constitute a majority, rather than by looking to raw proportionality alone. The Court's standard for vote dilution, when combined with its test for undiluted minority voting strength, makes actionable every deviation from usual, rough proportionality in representation for any cohesive minority group as to which this degree of proportionality is feasible within the framework of single-member districts. Requiring that every minority group that could possibly constitute a majority in a single-member district be assigned to such a district would approach a requirement of proportional representation as nearly as is possible within the framework of single-member districts. Since the Court's analysis entitles every such minority group usually to elect as many representatives under a multimember district as it could elect under the most favorable single-member district scheme, it follows that the Court is requiring a form of proportional representation. This approach is inconsistent with the results test and with § 2's disclaimer of a right to proportional representation.

In enacting § 2, Congress codified the "results" test this Court had employed, as an interpretation of the Fourteenth Amendment, in *White* and *Whitcomb.* The factors developed by the Fifth Circuit and relied on by the Senate Report simply fill in the contours of the "results" test as described in those decisions, and do not purport ****2791** to redefine or alter the ultimate showing of discriminatory effect required by *Whitcomb* and *White.* In my view, therefore, it is to *Whitcomb* and *White* that we should look in the first instance in determining how great an impairment of minority voting strength is required to establish vote dilution in violation of § 2.

***98** The "results" test as reflected in *Whitcomb* and *White* requires an inquiry into the extent of the minority group's opportunities to participate in the political processes. See *White,* 412 U.S., at 766, 93 S.Ct., at 2339–40. While electoral success is a central part of the vote dilution inquiry, *White* held that to prove vote dilution, "it is not enough that the racial group allegedly discriminated against has not had legislative seats in proportion to its voting potential," *id.,* at 765–766, 93 S.Ct., at 2339–40, and *Whitcomb* flatly rejected the proposition that "any group with distinctive interests must be represented in legislative halls if it is numerous enough to command at least one seat and represents a majority living in an area

sufficiently compact to constitute a single member district." 403 U.S., at 156, 91 S.Ct., at 1875. To the contrary, the results test as described in *White* requires plaintiffs to establish "that the political processes leading to nomination and election were not equally open to participation by the group in question—that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice." 412 U.S., at 766, 93 S.Ct., at 2339–40. By showing both "a history of disproportionate results" and "strong indicia of lack of political power and the denial of fair representation," the plaintiffs in *White* met this standard, which, as emphasized just today, requires "a substantially greater showing of adverse effects than a mere lack of proportional representation to support a finding of unconstitutional vote dilution." *Davis v. Bandemer,* 478 U.S. 109, 169–170, 106 S.Ct. 2797, ——, ——, 92 L.Ed.2d 85 (1986) (plurality opinion).

When Congress amended § 2 it intended to adopt this "results" test, while abandoning the additional showing of discriminatory intent required by *Bolden.* The vote dilution analysis adopted by the Court today clearly bears little resemblance to the "results" test that emerged in *Whitcomb* and *White.* The Court's test for vote dilution, combined with its standard for evaluating "voting potential," *White, supra,* 412 U.S., at 766, 93 S.Ct., at 2339–2340, means that any racial minority with distinctive interests must *usually* "be represented in legislative halls if ***99** it is numerous enough to command at least one seat and represents a minority living in an area sufficiently compact to constitute" a voting majority in "a single member district." *Whitcomb,* 403 U.S., at 156, 91 S.Ct., at 1875. Nothing in *Whitcomb, White,* or the language and legislative history of § 2 supports the Court's creation of this right to usual, roughly proportional representation on the part of every geographically compact, politically cohesive minority group that is large enough to form a majority in one or more single-member districts.

I would adhere to the approach outlined in *Whitcomb* and *White* and followed, with some elaboration, in *Zimmer* and other cases in the Courts of Appeals prior to *Bolden.* Under that approach, a court should consider all relevant factors bearing on whether the minority group has "less opportunity than other members of the electorate to participate in the political process *and* to elect representatives of their choice." 42 U.S.C. § 1973 (emphasis added). The court should not focus solely on the minority group's ability to elect representatives of its choice. Whatever measure of undiluted minority voting strength the court employs in connection with evaluating the presence or absence of minority electoral success, it should also bear in mind that "the power to influence the political process is not limited to winning elections." *Davis v. Bandemer, supra,* 478 U.S., at 132, 106 S.Ct., at ——. Of course, the relative lack of minority electoral success under a challenged plan, when compared ****2792** with the success that would be predicted under the measure of undiluted minority voting strength the court is employing, can constitute powerful evidence of vote dilution. Moreover, the minority group may in fact lack access to or influence upon representatives it did not support as candidates. Cf. *Davis v. Bandemer, supra,* at 169–170, 106 S.Ct., at —— (POWELL, J., concurring in part and dissenting in part). Nonetheless, a reviewing court should be required to find more than simply that the minority group does not usually attain an undiluted measure of electoral success. The court must find that even substantial minority success will be highly infrequent ***100** under the challenged plan before it may conclude, on this basis alone, that the plan operates "to cancel out or minimize the voting strength of [the] racial grou[p]." *White, supra,* 412 U.S., at 765, 93 S.Ct., at 2339.

III

Only three Justices of the Court join Part III–C of Justice BRENNAN's opinion, which addresses the validity of the statistical evidence on which the District Court relied in finding racially polarized voting in each of the challenged districts. Insofar as statistical evidence of divergent racial voting patterns is admitted solely to establish that the minority group is politically cohesive and to assess its prospects for electoral success, I agree that defendants cannot rebut this showing by offering evidence that the divergent racial voting patterns may be explained in part by causes other than race, such as an underlying divergence in the interests of minority and white voters. I do not agree, however, that such evidence can never affect the overall vote dilution inquiry. Evidence that a candidate preferred by the minority group in a particular election was rejected by white voters for reasons other than those which made that candidate the preferred choice of the minority group would seem clearly relevant in answering the question whether bloc voting by white voters will consistently defeat minority

candidates. Such evidence would suggest that another candidate, equally preferred by the minority group, might be able to attract greater white support in future elections.

I believe Congress also intended that explanations of the reasons why white voters rejected minority candidates would be probative of the likelihood that candidates elected without decisive minority support would be willing to take the minority's interests into account. In a community that is polarized along racial lines, racial hostility may bar these and other indirect avenues of political influence to a much greater extent than in a community where racial animosity is absent although the interests of racial groups diverge. Indeed, the ***101** Senate Report clearly stated that one factor that could have probative value in § 2 cases was "whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group." S.Rep., at 29, U.S.Code Cong. & Admin.News 1982, p. 207. The overall vote dilution inquiry neither requires nor permits an arbitrary rule against consideration of all evidence concerning voting preferences other than statistical evidence of racial voting patterns. Such a rule would give no effect whatever to the Senate Report's repeated emphasis on "intensive racial politics," on "racial political considerations," and on whether "racial politics ... dominate the electoral process" as one aspect of the "racial bloc voting" that Congress deemed relevant to showing a § 2 violation. *Id.,* at 33–34. Similarly, I agree with Justice WHITE that Justice BRENNAN's conclusion that the race of the candidate is always irrelevant in identifying racially polarized voting conflicts with *Whitcomb* and is not necessary to the disposition of this case. *Ante,* at 2783 (concurring).

In this case, as the Court grudgingly acknowledges, the District Court clearly erred in *aggregating* data from all of the challenged districts, and then relying on the fact that on average, 81.7% of white voters did not vote for any black candidate ****2793** in the primary elections selected for study. *Ante,* at 2771, n. 28. Although Senate District 22 encompasses House District 36, with that exception the districts at issue in this case are distributed throughout the State of North Carolina. *White* calls for "an intensely local appraisal of the design and impact of the ... multimember district," 412 U.S., at 769–770, 93 S.Ct., at 2341, and racial voting statistics from one district are ordinarily irrelevant in assessing the totality of the circumstances in another district. In view of the specific evidence from each district that the District Court also considered, however, I cannot say that its conclusion that there was severe racial bloc voting was clearly erroneous with regard to any of the challenged districts. Except in House District 23, where racial bloc voting did not prevent sustained and virtuallyproportional ***102** minority electoral success, I would accordingly leave undisturbed the District Court's decision to give great weight to racial bloc voting in each of the challenged districts.

IV

Having made usual, roughly proportional success the sole focus of its vote dilution analysis, the Court goes on to hold that proof that an occasional minority candidate has been elected does not foreclose a § 2 claim. But Justice BRENNAN, joined by Justice WHITE, concludes that "persistent proportional representation" will foreclose a § 2 claim unless the plaintiffs prove that this "sustained success does not accurately reflect the minority group's ability to elect its preferred representatives." *Ante,* at 2780. I agree with Justice BRENNAN that consistent and sustained success by candidates preferred by minority voters is presumptively inconsistent with the existence of a § 2 violation. Moreover, I agree that this case presents no occasion for determining what would constitute proof that such success did not accurately reflect the minority group's actual voting strength in a challenged district or districts.

In my view, the District Court erred in assessing the extent of black electoral success in House District 39 and Senate District 22, as well as in House District 23, where the Court acknowledges error. As the evidence summarized by the Court in table form shows, *ante,* at ——, Appendix B, the degree of black electoral success differed widely in the seven originally contested districts. In House District 8 and Senate District 2, neither of which is contested in this Court, no black candidate had ever been elected to the offices in question. In House District 21 and House District 36, the only instances of black electoral success came in the two most recent elections, one of which took place during the pendency of this litigation. By contrast, in House District 39 and Senate District 22, black successes, although intermittent, dated back to 1974, and a black candidate had been elected in each ***103** of these districts in three of the last five elections. Finally, in House District 23 a

black candidate had been elected in each of the last six elections.

The District Court, drawing no distinctions among these districts for purposes of its findings, concluded that "[t]he overall results achieved to date at all levels of elective office are minimal in relation to the percentage of blacks in the total population." 590 F.Supp., at 367. The District Court clearly erred to the extent that it considered electoral success in the aggregate, rather than in each of the challenged districts, since, as the Court states, "[t]he inquiry into the existence of vote dilution ... is district-specific." *Ante,* at 2771, n. 28. The Court asserts that the District Court was free to regard the results of the 1982 elections with suspicion and to decide "on the basis of all the relevant circumstances to accord greater weight to blacks' relative lack of success over the course of several recent elections," *ante,* at 2790, but the Court does not explain how this technique would apply in Senate District 22, where a black candidate was elected in three consecutive elections from 1974 to 1978, but no black candidate was elected in 1982, or in House District 39, where black ****2794** candidates were elected in 1974 and 1976 as well as in 1982. Contrary to what the District Court thought, see 590 F.Supp., at 367, these pre-1982 successes, which were proportional or nearly proportional to black population in these three multimember districts, certainly lend *some* support for a finding that black voters in these districts enjoy an equal opportunity to participate in the political process and to elect representatives of their choice.

Despite this error, I agree with the Court's conclusion that, except in House District 23, minority electoral success was not sufficiently frequent to compel a finding of equal opportunity to participate and elect. The District Court found that "in each of the challenged districts racial polarization in voting presently exists to a substantial or severe degree, and ... in each district it presently operates to ***104** minimize the voting strength of black voters." *Id.,* at 372. I cannot say that this finding was clearly erroneous with respect to House District 39 or Senate District 22, particularly when taken together with the District Court's findings concerning the other *Zimmer* factors, and hence that court's ultimate conclusion of vote dilution in these districts is adequately supported.

This finding, however, is clearly erroneous with respect to House District 23. Blacks constitute 36.3% of the population in that district and 28.6% of the registered voters. In each of the six elections since 1970 one of the three representatives from this district has been a black. There is no finding, or any reason even to suspect, that the successful black candidates in District 23 did not in fact represent the interests of black voters, and the District Court did not find that black success in previous elections was aberrant.

Zimmer's caveat against *necessarily* foreclosing a vote dilution claim on the basis of isolated black successes, 485 F.2d, at 1307; see S.Rep., at 29, n. 115, cannot be pressed this far. Indeed, the 23 Court of Appeals decisions on which the Senate Report relied, and which are the best evidence of the scope of this caveat, contain no example of minority electoral success that even remotely approximates the consistent, decade-long pattern in District 23. See, *e.g., Turner v. McKeithen,* 490 F.2d 191 (CA5 1973) (no black candidates elected); *Wallace v. House,* 515 F.2d 619 (CA5 1975) (one black candidate elected), vacated on other grounds, 425 U.S. 947, 96 S.Ct. 1721, 48 L.Ed.2d 191 (1976).

I do not propose that consistent and virtually proportional minority electoral success should always, as a matter of law, bar finding a § 2 violation. But, as a general rule, such success is entitled to great weight in evaluating whether a challenged electoral mechanism has, on the totality of the circumstances, operated to deny black voters an equal opportunity to participate in the political process and to elect representatives of their choice. With respect to House District 23, the District Court's failure to accord black electoral success such ***105** weight was clearly erroneous, and the District Court identified no reason for not giving this degree of success preclusive effect. Accordingly, I agree with Justice BRENNAN that appellees failed to establish a violation of § 2 in District 23.

V

When members of a racial minority challenge a multimember district on the grounds that it dilutes their voting strength, I agree with the Court that they must show that they possess such strength and that the multimember district impairs it. A court

must therefore appraise the minority group's undiluted voting strength in order to assess the effects of the multimember district. I would reserve the question of the proper method or methods for making this assessment. But once such an assessment is made, in my view the evaluation of an alleged impairment of voting strength requires consideration of the minority group's access to the political processes generally, not solely consideration of the chances that its preferred candidates will actually be elected. Proof that white voters withhold their support from minority-preferred ****2795** candidates to an extent that consistently ensures their defeat is entitled to significant weight in plaintiffs' favor. However, if plaintiffs direct their proof solely towards the minority group's prospects for electoral success, they must show that substantial minority success will be highly infrequent under the challenged plan in order to establish that the plan operates to "cancel out or minimize" their voting strength. *White,* 412 U.S., at 765, 93 S.Ct., at 2339.

Compromise is essential to much if not most major federal legislation, and confidence that the federal courts will enforce such compromises is indispensable to their creation. I believe that the Court today strikes a different balance than Congress intended to when it codified the results test and disclaimed any right to proportional representation under § 2. For that reason, I join the Court's judgment but not its opinion.

***106** Justice STEVENS, with whom Justice MARSHALL and Justice BLACKMUN join, concurring in part and dissenting in part.

In my opinion, the findings of the District Court, which the Court fairly summarizes, *ante,* at —— – ——; —— – ——, and n. 23; —— – ——, and nn. 28 and 29, adequately support the District Court's judgment concerning House District 23 as well as the balance of that judgment.

I, of course, agree that the election of one black candidate in each election since 1972 provides significant support for the State's position. The notion that this evidence creates some sort of a conclusive, legal presumption, *ante,* at —— – —— is not, however, supported by the language of the statute or by its legislative history.[1] I therefore cannot agree with the Court's view that the District Court committed error by failing to apply a rule of law that emerges today without statutory support. The evidence of candidate success in District 23 is merely one part of an extremely large record which the District Court carefully considered before making its ultimate findings of fact, all of which should be upheld under a normal application of the "clearly erroneous" standard that the Court traditionally applies.[2]

The Court identifies the reason why the success of one black candidate in the elections in 1978, 1980, and 1982 is not ***107** inconsistent with the District Court's ultimate finding concerning House District 23.[3] The fact that one black candidate was also elected in the 1972, 1974, and 1976 elections, *ante,* at ——, Appendix B, is not sufficient, in my opinion, to overcome the additional findings that apply to House District 23, as well as to other districts in the State for each of those years. The Court accurately summarizes those findings:

> "The District Court in this case carefully considered the totality of the circumstances and found that in each district racially polarized voting; the legacy of official discrimination in voting matters, education, housing, employment, and health services; and the persistence of campaign appeals to racial prejudice acted in concert with the multimember districting scheme to impair the ability of geographically insular and politically ****2796** cohesive groups of black voters to participate equally in the political process and to elect candidates of their choice. It found that the success a few black candidates have enjoyed in these districts is too recent, too limited, and, with regard to the 1982 elections, perhaps too aberrational, to disprove its conclusion." *Ante,* at 2782.

To paraphrase the Court's conclusion about the other districts, *ibid.,* I cannot say that the District Court, composed of local judges who are well acquainted with the political realities of the State, clearly erred in concluding that use of a multimember electoral structure has caused black voters in House District 23 to have less opportunity than white voters to elect representatives of their choice.[4] Accordingly, I concurin ***108** the Court's opinion except Part IV–B and except insofar as it explains why it reverses the judgment respecting House District 23.

All Citations

478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25, 54 USLW 4877, 4 Fed.R.Serv.3d 1082

Footnotes

[*] The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

[1] Appellees challenged Senate District No. 2, which consisted of the whole of Northampton, Hertford, Gates, Bertie, and Chowan Counties, and parts of Washington, Martin, Halifax, and Edgecombe Counties.

[2] Appellees challenged the following multimember districts: Senate No. 22 (Mecklenburg and Cabarrus Counties—four members), House No. 36 (Mecklenburg County—eight members), House No. 39 (part of Forsyth County—five members), House No. 23 (Durham County—three members), House No. 21 (Wake County—six members), and House No. 8 (Wilson, Nash, and Edgecombe Counties—four members).

[3] Appellants initiated this action in September 1981, challenging the North Carolina General Assembly's July 1981 redistricting. The history of this action is recounted in greater detail in the District Court's opinion in this case, *Gingles v. Edmisten,* 590 F.Supp. 345, 350–358 (EDNC 1984). It suffices here to note that the General Assembly revised the 1981 plan in April 1982 and that the plan at issue in this case is the 1982 plan.

[4] These factors were derived from the analytical framework of *White v. Regester,* 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973), as refined and developed by the lower courts, in particular by the Fifth Circuit in *Zimmer v. McKeithen,* 485 F.2d 1297 (1973) (en banc), aff'd *sub nom. East Carroll Parish School Board v. Marshall,* 424 U.S. 636, 96 S.Ct. 1083, 47 L.Ed.2d 296 (1976) (*per curiam*). S.Rep., at 28, n. 113.

[5] Bullet (single-shot) voting has been described as follows:

" 'Consider [a] town of 600 whites and 400 blacks with an at-large election to choose four council members. Each voter is able to cast four votes. Suppose there are eight white candidates, with the votes of the whites split among them approximately equally, and one black candidate, with all the blacks voting for him and no one else. The result is that each white candidate receives about 300 votes and the black candidate receives 400 votes. The black has probably won a seat. This technique is called single-shot voting. Single-shot voting enables a minority group to win some at-large seats if it concentrates its vote behind a limited number of candidates and if the vote of the majority is divided among a number of candidates.' " *City of Rome v. United States,* 446 U.S. 156, 184, n. 19, 100 S.Ct. 1548, 1565, n. 19, 64 L.Ed.2d 119 (1980), quoting United States Commission on Civil Rights, The Voting Rights Act: Ten Years After, pp. 206–207 (1975).

[6] Designated (or numbered) seat schemes require a candidate for election in multimember districts to run for specific seats, and can, under certain circumstances, frustrate bullet voting. See, *e.g., City of Rome, supra,* at 185, n. 21, 100 S.Ct., at 1566, n. 21.

[7] The United States urges this Court to give little weight to the Senate Report, arguing that it represents a compromise among conflicting "factions," and thus is somehow less authoritative than most Committee Reports. Brief for United States as *Amicus Curiae* 8, n. 12, 24, n. 49. We are not persuaded that the legislative history of amended § 2 contains anything to lead us to conclude that this Senate Report should be accorded little weight. We have repeatedly recognized that the authoritative source for legislative intent lies in the Committee Reports on the bill. See, *e.g., Garcia v. United States,* 469 U.S. 70, 76, and n. 3, 105 S.Ct. 479, 483,

and n. 3, 83 L.Ed.2d 472 (1984); *Zuber v. Allen,* 396 U.S. 168, 186, 90 S.Ct. 314, 324, 24 L.Ed.2d 345 (1969).

8 The Senate Report states that amended § 2 was designed to restore the "results test"—the legal standard that governed voting discrimination cases prior to our decision in *Mobile v. Bolden,* 446 U.S. 55, 100 S.Ct. 1490, 64 L.Ed.2d 47 (1980). S.Rep., at 15–16. The Report notes that in pre-*Bolden* cases such as *White v. Regester,* 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973), and *Zimmer v. McKeithen,* 485 F.2d 1297 (CA5 1973), plaintiffs could prevail by showing that, under the totality of the circumstances, a challenged election law or procedure had the effect of denying a protected minority an equal chance to participate in the electoral process. Under the "results test," plaintiffs are not required to demonstrate that the challenged electoral law or structure was designed or maintained for a discriminatory purpose. S.Rep., at 16, U.S.Code Cong. & Admin.News 1982, p. 193.

9 The Senate Committee found that "voting practices and procedures that have discriminatory results perpetuate the effects of past purposeful discrimination." *Id.,* at 40, U.S.Code Cong. & Admin.News 1982, p. 218 (footnote omitted). As the Senate Report notes, the purpose of the Voting Rights Act was " 'not only to correct an active history of discrimination, the denying to Negroes of the right to register and vote, but also to deal with the accumulation of discrimination.' " *Id.,* 5, U.S.Code Cong. & Admin.News 1982, p. 182 (quoting 111 Cong.Rec. 8295 (1965) (remarks of Sen. Javits)).

10 Section 2 prohibits all forms of voting discrimination, not just vote dilution. S.Rep., at 30.

11 Dilution of racial minority group voting strength may be caused by the dispersal of blacks into districts in which they constitute an ineffective minority of voters or from the concentration of blacks into districts where they constitute an excessive majority. Engstrom & Wildgen, Pruning Thorns from the Thicket: An Empirical Test of the Existence of Racial Gerrymandering, 2 Legis.Stud.Q. 465, 465–466 (1977) (hereinafter Engstrom & Wildgen). See also Derfner, Racial Discrimination and the Right to Vote, 26 Vand.L.Rev. 523, 553 (1973) (hereinafter Derfner); F. Parker, Racial Gerrymandering and Legislative Reapportionment (hereinafter Parker), in Minority Vote Dilution 86–100 (Davidson ed., 1984) (hereinafter Minority Vote Dilution).

12 The claim we address in this opinion is one in which the plaintiffs alleged and attempted to prove that their ability *to elect* the representatives of their choice was impaired by the selection of a multimember electoral structure. We have no occasion to consider whether § 2 permits, and if it does, what standards should pertain to, a claim brought by a minority group, that is not sufficiently large and compact to constitute a majority in a single-member district, alleging that the use of a multimember district impairs its ability *to influence* elections.

We note also that we have no occasion to consider whether the standards we apply to respondents' claim that multimember districts operate to dilute the vote of geographically cohesive minority groups, that are large enough to constitute majorities in single-member districts and that are contained within the boundaries of the challenged multimember districts, are fully pertinent to other sorts of vote dilution claims, such as a claim alleging that the splitting of a large and geographically cohesive minority between two or more multimember or single-member districts resulted in the dilution of the minority vote.

13 Commentators are in widespread agreement with this conclusion. See, *e.g.,* Berry & Dye, The Discriminatory Effects of At-Large Elections, 7 Fla.St.U.L.Rev. 85 (1979) (hereinafter Berry & Dye); Blacksher & Menefee, From *Reynolds v. Sims* to *City of Mobile v. Bolden,* 34 Hastings L.J. 1 (1982) (hereinafter Blacksher & Menefee); Bonapfel, Minority Challenges to At-Large Elections: The Dilution Problem, 10 Ga.L.Rev. 353 (1976) (hereinafter Bonapfel); Butler, Constitutional and Statutory Challenges to Election Structures: Dilution and the Value of the Right to Vote, 42 La.L.Rev. 851 (1982) (hereinafter Butler); Carpeneti, Legislative Apportionment: Multimember Districts and Fair Representation, 120 U.Pa.L.Rev. 666 (1972) (hereinafter Carpeneti); Davidson & Korbel, At-Large Elections and Minority Group Representation, in Minority Vote Dilution 65; Derfner; B. Grofman, Alternatives to Single-Member Plurality Districts: Legal and Empirical Issues (hereinafter Grofman, Alternatives), in Representation and Redistricting Issues 107 (B. Grofman, R. Lijphart, H. McKay, & H. Scarrow eds., 1982) (hereinafter Representation and Redistricting Issues); Hartman, Racial Vote Dilution and Separation of Powers, 50 Geo.Wash.L.Rev. 689 (1982); Jewell, The Consequences of Single-and Multimember Districting, in Representation and Redistricting Issues 129 (1982) (hereinafter Jewell); Jones, The Impact of Local Election Systems on Political Representation, 11 Urb.Aff.Q. 345 (1976); Karnig, Black Resources and

City Council Representation, 41 J.Pol. 134 (1979); Karnig, Black Representation on City Councils, 12 Urb.Aff.Q. 223 (1976); Parker 87–88.

14 Not only does "[v]oting along racial lines" deprive minority voters of their preferred representative in these circumstances, it also "allows those elected to ignore [minority] interests without fear of political consequences," *Rogers v. Lodge,* 458 U.S., at 623, 102 S.Ct., at 3279, leaving the minority effectively unrepresented. See, *e.g.,* Grofman, Should Representatives be Typical of Their Constituents?, in Representation and Redistricting Issues 97; Parker 108.

15 Under a "functional" view of the political process mandated by § 2, S.Rep., at 30, n. 120, U.S.Code Cong. & Admin.News 1982, p. 208, the most important Senate Report factors bearing on § 2 challenges to multimember districts are the "extent to which minority group members have been elected to public office in the jurisdiction" and the "extent to which voting in the elections of the state or political subdivision is racially polarized." *Id.,* 28–29, U.S.Code Cong. & Admin.News 1982, p. 206. If present, the other factors, such as the lingering effects of past discrimination, the use of appeals to racial bias in election campaigns, and the use of electoral devices which enhance the dilutive effects of multimember districts when substantial white bloc voting exists—for example antibullet voting laws and majority vote requirements, are supportive of, but *not essential to,* a minority voter's claim.

In recognizing that some Senate Report factors are more important to multimember district vote dilution claims than others, the Court effectuates the intent of Congress. It is obvious that unless minority group members experience substantial difficulty electing representatives of their choice, they cannot prove that a challenged electoral mechanism impairs their ability "to elect." § 2(b). And, where the contested electoral structure is a multimember district, commentators and courts agree that in the absence of significant white bloc voting it cannot be said that the ability of minority voters to elect their chosen representatives is inferior to that of white voters. See, *e.g., McMillan v. Escambia County, Fla.,* 748 F.2d 1037, 1043 (CA5 1984); *United States v. Marengo County Comm'n,* 731 F.2d 1546, 1566 (CA11), appeal dism'd and cert. denied, 469 U.S. 976, 105 S.Ct. 375, 83 L.Ed.2d 311 (1984); *Nevett v. Sides,* 571 F.2d 209, 223 (CA5 1978), cert. denied, 446 U.S. 951, 100 S.Ct. 2916, 64 L.Ed.2d 807 (1980); *Johnson v. Halifax County,* 594 F.Supp. 161, 170 (EDNC 1984); Blacksher & Menefee; Engstrom & Wildgen 469; Parker 107. Consequently, if difficulty in electing and white bloc voting are not proved, minority voters have not established that the multimember structure interferes with their ability to elect their preferred candidates. Minority voters may be able to prove that they still suffer social and economic effects of past discrimination, that appeals to racial bias are employed in election campaigns, and that a majority vote is required to win a seat, but they have not demonstrated a substantial inability to elect caused by the use of a multimember district. By recognizing the primacy of the history and extent of minority electoral success and of racial bloc voting, the Court simply requires that § 2 plaintiffs prove their claim before they may be awarded relief.

16 In this case appellees allege that within each contested multimember district there exists a minority group that is sufficiently large and compact to constitute a single-member district. In a different kind of case, for example a gerrymander case, plaintiffs might allege that the minority group that is sufficiently large and compact to constitute a single-member district has been split between two or more multimember or single-member districts, with the effect of diluting the potential strength of the minority vote.

17 The reason that a minority group making such a challenge must show, as a threshold matter, that it is sufficiently large and geographically compact to constitute a majority in a single-member district is this: Unless minority voters possess the *potential* to elect representatives in the absence of the challenged structure or practice, they cannot claim to have been injured by that structure or practice. The single-member district is generally the appropriate standard against which to measure minority group potential to elect because it is the smallest political unit from which representatives are elected. Thus, if the minority group is spread evenly throughout a multimember district, or if, although geographically compact, the minority group is so small in relation to the surrounding white population that it could not constitute a majority in a single-member district, these minority voters cannot maintain that they would have been able to elect representatives of their choice in the absence of the multimember electoral structure. As two commentators have explained:

"To demonstrate [that minority voters are injured by at-large elections], the minority voters must be sufficiently concentrated and politically cohesive that a putative districting plan would result in districts in which members of a racial minority would constitute a majority of the voters, whose clear electoral choices are in fact defeated by at-large voting. If minority voters' residences are substantially integrated throughout the jurisdiction, the at-large district cannot be blamed for the defeat of minority-supported candidates.... [This standard] thus would only protect racial minority votes from diminution proximately caused by the districting plan; *it would not assure racial minorities proportional representation.*" Blacksher & Menefee 55–56 (footnotes omitted; emphasis

added).

18 The terms "racially polarized voting" and "racial bloc voting" are used interchangeably throughout this opinion.

19 The 1982 reapportionment plan left essentially undisturbed the 1971 plan for five of the original six contested multimember districts. House District 39 alone was slightly modified. Brief for Appellees 8.

20 The District Court found both methods standard in the literature for the analysis of racially polarized voting. 590 F.Supp., at 367–368, n. 28, n. 32. See also Engstrom & McDonald, Quantitative Evidence in Vote Dilution Litigation: Political Participation and Polarized Voting, 17 Urb.Law. 369 (Summer 1985); Grofman, Migalski, & Noviello, The "Totality of Circumstances Test" in Section 2 of the 1982 Extension of the Voting Rights Act: A Social Science Perspective, 7 Law & Policy 199 (Apr.1985) (hereinafter Grofman, Migalski, & Noviello).

21 The court used the term "racial polarization" to describe this correlation. It adopted Dr. Grofman's definition—"racial polarization" exists where there is "a consistent relationship between [the] race of the voter and the way in which the voter votes," Tr. 160, or to put it differently, where "black voters and white voters vote differently." *Id.,* at 203. We, too, adopt this definition of "racial bloc" or "racially polarized" voting. See, *infra,* at ——.

22 The court found that the data reflected positive relationships and that the correlations did not happen by chance. 590 F.Supp., at 368, and n. 30. See also D. Barnes & J. Conley, Statistical Evidence in Litigation 32–34 (1986); Fisher, Multiple Regression in Legal Proceedings, 80 Colum.L.Rev. 702, 716–720 (1980); Grofman, Migalski, & Noviello 206.

23 The two exceptions were the 1982 State House elections in Districts 21 and 23. 590 F.Supp., at 368, n. 31.

24 This list of factors is illustrative, not comprehensive.

25 The number of elections that must be studied in order to determine whether voting is polarized will vary according to pertinent circumstances. One important circumstance is the number of elections in which the minority group has sponsored candidates. Where a minority group has never been able to sponsor a candidate, courts must rely on other factors that tend to prove unequal access to the electoral process. Similarly, where a minority group has begun to sponsor candidates just recently, the fact that statistics from only one or a few elections are available for examination does not foreclose a vote dilution claim.

26 This list of special circumstances is illustrative, not exclusive.

27 The trial court did not actually employ the term "legally significant." At times it seems to have used "substantive significance" as Dr. Grofman did, to describe polarization severe enough to result in the selection of different candidates in racially separate electorates. At other times, however, the court used the term "substantively significant" to refer to its ultimate determination that racially polarized voting in these districts is sufficiently severe to be relevant to a § 2 claim.

28 In stating that 81.7% of white voters did not vote for any black candidates in the primary election and that two-thirds of white

voters did not vote for black candidates in general elections, the District Court aggregated data from all six challenged multimember districts, apparently for ease of reporting. The inquiry into the existence of vote dilution caused by submergence in a multimember district is district specific. When considering several separate vote dilution claims in a single case, courts must not *rely* on data aggregated from all the challenged districts in concluding that racially polarized voting exists in each district. In the instant case, however, it is clear from the trial court's tabulated findings and from the exhibits that were before it, 1 App., Exs. 2–10, that the court relied on data that were specific to each individual district in concluding that each district experienced legally significant racially polarized voting.

29 For example, the court found that incumbency aided a successful black candidate in the 1978 primary in Senate District 22. The court also noted that in House District 23, a black candidate who gained election in 1978, 1980, and 1982, ran uncontested in the 1978 general election and in both the primary and general elections in 1980. In 1982 there was no Republican opposition, a fact the trial court interpreted to mean that the general election was for all practical purposes unopposed. Moreover, in the 1982 primary, there were only two white candidates for three seats, so that one black candidate had to succeed. Even under this condition, the court remarked, 63% of white voters still refused to vote for the black incumbent—who was the choice of 90% of the blacks. In House District 21, where a black won election to the six-member delegation in 1980 and 1982, the court found that in the relevant primaries approximately 60% to 70% of white voters did *not* vote for the black candidate, whereas approximately 80% of blacks did. The court additionally observed that although winning the Democratic primary in this district is historically tantamount to election, 55% of whites declined to vote for the Democratic black candidate in the general election.

30 The court noted that in the 1982 primary held in House District 36, out of a field of eight, the successful black candidate was ranked first by black voters, but seventh by whites. Similarly, the court found that the two blacks who won seats in the five-member delegation from House District 39 were ranked first and second by black voters, but seventh and eighth by white voters.

31 Appellants argue that plaintiffs must establish that race was the primary determinant of voter behavior as part of their prima facie showing of polarized voting; the United States suggests that plaintiffs make out a prima facie case merely by showing a correlation between race and the selection of certain candidates, but that defendants should be able to rebut by showing that factors other than race were the principal causes of voters' choices. We reject both arguments.

32 The Fifth Circuit cases on which North Carolina and the United States rely for their position are equally ambiguous. See *Lee County Branch of NAACP v. Opelika,* 748 F.2d 1473, 1482 (1984); *Jones v. Lubbock,* 730 F.2d 233, 234 (1984) (Higginbotham, J., concurring).

33 It is true, as we have recognized previously, that racial hostility may often fuel racial bloc voting. *United Jewish Organizations v. Carey,* 430 U.S. 144, 166, 97 S.Ct. 996, 1010, 51 L.Ed.2d 229 (1977); *Rogers v. Lodge,* 458 U.S., at 623, 102 S.Ct., at 3278. But, as we explain in this decision, the actual motivation of the voter has no relevance to a vote dilution claim. This is not to suggest that racial bloc voting is race neutral; because voter behavior correlates with race, obviously it is not. It should be remembered, though, as one commentator has observed, that "[t]he absence of racial animus is but one element of race neutrality." Note, Geometry and Geography 208.

34 The Senate Report rejected the argument that the words "on account of race," contained in § 2(a), create any requirement of purposeful discrimination. "[I]t is patently [clear] that Congress has used the words 'on account of race or color' in the Act to mean 'with respect to' race or color, and not to connote any required purpose of racial discrimination." S.Rep., at 27–28, n. 109, U.S.Code Cong. & Admin.News 1982, p. 205.

35 The relevant results of the 1982 General Assembly election are as follows. House District 21, in which blacks make up 21.8% of the population, elected one black to the six-person House delegation. House District 23, in which blacks constitute 36.3% of the

population, elected one black to the three-person House delegation. In House District 36, where blacks constitute 26.5% of the population, one black was elected to the eight-member delegation. In House District 39, where 25.1% of the population is black, two blacks were elected to the five-member delegation. In Senate District 22, where blacks constitute 24.3% of the population, no black was elected to the Senate in 1982.

36 The United States points out that, under a substantially identical predecessor to the challenged plan, see n. 15, *supra,* House District 21 elected a black to its six-member delegation in 1980, House District 39 elected a black to its five-member delegation in 1974 and 1976, and Senate District 22 had a black Senator between 1975 and 1980.

37 See also *Zimmer v. McKeithen,* 485 F.2d, at 1307 ("[W]e cannot endorse the view that the success of black candidates at the polls necessarily forecloses the possibility of dilution of the black vote. Such success might, on occasion, be attributable to the work of politicians, who, apprehending that the support of a black candidate would be politically expedient, campaign to insure his election. Or such success might be attributable to political support motivated by different considerations—namely that election of a black candidate will thwart successful challenges to electoral schemes on dilution grounds. In either situation, a candidate could be elected despite the relative political backwardness of black residents in the electoral district").

38 We have no occasion in this case to decide what types of special circumstances could satisfactorily demonstrate that sustained success does not accurately reflect the minority's ability to elect its preferred representatives.

1 I express no view as to whether the ability of a minority group to constitute a majority in a single-member district should constitute a threshold requirement for a claim that the use of multimember districts impairs the ability of minority voters to participate in the political processes and to elect representatives of their choice. Because the plaintiffs in this case would meet that requirement, if indeed it exists, I need not decide whether it is imposed by § 2. I note, however, the artificiality of the Court's distinction between claims that a minority group's "ability *to elect* the representatives of [its] choice" has been impaired and claims that "its ability to *influence* elections" has been impaired. *Ante,* at 2765–2765, n. 12. It is true that a minority group that could constitute a majority in a single-member district ordinarily has the potential ability to elect representatives without white support, and that a minority that could not constitute such a majority ordinarily does not. But the Court recognizes that when the candidates preferred by a minority group are elected in a multimember district, the minority group has *elected* those candidates, even if white support was indispensable to these victories. On the same reasoning, if a minority group that is not large enough to constitute a voting majority in a single-member district can show that white support would probably be forthcoming in some such district to an extent that would enable the election of the candidates its members prefer, that minority group would appear to have demonstrated that, at least under this measure of its voting strength, it would be able to elect some candidates of its choice.

2 At times, the District Court seems to have looked to simple proportionality rather than to hypothetical single-member districts in which black voters would constitute a majority. See, *e.g.,* 590 F.Supp., at 367. Nowhere in its opinion, however, did the District Court state that § 2 requires that minority groups consistently attain the level of electoral success that would correspond with their proportion of the total or voting population.

1 See *ante,* at 2779 ("Section 2(b) provides that '[t]he extent to which members of a protected class have been elected to office ... is one circumstance which may be considered.' 42 U.S.C. § 1973(b).... However, the Senate Report expressly states that 'the election of a few minority candidates does not "necessarily foreclose the possibility of dilution of the black vote," ' noting that if it did, 'the possibility exists that the majority citizens might evade [§ 2] by manipulating the election of a "safe" minority candidate.' ... The Senate Committee decided, instead, to ' "require an independent consideration of the record" ' ") (internal citations omitted).

2 See *ante,* at 46 ("[T]he application of the clearly-erroneous standard to ultimate findings of vote dilution preserves the benefit of the trial court's particular familiarity with the indigenous political reality without endangering the rule of law").

[3] See *ante,* at —— – ——, and n. 23, ——, n. 29, —— – ——.

[4] Even under the Court's analysis, the decision simply to reverse—without a remand—is mystifying. It is also extremely unfair. First, the Court does not give appellees an opportunity to address the new legal standard that the Court finds decisive. Second, the Court does not even bother to explain the contours of that standard, and why it was not satisfied in this case. Cf. *ante,* at 2780, n. 38 ("We have no occasion in this case to decide what types of special circumstances could satisfactorily demonstrate that sustained success does not accurately reflect the minority's ability to elect its preferred representatives"). Finally, though couched as a conclusion about a "matter of law," *ante,* at 2782, the Court's abrupt entry of judgment for appellants on District 23 reflects an unwillingness to give the District Court the respect it is due, particularly when, as in this case, the District Court has a demonstrated knowledge and expertise of the entire context that Congress directed it to consider.

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144 S.Ct. 662
Supreme Court of the United States.

Donald J. TRUMP, Petitioner
v.
Norma ANDERSON, et al.

No. 23-719
|
March 4, 2024

Synopsis

Background: State voters eligible filed petition in state court, under Colorado's Uniform Election Code, against former President and Colorado's Secretary of State, seeking to prohibit Secretary of State from placing former President's name on Colorado Republican presidential primary ballot, alleging that during his presidency, former President had engaged in insurrection in connection with January 6, 2021, attack on the United States Capitol after swearing oath as President to support Constitution, making him constitutionally ineligible for office of presidency based on Section Three of Fourteenth Amendment. Following removal, the United States District Court for the District of Colorado, Philip A. Brimmer, Chief Judge, 2023 WL 5938828, granted voters' unopposed motion to remand. Following intervention by former President and Colorado Republican State Central Committee (CRSCC), the Colorado District Court, City and County of Denver, Sarah B. Wallace, J., 2023 WL 7017744, denied former President's motion to dismiss and denied CRSCC's motion to dismiss and motion for judgment on pleadings, denied, 2023 WL 7017745, former President's motion to dismiss based on Fourteenth Amendment, and after bench trial, 2023 WL 8006216, determined that events at Capitol constituted insurrection and that former President engaged in insurrection, but that Section Three did not apply to former President. Voters and former President appealed. The Colorado Supreme Court, 2023 WL 8770111, affirmed in part and reversed in part, ordering Secretary of State to exclude former President from Republican primary ballot in State and to disregard any write-in votes that Colorado voters might cast for him, and the ruling was automatically stayed pending review by the United States Supreme Court. Certiorari was granted.

The Supreme Court held that only Congress, pursuant to its power under Section 5 of the Fourteenth Amendment to pass appropriate legislation to enforce the Fourteenth Amendment, and not States, may disqualify persons from holding federal office or from being federal candidates under Section 3 of the Fourteenth Amendment.

Judgment of Colorado Supreme Court reversed.

Chief Justice Roberts, and Justices Thomas, Alito, Gorsuch, Kavanaugh joined, and Justice Barrett joined in part.

Justice Barrett filed an opinion concurring in part and concurring in the judgment.

Justices Sotomayor, Kagan, and Jackson filed an opinion concurring in the judgment.

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Opinion

Per Curiam.

***104** A group of Colorado voters contends that Section 3 of the Fourteenth Amendment to the Constitution prohibits former President Donald J. Trump, who seeks the Presidential nomination ***105** of the Republican Party in this year's election, from becoming President again. The Colorado Supreme Court agreed with that contention. ****665** It ordered the Colorado secretary ***106** of state to exclude the former President from the Republican primary ballot in the State and to disregard any write-in votes that Colorado voters might cast for him.

Former President Trump challenges that decision on several grounds. Because the Constitution makes Congress, rather than the States, responsible for enforcing Section 3 against federal officeholders and candidates, we reverse.

I

Last September, about six months before the March 5, 2024, Colorado primary election, four Republican and two unaffiliated Colorado voters filed a petition against former President Trump and Colorado Secretary of State Jena Griswold in Colorado state court. These voters—whom we refer to as the respondents—contend that after former President Trump's defeat in the 2020 Presidential election, he disrupted the peaceful transfer of power by intentionally organizing and inciting the crowd that breached the Capitol as Congress met to certify the election results on January 6, 2021. One consequence of those actions, the respondents maintain, is that former President Trump is constitutionally ineligible to serve as President again.

Their theory turns on Section 3 of the Fourteenth Amendment. Section 3 provides:

> "No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the ***107** Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability."

According to the respondents, Section 3 applies to the former President because after taking the Presidential oath in 2017, he intentionally incited the breaching of the Capitol on January 6 in order to retain power. They claim that he is therefore not a qualified candidate, and that as a result, the Colorado secretary of state may not place him on the primary ballot. See Colo. Rev. Stat. §§ 1–1–113(1), 1–4–1101(1), 1–4–1201, 1–4–1203(2)(a), 1–4–1204 (2023).

After a five-day trial, the state District Court found that former President Trump had "engaged in insurrection" within the meaning of Section 3, but nonetheless denied the respondents' petition. The court held that Section 3 did not apply because the Presidency, which Section 3 does not mention by name, is not an "office ... under the United States" and the President is not an "officer of the United States" within the meaning of that provision. See App. to Pet. for Cert. 184a–284a.

In December, the Colorado Supreme Court reversed in part and affirmed in part by a 4 to 3 vote. Reversing the District

Court's operative holding, the majority concluded that for purposes of Section 3, the Presidency is an office under the United States and the President is an officer of the United States. The court otherwise affirmed, holding (1) that the Colorado Election Code permitted the respondents' challenge based on Section 3; (2) that Congress need not pass implementing legislation for disqualifications under Section 3 to attach; (3) that the political question doctrine did not preclude judicial review of former President Trump's eligibility; (4) that the District Court did not abuse its discretion in admitting ****666** into evidence portions of a congressional Report on the events of January 6; (5) that the District Court ***108** did not err in concluding that those events constituted an "insurrection" and that former President Trump "engaged in" that insurrection; and (6) that former President Trump's speech to the crowd that breached the Capitol on January 6 was not protected by the First Amendment. See *id.*, at 1a–114a.

The Colorado Supreme Court accordingly ordered Secretary Griswold not to "list President Trump's name on the 2024 presidential primary ballot" or "count any write-in votes cast for him." *Id.*, at 114a. Chief Justice Boatright and Justices Samour and Berkenkotter each filed dissenting opinions. *Id.*, at 115a–124a, 125a–161a, 162a–183a.

Under the terms of the opinion of the Colorado Supreme Court, its ruling was automatically stayed pending this Court's review. See *id.*, at 114a. We granted former President Trump's petition for certiorari, which raised a single question: "Did the Colorado Supreme Court err in ordering President Trump excluded from the 2024 presidential primary ballot?" See 601 U. S. ——, 144 S.Ct. 662, —— L.Ed.2d —— (2024). Concluding that it did, we now reverse.

II

A

Proposed by Congress in 1866 and ratified by the States in 1868, the Fourteenth Amendment "expand[ed] federal power at the expense of state autonomy" and thus "fundamentally altered the balance of state and federal power struck by the Constitution." *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 59, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996); see also *Ex parte Virginia*, 100 U.S. 339, 345, 25 L.Ed. 676 (1880). Section 1 of the Amendment, for instance, bars the States from "depriv[ing] any person of life, liberty, or property, without due process of law" or "deny[ing] to any person ... the equal protection of the laws." And Section 5 confers on Congress "power to enforce" those prohibitions, along with the other provisions of the Amendment, "by appropriate legislation."

***109** Section 3 of the Amendment likewise restricts state autonomy, but through different means. It was designed to help ensure an enduring Union by preventing former Confederates from returning to power in the aftermath of the Civil War. See, *e.g.*, Cong. Globe, 39th Cong., 1st Sess., 2544 (1866) (statement of Rep. Stevens, warning that without appropriate constitutional reforms "yelling secessionists and hissing copperheads" would take seats in the House); *id.*, at 2768 (statement of Sen. Howard, lamenting prospect of a "State Legislature ... made up entirely of disloyal elements" absent a disqualification provision). Section 3 aimed to prevent such a resurgence by barring from office "those who, having once taken an oath to support the Constitution of the United States, afterward went into rebellion against the Government of the United States." Cong. Globe, 41st Cong., 1st Sess., 626 (1869) (statement of Sen. Trumbull).

Section 3 works by imposing on certain individuals a preventive and severe penalty—disqualification from holding a wide array of offices—rather than by granting rights to all. It is therefore necessary, as Chief Justice Chase concluded and the Colorado Supreme Court itself recognized, to " 'ascertain[ ] what particular individuals are embraced' " by the provision. App. to Pet. for Cert. 53a (quoting *Griffin's Case*, 11 F.Cas. 7, 26 (No. 5,815) (CC Va. 1869) (Chase, Circuit Justice)). Chase went on to explain that "[t]o accomplish ****667** this ascertainment and ensure effective results, proceedings, evidence, decisions, and enforcements of decisions, more or less formal, are indispensable." *Id.*, at 26. For its part, the Colorado Supreme Court also concluded that there must be some kind of "determination" that Section 3 applies to a particular person "before the disqualification holds meaning." App. to Pet. for Cert. 53a.

The Constitution empowers Congress to prescribe how those determinations should be made. The relevant provision is

Section 5, which enables Congress, subject of course to judicial review, to pass "appropriate legislation" to "enforce" ***110** the Fourteenth Amendment. See *City of Boerne v. Flores*, 521 U.S. 507, 536, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997). Or as Senator Howard put it at the time the Amendment was framed, Section 5 "casts upon Congress the responsibility of seeing to it, for the future, that all the sections of the amendment are carried out in good faith." Cong. Globe, 39th Cong., 1st Sess., at 2768.

Congress's Section 5 power is critical when it comes to Section 3. Indeed, during a debate on enforcement legislation less than a year after ratification, Sen. Trumbull noted that "notwithstanding [Section 3] ... hundreds of men [were] holding office" in violation of its terms. Cong. Globe, 41st Cong., 1st Sess., at 626. The Constitution, Trumbull noted, "provide[d] no means for enforcing" the disqualification, necessitating a "bill to give effect to the fundamental law embraced in the Constitution." *Ibid.* The enforcement mechanism Trumbull championed was later enacted as part of the Enforcement Act of 1870, "pursuant to the power conferred by § 5 of the [Fourteenth] Amendment." *General Building Contractors Assn., Inc. v. Pennsylvania*, 458 U.S. 375, 385, 102 S.Ct. 3141, 73 L.Ed.2d 835 (1982); see 16 Stat. 143–144.

B

This case raises the question whether the States, in addition to Congress, may also enforce Section 3. We conclude that States may disqualify persons holding or attempting to hold *state* office. But States have no power under the Constitution to enforce Section 3 with respect to federal offices, especially the Presidency.

"In our federal system, the National Government possesses only limited powers; the States and the people retain the remainder." *Bond v. United States*, 572 U.S. 844, 854, 134 S.Ct. 2077, 189 L.Ed.2d 1 (2014). Among those retained powers is the power of a State to "order the processes of its own governance." *Alden v. Maine*, 527 U.S. 706, 752, 119 S.Ct. 2240, 144 L.Ed.2d 636 (1999). In particular, the States enjoy sovereign "power to prescribe the qualifications of their own officers" and "the manner of their election ... ***111** free from external interference, except so far as plainly provided by the Constitution of the United States." *Taylor v. Beckham*, 178 U. S. 548, 570–571, 20 S.Ct. 890, 44 L.Ed. 1187 (1900). Although the Fourteenth Amendment restricts state power, nothing in it plainly withdraws from the States this traditional authority. And after ratification of the Fourteenth Amendment, States used this authority to disqualify state officers in accordance with state statutes. See, *e.g.*, *Worthy v. Barrett*, 63 N.C. 199, 200, 204 (1869) (elected county sheriff); *State ex rel. Sandlin v. Watkins*, 21 La.Ann. 631, 631–633 (1869) (state judge).

Such power over governance, however, does not extend to *federal* officeholders and candidates. Because federal officers " 'owe their existence and functions to the united voice of the whole, not of a ****668** portion, of the people,' " powers over their election and qualifications must be specifically "delegated to, rather than reserved by, the States." *U. S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 803–804, 115 S.Ct. 1842, 131 L.Ed.2d 881 (1995) (quoting 1 J. Story, Commentaries on the Constitution of the United States § 627, p. 435 (3d ed. 1858)). But nothing in the Constitution delegates to the States any power to enforce Section 3 against federal officeholders and candidates.

As an initial matter, not even the respondents contend that the Constitution authorizes States to somehow remove *sitting* federal officeholders who may be violating Section 3. Such a power would flout the principle that "the Constitution guarantees 'the entire independence of the General Government from any control by the respective States.' " *Trump v.Vance*, 591 U. S. 786, 800, 140 S.Ct. 2412, 207 L.Ed.2d (2020) (quoting *Farmers and Mechanics Sav. Bank of Minneapolis v. Minnesota*, 232 U.S. 516, 521, 34 S.Ct. 354, 58 L.Ed. 706 (1914)). Indeed, consistent with that principle, States lack even the lesser powers to issue writs of mandamus against federal officials or to grant habeas corpus relief to persons in federal custody. See *McClung v. Silliman*, 6 Wheat. 598, 603–605 (1821); *Tarble's Case*, 13 Wall. 397, 405–410 (1872).

***112** The respondents nonetheless maintain that States may enforce Section 3 against *candidates* for federal office. But the text of the Fourteenth Amendment, on its face, does not affirmatively delegate such a power to the States. The terms of the Amendment speak only to enforcement by Congress, which enjoys power to enforce the Amendment through legislation pursuant to Section 5.

This can hardly come as a surprise, given that the substantive provisions of the Amendment "embody significant limitations

on state authority." *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456, 96 S.Ct. 2666, 49 L.Ed.2d 614 (1976). Under the Amendment, States cannot abridge privileges or immunities, deprive persons of life, liberty, or property without due process, deny equal protection, or deny male inhabitants the right to vote (without thereby suffering reduced representation in the House). See Amdt. 14, §§ 1, 2. On the other hand, the Fourteenth Amendment grants new power to Congress to enforce the provisions of the Amendment against the States. It would be incongruous to read this particular Amendment as granting the States the power—silently no less—to disqualify a candidate for federal office.

The only other plausible constitutional sources of such a delegation are the Elections and Electors Clauses, which authorize States to conduct and regulate congressional and Presidential elections, respectively. See Art. I, § 4, cl. 1; Art. II, § 1, cl. 2.[1] But there is little reason to think that these Clauses implicitly authorize the States to enforce Section 3 against federal officeholders and candidates. Granting the States that authority would invert the Fourteenth Amendment's rebalancing of federal and state power.

***113** The text of Section 3 reinforces these conclusions. Its final sentence empowers Congress to "remove" any Section 3 "disability" by a two-thirds vote of each house. The text imposes no limits on that ****669** power, and Congress may exercise it any time, as the respondents concede. See Brief for Respondents 50. In fact, historically, Congress sometimes exercised this amnesty power postelection to ensure that some of the people's chosen candidates could take office.[2] But if States were free to enforce Section 3 by barring candidates from running in the first place, Congress would be forced to exercise its disability removal power before voting begins if it wished for its decision to have any effect on the current election cycle. Perhaps a State may burden congressional authority in such a way when it exercises its "exclusive" sovereign power over its own state offices. *Taylor*, 178 U. S., at 571, 20 S.Ct. 890. But it is implausible to suppose that the Constitution affirmatively delegated to the States the authority to impose such a burden on congressional power with respect to candidates for federal office. Cf. *McCulloch v. Maryland*, 4 Wheat. 316 (1819) ("States have no power ... to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress").

Nor have the respondents identified any tradition of state enforcement of Section 3 against federal officeholders or candidates in the years following ratification of the Fourteenth Amendment.[3] Such a lack of historical precedent is generally ***114** a " 'telling indication' " of a " 'severe constitutional problem' " with the asserted power. *United States v. Texas*, 599 U.S. 670, 677, 143 S.Ct. 1964, 216 L.Ed.2d 624 (2023) (quoting *Free Enterprise Fund v. Public Company Accounting Oversight Bd.*, 561 U.S. 477, 505, 130 S.Ct. 3138, 177 L.Ed.2d 706 (2010)). And it is an especially telling sign here, because as noted, States *did* disqualify persons from holding state offices following ratification of the Fourteenth Amendment. That pattern of disqualification with respect to state, but not federal offices provides "persuasive evidence of a general understanding" that the States lacked enforcement power with respect to the latter. *U. S. Term Limits*, 514 U.S. at 826, 115 S.Ct. 1842.

Instead, it is Congress that has long given effect to Section 3 with respect to would-be or existing federal officeholders. Shortly after ratification of the Amendment, Congress enacted the Enforcement Act of 1870. That Act authorized federal district attorneys to bring civil actions in federal court to remove anyone holding nonlegislative office—federal or state—in violation of Section 3, and made holding or attempting to hold office in violation of Section 3 a federal crime. §§ 14, 15, 16 Stat. 143–144 (repealed, 35 Stat. 1153–1154, 62 Stat. 992–993). In the years following ratification, the House and Senate exercised their unique powers under Article I to adjudicate challenges contending ****670** that certain prospective or sitting Members could not take or retain their seats due to Section 3. See Art. I, § 5, cls. 1, 2; 1 A. Hinds, Precedents of the House of Representatives §§ 459–463, pp. 470–486 (1907). And the Confiscation Act of 1862, which predated Section 3, effectively provided an additional procedure for enforcing disqualification. That law made engaging in insurrection or rebellion, among other acts, a federal ***115** crime punishable by disqualification from holding office under the United States. See §§ 2, 3, 12 Stat. 590. A successor to those provisions remains on the books today. See 18 U.S.C. § 2383.

Moreover, permitting state enforcement of Section 3 against federal officeholders and candidates would raise serious questions about the scope of that power. Section 5 limits *congressional* legislation enforcing Section 3, because Section 5 is strictly "remedial." *City of Boerne*, 521 U.S. at 520, 117 S.Ct. 2157. To comply with that limitation, Congress "must tailor its legislative scheme to remedying or preventing" the specific conduct the relevant provision prohibits. *Florida Prepaid Postsecondary Ed. Expense Bd. v. College Savings Bank*, 527 U.S. 627, 639, 119 S.Ct. 2199, 144 L.Ed.2d 575 (1999). Section 3, unlike other provisions of the Fourteenth Amendment, proscribes conduct of individuals. It bars persons from holding office after taking a qualifying oath and then engaging in insurrection or rebellion—nothing more. Any congressional legislation enforcing Section 3 must, like the Enforcement Act of 1870 and § 2383, reflect "congruence and proportionality" between preventing or remedying that conduct "and the means adopted to that end." *City of Boerne*, 521 U.S. at 520, 117

S.Ct. 2157. Neither we nor the respondents are aware of any other legislation by Congress to enforce Section 3. See Tr. of Oral Arg. 123.

Any state enforcement of Section 3 against federal officeholders and candidates, though, would not derive from Section 5, which confers power only on "[t]he Congress." As a result, such state enforcement might be argued to sweep more broadly than congressional enforcement could under our precedents. But the notion that the Constitution grants the States freer rein than Congress to decide how Section 3 should be enforced with respect to federal offices is simply implausible.

Finally, state enforcement of Section 3 with respect to the Presidency would raise heightened concerns. "[I]n the context ***116** of a Presidential election, state-imposed restrictions implicate a uniquely important national interest." *Anderson v. Celebrezze*, 460 U.S. 780, 794–795, 103 S.Ct. 1564, 75 L.Ed.2d 547 (1983) (footnote omitted). But state-by-state resolution of the question whether Section 3 bars a particular candidate for President from serving would be quite unlikely to yield a uniform answer consistent with the basic principle that "the President ... represent[s] *all* the voters in the Nation." *Id.*, at 795, 103 S.Ct. 1564 (emphasis added).

Conflicting state outcomes concerning the same candidate could result not just from differing views of the merits, but from variations in state law governing the proceedings that are necessary to make Section 3 disqualification determinations. Some States might allow a Section 3 challenge to succeed based on a preponderance of the evidence, while others might require a heightened showing. Certain evidence (like the congressional Report on which the lower courts relied here) might be admissible in some States but inadmissible hearsay in others. Disqualification might be possible only through criminal prosecution, as opposed to expedited civil proceedings, in particular States. Indeed, in some States—unlike Colorado (or Maine, where ****671** the secretary of state recently issued an order excluding former President Trump from the primary ballot)—procedures for excluding an ineligible candidate from the ballot may not exist at all. The result could well be that a single candidate would be declared ineligible in some States, but not others, based on the same conduct (and perhaps even the same factual record).

The "patchwork" that would likely result from state enforcement would "sever the direct link that the Framers found so critical between the National Government and the people of the United States" as a whole. *U. S. Term Limits*, 514 U.S. at 822, 115 S.Ct. 1842. But in a Presidential election "the impact of the votes cast in each State is affected by the votes cast"—or, in this case, the votes not allowed to be cast—"for the various candidates in other States." *Anderson*, 460 U.S. at 795, 103 S.Ct. 1564. An evolving electoral map could dramatically change the behavior of voters, parties, and States across the country, ***117** in different ways and at different times. The disruption would be all the more acute—and could nullify the votes of millions and change the election result—if Section 3 enforcement were attempted after the Nation has voted. Nothing in the Constitution requires that we endure such chaos—arriving at any time or different times, up to and perhaps beyond the Inauguration.

* * *

For the reasons given, responsibility for enforcing Section 3 against federal officeholders and candidates rests with Congress and not the States. The judgment of the Colorado Supreme Court therefore cannot stand.

All nine Members of the Court agree with that result. Our colleagues writing separately further agree with many of the reasons this opinion provides for reaching it. See *post*, Part I (joint opinion of SOTOMAYOR, KAGAN, and JACKSON, JJ.); see also *post*, pp. 671 – 672 (opinion of BARRETT, J.). So far as we can tell, they object only to our taking into account the distinctive way Section 3 works and the fact that Section 5 vests *in Congress* the power to enforce it. These are not the only reasons the States lack power to enforce this particular constitutional provision with respect to federal offices. But they are important ones, and it is the combination of all the reasons set forth in this opinion—not, as some of our colleagues would have it, just one particular rationale—that resolves this case. In our view, each of these reasons is necessary to provide a complete explanation for the judgment the Court unanimously reaches.

The judgment of the Colorado Supreme Court is reversed.

The mandate shall issue forthwith.

It is so ordered.

Justice BARRETT, concurring in part and concurring in the judgment.

I join Parts I and II–B of the Court's opinion. I agree that States lack the power to enforce Section 3 against Presidential ***118** candidates. That principle is sufficient to resolve this case, and I would decide no more than that. This suit was brought by Colorado voters under state law in state court. It does not require us to address the complicated question whether federal legislation is the exclusive vehicle through which Section 3 can be enforced.

The majority's choice of a different path leaves the remaining Justices with a choice of how to respond. In my judgment, this is not the time to amplify disagreement with stridency. The Court has settled a politically charged issue in the volatile season of a Presidential election. Particularly in this circumstance, writings on the Court should turn the national temperature down, not up. For present purposes, our differences ****672** are far less important than our unanimity: All nine Justices agree on the outcome of this case. That is the message Americans should take home.

Justice SOTOMAYOR, Justice KAGAN, and Justice JACKSON, concurring in the judgment.

"If it is not necessary to decide more to dispose of a case, then it is necessary *not* to decide more." *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215, 348, 142 S.Ct. 2228, 213 L.Ed.2d 545 (2022) (ROBERTS, C. J., concurring in judgment). That fundamental principle of judicial restraint is practically as old as our Republic. This Court is authorized "to say what the law is" only because "[t]hose who apply [a] rule to particular cases ... must of *necessity* expound and interpret that rule." *Marbury v. Madison*, 5 U.S. 1 Cranch 137, 2 L.Ed. 60 (1803) (emphasis added).

Today, the Court departs from that vital principle, deciding not just this case, but challenges that might arise in the future. In this case, the Court must decide whether Colorado may keep a Presidential candidate off the ballot on the ground that he is an oathbreaking insurrectionist and thus disqualified from holding federal office under Section 3 of the Fourteenth Amendment. Allowing Colorado to do so would, ***119** we agree, create a chaotic state-by-state patchwork, at odds with our Nation's federalism principles. That is enough to resolve this case. Yet the majority goes further. Even though "[a]ll nine Members of the Court" agree that this independent and sufficient rationale resolves this case, five Justices go on. They decide novel constitutional questions to insulate this Court and petitioner from future controversy. *Ante,* at 671. Although only an individual State's action is at issue here, the majority opines on which federal actors can enforce Section 3, and how they must do so. The majority announces that a disqualification for insurrection can occur only when Congress enacts a particular kind of legislation pursuant to Section 5 of the Fourteenth Amendment. In doing so, the majority shuts the door on other potential means of federal enforcement. We cannot join an opinion that decides momentous and difficult issues unnecessarily, and we therefore concur only in the judgment.

I

Our Constitution leaves some questions to the States while committing others to the Federal Government. Federalism principles embedded in that constitutional structure decide this case. States cannot use their control over the ballot to "undermine the National Government." *U. S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 810, 115 S.Ct. 1842, 131 L.Ed.2d 881 (1995). That danger is even greater "in the context of a Presidential election." *Anderson v. Celebrezze*, 460 U.S. 780, 794–795, 103 S.Ct. 1564, 75 L.Ed.2d 547 (1983). State restrictions in that context "implicate a uniquely important national interest" extending beyond a State's "own borders." *Ibid.* No doubt, States have significant "authority over presidential

electors" and, in turn, Presidential elections. *Chiafalo v.Washington*, 591 U. S. 578, 588, 140 S.Ct. 2316, 207 L.Ed.2d 761 (2020). That power, however, is limited by "other constitutional constraint[s]," including federalism principles. *Id*., at 589.

The majority rests on such principles when it explains why Colorado cannot take Petitioner off the ballot. "[S]tate-by-state ***120** resolution of the question whether Section 3 bars a particular candidate for President from serving," the majority explains, "would be quite unlikely to yield a uniform answer consistent with the basic principle that 'the President ... represent[s] *all* the ****673** voters in the Nation.' " *Ante*, at 670 (quoting *Anderson*, 460 U.S. at 795, 103 S.Ct. 1564). That is especially so, the majority adds, because different States can reach "[c]onflicting ... outcomes concerning the same candidate ... not just from differing views of the merits, but from variations in state law governing the proceedings" to enforce Section 3. *Ante*, at 670.

The contrary conclusion that a handful of officials in a few States could decide the Nation's next President would be especially surprising with respect to Section 3. The Reconstruction Amendments "were specifically designed as an expansion of federal power and an intrusion on state sovereignty." *City of Rome v. United States*, 446 U.S. 156, 179, 100 S.Ct. 1548, 64 L.Ed.2d 119 (1980). Section 3 marked the first time the Constitution placed substantive limits on a State's authority to choose its own officials. Given that context, it would defy logic for Section 3 to give States new powers to determine who may hold the Presidency. Cf. *ante*, at 668 ("It would be incongruous to read this particular Amendment as granting the States the power—silently no less—to disqualify a candidate for federal office").

That provides a secure and sufficient basis to resolve this case. To allow Colorado to take a presidential candidate off the ballot under Section 3 would imperil the Framers' vision of "a Federal Government directly responsible to the people." *U. S. Term Limits*, 514 U.S. at 821, 115 S.Ct. 1842. The Court should have started and ended its opinion with this conclusion.

II

Yet the Court continues on to resolve questions not before us. In a case involving no federal action whatsoever, the ***121** Court opines on how federal enforcement of Section 3 must proceed. Congress, the majority says, must enact legislation under Section 5 prescribing the procedures to " ' "ascertain[ ] what particular individuals" ' " should be disqualified. *Ante*, at 666 (quoting *Griffin's Case*, 11 F.Cas. 7, 26 (No. 5,815) (CC Va. 1869) (Chase, Circuit Justice)). These musings are as inadequately supported as they are gratuitous.

To start, nothing in Section 3's text supports the majority's view of how federal disqualification efforts must operate. Section 3 states simply that "[n]o person shall" hold certain positions and offices if they are oathbreaking insurrectionists. Amdt. 14. Nothing in that unequivocal bar suggests that implementing legislation enacted under Section 5 is "critical" (or, for that matter, what that word means in this context). *Ante*, at 666 – 667. In fact, the text cuts the opposite way. Section 3 provides that when an oathbreaking insurrectionist is disqualified, "Congress may by a vote of two-thirds of each House, remove such disability." It is hard to understand why the Constitution would require a congressional supermajority to remove a disqualification if a simple majority could nullify Section 3's operation by repealing or declining to pass implementing legislation. Even petitioner's lawyer acknowledged the "tension" in Section 3 that the majority's view creates. See Tr. of Oral Arg. 31.

Similarly, nothing else in the rest of the Fourteenth Amendment supports the majority's view. Section 5 gives Congress the "power to enforce [the Amendment] by appropriate legislation." Remedial legislation of any kind, however, is not required. All the Reconstruction Amendments (including the due process and equal protection guarantees and prohibition of slavery) "are self-executing," meaning that they do not depend on legislation. *City of Boerne v. Flores*, 521 U.S. 507, 524, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997); see *Civil Rights Cases*, 109 U.S. 3, 20, 3 S.Ct. 18, 27 L.Ed. 835 (1883). Similarly, other constitutional ****674** rules of disqualification, like the two-term limit on the Presidency, do not require ***122** implementing legislation. See, *e.g.*, Art. II, § 1, cl. 5 (Presidential Qualifications); Amdt. 22 (Presidential Term Limits). Nor does the majority suggest otherwise. It simply creates a special rule for the insurrection disability in Section 3.

The majority is left with next to no support for its requirement that a Section 3 disqualification can occur only pursuant to legislation enacted for that purpose. It cites *Griffin's Case*, but that is a nonprecedential, lower court opinion by a single Justice in his capacity as a circuit judge. See *ante*, at 666 – 667 (quoting 11 F.Cas. at 26). Once again, even petitioner's lawyer distanced himself from fully embracing this case as probative of Section 3's meaning. See Tr. of Oral Arg. 35–36. The majority also cites Senator Trumbull's statements that Section 3 " 'provide[d] no means for enforcing' " itself. *Ante*, at 667 (quoting Cong. Globe, 41st Cong., 1st Sess., 626 (1869)). The majority, however, neglects to mention the Senator's view that "[i]t is the [F]ourteenth [A]mendment that prevents a person from holding office," with the proposed legislation simply "affor[ding] a more efficient and speedy remedy" for effecting the disqualification. Cong. Globe, 41st Cong., 1st Sess., at 626–627.

Ultimately, under the guise of providing a more "complete explanation for the judgment," *ante,* at 671, the majority resolves many unsettled questions about Section 3. It forecloses judicial enforcement of that provision, such as might occur when a party is prosecuted by an insurrectionist and raises a defense on that score. The majority further holds that any legislation to enforce this provision must prescribe certain procedures " 'tailor[ed]' " to Section 3, *ante,* at 669 – 670, ruling out enforcement under general federal statutes requiring the government to comply with the law. By resolving these and other questions, the majority attempts to insulate all alleged insurrectionists from future challenges to their holding federal office.

***123**
* * *

"What it does today, the Court should have left undone." *Bush v. Gore*, 531 U.S. 98, 158, 121 S.Ct. 525, 148 L.Ed.2d 388 (2000) (BREYER, J., dissenting). The Court today needed to resolve only a single question: whether an individual State may keep a Presidential candidate found to have engaged in insurrection off its ballot. The majority resolves much more than the case before us. Although federal enforcement of Section 3 is in no way at issue, the majority announces novel rules for how that enforcement must operate. It reaches out to decide Section 3 questions not before us, and to foreclose future efforts to disqualify a Presidential candidate under that provision. In a sensitive case crying out for judicial restraint, it abandons that course.

Section 3 serves an important, though rarely needed, role in our democracy. The American people have the power to vote for and elect candidates for national office, and that is a great and glorious thing. The men who drafted and ratified the Fourteenth Amendment, however, had witnessed an "insurrection [and] rebellion" to defend slavery. § 3. They wanted to ensure that those who had participated in that insurrection, and in possible future insurrections, could not return to prominent roles. Today, the majority goes beyond the necessities of this case to limit how Section 3 can bar an oathbreaking insurrectionist from becoming President. Although we agree that Colorado cannot enforce Section 3, we protest the majority's effort to use this case to define the limits of federal enforcement of that provision. Because we would decide only the ****675** issue before us, we concur only in the judgment.

All Citations

601 U.S. 100, 144 S.Ct. 662, 218 L.Ed.2d 1, 2024 Daily Journal D.A.R. 1887, 30 Fla. L. Weekly Fed. S 53

Footnotes

1 The Elections Clause directs, in relevant part, that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof." Art. I, § 4, cl. 1. The Electors Clause similarly provides that "[e]ach State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors," who in turn elect the President. Art. II, § 1, cl. 2.

2 Shortly after the Fourteenth Amendment was ratified, for instance, Congress enacted a private bill to remove the Section 3 disability of Nelson Tift of Georgia, who had recently been elected to represent the State in Congress. See ch. 393, 15 Stat. 427. Tift took his seat in Congress immediately thereafter. See Cong. Globe, 40th Cong., 2d Sess., 4499–4500 (1868). Congress similarly acted postelection to remove the disabilities of persons elected to state and local offices. See Cong. Globe, 40th Cong., 3d

Sess., 29–30, 120–121 (1868); ch. 5, 15 Stat. 435–436.

[3] We are aware of just one example of state enforcement against a would-be federal officer. In 1868, the Governor of Georgia refused to commission John Christy, who had won the most votes in a congressional election, because—in the Governor's view—Section 3 made Christy ineligible to serve. But the Governor's determination was not final; a committee of the House reviewed Christy's qualifications itself and recommended that he not be seated. The full House never acted on the matter, and Christy was never seated. See 1 A. Hinds, Precedents of the House of Representatives § 459, pp. 470–472 (1907).

65 N.Y.2d 344
Court of Appeals of New York.

UNDER 21, Catholic Home Bureau for Dependent Children, et al., Appellants,
v.
CITY OF NEW YORK et al., Respondents.
SALVATION ARMY, Appellant,
v.
Edward I. KOCH, as Mayor of the City of New York, et al., Respondents.
AGUDATH ISRAEL OF AMERICA, Appellant,
v.
CITY OF NEW YORK et al., Respondents.

June 28, 1985.

Synopsis
Three actions were brought challenging validity of mayor's executive order forbidding those who secure contracts with city from refusing to hire people simply on the basis of sexual orientation or affectional preference. Defendants appealed from so much of three orders and judgments of the New York County Supreme Court, Alvin F. Klein, J., as granted each of plaintiffs' motions for summary judgment. The Supreme Court, Appellate Division, Asch, J., 108 A.D.2d 250, 488 N.Y.S. 2d 669, modified judgments, and appeal was taken. The Court of Appeals, Wachtler, C.J., held that the mayor had no authority to initiate policy.

Order of appellate division modified.

Meyer, J., filed a dissenting opinion.

Attorneys and Law Firms

***345 ***523 **2** John P. Hale, New York City, and Patrick B. Silva, for appellants in the first above-entitled action.

***346** Joseph Polizzotto, William J. Moss, Edward P. O'Keefe and William D. Smith, New York City, for appellant in the second above-entitled action.

***347** David Zwiebel and Aaron Twerski, New York City, for appellant in the third above-entitled action.

Frederick A.O. Schwarz, Jr., Corp. Counsel, New York City (Alfred Weinstein, Dennis deLeon, Michael S. Adler and Paul Rephen, New York City, of counsel), for respondents in the first, second and third above-entitled actions.

***348** Nathan Lewin, Washington, D.C., and Dennis Rapps, New York City, for the National Jewish Commission on Law and Public Affairs, amicus curiae. I. The practice and toleration of homosexuality is condemned by Jewish religious law.

***349** David L. Benetar and Stanley Schair, New York City, for The New York Chamber of Commerce and Industry, amicus curiae.

Gregory K. Hiestand, Joy D. Oberman, Robert E. Williams, New York City, Douglas S. McDowell and Lorence L. Kessler for The Equal Employment Advisory Council, amicus curiae.

***350** Robert Abrams, Atty. Gen., Albany (Robert Hermann, O. Peter Sherwood, Albany, Rosemarie Rhodes, Lawrence S.

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***352** Richard E. Feldman, New York City, for Lambda Legal Defense and Education Fund, Inc., amicus curiae.

***353 OPINION OF THE COURT**

WACHTLER, Chief Judge.

The question on this appeal is whether the Mayor of the City of New York has the authority to promulgate an Executive Order prohibiting employment discrimination by city contractors on the basis of "sexual orientation or affectional preference." The Appellate Division held that the Mayor had this power. We disagree and hold that because of the separation of powers delineated in the City Charter, the Mayor has no authority to initiate such a policy.

*****524** I.

On April 25, 1980, the Mayor of the City of New York issued Executive Order No. 50 "to ensure compliance with the equal ****3** employment opportunity requirements of City, State and Federal law in City contracting" (Executive Order No. 50 § 1). The Executive Order applies to virtually every contract with the city, and requires that those entering into such contracts agree to ensure "equal employment opportunity" in all of their employment decisions. "Equal employment opportunity," as defined in section 3(i) of the order, includes not discriminating on the basis of "sexual orientation or affectional preference," terms which all parties agree refer to a person being homosexual or bisexual rather than heterosexual. The order provides that the Mayor's Bureau of Labor Services has the responsibility to implement, monitor compliance with, and enforce these equal employment requirements.

Pursuant to this grant of authority, the Bureau of Labor Services promulgated regulations, effective January 21, 1982, which require that specific language implementing Executive Order No. 50 be inserted into contracts with the city. In the required language, a contractor agrees, among other things, not to discriminate in any employment decision on the basis of "sexual orientation or affectional preference" and to state that condition in all solicitations or advertisements for employees.

Agudath Israel and the Salvation Army, the plaintiffs in two of three actions consolidated on appeal, are not-for-profit religious and charitable corporations. Both have annual contracts with the city, pursuant to which they provide social services ***354** such as day care facilities, counseling services, and senior citizen centers, and the city pays a portion of the costs of such services. The plaintiffs in the third action (the "Under 21" action) are not-for-profit corporations under the sponsorship of the Roman Catholic Archdiocese of New York, and they too provide social service programs partially funded through annual contracts with the city.

The plaintiffs in all three actions object on religious grounds to signing a contract in which they would agree not to discriminate on the basis of "sexual orientation or affectional preference," and have advised the city that they will not sign any contracts which contain such a condition. The city, in turn, has notified the plaintiffs that the contracts for the services they provide will not be renewed unless plaintiffs are in full compliance with Executive Order No. 50 and the Bureau of Labor Services' regulations promulgated thereunder, including the provision for insertion of the objected-to language into all the contracts.

Faced with the expiration of their contracts, plaintiffs brought three separate actions, each seeking a declaration that the portion of Executive Order No. 50 pertaining to "sexual orientation or affectional preference" is beyond the scope of the Mayor's authority, and thus void, and a permanent injunction against enforcement of this part of the order and the regulations implementing it.[1]

The plaintiffs in all three actions moved for summary judgment, and the motions were referred to the same Justice at Special Term. Special Term held that the challenged portion of Executive Order No. 50 was an impermissible usurpation of legislative ***525** power by Mayor Koch, and, in three separate judgments, declared that portion unlawful and permanently enjoined the city and the Mayor from enforcing it.

***355** **4** The Appellate Division consolidated the three appeals by the defendants,[2] and in a split decision, disagreed with Special Term's conclusion that the Mayor had exceeded his authority insofar as Executive Order No. 50 related to "sexual orientation or affectional preference". Rejecting the separation of powers concerns expressed by Special Term and the dissenting Justice at the Appellate Division, the majority at the Appellate Division characterized those principles as "vestigial relics * * * relied upon for State court holdings in fewer and fewer desultory cases", and concluded that the Mayor "did no more than make express the policies and principles [of equal protection] already firmly embedded in our State and Federal Constitutions." (108 A.D.2d 250 at pp. 258–259, 488 N.Y.S.2d 669.) Upon "search of the record," the Appellate Division granted defendants summary judgment declaring Executive Order No. 50 and the regulations promulgated thereunder constitutional and valid.[3]

II.

The plaintiffs' contention that the Mayor lacked the authority to proscribe discrimination by city contractors on the basis of "sexual orientation or affectional preference" is a facial attack on this portion of Executive Order No. 50, and our resolution of the case does not depend on the status of the plaintiffs as religious organizations. Nor do we decide today the extent to which New York City may regulate the employment practices of those with whom it does business. Rather, the sole issue we address is the extent of the authority in this area of the chief executive officer of the city, the Mayor, and specifically, whether the executive may forbid discrimination by city contractors on a ground not covered by any legislative enactment.

One of the fundamental principles of government underlying our Federal Constitution is the distribution of governmental power into three branches—the executive, legislative and judicial—to prevent too strong a concentration of authority in one person or body (*see, Youngstown Co. v. Sawyer,* 343 U.S. 579, 72 S.Ct. 863, 96 L.Ed. 1153; *id.,* at pp. 634, 635, 72 S.Ct. at pp. 869, 870 [Jackson, J., concurring]; 1 Story, Commentaries on the Constitution § 525 [5th ed.]). We have consistently recognized that this principle of separation of powers among the three branches is included by implication in the pattern of ***356** government adopted by the State of New York (*see, e.g., Matter of LaGuardia v. Smith,* 288 N.Y. 1, 5–6, 41 N.E.2d 153; *Matter of County of Oneida v. Berle,* 49 N.Y.2d 515, 522, 427 N.Y.S.2d 407, 404 N.E.2d 133), and, contrary to the Appellate Division's characterization of the doctrine as a "vestigial relic," we have very recently unanimously reaffirmed its continuing vitality (*see, Subcontractors Trade Assn. v. Koch,* 62 N.Y.2d 422, 427, 477 N.Y.S.2d 120, 465 N.E.2d 840). While the doctrine of separation of powers does not require the maintenance of " 'three airtight departments of government' " (*Nixon v. Administrator of Gen. Servs.,* 433 U.S. 425, 443, 97 S.Ct. 2777, 2790, 53 L.Ed.2d 867; 1 Story, Commentaries on the Constitution § 525, *supra*), it does require that no one branch be allowed to arrogate unto itself powers residing entirely in another branch (*Youngstown Co. v. Sawyer, supra; Matter of Nicholas v. Kahn,* 47 N.Y.2d 24, 30–31, 416 N.Y.S.2d 565, 389 N.E.2d 1086).

Of course, the pattern of government established for New York City by the City Charter is not identical to that of the United States or the State of New York. Still, the City Charter does provide for distinct legislative and executive branches: the ***526** City Council "shall be vested with the legislative power of the city, and shall be the local legislative body of the city" (New York City Charter, ch. 2, § 21), while the Mayor "shall be the chief executive officer **5** of the city" (*id.,* ch. 1, § 3). Thus, our prior decisions have held that, no matter how well-intentioned his actions may be, the Mayor may not unlawfully infringe upon the legislative powers reserved to the City Council (*see, Subcontractors Trade Assn. v. Koch, supra; Matter of Fullilove v. Beame,* 48 N.Y.2d 376, 423 N.Y.S.2d 144, 398 N.E.2d 765; *Matter of Broidrick v. Lindsay,* 39 N.Y.2d 641, 385 N.Y.S.2d 265, 350 N.E.2d 595).

The authority conferred upon the Mayor, as chief executive officer, does, of course, include the power to enforce and implement legislative enactments (*Subcontractors Trade Assn. v. Koch,* 62 N.Y.2d at p. 427, 477 N.Y.S.2d 120, 465 N.E.2d 840, *supra*). Indeed, if the City Council were to enact valid legislation proscribing discrimination by city contractors, or employers within the city generally, on the basis of "sexual orientation or affectional preference," the Mayor would have the duty to enforce it. The City Council, however, has never enacted any such law despite the introduction of bills which would have done so. The New York City Human Rights Act, in defining the types of "unlawful discriminatory practices" which an employer may not engage in, contains no reference to "sexual orientation or affectional preference," or to any similar classifications (Administrative Code of City of New York § B1–7.0). Similarly, Administrative Code § 343–8.0, which restricts discriminatory employment practices by many city contractors, contains no such classification.

***357** The relevant provisions of State law are closely akin to those of the city. The State Human Rights Law, which covers employment discrimination (Executive Law § 296), does not include among the protected classifications anything analogous to "sexual orientation or affectional preference," nor does Labor Law § 220–e, which mandates the inclusion of an antidiscrimination provision in most State and municipal contracts, encompass any such category. Finally, there is no Federal statute which the Mayor might be implementing. Title VII of the 1964 Civil Rights Act (42 U.S.C. § 2000e), the employment discrimination provision of Federal civil rights legislation, does not include homosexuals or bisexuals among the protected classes of employees (*see, e.g., DeSantis v. Pacific Tel. & Tel. Co.,* 608 F.2d 327; *Blum v. Gulf Oil Corp.,* 597 F.2d 936).

The issue we face, therefore, is whether the Mayor, in including within the coverage of Executive Order No. 50 "sexual orientation or affectional preference," despite the fact there is no legislative enactment prohibiting employment discrimination on such a basis, acted within the scope of his authority as the chief executive officer of the city.

III.

Defendants contend that the Mayor's authority to promulgate the challenged portion of Executive Order No. 50 stems from two aspects of his functions as executive—the power to regulate the terms of city contracts, and the power or duty to prevent the city from engaging in or funding discriminatory conduct which violates the equal protection clauses of the Federal and State Constitutions. We address each of these arguments in turn.[4]

A.

Under section 8(a) of the City Charter, the Mayor has all of the residual powers of ***527** the city. Thus, in *Matter of Bauch v. City of New York,* 21 N.Y.2d 599, 605, 289 N.Y.S.2d 951, 237 N.E.2d 211, we noted that the Mayor had the authority to enter into contracts **6** on the city's behalf and to determine the manner of transacting its business and affairs. Defendants contend that this power to regulate the terms of the ***358** city contracts gives the Mayor the authority to forbid parties who contract with the city from discriminating on the basis of "sexual orientation or affectional preference".

In *Matter of Broidrick v. Lindsay,* 39 N.Y.2d 641, *supra* and *Matter of Fullilove v. Beame,* 48 N.Y.2d 376, 423 N.Y.S.2d 144, 398 N.E.2d 765, 385 N.Y.S.2d 265, 350 N.E.2d 595, *supra,* we held that attempts by the Mayor of New York City to mandate some type of affirmative action in employment decisions by city contractors were impermissible infringements upon the legislative power because they utilized a remedial device which, rather than implementing a legislative policy, enacted a new policy not embraced by the City Council. Defendants rely on language in *Broidrick* and *Fullilove* approving executive action which " 'only would enlarge the pool of persons eligible for employment based on discrimination-free merit selection' " (*Matter of Fullilove v. Beame,* 48 N.Y.2d, at p. 379, *supra,* 423 N.Y.S.2d 144, 398 N.E.2d 765; *Matter of Broidrick v. Lindsay,* 39 N.Y.2d, at p. 649, 385 N.Y.S.2d 265, 350 N.E.2d 595, *supra*). This statement, however, was not intended to authorize the executive to enact his own views of what persons should be protected from employment discrimination without regard to the laws enacted by the Legislature. Rather, approval of enlarging the pool of employees was in reference to an executive implementing appropriate remedial relief to enforce a legislative policy.

Two other decisions from this court further explicate this distinction. In *Rapp v. Carey,* 44 N.Y.2d 157, 404 N.Y.S.2d 565, 375 N.E.2d 745, we invalidated a Governor's Executive Order requiring a broad range of State employees within the executive branch, including many not subject to removal by the Governor, to file financial disclosure statements and to abstain from various political and business activities not otherwise prohibited. We held that the order in question went beyond the powers of the Governor, including the power to implement legislation, and unlawfully "assume[d] the power of the Legislature to set State policy in an area of concededly increasing public concern" (*id.,* 44 N.Y.2d, at p. 160, 404 N.Y.S.2d 565, 375 N.E.2d 745). Most recently, in *Subcontractors Trade Assn. v. Koch (supra),* we held that the Mayor of New York City did not have the authority to mandate that at least 10% of all construction contracts awarded by the city be given to "locally based enterprises," as such an order went beyond the Mayor's "function of implementing general Charter-conferred powers" (*id.,* 62 N.Y.2d, at p. 429, 477 N.Y.S.2d 120, 465 N.E.2d 840). Of particular relevance here is our recognition in *Subcontractors* that "the general power to enter into contracts which is bestowed upon the executive branch of government ordinarily cannot serve as a basis for creating a remedial plan for which the executive never received a grant of legislative power" (*id.,* at p. 428, 477 N.Y.S.2d 120, 465 N.E.2d 840).

***359** Thus, as Special Term recognized, our prior cases hold that an executive may not usurp the legislative function by enacting social policies not adopted by the Legislature. Private employers in this State are free to make employment decisions on whatever basis they choose, as long as the basis is not prohibited by law (*cf. O'Connor v. Eastman Kodak,* 65 N.Y.2d 724, 492 N.Y.S.2d 9, 481 N.E.2d 549; *Murphy v. American Home Prods. Corp.,* 58 N.Y.2d 293, 461 N.Y.S.2d 232, 448 N.E.2d 86). Congress, the State Legislature and the City Council have enacted laws restricting the bases upon which most private employers may discriminate. None of these legislative bodies, however, has chosen to include a person's "sexual orientation or affectional preference" among the proscribed bases, nor have they established any general requirement that employment decisions must be merit-based. An attempt by the *****528** Mayor to broaden the class of persons protected from discrimination by private employers, or to require that all employment decisions be merit-based, however commendable, is an enactment of policy which ****7** the City Charter leaves to the City Council.[5] Accordingly, the challenged portion of Executive Order No. 50 does not fall within the Mayor's Charter-conferred power to regulate the terms of city contracts.

B.

The second basis put forth by the defendants for upholding the validity of the portion of Executive Order No. 50 covering "sexual orientation or affectional preference" is that the Mayor is properly acting to ensure compliance with constitutional guarantees of equal protection. The Appellate Division majority accepted this argument, concluding that the Mayor has the constitutional obligation, stemming from the equal protection ***360** clauses of the Federal and State Constitutions, to prevent all organizations contracting with the city from engaging in invidious discriminatory employment practices, which would include discrimination on the basis of sexual orientation.

Section 1 of the 14th Amendment to the United States Constitution provides in part that "No State shall * * * deny to any

person within its jurisdiction the equal protection of the laws."[6] This provision extends, of course, to subdivisions of a State, such as New York City (*see, e.g., Hunter v. Erickson,* 393 U.S. 385, 89 S.Ct. 557, 21 L.Ed.2d 616). Plaintiffs contend, however, that the Mayor is attempting to "enforce" the equal protection requirements of the 14th Amendment in a manner which is reserved to Congress. Section 5 of the 14th Amendment states that "Congress shall have power to enforce, by appropriate legislation, the provisions of this [Amendment]." The significance of this section is that it gives to Congress some authority to effectively enlarge the substantive reach of ***529** the equal protection clause by enacting laws prohibiting certain action even though such action would not otherwise be found by the judiciary to violate equal protection (*see,* **8 *Katzenbach v. Morgan,* 384 U.S. 641, 86 S.Ct. 1717, 16 L.Ed.2d 828; *United States v. Guest,* 383 U.S. 745, 774, 86 S.Ct. 1170, 1186, 16 L.Ed.2d 239 [Brennan, J., concurring]; Tribe, American Constitutional Law, at 28–29, 265–267; *cf. City of Rome v. United States,* 446 U.S. 156, 100 S.Ct. 1548, 64 L.Ed.2d 119 [enforcement of 15th Amend.]).

Although the Mayor does have a responsibility to uphold the United States Constitution, and a duty to prevent actions by the city which would violate the 14th Amendment's requirement of equal protection, as interpreted by the judiciary, he does not have the power to expand the coverage of the equal protection clause. The Mayor, unlike Congress, has no authority to prohibit ***361** discrimination merely because he feels that the prohibition furthers the goals of the 14th Amendment. His duty extends only to the prohibition of such discrimination if it in fact violates that provision. Accordingly, the Mayor's inclusion of "sexual orientation or affectional preference" in Executive Order No. 50 can be upheld under the 14th Amendment only if either discrimination on this basis by city contractors would violate the equal protection clause, or if the city would be violating the clause by contracting with those who so discriminate.

The prohibitions in the 14th Amendment are directed at the "State," and they " 'erect no shield against merely private conduct, however discriminatory or wrongful' " (*Blum v. Yaretsky,* 457 U.S. 991, 1002, 102 S.Ct. 2777, 2784, 73 L.Ed.2d 534, quoting *Shelley v. Kraemer,* 334 U.S. 1, 13, 68 S.Ct. 836, 842, 92 L.Ed. 1161; *see, Jackson v. Metropolitan Edison Co.,* 419 U.S. 345, 349, 95 S.Ct. 449, 452, 42 L.Ed.2d 477). In order for a court to conclude that there is "State action," thus making equal protection requirements applicable, the alleged discriminatory conduct of a private employer must be "fairly attributable to the State" (*Lugar v. Edmondson Oil Co.,* 457 U.S. 922, 937, 102 S.Ct. 2744, 2753, 73 L.Ed.2d 482; *see, Matter of Wilson,* 59 N.Y.2d 461, 476, 465 N.Y.S.2d 900, 452 N.E.2d 1228).

The Supreme Court has yet to formulate a single test which can be employed to determine whether there is the requisite degree of State involvement (*see, Reitman v. Mulkey,* 387 U.S. 369, 378, 87 S.Ct. 1627, 1632, 18 L.Ed.2d 830), and all the facts and circumstances of a particular case must be considered (*Burton v. Wilmington Parking Auth.,* 365 U.S. 715, 722, 81 S.Ct. 856, 860, 6 L.Ed.2d 45). It is clear, however, that the mere fact that a private entity contracts with the government (*see, e.g., Blum v. Yaretsky, supra*), is regulated by the government (*see, e.g., Jackson v. Metropolitan Edison Co.,* 419 U.S. 345, 95 S.Ct. 449, *supra*), or performs a function also performed by the government (*see, e.g., Rendell-Baker v. Kohn,* 457 U.S. 830, 102 S.Ct. 2764, 73 L.Ed.2d 418), is not enough by itself to treat it as a State actor. Rather, there must be some basis for finding that the State is "responsible" for the private conduct (*Blum v. Yaretsky,* 457 U.S., at p. 1004, 102 S.Ct., at p. 2785, *supra*), either because it maintains such a close relationship with the private actor that it can be viewed as a joint participant in all decisions of the latter (*see, Burton v. Wilmington Parking Auth.,* 365 U.S. 715, 81 S.Ct. 856, *supra*), because it allows the private actor to perform a function traditionally the exclusive prerogative of the State (*see, e.g., Evans v. Newton,* 382 U.S. 296, 86 S.Ct. 486, 15 L.Ed.2d 373), or because it requires or otherwise encourages the challenged conduct of the private actor (*see, e.g., Peterson v. City of Greenville,* 373 U.S. 244, 83 S.Ct. 1119, 10 L.Ed.2d 323).

There are no facts or circumstances pointed to by defendants or otherwise apparent which could make the city responsible for the employment decisions of the plaintiffs or of city contractors ***362** generally. The Supreme Court's recent decision in *Rendell-Baker v. Kohn (supra),* virtually ***530** compels the conclusion that their conduct is not attributable to the city and thus cannot be said to violate the 14th Amendment. In *Rendell-Baker,* the entity in question was a privately operated high school in Massachusetts **9 for maladjusted students. Virtually all of the school's students were referred to it by city school committees and the State, and pursuant to contracts with these governmental entities, the school received funding which paid for most of the costs of educating these students. In an action brought by a discharged employee against the school, the Supreme Court held that the school's personnel decisions were not State action, even though it received public funds, its business consisted almost exclusively of performing public contracts, and it performed a "public function," where the government did not influence or coerce those decisions.

Thus, Executive Order No. 50, in prohibiting discrimination by city contractors on the basis of "sexual orientation or affectional preference," is not prohibiting conduct covered by the 14th Amendment. The defendants contend, however, that

even if the employment decisions of organizations contracting with the city are not State action, the city itself would be in violation of the 14th Amendment if it contracts with an entity which discriminates on the basis of "sexual orientation or affectional preference," and the Mayor, therefore, is fulfilling his duty to prevent this violation. This contention is superficially appealing, but cannot withstand closer analysis.

Neither this court nor the Supreme Court has ever held that the government may have no contacts with a private entity which discriminates or otherwise acts in a manner in which the government itself could not. Furthermore, while there is a distinction between seeking to hold a private actor responsible under the 14th Amendment for discriminatory conduct and seeking to enjoin governmental involvement with that actor (*Blum v. Yaretsky,* 457 U.S., at pp. 1003–1004, 102 S.Ct., at pp. 2784–2785, *supra;* Note, *State Action: Theories For Applying Constitutional Restrictions To Private Activity,* 74 Colum.L.Rev. 656, 698–699), the considerations of State action applicable to the former are also relevant to the latter (*Blum v. Yaretsky,* 457 U.S., at p. 1004, 102 S.Ct., at p. 2785, *supra*).

Defendants rely heavily on the Supreme Court's decision in *Norwood v. Harrison,* 413 U.S. 455, 93 S.Ct. 2804, 37 L.Ed.2d 723, in which the court enjoined the State of Mississippi from lending textbooks to private schools with racially discriminatory admissions policies. The court concluded that, although the textbook lending program ***363** had not been implemented in order to further racial segregation, as it applied to all private schools and had begun prior to the desegregation of the public schools, the State was granting "tangible financial aid [which] has a significant tendency to facilitate, reinforce, and support private discrimination" (*id.,* 413 U.S., at p. 466, 93 S.Ct., at p. 2811).

There are several crucial distinctions between *Norwood* and this case. To begin, the Supreme Court found that the State's action in *Norwood* was effectively promoting the discrimination by the private actors (*see, Gilmore v. City of Montgomery,* 417 U.S. 556, 568–569, 94 S.Ct. 2416, 2423–2424, 41 L.Ed.2d 304). In contrast, there is no evidence that the city, by contracting for goods or services with a private organization, would be promoting any discriminatory acts by that organization (*cf.* Novack, Rotunda & Young, Constitutional Law, at 520 [2d ed]). Additionally, while the State in *Norwood* was gratuitously providing aid to the private entities, the city, in entering into contracts, is purchasing items it requires or fulfilling obligations it has, thus further negating any assertion that it is promoting the discriminatory acts.

Perhaps the most significant distinction between *Norwood* and this case is that the former involved governmental entanglement in racial discrimination. The Supreme Court has consistently recognized that the central purpose underlying the equal protection clause was to prevent governmental conduct discriminating on the *****531** basis of race, and that any such discrimination is subject to the most exacting scrutiny (*see, e.g., Palmore v. Sidoti,* 466 U.S. 429, 104 S.Ct. 1879, 1881–1882, 80 L.Ed.2d 421; ****10** *Washington v. Davis,* 426 U.S. 229, 239, 96 S.Ct. 2040, 2047, 48 L.Ed.2d 597). Consequently, it has become apparent that where racial discrimination by a private actor is involved, a lesser degree of State involvement than would otherwise be required will support a finding of "State action" (*see, Adickes v. Kress & Co.,* 398 U.S. 144, 190–191, 90 S.Ct. 1598, 1620–1621, 26 L.Ed.2d 142 [Brennan, J., concurring in part, dissenting in part]; *Taylor v. Consolidated Edison Co.,* 552 F.2d 39, 42, *cert. denied* 434 U.S. 845, 98 S.Ct. 147, 54 L.Ed.2d 111; Note, *State Action: Theories For Applying Constitutional Restrictions To Private Activity,* 74 Colum.L.Rev. 656, 657–658, 661). More generally, government has been permitted fewer contacts with private actors engaged in racial discrimination than with those otherwise acting in a manner which the government itself could not (*see, e.g., Granfield v. Catholic Univ.,* 530 F.2d 1035, 1046, n. 29, *cert.denied* 429 U.S. 821, 97 S.Ct. 68, 50 L.Ed.2d 81; *compare, e.g.,* title VI of the Civil Rights Act, 42 U.S.C. § 2000d [prohibiting racial discrimination in any activity or program receiving Federal financial assistance, without exception], *with* title IX of the Education Amendments of 1972, ***364** 20 U.S.C. § 1681*et seq.* [prohibiting sex discrimination in any educational program or activity receiving this assistance, but with several exemptions]; *Norwood v. Harrison, supra, with Board of Educ. v. Allen,* 392 U.S. 236, 88 S.Ct. 1923, 20 L.Ed.2d 1060).

Courts have uniformly refused to apply the same level of scrutiny applied to racial classifications in determining equal protection challenges to classifications based on sexual orientation (*see, e.g., Rich v. Secretary of Army,* 735 F.2d 1220, 1229; *Hatheway v. Secretary of Army,* 641 F.2d 1376, 1382, *cert. denied* 454 U.S. 864, 102 S.Ct. 324, 70 L.Ed.2d 164; *DeSantis v. Pacific Tel. & Tel. Co.,* 608 F.2d, at p. 332, *supra*). We need not decide now whether some level of "heightened scrutiny" would be applied to governmental discrimination based on sexual orientation (*see, Hatheway v. Secretary of Army,* 641 F.2d, at p. 1382, *supra;* Note, *An Argument for the Application of Equal Protection Heightened Scrutiny to Classifications Based on Homosexuality,* 57 S.Cal.L.Rev. 797, 810–834; Note, *Challenging Sexual Preference Discrimination in Private Employment,* 41 Ohio St.L.J. 501, 513–514). Rather, we conclude only that the equal protection clause does not ordinarily prevent the city from contracting with private employers who discriminate on this basis, as the existence of the contract

would not, by itself, make the city "responsible" for the private employment decisions so as to invoke constitutional protections (*see, Blum v. Yaretsky,* 457 U.S., at p. 1004, 102 S.Ct., at p. 2785, *supra*). Thus, we reject defendants' contention that the prohibition in Executive Order No. 50 against discrimination by city contractors on the basis of "sexual orientation or affectional preference" is necessary to prevent the city from aiding or engaging in a violation of the 14th Amendment.

As we have found that the Mayor lacked any authority to promulgate the challenged portion of Executive Order No. 50, we hold that this portion was an unlawful usurpation of the legislative power of the City Council. Accordingly, the order of the Appellate Division should be modified by reinstating the orders and judgments at Special Term.

MEYER, Judge (dissenting).

In concluding that the Mayor of New York City is not empowered by Constitution, Federal or State, or statute to bar those contracting with the city from discriminating in employment on a basis unrelated to bona fide occupational qualification, the majority ignores the difference between hiring quotas affirmatively imposed and a negative ban on arbitrary discrimination, and drastically extends this court's prior decisions concerning the Mayor's power with respect to city ***365** contracts (*****532** *Subcontractors Trade Assn. v. Koch,* 62 N.Y.2d 422, 477 N.Y.S.2d 120, 465 N.E.2d 840; *Matter of Fullilove v. Beame,* 48 N.Y.2d 376, 423 N.Y.S.2d 144, 398 N.E.2d 765; ****11** *Matter of Broidrick v. Lindsay,* 39 N.Y.2d 641, 385 N.Y.S.2d 265, 350 N.E.2d 595). I, therefore, respectfully dissent.

The conclusion that neither Constitution authorizes the Mayor to limit contracts with the city to entities that do not engage in arbitrary discrimination turns on the concept that the programs contracted for do not involve "State action." There are a number of problems with that conclusion, however. First, plaintiffs' challenge is to the facial validity of Executive Order No. 50 insofar as it affects all city contractors. Such contracts cover a broad range of mandated and discretionary services; as to the present plaintiffs alone, from counseling to senior citizen centers to foster care and adoption services. Foster care institutions of the same type as are involved here have, in fact, been found to be engaged in "State action" subject to the requirements of the Federal equal protection clause (*Perez v. Sugarman,* 499 F.2d 761), and in light of the total control over a child's life that the city delegates to such institutions (as I have more fully outlined in *Torres v. Little Flower Children's Servs.,* 64 N.Y.2d 119, 130–132, 485 N.Y.S.2d 15, 474 N.E.2d 223), the question whether their action is "State action" is not governed by the Supreme Court's decision in *Rendell-Baker v. Kohn,* 457 U.S. 830, 102 S.Ct. 2764, regarding a private day school, which the majority deems controlling.

Second, whether a different standard of State action should apply under the equal protection clause of the State Constitution (art I, § 11) than the test applied under the 14th Amendment to the Federal Constitution is not as simple as footnote 5 in the majority opinion would make it appear. While we held in 1949 that the same standard would apply (*Dorsey v. Stuyvesant Town Corp.,* 299 N.Y. 512, 530–531, 87 N.E.2d 541, *cert. denied* 339 U.S. 981, 70 S.Ct. 1019, 94 L.Ed. 1385), we have not had occasion to consider the question since then[1] and it should be reexamined in light of the court's decision in *Sharrock v. Dell Buick-Cadillac,* 45 N.Y.2d 152, 408 N.Y.S.2d 39, 379 N.E.2d 1169.

We held in *Sharrock* that a lesser degree of State involvement was required to trigger the due process clause of the State Constitution (art I, § 6) than would be required under the 14th Amendment (45 N.Y.2d, at pp. 159–161, 408 N.Y.S.2d 39, 379 N.E.2d 1169). That holding was based in part on the absence of any reference to State action in the text of the State constitutional provision (*id.,* at p. 160, 408 N.Y.S.2d 39, 379 N.E.2d 1169). There is a similar absence of any explicit State action requirement in the ***366** State equal protection clause.[2] Furthermore, because a long line of authority holds that the protection of a due process clause contains within it the requirement of equal protection (*Examining Bd. v. Flores de Otero,* 426 U.S. 572, 601, 96 S.Ct. 2264, 2280, 49 L.Ed.2d 65; *Weinberger v. Wiesenfeld,* 420 U.S. 636, 638, n. 2, 95 S.Ct. 1225, 1228, n. 2, 43 L.Ed.2d 514; *Frontiero v. Richardson,* 411 U.S. 677, 680, n. 5, 93 S.Ct. 1764, 1767, n. 5, 36 L.Ed.2d 583; *Shapiro v. Thompson,* 394 U.S. 618, 641–642, 89 S.Ct. 1322, 1335–1336, 22 L.Ed.2d 600; *Schneider v. Rusk,* 377 U.S. 163, 168, 84 S.Ct. 1187, 1190, 12 L.Ed.2d 218; *Bolling v. Sharpe,* 347 U.S. 497, 499, 74 S.Ct. 693, 694, 98 L.Ed. 884), it makes little sense to have differing standards for State action under the State equal protection clause and the State due *****533** process clause. Yet, by accepting plaintiffs' facial challenge to Executive Order No. 50, the court rejects any attempt to ****12** apply the State equal protection clause to particular city contracts.

If, however, it be accepted that neither constitutional provision is controlling, there remains the question whether the Mayor can adopt the policy that the city not contract with those who refuse to agree that they will not discriminate arbitrarily in employment decisions. As the court below makes clear, there can be no question that across-the-board discrimination against homosexuals, unrelated to any bona fide qualification for a particular position, is invidious and irrational. Nor is there any question that Executive Order No. 50 permits a contractor to discriminate as to any of the prohibited categories (race, creed, color, national origin, sex, age, handicap, marital status, sexual orientation or affectional preference) if it can be shown to be legitimately related to the requirement of a particular job. Thus, Executive Order No. 50, by barring discrimination against candidates meriting employment for reasons irrational because unrelated to qualification for employment, does no more than enforce merit selection.

In *Matter of Broidrick v. Lindsay,* 39 N.Y.2d 641, 385 N.Y.S.2d 265, 350 N.E.2d 595, *supra,* we explicitly recognized the Mayor's right to require selection on the basis of merit. There we struck down an Executive Order mandating affirmative action but were careful to note that, "Insofar as programs do not mandate percentage employment formulas, but only would enlarge the pool of persons eligible for employment based on discrimination-free merit selection, they are permissible under existing law" (*id.,* at p. 649, 385 N.Y.S.2d 265, 350 N.E.2d 595). Yet, the ***367** majority now rejects that view and reaches the remarkable conclusion that the Mayor has no power to require city contractors to make employment decisions on the basis of merit and fitness for the job. In other words, the Mayor cannot, by removing barriers to employment unrelated to qualification or merit, ensure that the city obtains the best possible services for the money it spends, because that policy has not been authorized or endorsed by appropriate legislation.

In fact, the Mayor "is empowered to enter into contracts * * * and to determine the manner of transacting the city's business and affairs" (*Matter of Bauch v. City of New York,* 21 N.Y.2d 599, 605, 289 N.Y.S.2d 951, 237 N.E.2d 211). In exercising that power, the Mayor's obligation is to ensure that the city receive the greatest value for the lowest possible cost (*see, e.g., Matter of Dairymen's League Coop. Assn. v. Murtagh,* 274 App.Div. 591, 594–595, 84 N.Y.S.2d 744, *affd.* 299 N.Y. 634, 86 N.E.2d 509). Thus, in *Matter of Broidrick v. Lindsay,* 39 N.Y.2d 641, 648, 385 N.Y.S.2d 265, 350 N.E.2d 595, *supra,* the court held that "cost minimization is a proper consideration in setting government procurement policy," thereby explicitly recognizing the validity of the social policy embodied in Executive Order No. 50.

The majority holds, however, that notwithstanding the recognition in *Matter of Broidrick v. Lindsay (supra),* and *Matter of Fullilove v. Beame,* 48 N.Y.2d 376, 379, 423 N.Y.S.2d 144, 398 N.E.2d 765, *supra,* of the Mayor's power to require discrimination-free merit selection, he is permitted to ban particular kinds of discrimination by city contractors only if the State Legislature or City Council has either itself already done so or expressly authorized him to do so. But one searches in vain for any language in these cases, or in the other cases cited by the majority, that limits the Mayor's power in this manner. *Rapp v. Carey,* 44 N.Y.2d 157, 404 N.Y.S.2d 565, 375 N.E.2d 745, invalidated an Executive Order issued by the Governor because it was not only unauthorized by any statute or constitutional provision, but was actually inconsistent with existing legislation (*id.,* at pp. 164–165, 404 N.Y.S.2d 565, 375 N.E.2d 745). And the defect in the Executive Order in *Subcontractors Trade Assn. v. Koch,* 62 N.Y.2d 422, 429, 477 N.Y.S.2d 120, 465 N.E.2d 840, *supra,* was that it imposed an affirmative, remedial plan which required that "a certain percentage ****534** of city construction contracts * * * be allotted to a particular group or category of business enterprise". Here, no affirmative ***13** action is mandated. There is only a ban on arbitrary discrimination, designed to implement the accepted social policy that the city should seek to get the most for its money.

Finally, in light of the majority's reliance on separation of powers cases involving the Federal Constitution, it should be noted that a number of Federal courts have upheld presidential ***368** Executive Orders barring discrimination in Federally funded projects on the ground that "the federal government has a vital interest in assuring that the largest possible pool of qualified manpower be available for the accomplishment of its projects" (*Contractors Assn. v. Secretary of Labor,* 442 F.2d 159, 171, *cert. denied* 404 U.S. 854, 92 S.Ct. 98, 30 L.Ed.2d 95; *accord, United States v. New Orleans Public Serv.,* 553 F.2d 459, 465, *vacated on other grounds* 436 U.S. 942, 98 S.Ct. 2841, 56 L.Ed.2d 783, *adhered to* 638 F.2d 899, *cert. denied* 454 U.S. 892, 102 S.Ct. 387, 70 L.Ed.2d 206; *Farkas v. Texas Instrument,* 375 F.2d 629, 632, n. 1). Those decisions were favorably commented on in *Matter of Broidrick v. Lindsay,* 39 N.Y.2d 641, 647–648, 385 N.Y.S.2d 265, 350 N.E.2d 595, *supra,* although they were distinguished on the ground that the Executive Order there in issue applied to the private projects of city contractors as well as their city-funded work and, thus, was intended to promote a social policy far beyond cost minimization in the expenditure of public funds. In the present case, Executive Order No. 50 applies only to contracts that are funded in whole or in part by government moneys appropriated or controlled by the city.[3] Accordingly, it is carefully tailored to the policy of obtaining the best possible work effort from city contractors through a ban on arbitrary employment discrimination

and is permissible under the prior decisions of this court. By reversing in this case, the majority adopts a new separation of powers principle that is inconsistent with both its own prior decisions and Federal case law.

JASEN, SIMONS, KAYE, ALEXANDER and TITONE, JJ., concur with WACHTLER, C.J. MEYER, J., dissents and votes to affirm in a separate opinion.

Order modified, with costs to appellants, in accordance with the opinion herein and, as so modified, affirmed.

All Citations

65 N.Y.2d 344, 482 N.E.2d 1, 492 N.Y.S.2d 522, 37 Empl. Prac. Dec. P 35,477

Footnotes

1 The plaintiffs in the *Under 21* action included in their complaint a similar facial challenge to all of Executive Order No. 50 as well as a challenge to all of Executive Order No. 50, as applied to religious or religiously sponsored corporations. We reject the argument that the Mayor may not enforce existing State and city laws prohibiting employment discrimination through the establishment of an additional "enforcement mechanism" (the Mayor's Bureau of Labor Services), and thus decline to hold all of Executive Order No. 50 invalid on its face.

As to the second additional challenge, we cannot on the record before us determine the extent to which 1st Amendment and 14th Amendment concerns would be implicated by enforcement of the various aspects of the order on the *Under 21* plaintiffs, and we thus decline to issue an advisory opinion on whether the Mayor may regulate the employment practices of a religious corporation contracting with the city.

2 Plaintiffs in the *Under 21* action cross-appealed from the judgment at Special Term insofar as it did not invalidate all of Executive Order No. 50 (*see,* n. 1, *supra*).

3 The Appellate Division order "modifies" the Special Term judgments as it affirms the judgment in the *Under 21* action insofar as it did not invalidate all of Executive Order No. 50.

4 At Special Term, defendants asserted as a third basis for validating all of Executive Order No. 50 an alleged "ratification" through a resolution of the New York City Board of Estimate. Defendants have since abandoned any reliance on the Board of Estimate's actions in attempting to uphold the order, and none of the complaints in the actions before us seeks to invalidate any Board of Estimate resolutions. Thus, the issue of whether the Board of Estimate may require that all contracts submitted to it for approval must prohibit discrimination by the contractor on the ground of "sexual orientation or affectional preference" is not before us on this appeal.

5 We reject the dissent's argument that the challenged portion of Executive Order No. 50, by restricting non-merit-based discrimination, is permissible as an attempt by the Mayor "to ensure that the city receive the greatest value for the lowest possible cost" (dissenting opn., 65 N.Y.2d, at p. 367, 492 N.Y.S.2d at 533, 482 N.E.2d at 12). To begin, as the most apparent consequence of the enforcement of this part of the order would be a *reduction* in the number of entities willing to contract with the city, it is unclear how the city would economically benefit from such enforcement. If a city agency feels that the price of a particular contract is too high due to a contractor's employment policies, it is of course free to choose some other contractor. More significantly the dissent itself concedes that Executive Order No. 50 is an enactment of social policy, notwithstanding the economic arguments now set forth by defendants, and thus is akin to the remedial plan in *Subcontractors* which we unanimously held invalid. The Federal cases cited by the dissent in support of this argument (dissenting opn., at p. 368, 492 N.Y.S.2d at 534, 482 N.E.2d at 13) are distinguishable, as those courts were construing a specific grant of authority to the executive by Congress. Any dictum in

those cases that the president has the authority to regulate the employment practices of government contractors even absent authorization by Congress was rejected by a more recent Federal case (*see, Liberty Mut. Ins. Co. v. Friedman,* 639 F.2d 164, 167–172, n. 13).

6 We have held that the State constitutional equal protection clause (N.Y. Const., art. I, § 11) is no broader in coverage than the Federal provision (*see, e.g., Matter of Esler v. Walters,* 56 N.Y.2d 306, 313–314, 452 N.Y.S.2d 333, 437 N.E.2d 1090) and this equation with the Federal provision extends to the requirement of "State action" in order for the equal protection clause to be applicable (*Dorsey v. Stuyvesant Town Corp.,* 299 N.Y. 512, 530–531, 87 N.E.2d 541, *cert. denied* 339 U.S. 981, 70 S.Ct. 1019, 94 L.Ed. 1385). In *Dorsey,* we recognized that the State provision approved at the Constitutional Convention of 1938 and adopted by the electorate that same year, was designed simply to " 'embod[y] in our Constitution the provisions of the Federal Constitution which are already binding upon our State and its agencies' " (*id.,* at p. 530, 87 N.E.2d 541 [quoting from 2 Rev. Record of N.Y. State Constitutional Convention, 1938, at 1065]). The dissent's reliance on *Sharrock v. Dell Buick-Cadillac,* 45 N.Y.2d 152, 408 N.Y.S.2d 39, 379 N.E.2d 1169, is misplaced, as that case concerned the interpretation of the due process clause in the State Constitution (art. I, § 6), a provision enacted prior to, and containing language materially different from, its counterpart in the 14th Amendment, and thus readily supporting a broader interpretation than the Federal provision. Accordingly, we need only analyze the equal protection issue under the framework of the 14th Amendment.

1 *Matter of Esler v. Walters,* 56 N.Y.2d 306, 452 N.Y.S.2d 333, 437 N.E.2d 1090, cited by the majority, dealt with the substantive scope of the protection against discrimination provided by the State Constitution, not with what constitutes State action.

2 Article I, § 11, provides that, "No person shall be denied the equal protection of the laws of this state or any subdivision thereof." Similarly, article I, § 6, states that, "No person shall be deprived of life, liberty or property without due process of law." In contrast, the 14th Amendment is explicitly phrased in terms of State action: "nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

3 Despite claims by some of the plaintiffs that the Executive Order and its implementing regulations apply to all work, public or private, by city contractors, the scope of the coverage is explained by the following statement from the Director of the City Bureau of Labor Services: "It is true that section 50.20(A) of the Regulations makes the non-discrimination requirement applicable to '[a]11 contractors doing business with the City without regard to the dollar amount or source of funding.' However, the phrase 'without regard to the dollar amount or source of funding' was inserted not to expand the non-discrimination requirement so as to cover programs wholly unrelated to City contract work but rather to clarify that the non-discrimination requirement is fully applicable to programs that the City funds only in part as well as to programs that the City contracts for but does not fund (*e.g.,* City contracts using federal funds). The reference in section 50.20(B) to '[c]ontractors whose contracts are funded in whole or in part by federal or state funds' likewise refers to contracts administered by and formally let by the City."

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8 A.D.3d 78
Supreme Court, Appellate Division, First Department, New York.

In re Joanne WALLACE, Petitioner–Appellant,
v.
ENVIRONMENTAL CONTROL BOARD OF the CITY OF NEW YORK (Dept. of Consumer Affairs), Respondent–Respondent.

June 10, 2004.

Synopsis

Background: Salesperson brought petition to annul determination by Environmental Control Board that salesperson was vending records without license and that she was vending from table of more than eight feet in length. The Supreme Court, New York County, Ira Gammerman, J., granted judgment for Board. Salesperson appealed.

Holdings: The Supreme Court, Appellate Division, held that:

argument improperly raised for first time on appeal could not be considered by appellate court, and

substantial evidence supported decision of ALJ.

Affirmed.

Attorneys and Law Firms

****478** John Corcos Levy, New York, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Stacy Laine Matthews of counsel), for respondent.

BUCKLEY, P.J., LERNER, FRIEDMAN, MARLOW, SWEENY, JJ.

Opinion

***78** Judgment, Supreme Court, New York County (Ira Gammerman, J.), entered March 17, 1999, which denied petitioner's application to annul respondent Environmental Control Board's determination that petitioner was guilty of vending records without a license in violation of Administrative Code of City of New York § 20–453, and of vending from a table more than eight feet in length in violation of Administrative Code § 20–465(b), unanimously affirmed, without costs.

Petitioner's argument that the determination is not supported by substantial evidence is improperly raised for the first time on appeal, and we decline to consider it. So too is her argument that she is entitled to a new hearing because the unavailability of the hearing transcripts makes review of her claim impossible. Indeed, in the latter regard, petitioner took the opposite position before the IAS court, arguing that it could decide her ***79** article 78 notwithstanding respondent's loss of the tape recording of the hearing and resulting inability to produce transcripts thereof. This position was consistent with the absence of any claims of lack of substantial evidence. Rather, petitioner claimed that she was effectively prevented from challenging the issuing officer's credibility, and his testimony should therefore have been rejected as a matter of law, because he acknowledged that all pertinent facts were contained in his partner's memo book, and neither the partner nor his memo book

were produced at the hearing. Meaningful review of that claim is allowed by the available record, namely, the ALJ's detailed decision summarizing the testimony and arguments of the parties, which petitioner does not challenge as inaccurate. The decision shows that the ALJ credited the issuing officer's testimony that petitioner was displaying records on a table approximately 12 feet long in a manner that showed the illustrated covers and the identities of the artists, indicating that the records were for sale and not, as petitioner claims, temporarily piled on the table while she was unloading books from her van. Petitioner, who was represented by counsel, had a full opportunity to cross-examine the officer and otherwise challenge his testimony based on an unaided recollection of personal observations, and respondent was under no legal obligation to produce any memo books. Nothing precluded petitioner ****479** from requesting an adjournment to secure the attendance of the issuing officer's partner, or a subpoena for his memo book.

All Citations

8 A.D.3d 78, 778 N.Y.S.2d 477, 2004 N.Y. Slip Op. 04852

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102 S.Ct. 3187
Supreme Court of the United States

WASHINGTON, et al., Appellants
v.
SEATTLE SCHOOL DISTRICT NO. 1, et al.

No. 81–9.
|
Argued March 22, 1982.
|
Decided June 30, 1982.

Synopsis

School district sued State of Washington challenging the constitutionality of a statute, adopted through initiative, which prohibited school boards from requiring any student to attend a school other than the school geographically nearest or next nearest his place of residence, but which contained exceptions permitting school boards to assign students away from their neighborhood schools for virtually all purposes required by their educational policies except racial desegregation. The United States District Court for the Western District of Washington, 473 F.Supp. 996, declared the statute invalid. The Court of Appeals for the Ninth Circuit, 633 F.2d 1338,affirmed. State of Washington appealed. The Supreme Court, Justice Blackmun, held that the initiative violated the equal protection clause.

Affirmed.

Justice Powell filed a dissenting opinion in which Chief Justice Burger, Justice Rehnquist and Justice O'Connor, joined.

****3188 *457** *Syllabus*[*]

In 1978, appellee Seattle School District No. 1 (District) enacted the so-called Seattle Plan for desegregation of its schools. The plan makes extensive use of mandatory busing. Subsequently, a statewide initiative (Initiative 350) was drafted to terminate the use of mandatory busing for purposes of racial integration in the public schools of the State of Washington. The initiative prohibits school boards from requiring any student to attend a school other than the one geographically nearest or next nearest to his home. It sets out a number of broad exceptions to this requirement, however: a student may be assigned beyond his neighborhood school if he requires special educational programs, or if the nearest or next nearest school is overcrowded or unsafe, or if it lacks necessary physical facilities. These exceptions permit school boards to assign students away from their neighborhood schools for virtually all of the nonintegrative purposes required by their educational policies. After the initiative was passed at the November 1978 general election, the District, together with two other districts, brought suit against appellant State in Federal District Court, challenging the constitutionality of Initiative 350 under the Equal Protection Clause of the Fourteenth Amendment. The District Court held the initiative unconstitutional on the ground, *inter alia*, that it established an impermissible racial classification in violation of *Hunter v. Erickson*, 393 U.S. 385, 89 S.Ct. 557, 21 L.Ed.2d 616, and *Lee v. Nyquist*, 318 F.Supp. 710 (WDNY), summarily aff'd, 402 U.S. 935, 91 S.Ct. 1618, 29 L.Ed.2d 105, "because it permits busing for non-racial reasons but forbids it for racial reasons." The court permanently enjoined implementation of the initiative's restrictions. The Court of Appeals affirmed.

Held : Initiative 350 violates the Equal Protection Clause. Pp. 3193–3204.

(a) When a State allocates governmental power nonneutrally, by explicitly using the *racial* nature of a decision to determine the decisionmaking process, its action "places *special* burdens on racial minorities within the governmental process," *Hunter*

v. Erickson, 393 U.S., at 391, 89 S.Ct., at 560, thereby "making it *more* difficult for certain racial and religious minorities [than for other members of the community] to achieve legislation that is in their interest." *Id.*, at 395, 89 S.Ct., at 563. Such a structuring of the political ***458** process is "no more permissible than [is] denying [members of a racial minority] the vote, on an equal basis with others." *Id.*, at 391, 89 S.Ct., at 560. Pp. 3193–3195.

(b) Initiative 350 must fall because it does "not attemp[t] to allocate governmental power on the basis of any general principle," *Hunter v. Erickson*, 393 U.S., at 395, 89 S.Ct., at 563, but instead uses the racial nature of an issue to define the governmental decisionmaking structure, thus imposing substantial and unique burdens on racial minorities. The initiative worked a major reordering of the State's educational decisionmaking process. Before adoption of the initiative, the power to determine what programs would most appropriately fill a school district's educational needs—including programs involving student ****3189** assignment and desegregation—was committed to the local board's discretion. After passage of Initiative 350, authority over all but one of these areas remained in the local board's hands. By placing power over desegregative busing at the state level, the initiative thus "differentiates between the treatment of problems involving racial matters and that afforded other problems in the same area." *Lee v. Nyquist*, 318 F.Supp., at 718. And Initiative 350 works something more than the "mere repeal" of a desegregation law by the political entity that created it. It burdens all future attempts to integrate Washington schools by lodging decisionmaking authority over the question at a new and remote level of government. This makes the enactment of racially beneficial legislation uniquely difficult, and therefore imposes direct and undeniable burdens on minority interests. Pp. 3195–3202.

(c) Contrary to appellants' suggestion, *Hunter v. Erickson* was not effectively overruled by *Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597, and *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed.2d 450. While *Washington v. Davis* and *Arlington Heights* considered classifications facially unrelated to race, *Hunter* —like this case—involved an attempt to use explicitly racial criteria to define the community's decisionmaking structure. In so doing, the legislation at issue there directly and invidiously curtailed "the operation of those political processes ordinarily to be relied upon to protect minorities." *United States v. Carolene Products Co.*, 304 U.S. 144, 152–153, n. 4, 58 S.Ct. 778, 783–784, n. 4, 82 L.Ed. 1234. *Hunter* 's principle—that meaningful and unjustified distinctions based on race are impermissible—is still vital. Pp. 3202–3204.

9th Cir., 633 F.2d 1338, affirmed.

Attorneys and Law Firms

***459** *Kenneth O. Eikenberry,* Attorney General of Washington, argued the cause for appellants. With him on the briefs were *Malachy R. Murphy,* Deputy Attorney General, *Thomas F. Carr,* Senior Assistant Attorney General, and *Timothy R. Malone,* Assistant Attorney General. *Solicitor General Lee, Assistant Attorney General Reynolds, Deputy Solicitor General Wallace,* and *Richard G. Wilkins* filed a brief for the United States.

Michael W. Hoge argued the cause for appellees. With him on the brief for appellees Seattle School District No. 1 et al. were *Camden M. Hall* and *David J. Burman. Phillip L. Burton, Frederick L. Noland, Thomas A. Lemly,* and *William H. Neukom* filed a brief for appellees American Civil Liberties Union et al. *Ladd Leavens* filed a brief for appellees East Pasco Neighborhood Council et al.*

* Briefs of *amici curiae* urging affirmance were filed by *Henry M. Aronson* for Grant L. Anderson et al.; by *Palmer Smith* for the League of Women Voters of Seattle et al.; by *Jack Greenberg, James M. Nabritt III,* and *Bill Lann Lee* for the NAACP Legal Defense and Educational Fund; and by *Judith A. Lonnquist* for the Washington Education Association.

Briefs of *amici curiae* were filed by *Gwendolyn H. Gregory, August W. Steinhilber,* and *Thomas A. Shannon* for the National School Boards Association; and by *William J. Bender* for the Seattle Chapter Japanese American Citizens League.

Opinion

Justice BLACKMUN delivered the opinion of the Court.

We are presented here with an extraordinary question: whether an elected local school board may use the Fourteenth Amendment to *defend* its program of busing for integration from attack by the State.

I

A

Seattle School District No. 1 (District), which is largely coterminous with the city of Seattle, Wash., is charged by state law with administering 112 schools and educating approximately 54,000 public school students. About 37% of these ***460** children are of Negro, Asian, American Indian, or Hispanic ancestry. Because segregated housing patterns in Seattle have created racially imbalanced schools, the District historically has taken steps to alleviate the isolation of minority students; since 1963, it has permitted students to transfer from their neighborhood schools to help cure the District's racial imbalance.[1]

Despite these efforts, the District in 1977 came under increasing pressure to accelerate its program of desegregation.[2] In response, the District's Board of Directors (School Board) enacted a resolution defining "racial imbalance" as "the situation ****3190** that exists when the combined minority student enrollment in a school exceeds the districtwide combined average by 20 percentage points, provided that the single minority enrollment ... of no school will exceed 50 percent of the student body." 473 F.Supp. 996, 1006 (WD Wash.1979). The District resolved to eliminate all such imbalance from the Seattle public schools by the beginning of the 1979–1980 academic year.[3]

***461** In September 1977, the District implemented a "magnet" program, designed to alleviate racial isolation by enhancing educational offerings at certain schools, thereby encouraging voluntary student transfers. A "disproportionate amount of the overall movement" inspired by the program was undertaken by Negro students, however, *ibid.*, and racial imbalance in the Seattle schools was found to have actually increased between the 1970–1971 and 1977–1978 academic years. The District therefore concluded that mandatory reassignment of students was necessary if racial isolation in its schools was to be eliminated. Accordingly, in March 1978, the School Board enacted the so-called "Seattle Plan" for desegregation. The plan, which makes extensive use of busing and mandatory reassignments, desegregates elementary schools by "pairing" and "triading" predominantly minority with predominantly white attendance areas, and by basing student assignments on attendance zones rather than on race. The racial makeup of secondary schools is moderated by "feeding" them from the desegregated elementary schools. App. 142–143. The District represents that the plan results in the reassignment of roughly equal numbers of white and minority students, and allows most students to spend roughly half of their academic careers attending a school near their homes. Brief for Appellee Seattle School District No. 1, p. 5.
The desegregation program, implemented in the 1978–1979 academic year, apparently was effective: the District Court found that the Seattle Plan "has substantially reduced the number of racially imbalanced schools in the district and has substantially reduced the percentage of minority students in those schools which remain racially imbalanced." 473 F.Supp., at 1007.

B

In late 1977, shortly before the Seattle Plan was formally adopted by the District, a number of Seattle residents who opposed the desegregation strategies being discussed by the School Board formed an organization called the Citizens for ***462** Voluntary Integration Committee (CiVIC). This organization, which the District Court found "was formed because of its

founders' opposition to The Seattle Plan," *ibid.*, attempted to enjoin implementation of the Board's mandatory desegregation program through litigation in state court; when these efforts failed, CiVIC drafted a statewide initiative designed to terminate the use of mandatory busing for purposes of racial integration.[4] This proposal, known as Initiative 350, provided that "no school board ... shall directly or indirectly require ****3191** any student to attend a school other than the school which is geographically nearest or next nearest the student's place of residence ... and which offers the course of study pursued by such student...." See Wash.Rev.Code § 28A.26.010 (1981).[5] The initiative then set out, however, a number of broad exceptions to this requirement: a student may be assigned beyond his neighborhood school if he "requires special education, care or guidance," or if "there are health or safety hazards, either natural or man made, or physical barriers or obstacles ... between the student's place of residence and the nearest or next nearest school," or if "the school nearest or next nearest to his place of residence is unfit or inadequate because of overcrowding, unsafe conditions or lack of physical facilities." See *ibid.* Initiative 350 also specifically proscribed use of seven enumerated methods of "indirec[t]" student assignment—among them the redefinition of attendance zones, the pairing of schools, and the use of ***463** "feeder" schools—that are a part of the Seattle Plan. See § 28A.26.030. The initiative envisioned busing for racial purposes in only one circumstance: it did not purport to "prevent any court of competent jurisdiction from adjudicating constitutional issues relating to the public schools." See § 28A.26.060.

Its proponents placed Initiative 350 on the Washington ballot for the November 1978 general election. During the ensuing campaign, the District Court concluded, the leadership of CiVIC "acted legally and responsibly," and did not address "its appeals to the racial biases of the voters." 473 F.Supp., at 1009. At the same time, however, the court's findings demonstrate that the initiative was directed solely at desegregative busing in general, and at the Seattle Plan in particular. Thus, "[e]xcept for the assignment of students to effect racial balancing, the drafters of Initiative 350 attempted to preserve to school districts the maximum flexibility in the assignment of students," *id.*, at 1008, and "[e]xcept for racially-balancing purposes" the initiative "permits local school districts to assign students other than to their nearest or next nearest schools for most, if not all, of the major reasons for which students are at present assigned to schools other than their nearest or next nearest schools." *Id.*, at 1010.[6] In campaigning for the measure, CiVIC officials accurately represented that its passage would result in "no loss of school district flexibility other than in busing for desegregation purposes," *id.*, at 1008, and it is evident that the campaign focused almost exclusively on the wisdom of "forced busing" for integration. See *id.*, at 1009.

On November 8, 1978, two months after the Seattle Plan went into effect, Initiative 350 passed by a substantial margin, drawing almost 66% of the vote statewide. The initiative failed to attract majority support in two state legislative ***464** districts, both in Seattle. In the city as a whole, however, the initiative passed with some 61% of the vote. Within the month, the District, together with the Tacoma and Pasco School Districts,[7] initiated this suit against the ****3192** State in the United States District Court for the Western District of Washington, challenging the constitutionality of Initiative 350 under the Equal Protection Clause of the Fourteenth Amendment. The United States and several community organizations intervened in support of the District;[8] CiVIC intervened on behalf of the defendants.

After a 9-day trial, the District Court made extensive and detailed findings of fact. The court determined that "[t]hose Seattle schools which are most crowded are located in those areas of the city where the preponderance of minority families live." *Id.*, at 1001. Yet the court found that Initiative 350, if implemented, "will prevent the racial balancing of a significant number of Seattle schools and will cause the school system to become more racially imbalanced than it presently is," "will make it impossible for Tacoma schools to maintain their present racial balance," and will make "doubtful" the ***465** prospects for integration of the Pasco schools. *Id.*, at 1010; see *id.*, at 1001, 1011. Except for desegregative busing, however, the court found that "almost all of the busing of students currently taking place in [Washington] is permitted by Initiative 350." *Id.*, at 1010. And while the court found that "racial bias ... is a factor in the opposition to the 'busing' of students to obtain racial balance," *id.*, at 1001, it also found that voters were moved to support Initiative 350 for "a number of reasons," so that "[i]t is impossible to ascertain all of those reasons [o]r to determine the relative impact of those reasons upon the electorate." *Id.*, at 1010.

The District Court then held Initiative 350 unconstitutional for three independent reasons. The court first concluded that the initiative established an impermissible racial classification in violation of *Hunter v. Erickson*, 393 U.S. 385, 89 S.Ct. 557, 21 L.Ed.2d 616 (1969), and *Lee v. Nyquist*, 318 F.Supp. 710 (WDNY 1970) (three-judge court), summarily aff'd, 402 U.S. 935, 91 S.Ct. 1618, 29 L.Ed.2d 105 (1971), "because it permits busing for non-racial reasons but forbids it for racial reasons." 473 F.Supp., at 1012. The court next held Initiative 350 invalid because "a racially discriminatory purpose was one of the factors which motivated the conception and adoption of the initiative." *Id.*, at 1013.[9] Finally, the District Court reasoned that Initiative 350 was unconstitutionally overbroad, because in the absence of a ***466** court order it barred even school boards

that had engaged in *de jure* segregation from taking steps to foster integration.[10] *Id.*, at 1016. The court permanently enjoined implementation of the initiative's restrictions.

On the merits, a divided panel of the United States Court of Appeals for the Ninth Circuit affirmed, relying entirely on the District Court's first rationale. ****3193** 633 F.2d 1338 (1980).[11] By subjecting desegregative student assignments to unique treatment, the Court of Appeals concluded, Initiative 350 "both creates a constitutionally-suspect racial classification and radically restructures the political process of Washington by allowing a state-wide majority to usurp traditional local authority over local school board educational policies." *Id.*, at 1344. In doing so, the court continued, the initiative "*remove[s]* from local school boards their existing authority, and in large part their capability, to enact programs designed to desegregate the schools." *Id.*, at 1346 (emphasis in original and footnote omitted). The court found such a result contrary to the principles of *Hunter v. Erickson, supra*, and *Lee v. Nyquist, supra.* The court acknowledged that the issue would be a different one had a successor school board attempted to rescind the Seattle Plan. Here, however, "a different governmental body—the state-wide electorate—rescinded a policy voluntarily enacted by locally elected school boards already subject to local political control." 633 F.2d, at 1346.[12]

***467** The State and various state officers appealed to this Court. We noted probable jurisdiction to address an issue of significance to our Nation's system of education. 454 U.S. 890, 102 S.Ct. 384, 70 L.Ed.2d 204 (1981).

II

The Equal Protection Clause of the Fourteenth Amendment guarantees racial minorities the right to full participation in the political life of the community. It is beyond dispute, of course, that given racial or ethnic groups may not be denied the franchise, or precluded from entering into the political process in a reliable and meaningful manner. See *White v. Regester*, 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973); *Nixon v. Herndon*, 273 U.S. 536, 47 S.Ct. 446, 71 L.Ed. 759 (1927). But the Fourteenth Amendment also reaches "a political structure that treats all individuals as equals," *Mobile v. Bolden*, 446 U.S. 55, 84, 100 S.Ct. 1490, 1509, 64 L.Ed.2d 47 (1980) (STEVENS, J., concurring in judgment), yet more subtly distorts governmental processes in such a way as to place special burdens on the ability of minority groups to achieve beneficial legislation.

This principle received its clearest expression in *Hunter v. Erickson, supra*, a case that involved attempts to overturn antidiscrimination legislation in Akron, Ohio. The Akron City Council, pursuant to its ordinary legislative processes, had enacted a fair housing ordinance. In response, the local citizenry, using an established referendum procedure, see 393 U.S., at 390, and n. 6; at *id.*, 393–394, and n., 89 S.Ct., at 560, and n. 6; 562, and n. (Harlan, J., concurring), amended the city charter to provide that ordinances regulating real estate transactions " 'on the basis of race, color, religion, national origin or ancestry must first be approved by a majority of the electors voting on the question at a regular or general election before said ordinance shall be ***468** effective.' " *Id.*, at 387, 89 S.Ct., at 558. This action "not only suspended the operation of the existing ordinance forbidding housing discrimination, but also required the approval of the electors before any future [fair housing] ordinance could take effect." *Id.*, at 389–390, 89 S.Ct., at 559–560. In essence, the amendment changed the requirements for the adoption ****3194** of one type of local legislation: to enact an ordinance barring housing discrimination on the basis of race or religion, proponents had to obtain the approval of the City Council *and* of a majority of the voters citywide. To enact an ordinance preventing housing discrimination on other grounds, or to enact any other type of housing ordinance, proponents needed the support of only the City Council.

In striking down the charter amendment, the *Hunter* Court recognized that, on its face, the provision "draws no distinctions among racial and religious groups." *Id.*, at 390, 89 S.Ct., at 560. But it did differentiate "between those groups who sought the law's protection against racial ... discriminatio [n] in the sale and rental of real estate and those who sought to regulate real property transactions in the pursuit of other ends," *ibid.*, thus "disadvantag[ing] those who would benefit from laws barring racial ... discriminatio[n] as against those who would bar other discriminations or who would otherwise regulate the real estate market in their favor." *Id.*, at 391, 89 S.Ct., at 560. In "reality," the burden imposed by such an arrangement necessarily "falls on the minority. The majority needs no protection against discrimination and if it did, a referendum might

be bothersome but no more than that." *Ibid.* In effect, then, the charter amendment served as an "explicitly racial classification treating racial housing matters differently from other racial and housing matters." *Id.*, at 389, 89 S.Ct., at 559. This made the amendment constitutionally suspect: "the State may no more disadvantage any *particular* group by making it more difficult to enact legislation in its behalf than it may dilute any person's vote or give any group a smaller representation than another of comparable size." *Id.*, at 393, 89 S.Ct., at 562 (emphasis added).

***469** *Lee v. Nyquist*, 318 F.Supp. 710 (WDNY 1970) (three-judge court), offers an application of the *Hunter* doctrine in a setting strikingly similar to the one now before us. That case involved the New York education system, which made use of both elected and appointed school boards and which conferred extensive authority on state education officials. In an effort to eliminate *de facto* segregation in New York's schools, those officials had directed the city of Buffalo—a municipality with an appointed school board—to implement an integration plan. While these developments were proceeding, however, the New York Legislature enacted a statute barring state education officials and appointed—though not elected—school boards from "assign[ing] or compell[ing] [students] to attend any school on account of race ... or for the purpose of achieving [racial] equality in attendance ... at any school." *Id.*, at 712.[13]
Applying *Hunter*, the three-judge District Court invalidated the statute, noting that under the provision "[t]he Commissioner [of Education] and local appointed officials are prohibited from acting in [student assignment] matters only where racial criteria are involved." *Id.*, at 719. In the court's view, the statute therefore "place[d] *burdens* on the implementation of educational policies designed to deal with race on the local level" by "treating educational matters involving racial criteria differently from other educational matters and making it more difficult to deal with racial imbalance in the public schools." *Ibid*. (emphasis in original). This drew an impermissible distinction "between the treatment of problems involving racial matters and that afforded other problems in the same area." *Id.*, at 718. This Court affirmed the District Court's judgment without opinion. 402 U.S. 935, 91 S.Ct. 1618, 29 L.Ed.2d 105 (1971).

These cases yield a simple but central principle. As Justice Harlan noted while concurring in the Court's opinion in ***470** *Hunter*, laws structuring political institutions or ****3195** allocating political power according to "neutral principles"—such as the executive veto, or the typically burdensome requirements for amending state constitutions—are not subject to equal protection attack, though they may "make it more difficult for minorities to achieve favorable legislation." 393 U.S., at 394, 89 S.Ct., at 562. Because such laws make it more difficult for *every* group in the community to enact comparable laws, they "provid[e] a just framework within which the diverse political groups in our society may fairly compete." *Id.*, at 393, 89 S.Ct., at 562. Thus, the political majority may generally restructure the political process to place obstacles in the path of everyone seeking to secure the benefits of governmental action. But a different analysis is required when the State allocates governmental power nonneutrally, by explicitly using the *racial* nature of a decision to determine the decisionmaking process. State action of this kind, the Court said, "places *special* burdens on racial minorities within the governmental process," *id.*, at 391, 89 S.Ct., at 560 (emphasis added), thereby "making it *more* difficult for certain racial and religious minorities [than for other members of the community] to achieve legislation that is in their interest." *Id.*, at 395, 89 S.Ct., at 563 (emphasis added) (Harlan, J., concurring). Such a structuring of the political process, the Court said, was "no more permissible than [is] denying [members of a racial minority] the vote, on an equal basis with others." *Id.*, at 391, 89 S.Ct., at 560.

III

We believe that the Court of Appeals properly focused on *Hunter* and *Lee*, for we find the principle of those cases dispositive of the issue here. In our view, Initiative 350 must fall because it does "not attemp[t] to allocate governmental power on the basis of any general principle." *Hunter v. Erickson*, 393 U.S., at 395, 89 S.Ct., at 563 (Harlan, J., concurring). Instead, it uses the racial nature of an issue to define the governmental decisionmaking structure, and thus imposes substantial and unique burdens on racial minorities.

***471** A

Noting that Initiative 350 nowhere mentions "race" or "integration," appellants suggest that the legislation has no racial overtones; they maintain that *Hunter* is inapposite because the initiative simply permits busing for certain enumerated purposes while neutrally forbidding it for all other reasons. We find it difficult to believe that appellants' analysis is seriously advanced, however, for despite its facial neutrality there is little doubt that the initiative was effectively drawn for racial purposes. Neither the initiative's sponsors, nor the District Court, nor the Court of Appeals had any difficulty perceiving the racial nature of the issue settled by Initiative 350. Thus, the District Court found that the text of the initiative was carefully tailored to interfere only with desegregative busing.[14] Proponents of the initiative candidly "represented that there would be no loss of school district flexibility other than in busing for desegregation purposes." 473 F.Supp., at 1008. And, as we have noted, Initiative 350 in fact allows school districts to bus their students "for most, if not all," of the nonintegrative purposes required by their educational policies. *Id.*, at 1010. The Washington electorate surely was aware of this, for it was "assured" by CiVIC officials that " '99% of the school districts in the state' "—those that lacked mandatory integration programs—"would not be affected by the passage of 350." *Id.*, at 1008–1009. It is beyond reasonable dispute, then, that the initiative was enacted " 'because of,' not merely 'in spite of,' its adverse effects upon" busing for integration. ****3196** *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 279, 99 S.Ct. 2282, 2296, 60 L.Ed.2d 870 (1979).

Even accepting the view that Initiative 350 was enacted for such a purpose, the United States—which has changed its position during the course of this litigation, and now supports the State—maintains that busing for integration, unlike the ***472** fair housing ordinance involved in *Hunter*, is not a peculiarly "racial" issue at all. Brief for United States 17, n. 18. Again, we are not persuaded. It undoubtedly is true, as the United States suggests, that the proponents of mandatory integration cannot be classified by race: Negroes and whites may be counted among both the supporters and the opponents of Initiative 350. And it should be equally clear that white as well as Negro children benefit from exposure to "ethnic and racial diversity in the classroom." *Columbus Board of Education v. Penick*, 443 U.S. 449, 486, 99 S.Ct. 2941, 2991, 61 L.Ed.2d 666 (1979) (POWELL, J., dissenting). See *Milliken v. Bradley*, 418 U.S. 717, 783, 94 S.Ct. 3112, 3146, 41 L.Ed.2d 1069 (1974) (MARSHALL, J., dissenting).[15] But neither of these factors serves to distinguish *Hunter*, for we may fairly assume that members of the racial majority both favored and benefited from Akron's fair housing ordinance. Cf. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 376–377, and n. 17, 102 S.Ct. 1114, 1122–1123, and n. 17, 71 L.Ed.2d 214 (1982); *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 111, 115, 99 S.Ct. 1601, 1614, 1615, 60 L.Ed. 66 (1979).

In any event, our cases suggest that desegregation of the public schools, like the Akron open housing ordinance, at bottom inures primarily to the benefit of the minority, and is designed for that purpose. Education has come to be "a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment." *Brown v. Board of Education*, 347 U.S. 483, 493, 74 S.Ct. 686, 691, 98 L.Ed. 873 (1954). When that environment is largely shaped by members of different racial and cultural groups, minority children can achieve their full ***473** measure of success only if they learn to function in—and are fully accepted by—the larger community. Attending an ethnically diverse school may help accomplish this goal by preparing minority children "for citizenship in our pluralistic society," *Estes v. Metropolitan Branches of Dallas NAACP*, 444 U.S. 437, 451, 100 S.Ct. 716, 723, 62 L.Ed.2d 626 (1980) (POWELL, J., dissenting), while, we may hope, teaching members of the racial majority "to live in harmony and mutual respect" with children of minority heritage. *Columbus Board of Education v. Penick*, 443 U.S., at 485, n. 5, 99 S.Ct., at 2946, n. 5 (POWELL, J., dissenting). *Lee v. Nyquist* settles this point, for the Court there accepted the proposition that mandatory desegregation strategies present the type of racial issue implicated by the *Hunter* doctrine.[16]

****3197** It is undeniable that busing for integration—particularly when ordered by a federal court—now engenders considerably more controversy than does the sort of fair housing ordinance debated in *Hunter.* See ***474** *Estes v. Metropolitan Branches of Dallas NAACP*, 444 U.S., at 448–451, 100 S.Ct., at 722–723 (POWELL, J., dissenting). But in the absence of a constitutional violation, the desirability and efficacy of school desegregation are matters to be resolved through the political process. For present purposes, it is enough that minorities may consider busing for integration to be "legislation that is in their interest." *Hunter v. Erickson*, 393 U.S., at 395, 89 S.Ct., at 563 (Harlan, J., concurring). Given the racial focus of Initiative 350, this suffices to trigger application of the *Hunter* doctrine.

B

We are also satisfied that the practical effect of Initiative 350 is to work a reallocation of power of the kind condemned in *Hunter*. The initiative removes the authority to address a racial problem—and only a racial problem—from the existing decisionmaking body, in such a way as to burden minority interests. Those favoring the elimination of *de facto* school segregation now must seek relief from the state legislature, or from the statewide electorate. Yet authority over all other student assignment decisions, as well as over most other areas of educational policy, remains vested in the local school board. Indeed, by specifically exempting from Initiative 350's proscriptions most nonracial reasons for assigning students away from their neighborhood schools, the initiative expressly requires those championing school integration to surmount a considerably higher hurdle than persons seeking comparable legislative action. As in *Hunter*, then, the community's political mechanisms are modified to place effective decisionmaking authority over a racial issue at a different level of government.[17] In a very obvious ****3198** sense, the initiative ***475** thus "disadvantages those who would benefit from laws barring" *de facto* desegregation "as against those who ... would otherwise regulate" student assignment decisions; "the reality is that the law's impact falls on the minority." *Hunter v. Erickson*, 393 U.S., at 391, 89 S.Ct., at 560.

The state appellants and the United States, in response to this line of analysis, argue that Initiative 350 has not worked *any* reallocation of power. They note that the State necessarily retains plenary authority over Washington's system of education, and therefore they suggest that the initiative ***476** amounts to nothing more than an unexceptional example of a State's intervention in its own school system. In effect, they maintain that the State functions as a "super school board," Tr. of Oral Arg. 5, 17, which typically involves itself in all areas of educational policy. And, the argument continues, if the State is the body that usually makes decisions in this area, Initiative 350 worked a simple change in policy rather than a forbidden reallocation of power. Cf. *Crawford v. Los Angeles Board of Education*, 458 U.S. 527, 102 S.Ct. 3211, 73 L.Ed.2d 948.

This at first glance would seem to be a potent argument, for States traditionally have been accorded the widest latitude in ordering their internal governmental processes, see *Holt Civic Club v. Tuscaloosa*, 439 U.S. 60, 71, 99 S.Ct. 383, 390, 58 L.Ed.2d 292 (1978), and school boards, as creatures of the State, obviously must give effect to policies announced by the state legislature. But "insisting that a State may distribute legislative power as it desires ... furnish[es] no justification for a legislative structure which otherwise would violate the Fourteenth Amendment. Nor does the implementation of this change through popular referendum immunize it." *Hunter v. Erickson*, 393 U.S., at 392, 89 S.Ct., at 561. The issue here, after all, is not whether Washington has the authority to intervene in the affairs of local school boards; it is, rather, whether the State has exercised that authority in a manner consistent with the Equal Protection Clause. As the Court noted in *Hunter*: "[T]hough Akron might have proceeded by majority vote ... on all its municipal legislation, it has instead chosen a more complex system. Having done so, the State may no more disadvantage any particular group by making it more difficult to enact legislation in its behalf than it may dilute any person's vote." *Id.*, at 392–393, 89 S.Ct., at 561–562.[18] Washington also has chosen ***477** to make use of a more complex governmental structure, and a close examination both of the Washington statutes and of the Court's decisions in related areas convinces us that *Hunter* is fully applicable here.

At the outset, it is irrelevant that the State might have vested all decisionmaking authority in itself, so long as the political structure it in fact erected imposes comparative burdens on minority interests; that much is settled by *Hunter* and by *Lee*.[19] And until the passage of Initiative 350, Washington law in fact had established the local school board, rather than the State, as the entity charged with making decisions of the type at issue here. Like all 50 States, see Brief for National School Boards Assn. ****3199** as *Amicus Curiae* 11, 14–16, Washington of course is ultimately responsible for providing education within its borders, see Wash.Const., Art. IX; Wash.Rev.Code § 28A.02.010 (1981); ch. 28A.41 (establishing a uniform school financing system); *Seattle School District No. 1 v. State*, 90 Wash.2d 476, 585 P.2d 71 (1978), and it therefore has set certain procedural requirements and minimum educational standards to be met by each school. See, *e.g.*, §§ 28A.01.010, 28A.01.020 (length of school day and year); ch. 28A.27 (mandatory attendance); ch. 28A.67 (teacher qualifications); ch. 28A.05 and §§ 28A.58.750–28A.58.754 (curriculum). But Washington has chosen to meet its educational responsibilities primarily through "state and local officials, boards, and committees," § 28A.02.020, and the responsibility to devise and tailor educational programs ***478** to suit local needs has emphatically been vested in the local school boards.

Thus "each common school district board of directors" is made "accountable for the proper operation of [its] district to the local community and its electorate." § 28A.58.758(1). To this end, each school board is "vested with the *final* responsibility for the setting of policies ensuring quality in the content and extent of its educational program" (emphasis added). *Ibid.* School boards are given responsibility for, among many other things, "[e]stablish[ing] performance criteria" for personnel and programs, for assigning staff "according to board enumerated classroom and program needs," for setting requirements

concerning hours of instruction, for establishing curriculum standards "relevant to the particular needs of district students or the unusual characteristics of the district," and for evaluating teaching materials. § 28A.58.758(2). School boards are generally directed to "develop a program identifying student learning objectives for their district [s]," § 28A.58.090; see also § 28A.58.092, to select instructional materials, § 28A.58.103, to stock libraries as they deem necessary, § 28A.58.104, and to initiate a variety of optional programs. See, *e.g.*, §§ 28A.34.010, 28A.35.010, 28A.58.105. School boards, of course, are given broad corporate powers. §§ 28A.58.010, 28A.58.075, 28A.59.180. Significantly for present purposes, school boards are directed to determine which students should be bused to school and to provide those students with transportation. § 28A.24.055.

Indeed, the notion of school board responsibility for local educational programs is so firmly rooted that local boards are subject to disclosure and reporting provisions specifically designed to ensure the board's "accountability" to the people of the community for "the educational programs in the school distric[t]." § 28A.58.758(3). And, perhaps most relevant here, before the adoption of Initiative 350 the Washington Supreme Court had found it within the general discretion of ***479** local school authorities to settle problems related to the denial of "equal educational opportunity."[20] *Citizens Against Mandatory Bussing v. Palmason*, 80 Wash.2d 445, 453, 495 P.2d 657, 663 (1972). It therefore had squarely held that a program of desegregative busing was a proper means of furthering the school board's responsibility to "administe[r] the schools in such a way as to provide a sound education for all children." *Id.*, at 456, 495 P.2d, at 664.[21] See *State ex rel. Citizens Against Mandatory Bussing v. Brooks*, 80 Wash.2d 121, 492 P.2d 536 (1972); *State ex rel. Lukens* ****3200** *v. Spokane School District No. 81*, 147 Wash. 467, 474, 266 P. 189, 191 (1928).[22]

Given this statutory structure, we have little difficulty concluding that Initiative 350 worked a major reordering of the State's educational decisionmaking process. Before adoption of the initiative, the power to determine what programs would most appropriately fill a school district's educational needs—including programs involving student assignment and desegregation—was firmly committed to the local board's ***480** discretion. The question whether to provide an integrated learning environment rather than a system of neighborhood schools surely involved a decision of that sort. See *Citizens Against Mandatory Bussing v. Palmason*, 80 Wash.2d, at 459–460, 495 P.2d, at 666–667. After passage of Initiative 350, authority over all but one of those areas remained in the hands of the local board. By placing power over desegregative busing at the state level, then, Initiative 350 plainly "differentiates between the treatment of problems involving racial matters and that afforded other problems in the same area." *Lee v. Nyquist*, 318 F.Supp., at 718.[23] The District Court and the Court of Appeals similarly concluded that the initiative restructured the Washington political process, and we see no reason to challenge the determinations of courts familiar with local law. Cf. *Milliken v. Bradley*, 418 U.S., at 769, 94 S.Ct., at 3139 (WHITE, J., dissenting).

That we reach this conclusion should come as no surprise, for when faced with a similar educational scheme in ***481** *Milliken v. Bradley, supra*,[24] the Court concluded that the actions of a local school board could not be attributed to the State that had created it. We there addressed the Michigan education system, which vests in the State constitutional responsibility for providing education: " 'The policy of [Michigan] has been to retain control of its school system, to be administered throughout the State under State laws by local State agencies ... to carry out the delegated functions given [them] by the legislature.' " *Milliken v. Bradley*, 418 U.S., at 794, 94 S.Ct., at 3151 (MARSHALL, J., dissenting), quoting *School District of City of Lansing v. State Board of Education*, 367 Mich. 591, 595, 116 N.W.2d 866, 868 (1962). See *Milliken v. Bradley*, 418 U.S., at 726, n. 5, 94 S.Ct., at 3118, n. 5. To fulfill this responsibility, the State of Michigan provided a substantial measure of school district funding, established standards for teacher certification, ****3201** determined part of the curriculum, set a minimum school term, approved bus routes and textbooks, established disciplinary procedures, and under certain circumstances had the power even to remove local school board members. See *id.*, at 795–796, 94 S.Ct., at 3151–3152 (MARSHALL, J., dissenting). See also *id.*, at 726, n. 5, 727, 94 S.Ct., at 3118, n. 5, 3118 (describing state controls over education); *id.*, at 768, and n. 4, 94 S.Ct., at 3139, and n. 4 (WHITE, J., dissenting) (same); *id.*, at 794, 94 S.Ct., at 3151 (MARSHALL, J., dissenting) (same).

Yet the Court, noting that "[n]o single tradition in public education is more deeply rooted than local control over the operation of schools," concluded that the "Michigan educational structure ... in common with most States, provides for a large measure of local control." *Id.*, at 741–742, 94 S.Ct., at 3125–3126. Relying on this analysis, the Court determined that a Michigan school board's assignment policies could not be attributed to the State, and therefore declined to permit interdistrict busing as a remedy for one school district's acts of unconstitutional ***482** segregation. If local school boards operating under a similar statutory structure are considered separate entities for purposes of constitutional adjudication when they make segregative assignment decisions, it is difficult to see why a different analysis should apply when a local board's

desegregative policy is at issue.

In any event, we believe that the question here is again settled by *Lee.* There, state control of the educational system was fully as complete as it now is in Washington. See generally N.Y.Educ.Law §§ 305, 306, 308–310 (McKinney 1969 and Supp.1981). The state statute under attack reallocated power over mandatory desegregation in two ways: it transferred authority from the State Commissioner of Education to local elected school boards, and it shifted authority from local appointed school boards to the state legislature.[25] When presented with this restructuring of the political process, the District Court declared that it could "conceive of no more compelling case for the application of the *Hunter* principle." 318 F.Supp., at 719. This Court of course affirmed the District Court's judgment. We see no relevant distinction between this case and *Lee* ; indeed, it is difficult to imagine a more precise parallel.[26]

***483** C

To be sure, "the simple repeal or modification of desegregation or antidiscrimination laws, without more, never has been viewed as embodying a presumptively invalid racial classification." *Crawford v. Los Angeles Board of Education*, 458 U.S. 527, 539, 102 S.Ct. 3211, 3218, 73 L.Ed.2d 948. See *Dayton Board of Education v.* ****3202** *Brinkman*, 443 U.S. 526, 531, n. 5, 99 S.Ct. 2971, 2976, n. 5, 61 L.Ed.2d 720 (1979); *Hunter v. Erickson*, 393 U.S., at 390, n. 5, 89 S.Ct., at 560, n. 5. As Justice Harlan noted in *Hunter*, the voters of the polity may express their displeasure through an established legislative or referendum procedure when particular legislation "arouses passionate opposition." *Id.*, at 395, 89 S.Ct., at 563 (concurring opinion). Had Akron's fair housing ordinance been defeated at a referendum, for example, "Negroes would undoubtedly [have lost] an important political battle, but they would not thereby [have been] denied equal protection." *Id.*, at 394, 89 S.Ct., at 562.

Initiative 350, however, works something more than the "mere repeal" of a desegregation law by the political entity that created it. It burdens all future attempts to integrate Washington schools in districts throughout the State, by lodging decisionmaking authority over the question at a new and remote level of government. Indeed, the initiative, like the charter amendment at issue in *Hunter*, has its most pernicious effect on integration programs that do "*not* arouse extraordinary controversy." *Id.*, at 396, 89 S.Ct., at 563 (emphasis in original). In such situations the initiative makes the enactment of racially beneficial legislation difficult, though the particular program involved might not have inspired opposition had it been promulgated through the usual legislative processes ***484** used for comparable legislation.[27] This imposes direct and undeniable burdens on minority interests. "If a governmental institution is to be fair, one group cannot always be expected to win," *id.*, at 394, 89 S.Ct., at 562; by the same token, one group cannot be subjected to a debilitating and often insurmountable disadvantage.

IV

In the end, appellants are reduced to suggesting that *Hunter* has been effectively overruled by more recent decisions of this Court. As they read it, *Hunter* applied a simple "disparate impact" analysis: it invalidated a facially neutral ordinance because of the law's adverse effects upon racial minorities. Appellants therefore contend that *Hunter* was swept away, along with the disparate-impact approach to equal protection, in *Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976), and *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977). Cf. *James v. Valtierra*, 402 U.S. 137, 91 S.Ct. 1331, 28 L.Ed.2d 678 (1971).

Appellants unquestionably are correct when they suggest that "purposeful discrimination is 'the condition that offends the Constitution,' " *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S., at 274, 99 S.Ct., at 2293, quoting *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16, 91 S.Ct. 1267, 1276, 28 L.Ed.2d 554 (1971), for the "central

purpose of the Equal Protection Clause ... is the prevention of official conduct discriminating on the basis of race." *Washington v. Davis*, 426 U.S., at 239, 96 S.Ct., at 2047. Thus, when facially neutral legislation is subjected to ***485** equal protection attack, an inquiry into intent is necessary to determine whether the legislation in some sense was designed to accord disparate treatment on the basis of racial considerations. Appellants' suggestion that this analysis somehow conflicts with *Hunter*, however, misapprehends the basis of the *Hunter* doctrine. We have not insisted on a particularized inquiry into motivation in all equal protection cases: "A racial classification, regardless of purported motivation, is presumptively ****3203** invalid and can be upheld only upon an extraordinary justification." *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S., at 272, 99 S.Ct., at 2292. And legislation of the kind challenged in *Hunter* similarly falls into an inherently suspect category.[28]

There is one immediate and crucial difference between *Hunter* and the cases cited by appellants. While decisions such as *Washington v. Davis* and *Arlington Heights* considered classifications facially unrelated to race, the charter amendment at issue in *Hunter* dealt in explicitly racial terms with legislation designed to benefit minorities "as minorities," not legislation intended to benefit some larger group of underprivileged citizens among whom minorities were disproportionately represented. This does not mean, of course, that every attempt to address a racial issue gives rise to an impermissible racial classification. See *Crawford v. Los Angeles Board of Education*, 458 U.S. 527, 102 S.Ct. 3211, 73 L.Ed.2d 948. But when the political process or the decisionmaking mechanism used to *address* racially conscious legislation—and only such legislation—is singled out for peculiar and disadvantageous treatment, the governmental action plainly "rests on 'distinctions based on race.' "[29] ***486** *James v. Valtierra*, 402 U.S., at 141, 91 S.Ct., at 1333, quoting *Hunter v. Erickson*, 393 U.S., at 391, 89 S.Ct., at 560. And when the State's allocation of power places unusual burdens on the ability of racial groups to enact legislation specifically designed to overcome the "special condition" of prejudice, the governmental action seriously "curtail[s] the operation of those political processes ordinarily to be relied upon to protect minorities." *United States v. Carolene Products Co.*, 304 U.S. 144, 153, n. 4, 58 S.Ct. 778, 783–784, n. 4, 82 L.Ed. 1234 (1938). In a most direct sense, this implicates the judiciary's special role in safeguarding the interests of those groups that are "relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 28, 93 S.Ct. 1278, 1296, 36 L.Ed.2d 16 (1973).[30]

Hunter recognized the considerations addressed above, and it therefore rested on a principle that has been vital for over a century—that "the core of the Fourteenth Amendment is the prevention of meaningful and unjustified official distinctions based on race." 393 U.S., at 391, 89 S.Ct., at 560. Just such distinctions infected the reallocation of decisionmaking authority considered in *Hunter*, for minorities are no less powerless with the vote than without it when a racial criterion is used to assign governmental power in such a way as to exclude particular racial groups "from effective participation in the political proces[s]." *Mobile v. Bolden*, 446 U.S., at 94, 100 S.Ct., at 1514 (WHITE, J., dissenting). Certainly, a state requirement that "desegregation or antidiscrimination laws," *Crawford v. Los Angeles Board of Education*, 458 U.S., at 539, 102 S.Ct., at 3218, and only such ***487** laws, be passed by unanimous vote of the legislature would be constitutionally suspect. It would be equally questionable for a community to require that laws or ordinances "designed to ameliorate ****3204** race relations or to protect racial minorities," *ibid.*, be confirmed by popular vote of the electorate as a whole, while comparable legislation is exempted from a similar procedure. The amendment addressed in *Hunter* —and, as we have explained, the legislation at issue here—was less obviously pernicious than are these examples, but was no different in principle.

V

In reaching this conclusion, we do not undervalue the magnitude of the State's interest in its system of education. Washington could have reserved to state officials the right to make all decisions in the areas of education and student assignment. It has chosen, however, to use a more elaborate system; having done so, the State is obligated to operate that system within the confines of the Fourteenth Amendment. That, we believe, it has failed to do.[31]

Accordingly, the judgment of the Court of Appeals is

Affirmed.

***488** Justice POWELL, with whom THE CHIEF JUSTICE, Justice REHNQUIST, and Justice O'CONNOR join, dissenting.

The people of the State of Washington, by a two-to-one vote, have adopted a neighborhood school policy. The policy is binding on local school districts but in no way affects the authority of state or federal courts to order school transportation to remedy violations of the Fourteenth Amendment. Nor does the policy affect the power of local school districts to establish voluntary transfer programs for racial integration or for any other purpose.

In the absence of a constitutional violation, no decision of this Court compels a school district to adopt or maintain a mandatory busing program for racial integration.[1] Accordingly, the Court does not hold that the adoption of a neighborhood school policy by *local* school districts would be unconstitutional. Rather, it holds that the adoption of such a ***489** policy at the *state* level—rather than at the local level—violates the Equal Protection Clause of the Fourteenth Amendment.

****3205** I dissent from the Court's unprecedented intrusion into the structure of a state government. The School Districts in this case were under no federal constitutional obligation to adopt mandatory busing programs. The State of Washington, the governmental body ultimately responsible for the provision of public education, has determined that certain mandatory busing programs are detrimental to the education of its children. "[T]he Fourteenth Amendment leaves the States free to distribute the powers of government as they will between their legislative and judicial branches." *Hughes v. Superior Court*, 339 U.S. 460, 467, 70 S.Ct. 718, 722, 94 L.Ed. 985 (1950). In my view, that Amendment leaves the States equally free to decide matters of concern to the State at the state, rather than local, level of government.

I

At the November 1978 general election, the voters of the State adopted Initiative 350 by a two-to-one majority.[2] The Initiative sets forth a neighborhood school policy binding on local school districts. It establishes a general rule prohibiting school districts from "directly or indirectly requir [ing] any student to attend a school other than the school which is geographically nearest or next nearest the student's place of residence." Wash.Rev.Code § 28A.26.010 (1981). The rule may be avoided in individual instances only if the student requires special education; if there are health or safety hazards between the student's residence and the nearest or next ***490** nearest school; or if the nearby schools are overcrowded, unsafe, or lacking in physical facilities. *Ibid.*

The Initiative includes two significant limitations upon the scope of its neighborhood school policy. It expressly provides that nothing in the Initiative shall "preclude the establishment of schools offering specialized or enriched educational programs which students may voluntarily choose to attend, or of any other voluntary option offered to students." § 28A.26.050. Moreover, and critical to this case, the authority of state and federal courts to order mandatory school assignments to remedy constitutional violations is left untouched by the Initiative: "This chapter shall not prevent any court of competent jurisdiction from adjudicating constitutional issues relating to the public schools." § 28A.26.060.[3]

This suit was filed in United States District Court shortly after the Initiative was enacted. The Seattle School District, joined by the Tacoma and Pasco School Districts[4] and certain individual plaintiffs, argued that the Initiative violated the Equal Protection Clause of the Fourteenth Amendment. The District Court agreed, and, in a split decision, the Court of Appeals affirmed. Relying on *Hunter v. Erickson*, 393 U.S. 385, 89 S.Ct. 557, 21 L.Ed.2d 616 (1969), the Court of Appeals concluded that Initiative 350 "both creates a constitutionally-suspect racial classification and radically restructures the political ***491** process of Washington by allowing a state-wide majority to usurp traditional local authority ****3206** over local school board educational policies." 633 F.2d 1338, 1344 (CA9 1980).[5]

II

The principles that should guide us in reviewing the constitutionality of Initiative 350 are well established. To begin with, we have never held, or even intimated, that absent a federal constitutional violation, a State *must* choose to treat persons differently on the basis of race. In the absence of a federal constitutional violation requiring race-specific remedies, a policy of strict racial neutrality by a State would violate no federal constitutional principle. Cf. *University of California Regents v. Bakke*, 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978).

In particular, a neighborhood school policy and a decision *not* to assign students on the basis of their race, does not offend the Fourteenth Amendment.[6] The Court has never ***492** held that there is an affirmative duty to integrate the schools in the absence of a finding of unconstitutional segregation. See *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 24, 91 S.Ct. 1267, 1280, 28 L.Ed.2d 554 (1971); *Dayton Board of Education v. Brinkman*, 433 U.S. 406, 417, 97 S.Ct. 2766, 2774, 53 L.Ed.2d 851 (1977). Certainly there is no constitutional duty to adopt mandatory busing in the absence of such a violation. Indeed, even where desegregation is ordered because of a constitutional violation, the Court has never held that racial balance itself is a constitutional requirement. *Ibid.* And even where there have been segregated schools, once desegregation has been accomplished no further constitutional duty exists upon school boards or States to maintain integration. See *Pasadena City Board of Education v. Spangler*, 427 U.S. 424, 96 S.Ct. 2697, 49 L.Ed.2d 599 (1976).

Moreover, it is a well-established principle that the States have "extraordinarily wide latitude ... in creating various types of political subdivisions and conferring authority upon them." ****3207** *Holt Civic Club v. Tuscaloosa*, 439 U.S. 60, 71, 99 S.Ct. 383, 390, 58 L.Ed.2d 292 (1978).[7] The Constitution does not dictate to the States a ***493** particular division of authority between legislature and judiciary or between state and local governing bodies. It does not define institutions of local government.

Thus, a State may choose to run its schools from the state legislature or through local school boards just as it may choose to address the matter of race relations at the state or local level. There is no constitutional requirement that the State establish or maintain local institutions of government or that it delegate particular powers to these bodies. The only relevant constitutional limitation on a State's freedom to order its political institutions is that it may not do so in a fashion designed to "plac[e] *special* burdens on racial minorities within the governmental process." *Hunter v. Erickson*, 393 U.S., at 391, 89 S.Ct., at 560–61 (emphasis added).

In sum, in the absence of a prior constitutional violation, the States are under no constitutional duty to adopt integration programs in their schools, and certainly they are under no duty to establish a regime of mandatory busing. Nor does the Federal Constitution require that particular decisions concerning the schools or any other matter be made on the local as opposed to the state level. It does not require the States to establish local governmental bodies or to delegate unreviewable authority to them.

III

Application of these settled principles demonstrates the serious error of today's decision—an error that cuts deeply into the heretofore unquestioned right of a State to structure the decisionmaking authority of its government. In this case, by ***494** Initiative 350, the State has adopted a policy of racial neutrality in student assignments. The policy in no way interferes with the power of state or federal courts to remedy constitutional violations. And if such a policy had been adopted by any of the

School Districts in this litigation there could have been no question that the policy was constitutional.[8]

The issue here arises only because the Seattle School District—in the absence of a then-established state policy—chose to adopt race specific school assignments with extensive busing. It is not questioned that the District itself, at any time thereafter, could have changed its mind and canceled its integration program without violating the Federal Constitution. Yet this Court holds that neither the legislature nor the people of the State of Washington could alter what the District had decided.

The Court argues that the people of Washington by Initiative 350 created a racial classification, and yet must agree that identical action by the Seattle School District itself would have created no such classification. This is not an easy argument to answer because it seems to make no sense. School boards are the creation of supreme state authority, whether in a State Constitution or by legislative enactment. Until today's decision no one would have questioned the authority of a State to abolish school boards altogether, or to require that they conform to any lawful state policy. ****3208** And in the State of Washington, a neighborhood school policy would have been lawful.

Under today's decision this heretofore undoubted supreme authority of a State's electorate is to be curtailed whenever a school board—or indeed any other state board or local instrumentality—adopts a race-specific program that arguably benefits racial minorities. Once such a program is adopted, ***495** *only* the local or subordinate entity that approved it will have authority to change it. The Court offers no authority or relevant explanation for this extraordinary subordination of the ultimate sovereign power of a State to act with respect to racial matters by subordinate bodies. It is a strange notion—alien to our system—that local governmental bodies can forever preempt the ability of a State—the sovereign power—to address a matter of compelling concern to the State. The Constitution of the United States does not require such a bizarre result.

This is certainly not a case where a State—in moving to change a locally adopted policy—has established a racially discriminatory requirement. Initiative 350 does not impede enforcement of the Fourteenth Amendment. If a Washington school district should be found to have established a segregated school system, Initiative 350 will place no barrier in the way of a remedial busing order. Nor does Initiative 350 authorize or approve segregation in any form or degree. It is neutral on its face, and racially neutral as public policy. Children of all races benefit from neighborhood schooling, just as children of all races benefit from exposure to " 'ethnic and racial diversity in the classroom.' " *Ante*, at 3196, quoting *Columbus Board of Education v. Penick*, 443 U.S. 449, 486, 99 S.Ct. 2941, 2991, 61 L.Ed.2d 666 (1979) (POWELL, J., dissenting).[9]

Finally, Initiative 350 places no "special burdens on racial minorities within the governmental process," ***496** *Hunter v. Erickson, supra*, 393 U.S., at 391, 89 S.Ct., at 560–61, such that interference with the State's distribution of authority is justified. Initiative 350 is simply a reflection of the State's political process at work. It does not alter that process in any respect. It does not require, for example, that all matters dealing with race—or with integration in the schools—must henceforth be submitted to a referendum of the people. Cf. *Hunter v. Erickson, supra.* The State has done no more than precisely what the Court has said that it should do: It has "resolved through the political process" the "desirability and efficacy of [mandatory] school desegregation" where there has been no unlawful segregation. *Ante*, at 3197.

The political process in Washington, as in other States, permits persons who are dissatisfied at a local level to appeal to the state legislature or the people of the State for redress. It permits the people of a State to pre-empt local policies, and to formulate new programs and regulations. Such a process is inherent in the continued sovereignty of the States. This is our system. Any time a State chooses to address a major issue some persons or groups may be disadvantaged. In a democratic system there are winners and losers. But there is no inherent unfairness in this and certainly no constitutional violation.[10]

****3209** IV

Nonetheless, the Court holds that Initiative 350 "imposes substantial and unique burdens on racial minorities" in the governmental process. See *ante*, at 3195. Its authority for ***497** this holding is said to be *Hunter v. Erickson, supra.*[11] In

Hunter the people of Akron passed a charter amendment that "not only suspended the operation of the existing ordinance forbidding housing discrimination, but also required the approval of the electors before any future [antidiscrimination] ordinance could take effect." 393 U.S., at 389–390, 89 S.Ct., at 559–60. Although the charter amendment was facially neutral, the Court found that it could be said to embody a racial classification: "[T]he reality is that the law's impact falls on the minority. The majority needs no protection against discrimination." *Id.*, at 391, 89 S.Ct., at 560. By making it more difficult to pass legislation in favor of racial minorities, the amendment placed "special burdens on racial minorities within the governmental process." *Ibid.*

Nothing in *Hunter* supports the Court's extraordinary invasion into the State's distribution of authority. Even could it be assumed that Initiative 350 imposed a burden on racial minorities,[12] it simply does not place unique political obstacles in the way of racial minorities. In this case, unlike in ***498** *Hunter*, the political system has *not* been redrawn or altered. The authority of the State over the public school system, acting through initiative or the legislature, is plenary. Thus, the State's political system is not altered when it adopts for the first time a policy, concededly within the area of its authority, for the regulation of local school districts. And certainly racial minorities are not uniquely or comparatively burdened by the State's adoption of a policy that would be lawful if adopted by any school district in the State.[13]

Hunter, therefore, is simply irrelevant. It is the *Court* that by its decision today ****3210** disrupts the normal course of State government.[14] Under its unprecedented theory of a vested ***499** constitutional right to local decisionmaking, the State apparently is now forever barred from addressing the perplexing problems of how best to educate fairly *all* children in a multi-racial society where, as in this case, the local school board has acted first.[15]

***500** V

We are not asked to decide the wisdom of a state policy that limits the ability of local school districts to adopt—on their own volition—mandatory reassignments for racial balance. We must decide only whether the Federal Constitution permits the State to adopt such a policy. The School Districts in this case were under no federal constitutional obligation to adopt mandatory busing. Absent such an obligation, the State—exercising its sovereign authority over all subordinate agencies—should be free to reject this debatable restriction on liberty. But today's decision denies this right to a State. In this case, it deprives the State of Washington of all opportunity to address the unresolved questions resulting from extensive mandatory busing.[16] ****3211** The Constitution does not dictate to the States at what level of government decisions ***501** affecting the public schools must be taken. It certainly does not strip the States of their sovereignty. It therefore does not authorize today's intrusion into the State's internal structure.[17]

All Citations

458 U.S. 457, 102 S.Ct. 3187, 73 L.Ed.2d 896, 5 Ed. Law Rep. 58

Footnotes

[*] The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

[1] In 1971, the District implemented a program of mandatory reassignments to integrate certain of its middle schools. This prompted an attempt to recall four School Board members who had voted for the program. That attempt narrowly failed. See 473 F.Supp. 996, 1006 (WD Wash.1979).

[2] Several community organizations threatened legal action if the District did not initiate a more effective integration effort, while the Mayor of Seattle and a number of community leaders, by letter dated May 20, 1977, urged the District to adopt "a definition of racial isolation and measurable goals leading to the elimination of racial isolation in the Seattle Public Schools prior to a Court ordered and mandated desegregation remedy." App. 139.

[3] The District Court found that the actions of the School Board were prompted by its members' "desire to ward off threatened litigation, their desire to prevent the threatened loss of federal funds, their desire to relieve the black students of the disproportionate burden which they had borne in the voluntary efforts to balance the schools racially and their perception that racial balance in the schools promotes the attainment of equal educational opportunity and is beneficial in the preparation of all students for democratic citizenship regardless of their race." 473 F.Supp., at 1007.

[4] Washington's Constitution reserves to the people of the State "the power to propose bills, laws, and to enact or reject the same at the polls, independent of the legislature." Wash.Const., Art. II, § 1. Such initiatives are placed on the ballot upon the petition of 8% of the State's voters registered and voting for governor at the last preceding regular gubernatorial election. § 1a. If passed by the electorate, an initiative may not be repealed by the state legislature for two years, although it may be amended within two years by a vote of two-thirds of each house of the legislature. § 41. See generally Comment, Judicial Review of Laws Enacted by Popular Vote, 55 Wash.L.Rev. 175 (1979).

[5] The text of Initiative 350 is now codified as Wash.Rev.Code §§ 28A.26.010–28A.26.900 (1981).

[6] At the beginning of the 1978–1979 academic year, approximately 300,000 of the 769,040 students enrolled in Washington's public schools were bused to school. Ninety-five percent of these students were transported for reasons unrelated to race. 473 F.Supp., at 1002.

[7] Along with Seattle, Tacoma School District No. 10 and Pasco School District No. 1 are the only districts in the State of Washington with comprehensive integration programs, and therefore the three are the only districts affected by Initiative 350. See *id.*, at 1009. Since 1965, Pasco has made use of school closures and a mandatory busing program to overcome the racial isolation caused by segregated housing patterns; if students attended the schools nearest their homes, three of Pasco's seven elementary schools would have a primarily white and three a primarily minority student body. *Id.*, at 1002–1003. The Tacoma School District has made use of school closures, racially controlled enrollment at magnet schools, and voluntary transfers—though not mandatory busing—to enhance racial balance in its schools. *Id.*, at 1003–1004.

[8] Several of the intervenor plaintiffs also alleged that the District had engaged in *de jure* segregation, and therefore was operating an unconstitutional dual school system. The District Court therefore bifurcated the litigation, first addressing the constitutionality of Initiative 350. Because of the court's conclusions on that question, the allegations of *de jure* segregation did not go to trial and have not been addressed by the District Court or by the Court of Appeals.

[9] The District Court acknowledged that it was impossible to determine whether the supporters of Initiative 350 "subjectively [had] a racially discriminatory intent or purpose," because "[a]s to that subjective intent the secret ballot raises an impenetrable barrier." *Id.*, at 1014. The court looked instead to objective factors, noting that it "marked [a] departure from the norm ... for the autonomy of school boards to be restricted relative to the assignment of students," and that it marked a similar "departure from the procedural norm" for "an administrative decision of a subordinate local unit of government ... [to be] overridden in a statewide initiative." *Id.*, at 1016. These factors, when coupled with the "racially disproportionate impact of the initiative," its "historical background," and "the sequence of events leading to its adoption," were found to demonstrate that a "racially discriminatory intent or purpose was at

least one motivating factor in the adoption of the initiative." *Ibid.*

10 The District Court noted that school boards that had practiced *de jure* segregation are under an affirmative obligation to eliminate the effects of that practice. *Ibid*. See *Columbus Board of Education v. Penick*, 443 U.S. 449, 458–459, 99 S.Ct. 2941, 2947, 61 L.Ed.2d 666 (1979).

11 The Court of Appeals therefore did not address the District Court's alternative finding that Initiative 350 had been adopted for discriminatory reasons, or its conclusion that the initiative was overbroad. 633 F.2d, at 1342.

12 After the decision on the merits, the District Court had declined to award attorney's fees to the plaintiff School Districts because the Districts are state-funded entities. App. to Juris. Statement C–1. The Court of Appeals reversed on this issue, concluding that the District Court had abused its discretion in denying fees. The Court of Appeals determined that the School Districts fell within the language of the attorney's fees statutes, 42 U.S.C. § 1988 and 20 U.S.C. § 3205 (1976 ed., Supp.IV), see n. 31, *infra*, and it reasoned that "[a]s long as a publicly-funded organization advances important constitutional values, it is eligible for fees under the statutes." 633 F.2d, at 1348.

13 As does Initiative 350, the New York statute apparently permitted voluntary student transfers to achieve integration. See n. 16, *infra.*

14 The Court of Appeals accepted the District Court's characterization of the initiative, and even the dissenting judge in the Court of Appeals agreed that Initiative 350 addresses a "racial" problem. 633 F.2d, at 1353.

15 Appellants and the United States do not challenge the propriety of race-conscious student assignments for the purpose of achieving integration, even absent a finding of prior *de jure* segregation. We therefore do not specifically pass on that issue. See generally *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16, 91 S.Ct. 1267, 1276, 28 L.Ed.2d 586 (1971); *North Carolina State Board of Education v. Swann*, 402 U.S. 43, 45, 91 S.Ct. 1284, 1286, 28 L.Ed.2d 554 (1971). Cf. *University of California Regents v. Bakke*, 438 U.S. 265, 300, n. 39, 312–314, 98 S.Ct. 2733, 2753, n. 39, 2759–2760, 57 L.Ed.2d 750 (1978) (opinion of POWELL, J.).

16 The United States seeks to distinguish *Lee* by suggesting that the statute there at issue "clearly prohibited" all attempts to ameliorate racial imbalance in the schools, while Initiative 350 permits voluntary desegregation efforts. Brief for United States 25. Even assuming that this distinction would otherwise be of constitutional significance, its premise is not accurate. The legislation challenged in *Lee did* permit voluntary integration efforts, for it expressly exempted from its restrictions "the assignment of a pupil in the manner requested or authorized by his parents or guardian." 318 F.Supp., at 712. Thus, as the District Court in *Lee* noted, the statute "denie[d] appointed officials the power to implement *non-voluntary* programs for the improvement of racial balance." *Id.*, at 715 (emphasis added). The difficulty in *Lee* —as in this case—stemmed from the *Lee* District Court's conclusion that a voluntary program would not serve to integrate the community's schools: "Voluntary plans for achieving racial balance ... have not had a significant impact on the problems of racial segregation in the Buffalo public schools; indeed it would appear that racial isolation is actually increasing." *Ibid.* Thus the statute challenged in *Lee* and Initiative 350 operated in precisely the same way to "deny ... student [s] the right to attend a fully integrated school." Brief for United States 25.

17 Justice POWELL finds *Hunter* completely irrelevant, dismissing it with the conclusory statement that "the political system [of Washington] has *not* been redrawn or altered." *Post*, at 3209 (emphasis in original). But the dissent entirely fails to address the relevance of *Hunter* to the reallocation of decisionmaking authority worked by Initiative 350. The evil condemned by the *Hunter* Court was not the particular political obstacle of mandatory referenda imposed by the Akron charter amendment; it was, rather, the

comparative structural burden placed on the political achievement of minority interests. Thus, in *Hunter*, the procedures for enacting racial legislation were modified in such a way as to place effective control in the hands of the citywide electorate. Similarly here, the power to enact racial legislation has been reallocated. In each case, the effect of the challenged action was to redraw decisionmaking authority over racial matters—and only over racial matters—in such a way as to place comparative burdens on minorities. While Justice POWELL and the United States find it crucial that the proponents of integrated schools remain free to use Washington's initiative system to further their ends, that was true in *Hunter* as well: proponents of open housing were not barred from invoking Akron's initiative procedures to repeal the charter amendment, or to enact fair housing legislation of their own. It surely is an excessively formal exercise, then, to argue that the procedural revisions at issue in *Hunter* imposed special burdens on minorities, but that the selective allocation of decisionmaking authority worked by Initiative 350 does not erect comparable political obstacles. Indeed, *Hunter* would have been virtually identical to this case had the Akron charter amendment simply barred the City Council from passing any fair housing ordinance, as Initiative 350 forbids the use of virtually all mandatory desegregation strategies. Surely, however, *Hunter* would not have come out the other way had the charter amendment made *no* provision for the passage of fair housing legislation, instead of subjecting such legislation to ratification by referendum.

The United States also would note that Initiative 350's "modification of state policy [was] not the result of any unusual political procedure," Brief for United States 30, for initiatives and referenda are often used by the Washington electorate. But that observation hardly serves to distinguish this case from *Hunter*, since the fair housing charter amendment was added through the unexceptional use of Akron's initiative procedure. See 393 U.S., at 387, 89 S.Ct., at 558.

18 Despite the force with which it is written, then, Justice POWELL's essay on "the heretofore unquestioned right of a State to structure the decisionmaking authority of its government," *post*, at 3207 —as well as his observations on a State's right to repeal programs designed to eliminate *de facto* segregation—is largely beside the point. The State's *power* has not been questioned at any point during this litigation. The single narrow question before us is whether the State has exercised its power in such a way as to place special, and therefore impermissible, burdens on minority interests.

19 The Court noted in *Hunter* that Akron "might have proceeded by majority vote ... on all its municipal legislation," 393 U.S., at 392, 89 S.Ct., at 561; the charter amendment was invalidated because the citizens of Akron did not reserve all power to themselves, but rather distributed it in a nonneutral manner. In *Lee*, of course, the State had unquestioned authority to vest all power over education in state officials.

20 Indeed, even the State's efforts to help ensure equal opportunity in education and to encourage desegregation are cast in cooperative terms, and are designed to assist school districts in implementing programs of their choosing. See, *e.g.*, Wash.Rev.Code §§ 28A.21.010(3), 28A.21.136(1) and (3) (1981); cf. § 28A.58.245(3).

21 The Washington Supreme Court noted: "[A]s long as the school board authorized or required students to attend schools geographically situated close to their homes, they had such a right. But the right existed only because it was given to them by the school authorities." 80 Wash.2d, at 452, 495 P.2d, at 662.

22 We also note that the State has not attempted to reserve to itself exclusive power to deal with racial issues generally. Municipalities in Washington have been given broad powers of self-government, see generally Wash.Const., Amdt. 40; Wash.Rev.Code §§ 35.22.020, 35.23.440, 35.27.370, 35.30.010 (1981); Wash.Rev.Code, Tit. 35A (Optional Municipal Code), and Washington courts specifically have held that municipalities have the power to enact antidiscrimination ordinances. See, *e.g., Seattle Newspaper-Web Pressmen's Union Local No. 26 v. Seattle*, 24 Wash.App. 462, 604 P.2d 170 (1979). Cf. 5 E. McQuillin, Law of Municipal Corporations § 19.23, p. 425 (3d rev. ed. 1981).

23 Throughout his dissent, Justice POWELL insists that the Court has created a "vested constitutional right to local decisionmaking," *post*, at 3210, that under our holding "the people of the State of Washington apparently are forever barred from developing a different policy on mandatory busing where a school district previously has adopted one of its own," *post*, at 3210, n. 14, and that today's decision somehow raises doubts about "the authority of a State to abolish school boards altogether." *Post*, at 3207. See also

id., at 3208, and at 3210, n. 14. These statements evidence a basic misunderstanding of our decision. Our analysis vests no rights, and has nothing to do with whether school board action predates that taken by the State. Instead, what we find objectionable about Initiative 350 is the comparative burden it imposes on minority participation in the political process—that is, the racial nature of the way in which it structures the *process* of decisionmaking. It is evident, then, that the horribles paraded by the dissent, *post*, at 3210, n. 14—which have nothing to do with the ability of minorities to participate in the process of self-government—are entirely unrelated to this case. It is equally clear, as we have noted at several points in our opinion, that the State remains free to vest all decisionmaking power in state officials, or to remove authority from local school boards in a race-neutral manner.

24 One *amicus* observes that many States employ a similar educational structure. See Brief for National School Boards Assn. as *Amicus Curiae* 11, 14–16, App. 1a–10a.

25 When authority to initiate desegregation programs was removed from appointed school boards and from state education officials, the only body capable of exercising power over such programs was the state legislature.

26 The United States makes only one attempt to distinguish *Lee* in this regard: *Lee* is inapposite, the United States maintains, because the statute at issue there "blocked desegregation efforts even by 'a school district subject to a pre-existing order to eliminate segregation in its schools,' " and therefore—purportedly in contrast to Initiative 350—"interfere[d] with the efforts of individual school districts to eliminate de jure segregation." Brief for United States 25, quoting *Lee v. Nyquist*, 318 F.Supp., at 715. If by this statement the United States seeks to place the District Court's holding and this Court's affirmance in *Lee* on the ground that the New York statute interfered with Buffalo's attempts to eliminate *de jure* segregation, its submission is simply inaccurate. At the time of the *Lee* litigation, Buffalo had *not* been found guilty of practicing intentional segregation. See *Arthur v. Nyquist*, 573 F.2d 134, 137 (CA2 1978). As the United States notes, Buffalo was under a "pre-existing order to eliminate segregation in its schools"—but that order was issued by the New York Commissioner of Education, because he had found Buffalo's schools *de facto* segregated. *Appeal of Dixon*, 4 N.Y.Educ. Dept. Reports 115 (1965). See *Lee v. Nyquist*, 318 F.Supp., at 714–715. *Lee* did not concern *de jure* segregation; it is to be explained only as a straightforward application of the *Hunter* doctrine.

27 That phenomenon is graphically demonstrated by the circumstances of this litigation. The longstanding desegregation programs in Pasco and Tacoma, as well as the Seattle middle school integration plan, have functioned for years without creating undue controversy. Yet they have been swept away, along with the Seattle Plan, by Initiative 350. As a practical matter, it seems most unlikely that proponents of desegregative busing in smaller communities such as Tacoma or Pasco will be able to obtain the statewide support now needed to permit them to desegregate the schools in their communities.

28 The State does not suggest that Initiative 350 furthers the kind of compelling interest necessary to overcome the strict scrutiny applied to explicit racial classifications.

29 Thus we do not hold, as the dissent implies, *post*, at 3207, that the State's attempt to repeal a desegregation program creates a racial classification, while "identical action" by the Seattle School Board does not. It is the State's race-conscious restructuring of its decisionmaking process that is impermissible, not the simple repeal of the Seattle Plan.

30 We also note that singling out the political processes affecting racial issues for uniquely disadvantageous treatment inevitably raises dangers of impermissible motivation. When political institutions are more generally restructured, as JUSTICE BRENNAN has noted in another context, "[t]he very breadth of [the] scheme ... negates any suggestion" of improper purpose. *Walz v. Tax Comm'n*, 397 U.S. 664, 689, 90 S.Ct. 1409, 1422, 25 L.Ed.2d 697 (1970) (concurring opinion).

31 Appellants also challenge the Court of Appeals' award of attorney's fees to the School District plaintiffs, see n. 12, *supra*, arguing

that state-funded entities are not eligible to receive such awards from the State. In our view, this contention is without merit. The Districts are plainly parties covered by the language of the fees statutes. See 42 U.S.C. § 1988 (1976 ed., Supp. IV) ("In any action ... to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title ... the court, in its discretion, may allow *the prevailing party, other than the United States*, a reasonable attorney's fee as part of its costs") (emphasis added); 20 U.S.C. § 3205 (1976 ed., Supp. IV) ("Upon the entry of a final order by a court of the United States against a ... State ... for failure to comply with ... the fourteenth amendment to the Constitution of the United States as [it] pertain[s] to elementary and secondary education, the court, in its discretion ... may allow *the prevailing party, other than the United States*, a reasonable attorney's fee as part of its costs") (emphasis added). Nothing in the history of the statutes suggests that this language was meant to exclude state-funded entities. To the contrary, the Courts of Appeals have held with substantial unanimity that publicly funded legal services organizations may be awarded fees. See, *e.g., Dennis v. Chang*, 611 F.2d 1302 (CA9 1980); *Holley v. Lavine*, 605 F.2d 638 (CA2 1979), cert. denied *sub nom. Blum v. Holley*, 446 U.S. 913, 100 S.Ct. 1843, 64 L.Ed.2d 266 (1980); *Lund v. Affleck*, 587 F.2d 75 (CA1 1978). And when it enacted § 1988, Congress cited with approval a decision awarding fees to a state-funded organization. See H.R.Rep.No.94–1558, p. 8, n. 16 (1976) (citing *Incarcerated Men of Allen County Jail v. Fair*, 507 F.2d 281 (CA6 1974). In any event, the underlying congressional policies are served by awarding fees in cases such as the one before us: no matter what the source of their funds, school boards have limited budgets, and allowing them fees "encourage[s] compliance with and enforcement of the civil rights laws." *Dennis v. Chang*, 611 F.2d, at 1306. See *id.*, at 1306–1307. While appellants suggest that it is incongruous for a State to pay attorney's fees to one of its school boards, it seems no less incongruous that a local board would feel the need to sue the State for a violation of the Fourteenth Amendment. We see no reason to disturb the judgment of the Court of Appeals on this point.

1 Throughout this dissent, I use the term "mandatory busing" to refer to busing—or mandatory student reassignments—for the purpose of achieving racial integration.

2 The Initiative passed by almost 66% of the statewide vote. In Seattle the Initiative passed by over 61% of the vote. It failed in only two of Seattle's legislative districts—one predominantly black and one predominantly white.

3 Unlike the constitutional amendment at issue in *Crawford v. Los Angeles Board of Education of the City of Los Angeles*, 458 U.S. 527, 102 S.Ct. 3211, 73 L.Ed.2d 948, Initiative 350 places no limits on the state courts in their interpretation of the State Constitution. Thus, if mandatory school assignments were required by the State Constitution—although not by the Fourteenth Amendment of the Federal Constitution—Initiative 350 would not hinder a State from enforcing its Constitution.

4 Tacoma School District No. 10 and Pasco School District No. 1 are the only other school districts in Washington with extensive integration programs. Pasco has relied upon school closings and mandatory busing to achieve racial integration in its schools. Only minority children are bused under the Pasco plan. 473 F.Supp. 996, 1002 (WDWash.1979). In addition to school closings, the Tacoma integration plan relies upon voluntary techniques—magnet schools and voluntary transfers.

5 Judge Wright dissented. In his view Initiative 350 could not be said to embody a racial classification. The Initiative does not classify individuals on the basis of their race. It simply deals with a matter bearing on race relations. Moreover, no racial classification is created because the citizens of a State favor mandatory school reassignments for some purposes but not for reasons of race. The benefits and problems associated with busing for one reason—*e.g.,* for racial integration—are not the same as for another—*e.g.,* to avoid safety hazards. Finally, Judge Wright could not understand how the exercise of authority by the State could create a racial classification. The State had not intervened by altering the legislative process in a way that burdened racial minorities. Charged by the State Constitution with the responsibility for the provision of public education, the State had simply exercised its authority to run its own school system.

Judge Wright also addressed the District Court's alternative holdings that Initiative 350 is overbroad or that it was motivated by discriminatory intent. He found no basis for either conclusion. These alternative holdings were not addressed by the Court of Appeals majority. Nor are they relied upon by the Court today. Accordingly, they are not discussed in this dissent.

[6] See *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 28, 91 S.Ct. 1267, 1282, 28 L.Ed.2d 554 (1971) ("Absent a constitutional violation there would be no basis for judicially ordering assignment of students on a racial basis. All things being equal, with no history of discrimination, it might well be desirable to assign pupils to schools nearest their homes").

Indeed, in the absence of a finding of segregation by the School District, mandatory busing on the basis of race raises constitutional difficulties of its own. Extensive pupil transportation may threaten liberty or privacy interests. See *University of California Regents v. Bakke*, 438 U.S. 265, 300, n. 39, 98 S.Ct. 2733, 2753, n. 39, 57 L.Ed.2d 750 (1978) (opinion of POWELL, J.); *Keyes v. School District No. 1, Denver, Colo.*, 413 U.S. 189, 240–250, 93 S.Ct. 2686, 2713–18, 37 L.Ed.2d 548 (1973) (POWELL, J., concurring in part and dissenting in part). Moreover, when a State or school board assigns students on the basis of their race, it acts on the basis of a racial classification, and we have consistently held that "[a] racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification." *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 272, 99 S.Ct. 2282, 2292, 60 L.Ed.2d 870 (1979).

[7] "[A]ccording to the institutions of this country, the sovereignty in every State resides in the people of the State, and ... they may alter and change their form of government at their own pleasure." *Luther v. Borden*, 7 How. 1, 47, 12 L.Ed. 581 (1849). See *Community Communications Co. v. Boulder*, 455 U.S. 40, 53–54, 102 S.Ct. 835, 842, 70 L.Ed.2d 810 (1982); *Sailors v. Board of Education*, 387 U.S. 105, 109, 87 S.Ct. 1549, 1552, 18 L.Ed.2d 650 (1967) ("Save and unless the state, county, or municipal government runs afoul of a federally protected right, it has vast leeway in the management of its internal affairs"); *United States v. Kagama*, 118 U.S. 375, 379, 6 S.Ct. 1109, 1111, 30 L.Ed. 228 (1886) (under the Constitution, sovereign authority resides either with the States or the Federal Government, and "[t]here exist ... but these two").

[8] The Court consistently has held that "the Equal Protection Clause is not violated by the mere repeal of race-related legislation or policies that were not required by the Federal Constitution in the first place." *Crawford v. Los Angeles Board of Education*, 458 U.S., at 538, 102 S.Ct., at 3218.

[9] The policies in support of neighborhood schooling are various but all of them are racially neutral. The people of the State legitimately could decide that unlimited mandatory busing places too great a burden on the liberty and privacy interests of families and students of all races. It might decide that the reassignment of students to distant schools, on the basis of race, was too great a departure from the ideal of racial neutrality in state action. And, in light of the experience with mandatory busing in other cities, the State might conclude that such a program ultimately would lead to greater racial imbalance in the schools. See *Estes v. Metropolitan Branches of Dallas NAACP*, 444 U.S. 437, 451, 100 S.Ct. 716, 723, 62 L.Ed.2d 626 (1980) (POWELL, J., dissenting).

[10] Cf. *James v. Valtierra*, 402 U.S. 137, 142, 91 S.Ct. 1331, 1334, 28 L.Ed.2d 678 (1971) ("[O]f course a lawmaking procedure that 'disadvantages' a particular group does not always deny equal protection. Under any such holding, presumably a State would not be able to require referendums on any subject unless referendums were required on all, because they would always disadvantage some group. And this Court would be required to analyze governmental structures to determine whether a gubernatorial veto provision or a filibuster rule is likely to 'disadvantage' any of the diverse and shifting groups that make up the American people").

[11] The Court also relies at certain critical points in its discussion on the summary affirmance in *Lee v. Nyquist*, 318 F.Supp. 710 (WDNY 1970), summarily aff'd, 402 U.S. 935, 91 S.Ct. 1618, 29 L.Ed.2d 105 (1971). As we have often noted, however, summary affirmances by this Court are of little precedential force. See *Metromedia, Inc. v. San Diego*, 453 U.S. 490, 500, 101 S.Ct. 2882, 2888, 69 L.Ed.2d 800 (1981). A summary affirmance "is not to be read as an adoption of the reasoning supporting the judgment under review." *Zobel v. Williams*, 457 U.S. 55, 64, n. 13, 102 S.Ct. 2309, 2315, n. 13, 72 L.Ed.2d 672 (1982).

[12] It is far from clear that in the absence of a constitutional violation, mandatory busing necessarily benefits racial minorities or that it is even viewed with favor by racial minorities. See *Crawford v. Los Angeles Board of Education*, 458 U.S. 527, 545, n. 32, 102 S.Ct. 3211, 3222, n. 32, 73 L.Ed.2d 948. As the Court indicates, the busing question is complex and is best resolved by the political

process. *Ante*, at 3197.

Moreover, it is significant that Initiative 350 places no limits on voluntary programs or on court-ordered reassignments. It permits school districts to order school closings for purposes of racial balance. § 28A.26.030. And it permits school districts to order a student to attend the "next nearest"—rather than nearest—school to promote racial integration.

13 The Court repeatedly states that the effect of Initiative 350 is "to redraw decisionmaking authority over racial matters—*and only over racial matters* —in such a way as to place *comparative* burdens on minorities." *Ante*, at 3197, n. 17 (emphasis added). But the decision by the State to exercise its authority over the schools and over racial matters in the schools does not place a comparative burden on racial minorities. In *Hunter*, as we have understood it, "fair housing legislation *alone* was subject to an automatic referendum requirement." *Gordon v. Lance*, 403 U.S. 1, 5, 91 S.Ct. 1889, 1891, 29 L.Ed.2d 273 (1971) (emphasis added). By contrast, Initiative 350 merely places mandatory busing among the much larger group of matters—covering race relations, administration of the schools, and a variety of other matters—addressed at the state level. See n. 15, *infra.* Racial minorities, if indeed they are burdened by Initiative 350, are not *comparatively* burdened. In this respect, they are in the same position as any other group of persons who are disadvantaged by regulations drawn at the state level.

14 The Court's decision intrudes deeply into normal state decisionmaking. Under its holding the people of the State of Washington apparently are forever barred from developing a different policy on mandatory busing where a school district previously has adopted one of its own. This principle would not seem limited to the question of mandatory busing. Thus, if the admissions committee of a state law school developed an affirmative-action plan that came under fire, the Court apparently would find it unconstitutional for any higher authority to intervene unless that authority traditionally dictated admissions policies. As a constitutional matter, the dean of the law school, the faculty of the university as a whole, the university president, the chancellor of the university system, and the board of regents might be powerless to intervene despite their greater authority under state law.

After today's decision it is unclear whether the State may set policy in any area of race relations where a local governmental body arguably has done "more" than the Fourteenth Amendment requires. If local employment or benefits are distributed on a racial basis to the benefit of racial minorities, the State apparently may not thereafter ever intervene. Indeed, under the Court's theory one must wonder whether—under the equal protection component of the Fifth Amendment—even the Federal Government could assert its superior authority to regulate in these areas.

15 Even accepting the dubious notion that a State must demonstrate some past control over public schooling or race relations before now intervening in these matters, *ante*, at 3198, the Court's attempt to demonstrate that Initiative 350 represents a unique thrust by the State into these areas is unpersuasive. The Court's own discussion indicates the comprehensive character of the State's activity. The Common School Provisions of the State's Code of Laws are nearly 200 pages long, governing a broad variety of school matters. The State has taken seriously its constitutional obligation to provide public education. See Wash.Const., Art. IX, § 2; *Seattle School District No. 1 v. State*, 90 Wash.2d 476, 518, 585 P.2d 71, 95 (1978). In light of the wide range of regulation of the public schools by the State, it is wholly unclear what degree of prior concern or control by the State would satisfy the Court's new doctrine.

In addition to public school affairs generally, the State has taken a direct interest in ending racial discrimination in the schools and elsewhere. See Wash.Rev.Code § 49.60.010 *et seq.* (1981). Article IX, § 1, of the State Constitution specifically prohibits discrimination in public schools: "It is the paramount duty of the state to make ample provision for the education of all children residing within its borders without distinction or preference on account of race, color, caste, or sex." The State Supreme Court has not interpreted this section of the State Constitution to prohibit race-conscious school assignments in the absence of a violation of the Fourteenth Amendment. Cf. *Citizens Against Mandatory Bussing v. Palmason*, 80 Wash.2d 445, 495 P.2d 657 (1972). But until today's decision one would have thought that the state court *could* have rendered such a decision without violating the Federal Constitution.

16 Responding to this dissent, the Court denies that its opinion limits the authority of the people of the State of Washington and the legislature to control or regulate school boards. It further states that "the State remains free to vest all decisionmaking power in state officials, or to remove authority from local school boards in a race-neutral manner." *Ante*, at 3200, n. 23. These are puzzling statements that seem entirely at odds with much of the text of the Court's opinion. It will be surprising if officials of the State of

Washington—with the one exception mentioned below—will have any clear idea as to what the State now lawfully may do.

The Court does say that "[i]t is the State's race-conscious restructuring of its decisionmaking process that is impermissible, not the simple repeal of the Seattle Plan." *Ante*, at 3203, n. 29. Apparently the Court is saying that, despite what else may be said in its opinion, the people of the State—or the state legislature—may repeal the *Seattle Plan*, even though neither the people nor the legislature validly may prescribe statewide standards. I perceive no logic in—and certainly no constitutional basis for—a distinction between repealing the Seattle Plan of mandatory busing and establishing a statewide policy to the same effect. The people of a State have far greater interest in the general problems associated with compelled busing for the purpose of integration than in the plan of a single school board.

17 As a former school board member for many years, I accept the privilege of a dissenting Justice to add a personal note. In my view, the local school board—responsible to the people of the district it serves—*is* the best qualified agency of a state government to make decisions affecting education within its district. As a policy matter, I would not favor reversal of the Seattle Board's decision to experiment with a reasonable mandatory busing program, despite my own doubts as to the educational or social merit of such a program. See *Estes v. Metropolitan Branches of Dallas NAACP*, 444 U.S., at 438–448, 100 S.Ct., at 716–722 (POWELL, J., dissenting). But this case does not present a question of educational policy or even the merits of busing for racial integration. The question is one of a State's sovereign authority to structure and regulate its own subordinate bodies.

142 S.Ct. 1245
Supreme Court of the United States.

WISCONSIN LEGISLATURE, et al.
v.
WISCONSIN ELECTIONS COMMISSION, et al.

No. 21A471
|
March 23, 2022

Synopsis

Background: Individual voters petitioned to Wisconsin Supreme Court for leave to commence original action for declaration that existing maps for state legislative districts were unconstitutional and for mandatory injunction as remedy. The Wisconsin Supreme Court granted the petition and permitted the legislature, the Governor, and several other parties to intervene. The Wisconsin Supreme Court, Rebecca Grassl Bradley, J., 399 Wis.2d 623, 967 N.W.2d 469, set out the basic process and criteria that it would use to guide its decision, and later invited parties to submit proposed maps. The Wisconsin Supreme Court, Brian Hagedorn, J., 2022 WL 621082, accepted Governor's proposed maps. Certiorari was granted on request by legislature and voters for emergency stay or certiorari review.

Holdings: The Supreme Court held that:

assuming that Governor was the mapmaker who was required to satisfy narrow tailoring element of strict scrutiny for equal protection violation, Governor failed to show strong basis in evidence for concluding that Voting Rights Act (VRA) required the addition of seventh majority-Black district for General Assembly;

assuming that Wisconsin Supreme Court was the mapmaker that was required to show narrow tailoring, it did not show strong basis in evidence for concluding that VRA required the addition of seventh majority-Black district; and

Wisconsin Supreme Court improperly reduced, to single factor, the three *Gingles* preconditions for a VRA vote-dilution claim.

Reversed and remanded.

Justice Sotomayor filed a dissenting opinion, in which Justice Kagan joined.

Opinion

****1247** PER CURIAM.

***399** Because of population shifts revealed by the 2020 decennial census, Wisconsin's State Assembly and Senate districts are no longer equally apportioned. The Wisconsin Legislature passed new maps to fix the problem, but the Governor vetoed them. At an impasse, the legislature and the Governor turned to the Wisconsin Supreme Court, which had already agreed to hear an original action brought by a group ***400** of voters seeking to remedy the malapportionment. Rather than attempt to draw new maps itself, the court invited the parties and intervenors—including the legislature and the Governor—to propose

maps that complied with the State Constitution, the Federal Constitution, and the Voting Rights Act of 1965 (VRA), 79 Stat. 437, as amended, 52 U.S.C. § 10301 *et seq*., and that otherwise minimized changes from the current maps.

On March 3, the court issued a decision selecting the Assembly and Senate maps that the Governor had proposed. *Johnson v. Wisconsin Elections Comm'n*, 2022 WI 14, —— Wis. 2d ——, 971 N.W.2d 402. (Because the State Constitution requires three Assembly districts to be nested within each Senate district, the court analyzed and selected the maps as a unit. *Id.*, ¶26.) The Governor's Assembly map intentionally created seven majority-black districts—one more than the current map.[1] The Governor argued that the addition of a seventh majority-black district was necessary for compliance with the VRA. In adopting the Governor's map, the court explained: "[W]e cannot say for certain on this record that seven majority-Black assembly districts are required by the VRA." *Id.*, ¶47. It nevertheless concluded that the Governor's map complied with the Equal Protection Clause of the Fourteenth Amendment ****1248** because there were "good reasons" to think that the VRA "may" require the additional majority-black district. *Id.*, ¶50.

The legislature and the voters who initiated the state-court proceeding now seek relief from that decision. They argue that the court selected race-based maps without sufficient ***401** justification, in violation of the Equal Protection Clause. They ask this Court either to grant an emergency stay or to construe their application as a petition for certiorari and reverse the decision below.

We agree that the court committed legal error in its application of decisions of this Court regarding the relationship between the constitutional guarantee of equal protection and the VRA. We accordingly construe the application for stay presented to Justice BARRETT and by her referred to the Court as a petition for certiorari, grant the petition, reverse the imposition of the Governor's State Assembly and Senate maps, and remand to the Wisconsin Supreme Court for proceedings not inconsistent with this opinion. Summarily correcting the error gives the court sufficient time to adopt maps consistent with the timetable for Wisconsin's August 9th primary election.

* * *

Under the Equal Protection Clause, districting maps that sort voters on the basis of race " 'are by their very nature odious.' " *Shaw v. Reno*, 509 U.S. 630, 643, 113 S.Ct. 2816, 125 L.Ed.2d 511 (1993). Such laws "cannot be upheld unless they are narrowly tailored to achieving a compelling state interest." *Miller v. Johnson*, 515 U.S. 900, 904, 115 S.Ct. 2475, 132 L.Ed.2d 762 (1995). We have assumed that complying with the VRA is a compelling interest. *Cooper v. Harris*, 581 U. S. ——, ——, 137 S.Ct. 1455, 1463–1464, 197 L.Ed.2d 837 (2017). And we have held that if race is the predominant factor motivating the placement of voters in or out of a particular district, the State bears the burden of showing that the design of that district withstands strict scrutiny. *Ibid.* Thus, our precedents hold that a State can satisfy strict scrutiny if it proves that its race-based sorting of voters is narrowly tailored to comply with the VRA. *Ibid.*

A State violates § 2 of the VRA "if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of [a ***402** minority group] in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 52 U.S.C. § 10301(b). We have construed § 2 to prohibit the distribution of minority voters into districts in a way that dilutes their voting power. See *Thornburg v. Gingles*, 478 U.S. 30, 46–51, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986). In *Gingles*, we provided a framework for demonstrating a violation of that sort. First, three "preconditions" must be shown: (1) The minority group must be sufficiently large and compact to constitute a majority in a reasonably configured district, (2) the minority group must be politically cohesive, and (3) a majority group must vote sufficiently as a bloc to enable it to usually defeat the minority group's preferred candidate. *Id.*, at 50–51, 106 S.Ct. 2752.

If the preconditions are established, a court considers the totality of circumstances to determine "whether the political process is equally open to minority voters." *Id.*, at 79, 106 S.Ct. 2752; see also *Johnson v. De Grandy*, 512 U.S. 997, 1011–1012, 114 S.Ct. 2647, 129 L.Ed.2d 775 (1994) (satisfying the *Gingles* preconditions is necessary but not sufficient to show a § 2 ****1249** violation; "courts must also examine other evidence in the totality of circumstances"). We have identified as relevant to the totality analysis several factors enumerated in the Senate Report on the 1982 amendments to the VRA, as well as "whether the number of districts in which the minority group forms an effective majority is roughly proportional to its share of the population in the relevant area." *League of United Latin American Citizens v. Perry*, 548 U.S. 399, 426, 126 S.Ct. 2594, 165 L.Ed.2d 609 (2006) (*LULAC*).

We said in *Cooper* that when a State invokes § 2 to justify race-based districting, "it must show (to meet the 'narrow tailoring' requirement) that it had 'a strong basis in evidence' for concluding that the statute required its action." 581 U. S., at ——, 137 S.Ct., at 1464. The Wisconsin Supreme Court concluded that the Governor's intentional addition of a seventh majority-black district triggered the Equal Protection Clause and that *Cooper*'s strict-scrutiny test must accordingly be satisfied. ***403** Accepting those conclusions, we hold that the court erred in its efforts to apply *Cooper*'s understanding of what the Equal Protection Clause requires.

It is not clear whether the court viewed the Governor or itself as the state mapmaker who must satisfy strict scrutiny, but the court's application of *Cooper* was flawed either way. If the former, the Governor failed to carry his burden. His main explanation for drawing the seventh majority-black district was that there is now a sufficiently large and compact population of black residents to fill it, Brief for Intervenor-Respondent Evers in *Johnson* v. *Wisconsin Elections Comm'n*, No. 2021AP1450–OA (Wis. Sup. Ct., Dec. 15, 2021), p. 14—apparently embracing just the sort of uncritical majority-minority district maximization that we have expressly rejected. *De Grandy*, 512 U.S. at 1017, 114 S.Ct. 2647 ("Failure to maximize cannot be the measure of § 2"). He provided almost no other evidence or analysis supporting his claim that the VRA required the seven majority-black districts that he drew. See 2022 WI 14, ¶¶90–91, 103–107 (Ziegler, C. J., dissenting). Strict scrutiny requires much more. See *Abbott v. Perez*, 585 U. S. ——, ——, 138 S.Ct. 2305, 2335, 201 L.Ed.2d 714 (2018) ("[W]here we have accepted a State's 'good reasons' for using race in drawing district lines, the State made a strong showing of a pre-enactment analysis with justifiable conclusions"). If the Wisconsin Supreme Court was reviewing whether the Governor satisfied strict scrutiny, it erred by adopting his maps.

If, on the other hand, the court sought to shoulder strict scrutiny's burden itself, it fared little better. *First*, it misunderstood *Cooper*'s inquiry. The court believed that it had to conclude only that the VRA *might* support race-based districting—not that the statute required it. See 2022 WI 14, ¶¶47, 50 ("[W]e cannot say for certain on this record that seven majority-Black assembly districts are required by the VRA," but "we see good reasons to conclude a seventh majority-Black assembly district ***404** *may* be required" (emphasis added)). Our precedent instructs otherwise. Thus in *Cooper* we explained, for example, that "race-based districting is narrowly tailored ... if a State had 'good reasons' for thinking that the Act *demanded* such steps." 581 U. S., at ——, 137 S.Ct., at 1969 (emphasis added). And we concluded that "experience gave the State no reason to think that the VRA *required*" it to move voters based on race. *Id.*, at ——, 137 S.Ct., at 1970 (emphasis added). That principle grew out of the more general proposition that "the institution that makes the racial distinction must have had a 'strong basis in evidence' to conclude that remedial action was *necessary*, '*before* ****1250** it embarks on an affirmative-action program.' " *Shaw v. Hunt*, 517 U.S. 899, 910, 116 S.Ct. 1894, 135 L.Ed.2d 207 (1996) (some emphasis added).

To be sure, we said in *Cooper* that States have " 'breathing room' " to make reasonable mistakes; we will not fault a State just because its "compliance measures ... may prove, in perfect hindsight, not to have been needed." 581 U. S., at ——, 137 S.Ct., at 1464. But that "leeway" does not allow a State to adopt a racial gerrymander that the State does not, at the time of imposition, "judg[e] necessary under a proper interpretation of the VRA." *Id.*, at ——, 137 S.Ct., at 1472.

Second, the court's analysis of *Gingles*' preconditions fell short of our standards. As we explained in *Cooper*, "[t]o have a strong basis in evidence to conclude that § 2 demands ... race-based steps, the State must carefully evaluate whether a plaintiff could establish the *Gingles* preconditions ... in a new district created without those measures." 581 U. S., at ——, 137 S.Ct., at 1471. Rather than carefully evaluating evidence at the district level, the court improperly relied on generalizations to reach the conclusion that the preconditions were satisfied. See *id.*, at ——, n. 5, 137 S.Ct., at 1471, n. 5 (a "generalized conclusion fails to meaningfully ... address the relevant local question" whether the preconditions would be satisfied as to each district).

The court's entire discussion of the first precondition was to say that "it is undisputed" and "the parties' submissions ***405** demonstrate" that seven sufficiently large and compact majority-black districts could be drawn. 2022 WI 14, ¶43. Similarly, its discussion of the second precondition consisted of nothing but the statement that "[e]xperts from multiple parties analyzed voting trends and concluded political cohesion existed; no party disagreed." *Id.*, ¶44. And while the court did cite one specific expert report for the third precondition—calculating, based on eight previous races, how often white voters in the Milwaukee area defeat the preferred candidate of black voters—it made virtually no effort to parse that data at the district level or respond to criticisms of the expert's analysis. *Id.*, ¶45; see *id.*, ¶¶108–111 (Ziegler, C. J., dissenting).[2]

Third, the court improperly reduced *Gingles*' totality-of-circumstances analysis to a single factor. The court acknowledged the Senate factors but concluded that they had no role to play in its analysis. 2022 WI 14, ¶46, and n. 28. Instead, it focused

exclusively on proportionality. See *id.*, ¶¶46–50. We rejected just that approach in *De Grandy*, explaining that "[n]o single statistic provides courts with a shortcut to determine whether a set of single-member districts unlawfully dilutes minority voting strength." 512 U.S. at 1020–1021, 114 S.Ct. 2647; see also *id.*, at 1026, 114 S.Ct. 2647 (O'Connor, J., concurring) ("The Court ... makes clear that proportionality is never dispositive. Lack of proportionality can never by itself prove dilution, for courts must always carefully and searchingly review the totality of the circumstances").

***406** The question that our VRA precedents ask and the court failed to answer is whether a race-neutral alternative that did not add a seventh majority-black district ****1251** would deny black voters equal political opportunity. Answering that question requires an " ' "intensely local appraisal" ' of the challenged district." *LULAC*, 548 U.S. at 437, 126 S.Ct. 2594. When the Wisconsin Supreme Court endeavored to undertake a full strict-scrutiny analysis, it did not do so properly under our precedents, and its judgment cannot stand.

* * *

The judgment of the Supreme Court of Wisconsin is reversed as to the selection of the Governor's State Assembly and Senate maps, and the case is remanded for further proceedings not inconsistent with this opinion. On remand, the court is free to take additional evidence if it prefers to reconsider the Governor's maps rather than choose from among the other submissions. Any new analysis, however, must comply with our equal protection jurisprudence.

It is so ordered.

Justice SOTOMAYOR, with whom Justice KAGAN joins, dissenting.

The Court's action today is unprecedented. In an emergency posture, the Court summarily overturns a Wisconsin Supreme Court decision resolving a conflict over the State's redistricting, a decision rendered after a 5-month process involving all interested stakeholders. Despite the fact that summary reversals are generally reserved for decisions in violation of settled law, the Court today faults the State Supreme Court for its failure to comply with an obligation that, under existing precedent, is hazy at best.

When the Wisconsin Legislature and executive were unable to agree on reapportioned electoral maps following the 2020 census, the Wisconsin Supreme Court granted a voter petition to ensure that maps were in place before the 2022 elections. The court announced the criteria that it would ***407** use to select maps (namely, that it would seek to minimize changes from the 2011 maps while accounting for population shifts) and permitted any party to intervene and submit maps for consideration. See *Johnson v. Wisconsin Elections Comm'n*, 2021 WI 87, ¶81, 399 Wis.2d 623, 671, 967 N.W.2d 469, 493.[1] The court ultimately rejected the State Assembly map submitted by the Wisconsin Legislature (applicants here) in favor of the map submitted by the Governor because it found the Governor's map "vastly superior" under its announced "least change" criteria. *Johnson v. Wisconsin Elections Comm'n*, 2022 WI 14, ¶¶26, 29, —— Wis. 2d ——, ——, ——, 971 N.W.2d 402, 411, 412.

The court proceeded to a preliminary analysis of whether the Equal Protection Clause or the Voting Rights Act of 1965 (VRA) precluded it from adopting the Governor's map, which increased the number of majority-Black Assembly districts in Milwaukee from six to seven based on changes in population.[2] The court noted that the parties before it had all "appeared to assume the VRA requires at least some majority-Black districts in the Milwaukee area" and that there had been no dispute that the preconditions in *Thornburg v. Gingles*, 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986) (for assessing whether race-conscious districting is required in order to avoid diluting minority voting power) were satisfied, aside from an undeveloped ****1252** reference at oral argument. 2022 WI 14, ¶45. The court stressed, however, that no Equal Protection Clause or VRA claim was before it and that adjudicating such claims would require a fuller record and a closer assessment. It concluded that neither the Equal Protection Clause nor the VRA clearly foreclosed adopting the Governor's map in the first instance, *id.*, ¶47, but left open the possibility that a "standard VRA ***408** claim" could be "brought after the adoption of new districts," *id.*, ¶41, n. 24.

Applicants now assert that the Wisconsin Supreme Court misapplied this Court's precedents in its preliminary assessment of whether the Governor's map violated the Equal Protection Clause. The Court agrees and summarily reverses. In doing so, however, the Court assumes the answers to multiple questions that our precedent leaves uncertain.

In its brief discussion of equal protection and the VRA, the Wisconsin Supreme Court presumed that the framework summarized in this Court's decision in *Cooper v. Harris*, 581 U. S. ——, 137 S.Ct. 1455, 197 L.Ed.2d 837 (2017), governed in this posture. The Court tacitly accepts that assumption. *Ante*, at 1248 – 1249. *Cooper*, however, arose in a starkly different posture. *Cooper* outlines the specific, burden-shifting procedure for adjudicating claims brought under the Equal Protection Clause "[w]hen a voter sues state officials for drawing ... race-based lines." 581 U. S., at ——, 137 S.Ct., at 1463. That framework requires that the plaintiff first "prove that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district." *Ibid.* (internal quotation marks omitted). If the court finds that "racial considerations predominated over others," the burden then "shifts to the State to prove that its race-based sorting of voters" satisfies strict scrutiny. *Ibid.* The State can meet that burden by showing that "it had a strong basis in evidence" for concluding that the VRA required its actions, a standard that "gives States breathing room to adopt reasonable compliance measures that may prove, in perfect hindsight, not to have been needed." *Id.,* at ——, 137 S.Ct., at 1464 (internal quotation marks omitted).[3] It is far from clear whether this burden-shifting framework should also apply in the unusual ***409** circumstance where, as here, a state court is adopting a map in the first instance with no Equal Protection Clause claim before it.

Even accepting the assumption that this framework controls, it remains unclear how a court in the posture below should apply it. Again, the Wisconsin Supreme Court was selecting a map itself, not adjudicating a subsequent challenge in the manner that *Cooper* and other cases have addressed. The court accepted an original action to supervise the redistricting and, with the input of the parties, designed its own process for doing so: accepting proposed maps from litigants rather than "craft[ing its] own map" and determining to "choose the maps that best conform[ed] with [its] directives," even if those maps were "imperfect," rather than "modify[ing]" the lines they drew. 2022 WI 14, ¶¶4, 6. Although the Governor reported that he considered race in drawing his ****1253** Assembly map, the Wisconsin Supreme Court selected the Governor's map because it scored best on a race-neutral "least change" metric. *Id.,* ¶8. Our precedents offer no clear answers to the question whose motives should be analyzed in these circumstances (the four justices who selected the map based on the "least change" criteria, the Governor, or some combination) or how. The Court does not purport to answer this question.

The Court also faults the Wisconsin Supreme Court for failing to scrutinize each of the *Gingles* preconditions independently after the parties agreed that some majority-Black districts needed to be drawn in Milwaukee. *Ante,* at 1250 – 1251.[4] But courts generally are not mandated to investigate " 'undisputed' " and nonjurisdictional issues. *Ante,* at 1250 – 1251. ***410** The Court points to no precedent requiring a court conducting a malapportionment analysis to embark on an independent inquiry into matters that the parties have conceded or not contested, like the *Gingles* preconditions here.

This Court's intervention today is not only extraordinary but also unnecessary. The Wisconsin Supreme Court rightly preserved the possibility that an appropriate plaintiff could bring an equal protection or VRA challenge in the proper forum. 2022 WI 14, ¶41, n. 24. I would allow that process to unfold, rather than further complicating these proceedings with legal confusion through a summary reversal. I respectfully dissent.

All Citations

595 U.S. 398, 142 S.Ct. 1245, 212 L.Ed.2d 251, 22 Cal. Daily Op. Serv. 2962, 2022 Daily Journal D.A.R. 2855, 29 Fla. L. Weekly Fed. S 157

Footnotes

1 The Governor's map accomplished this addition by reducing the black voting-age population in the other six majority-black districts. The black voting-age populations in the Governor's seven districts all cluster between 50.1% and 51.4%, compared to the current six districts' range of 51% to 62%. See 2022 WI 14, ¶87 (Ziegler, C. J., dissenting).

2 That sole piece of cited record evidence came from an intervenor who argued that the Governor's map *violated* the VRA. See 2022

WI 14, ¶¶91, 112 (Ziegler, C. J., dissenting); Response Brief for Intervenor-Petitioner Black Leaders Organizing for Communities et al. in *Johnson* v. *Wisconsin Elections Comm'n*, No. 2021AP1450–OA (Wis. Sup. Ct., Dec. 30, 2021), pp. 7–20. The court did not acknowledge or respond to that argument.

1 Before this Court, applicants do not challenge this process.

2 The court found that the Black voting age population in the Milwaukee area had increased 5.5% since the last census, while the White voting age population had decreased 9.5%. 2022 WI 14, ¶48.

3 The other precedents on which the Court relies arose in analogous postures. See *Abbott v. Perez*, 585 U. S. ——, 138 S.Ct. 2305, 201 L.Ed.2d 714 (2018); *League of United Latin American Citizens v. Perry*, 548 U.S. 399, 126 S.Ct. 2594, 165 L.Ed.2d 609 (2006); *Shaw v. Hunt*, 517 U.S. 899, 116 S.Ct. 1894, 135 L.Ed.2d 207 (1996); *Johnson v. De Grandy*, 512 U.S. 997, 114 S.Ct. 2647, 129 L.Ed.2d 775 (1994); *Thornburg v. Gingles*, 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986).

4 Applicants proposed a map with five majority-Black districts and a sixth with less than a majority. The court below noted concern that applicants' map might violate the VRA by "packing" minority voters into a "small number of districts to minimize their influence in the districts next door." 2022 WI 14, ¶49 (internal quotation marks omitted).

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6 S.Ct. 1064
Supreme Court of the United States

YICK WO
v.
HOPKINS, Sheriff, etc.[1] (In Error to the Supreme Court of the State of California.)
WO LEE
v.
SAME. (Appeal from the Circuit Court of the United States for the District of California.)

Filed May 10, 1886.

Syllabus

**1065 These two cases were argued as one, and depend upon precisely the same state of facts; the first coming here upon a writ of error to the supreme court of the state of California, the second on appeal from the circuit court of the United States for that district.

The plaintiff in error, Yick Wo, on August 24, 1885, petitioned the supreme court of California for the writ of *habeas corpus*, alleging that he was illegally deprived of his personal liberty by the defendant as sheriff of the city and county of San Francisco. The sheriff made return to the writ that he held the petitioner in custody by virtue of a sentence of the police judge's court No. 2 of the city and county of San Francisco, whereby he was found guilty of a violation of certain ordinances of the board of supervisors of that county, and adjudged to pay a fine of $10, and, in default of payment, be imprisoned in the county jail at the rate of one day for each dollar of fine until said fine should be satisfied; and a commitment in consequence of non-payment of said fine.

The ordinances for the violation of which he had been found guilty are set out as follows:

Order No. 1,569, passed May 26, 1880, prescribing the kind of buildings in which laundries may be located.

'The people of the city and county of San Francisco do ordain as follows:

'Section 1. It shall be unlawful, from and after the passage of this order, for any person or persons to establish, maintain, or carry on a laundry, within the corporate limits of the city and county of San Francisco, without having first obtained the consent of the board of supervisors, except the same be located in a building constructed either of brick or stone.

'Sec. 2. It shall be unlawful for any person to erect, build, or maintain, or cause to be erected, built, or maintained, over or upon the roof of any building now erected, or which may hereafter be erected, within the limits of said city and county, any scaffolding, without first obtaining the written permission of the board of supervisors, which permit shall state fully for what purpose said scaffolding is to be erected and used, and such scaffolding shall not be used for any other purpose than that designated in such permit.

'Sec. 3. Any person who shall violate any of the provisions of this order shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not more than one thousand dollars, or by imprisonment in the county jail not more than six months, or by both such fine and imprisonment.'

Order No. 1,587, passed July 28, 1880, the following section:

'Sec. 68. It shall be unlawful, from and after the passage of this order, for any person or persons to establish, maintain, or carry on a laundry within the corporate limits of the city and county of San Francisco without having first obtained the consent of the board of supervisors, except the same be located in a building constructed either of brick or stone'

The following facts are also admitted on the record: That petitioner is a native of China, and came to California in 1861, and is still a subject of the emperor of China; that he has been engaged in the laundry business in the same premises and building for 22 years last past; that he had a license from the board of fire-wardens, dated March 3, 1884, from which it appeared 'that the above-described premises have been inspected by the board of fire-wardens, and upon such inspection said board found all proper arrangements for carrying on the business; that the stoves, washing and drying apparatus, and the appliances for heating smoothing-irons, are in good condition, and that **1066 their use is not dangerous to the surrounding property from fire, and that all proper precautions have been taken to comply with the provisions of order No. 1,617, defining 'the fire limits of the city and county of San Francisco, and making regulations concerning the erection and use of buildings in said city and county,' and of order No. 1,670, 'prohibiting the kindling, maintenance, and use of open fires in houses;' that he had a certificate from the health officer that the same premises had been inspected by him, and that he found that they were properly and sufficiently drained, and that all proper arrangements for carrying on the business of a laundry, without injury to the sanitary condition of the neighborhood, had been complied with; that the city license of the petitioner was in force, and expired October 1, 1885; and that the petitioner applied to the board of supervisors, June 1, 1885, for consent of said board to maintain and carry on his laundry, but that said board, on July 1, 1885, refused said consent.' It is also admitted to be true, as alleged in the petition, that on February 24, 1880, 'there were about 320 laundries in the city and county of San Francisco, of which about 240 were owned and conducted by subjects of China, and of the whole number, viz., 320, about 310 were constructed of wood, the same material that constitutes ninetenths of the houses in the city of San Francisco. The capital thus invested by the subjects of China was not less than two hundred thousand dollars, and they paid annually for rent, license, taxes, gas, and water about one hundred and eighty thousand dollars.' It is alleged in the petition that 'your petitioner, and more than one hundred and fifty of his countrymen, have been arrested upon the charge of carrying on business without having such special consent, while those who are not subjects of China, and who ar conducting eighty odd laundries under similar conditions, are left unmolested, and free to enjoy the enhanced trade and profits arising from this hurtful and unfair discrimination. The business of your petitioners, and of those of his countrymen similarly situated, is greatly impaired, and in many cases practically ruined, by this system of oppression to one kind of men, and favoritism to all others.'

The statement therein contained as to the arrest, etc., is admitted to be true, with the qualification only that the 80-odd laundries referred to are in wooden buildings without scaffolds on the roofs. It is also admitted 'that petitioner and 200 of his countrymen similarly situated petitioned the board of supervisors for permission to continue their business in the various houses which they had been occupying and using for laundries for more than twenty years, and such petitions were denied, and all the petitions of those who were not Chinese, with one exception of Mrs. Mary Meagles, were granted.'

By section 11 of article 11 of the constitution of California it is provided that 'any county, city, town, or township may make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws.' By section 74 of the act of April 19, 1856, usually known as the 'Consolidation Act,' the board of supervisors is empowered, among other things, 'to provide by regulation for the prevention and summary removal of nuisances to public health, the prevention of contagious diseases; * * * to prohibit the erection of wooden buildings within any fixed limits where the streets shall have been established and graded; * * * to regulate the sale, storage, and use of gunpowder, or other explosive or combustible materials and substances, and make all needful regulations for protection against fire; to make such regulations concerning the erection and use of buildings as may be necessary for the safety of the inhabitants.'

The supreme court of California, in the opinion pronouncing the judgment in this case, said: 'The board of supervisors, under the several statutes conferring authority upon them, has the power to prohibit or regulate all occupations which are against good morals, contrary to public order and decency, or dangerous to the public safety. Clothes-washing is certainly not opposed **1067 to good morals, or subversive of public order or decency, but when conducted in given localities it may be highly dangerous to the public safety. Of this fact the supervisors are made the judges, and, having taken action in the premises, we do not find that they have prohibited the establishment of laundries, but they have, as they well might do, regulated the places at which they should be established, the character of the buildings in which they are to be maintained, etc. The process of washing is not prohibited by thus regulating the places at which and the surroundings by which it must be exercised. The order No. 1,569 and section 68 of order No. 1,587 are not in contravention of common right, or unjust, unequal, partial, or oppressive, in such sense as authorizes us in this proceeding to pronounce them invalid.' After answering the position taken in behalf of the petitioner, that the ordinances in question had been repealed, the court adds: 'We have not

deemed it necessary to discuss the question in the light of supposed infringement of petitioner's rights under the constitution of the United States, for the reason that we think the principles upon which contention on that head can be based have in effect been set at rest by the cases of *Barbier* v. *Connolly*, 113 U. S. 27, S. C. 5 Sup. Ct. Rep. 357, and *Soon Hing* v. *Crowley*, 113 U. S. 703, S. C. 5 Sup. Ct. Rep. 730.' The writ was accordingly discharged, and the prisoner remanded.

In the other case, the appellant, Wo Lee, petitioned for his discharge from an alleged illegal imprisonment, upon a state of facts, shown upon the record, precisely similar to that in the *Case of Yick Wo.* In disposing of the application, the learned Circuit Judge SAWYER, in his opinion, (26 Fed. Rep. 471,) after quoting the ordinance in question, proceeded at length as follows:

'Thus, in a territory some ten miles wide by fifteen or more miles long, much of it still occupied as mere farming and pasturage lands, and much of it unoccupied sand banks, in many places without a building within a quarter or half a mile of each other, including the isolated and almost wholly unoccupied Goat island, the right to carry on this, when properly guarded, harmless and necessary occupation, in a wooden building, is not made to depend upon any prescribed conditions giving a right to anybody complying with them, but upon the consent or arbitrary will of the board of supervisors. In three-fourths of the territory covered by the ordinance there is no more need of prohibiting or regulating laundries than if they were located in any portion of the farming regions of the state. Hitherto the regulation of laundries has been limited to the thickly-settled portions of the city. Why this unnecessary extension of the limits affected, if not designed to prevent the establishment of laundries, after a compulsory removal from their present locations, within practicable reach of the customers or their proprietors? And the uncontradicted petition shows that all Chinese applications are, in fact, denied, and those of Caucasians granted; thus, in fact, making the discriminations in the administration of the ordinance which its terms permit. The fact that the right to give consent is reserved in the ordinance shows that carrying on the laundry business in wooden buildings is not deemed of itself necessarily dangerous. It must be apparent to every well-informed mind that a fire, properly guarded, for laundry purposes, in a wooden building, is just as necessary, and no more dangerous, than a fire for cooking purposes or for warming a house. If the ordinance under consideration is valid, then the board of supervisors can pass a valid ordinance preventing the maintenance, in a wooden building, of a cooking-stove, heating apparatus, or a restaurant, within the boundaries of the city and county of San Francisco, without the consent of that body, arbitrarily given or withheld, as their prejudices or other motives may dictate. If it is competent for the board of supervisors to pass a valid ordinance prohibiting the inhabitants of San Francisco from following any ordinary, proper, and necessary calling within the limits of the city and county, except at its arbitrary and unregulated discretion and special ****1068** consent,—and it can do so if this ordinance is valid,—then it seems to us that there has been a wide departure from the principles that have heretofore been supposed to guard and protect the rights, property, and liberties of the American people. And if, by an ordinance general in its terms and form, like the one in question, by reserving an arbitrary discretion in the enacting body to grant or deny permission to engage in a proper and necessary calling, a discrimination against any class can be made in its execution, thereby evading and in effect nullifying the provisions of the national constitution, then the insertion of provisions to guard the rights of every class and person in that instrument was a vain and futile act.

'The effect of the execution of this ordinance in the manner indicated in the record would seem to be necessarily to close up the many Chinese laundries now existing, or compel their owners to pull down their present buildings and reconstruct of brick or stone, or to drive them outside the city and county of San Francisco, to the adjoining counties, beyond the convenient reach of customers, either of which results would be little short of absolute confiscation of the large amount of property shown to be now, and to have been for a long time, invested in these occupations. If this would not be depriving such parties of their property without due process of law, it would be difficult to say what would effect that prohibited result. The necessary tendency, if not the specific purpose, of this ordinance, and of enforcing it in the manner indicated in the record, is to drive out of business all the numerous small laundries, especially those owned by Chinese, and give a monopoly of the business to the large institutions established and carried on by means of large associated Caucasian capital. If the facts appearing on the face of the ordinance, on the petition and return, and admitted in the case, and shown by the notorious public and municipal history of the times, indicate a purpose to drive out the Chinese laundrymen, and not merely to regulate the business for the public safety, does it not disclose a case of violation of the provisions of the fourteenth amendment to the national constitution, and of the treaty between the United States and China, in more than one particular? * * * If this means prohibition of the occupation, and a destruction of the business and property, of the Chinese laundrymen in San Francisco,—as it seems to us this must be the effect of executing the ordinance,—and not merely the proper regulation of the business, then there is discrimination, and a violation of other highly important rights secured by the fourteenth amendment and the treaty. That it does mean prohibition, as to the Chinese, it seems to us must be apparent to every citizen of San Francisco who has been here long enough to be familiar with the course of an active and aggressive branch of public opinion

and of public notorious events. Can a court be blind to what must be necessarily known to every intelligent person in the state? See *Ah Kow* v. *Nunan*, 5 Sawy. 560; *Sparrow* v. *Strong*, 3 Wall. 104; *Brown* v. *Piper*, 91 U. S. 42.'

But, in deference to the decision of the supreme court of California in the *Case of Yick Wo*, and contrary to his own opinion as thus expressed, the circuit judge discharged the writ and remanded the prisoner.

Attorneys and Law Firms

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H. G. Sieberst, for Hopkins, Sheriff, etc.

Opinion

***365** MATTHEWS, J.

In the case of the petitioner, brought here by writ of error to the supreme court of California, our jurisdiction is limited to the question whether the plaintiff in error has been denied a right in violation of the constitution, laws, or treaties of the United States. The question whether his imprisonment is illegal, under the constitution and laws of the state, is not open to us. And although that question might have been considered ***366** in the circuit court in the application made to it, and by this court on appeal from its order, yet judicial propriety is best consulted by accepting the judgment ****1069** of the state court upon the points involved in that inquiry. That, however, does not preclude this court from putting upon the ordinances of the supervisors of the county and city of San Francisco an independent construction; for the determination of the question whether the proceedings under these ordinances, and in enforcement of them, are in conflict with the constitution and laws of the United States, necessarily involves the meaning of the ordinances, which, for that purpose, we are required to ascertain and adjudge.

We are consequently constrained, at the outset, to differ from the supreme court of California upon the real meaning of the ordinances in question. That court considered these ordinances as vesting in the board of supervisors a not unusual discretion in granting or withholding their assent to the use of wooden buildings as laundries, to be exercised in reference to the circumstances of each case, with a view to the protection of the public against the dangers of fire. We are not able to concur in that interpretation of the power conferred upon the supervisors. There is nothing in the ordinances which points to such a regulation of the business of keeping and conducting laundries. They seem intended to confer, and actually to confer, not a discretion to be exercised upon a consideration of the circumstances of each case, but a naked and arbitrary power to give or withhold consent, not only as to places, but as to persons; so that, if an applicant for such consent, being in every way a competent and qualified person, and having complied with every reasonable condition demanded by any public interest, should, failing to obtain the requisite consent of the supervisors to the prosecution of his business, apply for redress by the judicial process of *mandamus* to require the supervisors to consider and act upon his case, it would be a sufficient answer for them to say that the law had conferred upon them authority to withhold their assent, without reason and without responsibility. The power given to them is not confided to their discretion in the legal sense of that term, but is granted ***367** to their mere will. It is purely arbitrary, and acknowledges neither guidance nor restraint.

This erroneous view of the ordinances in question led the supreme court of California into the further error of holding that they were justified by the decisions of this court in the cases of *Barbier* v. *Connelly*, 113 U. S. 27, S. C. 5 Sup. Ct. Rep. 357, and *Soon Hing* v. *Crowley*, 113 U. S. 703, S. C. 5 Sup. Ct. Rep. 730. In both of these cases the ordinance involved was simply a prohibition to carry on the washing and ironing of clothes in public laundries and wash houses, within certain prescribed limits of the city and county of San Francisco, from 10 o'clock at night until 6 o'clock in the morning of the following day. This provision was held to be purely a police regulation, within the competency of any municipality possessed of the ordinary powers belonging to such bodies,—a necessary measure of precaution in a city composed largely of wooden buildings, like San Francisco, in the application of which there was no invidious discrimination against any one within the prescribed limits; all persons engaged in the same business being treated alike, and subject to the same restrictions, and entitled to the same privileges, under similar conditions. For these reasons that ordinance was adjudged not to be within the

prohibitions of the fourteenth amendment to the constitution of the United States, which, it was said in the first case cited, 'undoubtedly intended, not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness, and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of any one, except as applied to the same ****1070** pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition; and that, in the administration of criminal justice, no different or higher punishment should be imposed upon ***368** one than such as is prescribed to all for like offenses. * * * Class legislation, discriminating against some and favoring others, is prohibited; but legislation which, in carrying out a public purpose, is limited in its application, if, within the sphere of its operation, it affects alike all persons similarly situated, is not within the amendment.'

The ordinance drawn in question in the present case is of a very different character. It does not prescribe a rule and conditions, for the regulation of the use of property for laundry purposes, to which all similarly situated may conform. It allows, without restriction, the use for such purposes of buildings of brick or stone; but, as to wooden buildings, constituting nearly all those in previous use, it divides the owners or occupiers into two classes, not having respect to their personal character and qualifications for the business, nor the situation and nature and adaptation of the buildings themselves, but merely by an arbitrary line, on one side of which are those who are permitted to pursue their industry by the mere will and consent of the supervisors, and on the other those from whom that consent is withheld, at their mere will and pleasure. And both classes are alike only in this: that they are tenants at will, under the supervisors, of their means of living. The ordinance, therefore, also differs from the not unusual case where discretion is lodged by law in public officers or bodies to grant or withhold licenses to keep taverns, or places for the sale of spirituous liquors, and the like, when one of the conditions is that the applicant shall be a fit person for the exercise of the privilege, because in such cases the fact of fitness is submitted to the judgment of the officer, and calls for the exercise of a discretion of a judicial nature.

The rights of the petitioners, as affected by the proceedings of which they complain, are not less because they are aliens and subjects of the emperor of China. By the third article of the treaty between this government and that of China, concluded November 17, 1880, (22 St. 827), it is stipulated: 'If Chinese laborers, or Chinese of any other class, now either permanently or temporarily residing in the territory of the United States, meet with ill treatment at the hands of any other persons, ***369** the government of the United States will exert all its powers to devise measures for their protection, and to secure to them the same rights, privileges, immunities, and exemptions as may be enjoyed by the citizens or subjects of the most favored nation, and to which they are entitled by treaty.' The fourteenth amendment to the constitution is not confined to the protection of citizens. It says: 'Nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.' These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws. It is accordingly enacted by section 1977 of the Revised Statutes that 'all persons within the jurisdiction of the United States shall have the same right, in every state and territory, to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.' The questions we have to consider and decide in these cases, therefore, are to be treated as involving the rights of every citizen of the United States equally with those of the strangers and aliens who now invoke the jurisdiction of the court.

It is contended on the part of the petitioners that the ordinances for violations of which they are severally sentenced to imprisonment are void on ****1071** their face, as being within the prohibitions of the fourteenth amendment, and, in the alternative, if not so, that they are void by reason of their administration, operating unequally, so as to punish in the present petitioners what is permitted to others as lawful, without any distinction of circumstances,—an unjust and illegal discrimination, it is claimed, which, though not made expressly by the ordinances, is made possible by them.

When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed ***370** to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power. Sovereignty itself is, of course, not subject to law, for it is the author and source of law; but in our system, while sovereign powers are delegated to the agencies of government, sovereignty itself remains with the people, by whom and for whom all government exists and acts. And the law is the definition and

limitation of power. It is, indeed, quite true that there must always be lodged somewhere, and in some person or body, the authority of final decision; and in many cases of mere administration, the responsibility is purely political, no appeal lying except to the ultimate tribunal of the public judgment, exercised either in the pressure of opinion, or by means of the suffrage. But the fundamental rights to life, liberty, and the pursuit of happiness, considered as individual possessions, are secured by those maxims of constitutional law which are the monuments showing the victorious progress of the race in securing to men the blessings of civilization under the reign of just and equal laws, so that, in the famous language of the Massachusetts bill of rights, the government of the commonwealth 'may be a government of laws and not of men.' For the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself.

There are many illustrations that might be given of this truth, which would make manifest that it was self-evident in the light of our system of jurisprudence. The case of the political franchise of voting is one. Though not regarded strictly as a natural right, but as a privilege merely conceded by society, according to its will, under certain conditions, nevertheless it is regarded as a fundamental political right, because preservative of all rights. In reference to that right, it was declared by the supreme judicial court of Massachusetts, in *Capen* v. *Foster*, 12 Pick. 485, 488, in the words of Chief Justice SHAW, 'that in all ***371** cases where the constitution has conferred a political right or privilege, and where the constitution has not particularly designated the manner in which that right is to be exercised, it is clearly within the just and constitutional limits of the legislative power to adopt any reasonable and uniform regulations, in regard to the time and mode of exercising that right, which are designed to secure and facilitate the exercise of such right in a prompt, orderly, and convenient manner;' nevertheless, 'such a construction would afford no warrant for such an exercise of legislative power as, under the pretense and color of regulating, should subvert or injuriously restrain, the right itself.' It has accordingly been held generally in the states that whether the particular provisions of an act of legislation establishing means for ascertaining the qualifications of those entitled to vote, and making previous registration in lists of such, a condition precedent to the exercise of the right, were or were not reasonable regulations, and accordingly valid or void, was always open to inquiry, as a judicial question. See *Daggett* v. *Hudson*, 3 N. E. Rep. 538, decided by the supreme court of Ohio, where many of the cases are collected; *Monroe* v. *Collins*, 17 Ohio St. 666.

The same principle has been more freely extended to the *quasi* legislative acts of inferior municipal bodies, in respect to which it is an ancient jurisdiction of judicial tribunals to pronounce upon the reasonableness and consequent ****1072** validity of their by-laws. In respect to these it was the doctrine that every by-law must be reasonable, not inconsistent with the charter of the corporation, nor with any statute of parliament, nor with the general principles of the common law of the land, particularly those having relation to the liberty of the subject, or the rights of private property. Dill. Mun. Corp. (3d Ed.) § 319, and cases cited in notes. Accordingly, in the case of *State* v. *Cincinnati Gas-light & Coke Co.*, 18 Ohio St. 262, 300, an ordinance of the city council purporting to fix the price to be charged for gas, under an authority of law giving discretionary power to do so, was held to be bad, if passed in bad faith, fixing an unreasonable price, for the fraudulent purpose of compelling ***372** the gas company to submit to an unfair appraisement of their works. And a similar question, very pertinent to the one in the present cases, was decided by the court of appeals of Maryland in the case of *City of Baltimore* v. *Radecke*, 49 Md. 217. In that case the defendant had erected and used a steam-engine, in the prosecution of his business as a carpenter and box-maker in the city of Baltimore, under a permit from the mayor and city council, which contained a condition that the engine was 'to be removed after six months' notice to that effect from the mayor.' After such notice, and refusal to conform to it, a suit was instituted to recover the penalty provided by the ordinance, to restrain the prosecution of which a bill in equity was filed. The court holding the opinion that 'there may be a case in which an ordinance, passed under grants of power like those we have cited, is so clearly unreasonable, so arbitrary, oppressive, or partial, as to raise the presumption that the legislature never intended to confer the power to pass it, and to justify the courts in interfering and setting it aside as a plain abuse of authority,' it proceeds to speak, with regard to the ordinance in question, in relation to the use of steam-engines, as follows: 'It does not profess to prescribe regulations for their construction, location, or use; nor require such precautions and safeguards to be provided by those who own and use them as are best calculated to render them less dangerous to life and property; nor does it restrain their use in box factories and other similar establishments within certain defined limits; not in any other way attempt to promote their safety and security without destroying their usefulness. But it commits to the unrestrained will of a single public officer the power to notify every person who now employs a steam-engine in the prosecution of any business in the city of Baltimore to cease to do so, and, by providing compulsory fines for every day's disobedience of such notice and order of removal, renders his power over the use of steam in that city practically absolute, so that he may prohibit its use altogether. But if he should not choose to do this, but only to act in particular cases, there is nothing in the ordinance to guide or control his action. It lays down no ***373** rules by which its impartial execution can be secured, or partiality and oppression prevented. It is clear that giving and enforcing these notices

may, and quite likely will, bring ruin to the business of those against whom they are directed, while others, from whom they are withheld, may be actually benefited by what is thus done to their neighbors; and, when we remember that this action of non-action may proceed from enmity or prejudice, from partisan zeal or animosity, from favoritism and other improper influences and motives easy of concealment, and difficult to be detected and exposed, it becomes unnecessary to suggest or comment upon the injustice capable of being wrought under cover of such a power, for that becomes apparent to every one who gives to the subject a moment's consideration. In fact, an ordinance which clothes a single individual with such power hardly falls within the domain of law, and we are constrained to pronounce it inoperative and void.' This conclusion, and the reasoning on which it is based, are deductions from the face of the ordinance, as to its necessary pendency and ultimate actual operation.

In the present cases, we are not obliged to reason from the probable to the ****1073** actual, and pass upon the validity of the ordinances complained of, as tried merely by the opportunities which their terms afford, of unequal and unjust discrimination in their administration; for the cases present the ordinances in actual operation, and the facts shown establish an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion that, whatever may have been the intent of the ordinances as adopted, they are applied by the public authorities charged with their administration, and thus representing the state itself, with a mind so unequal and oppressive as to amount to a practical denial by the state of that equal protection of the laws which is secured to the petitioners, as to all other persons, by the broad and benign provisions of the fourteenth amendment to the constitution of the United States. Though the law itself be fair on its face, and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal ***374** hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution. This principle of interpretation has been sanctioned by this court in *Henderson* v. *Mayor of New York*, 92 U. S. 259; *Chy Luny* v. *Freeman*, 92 U. S. 275; *Ex parte Virginia*, 100 U. S. 339; *Neal* v. *Delaware*, 103 U.S. 370; and *Soon Hing* v. *Crowley*, 113 U. S. 703; S. C. 5 Sup. Ct. Rep. 730.

The present cases, as shown by the facts disclosed in the record, are within this class. It appears that both petitioners have complied with every requisite deemed by the law, or by the public officers charged with its administration, necessary for the protection of neighboring property from fire, or as a precaution against injury to the public health. No reason whatever, except the will of the supervisors, is assigned why they should not be permitted to carry on, in the accustomed manner, their harmless and useful occupation, on which they depend for a livelihood; and while this consent of the supervisors is withheld from them, and from 200 others who have also petitioned, all of whom happen to be Chinese subjects, 80 others, not Chinese subjects, are permitted to carry on the same business under similar conditions. The fact of this discrimination is admitted. No reason for it is shown, and the conclusion cannot be resisted that no reason for it exists except hostility to the race and nationality to which the petitioners belong, and which, in the eye of the law, is not justified. The discrimination is therefore illegal, and the public administration which enforces it is a denial of the equal protection of the laws, and a violation of the fourteenth amendment of the constitution. The imprisonment of the petitioners is therefore illegal, and they must be discharged. To this end the judgment of the supreme court of California in the *Case of Yick Wo*, and that of the circuit court of the United States for the district of California in the *Case of Wo Lee*, are severally reversed, and the cases remanded, each to the proper court, with directions to discharge the petitioners from custody and imprisonment.

All Citations

118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220

Footnotes

1 S. C. 9 Pac. Rep. 139.

485 F.2d 1297
United States Court of Appeals,
Fifth Circuit.

Charles F. ZIMMER, Plaintiff, Stewart Marshall, Intervenor-Appellant,
v.
John J. McKEITHEN et al., Defendants-Appellees.

No. 71-2649.
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Sept. 12, 1973.

Synopsis
Action for reapportionment of school board and police juries in Louisiana Parish. The United States District Court for the Western District of Louisiana, Benjamin C. Dawkins, Jr., Chief Judge, ordered at-large elections, and plaintiffs appealed. The Court of Appeals, 467 F.2d 1381, affirmed. On rehearing en banc, the Court of Appeals, Gewin, Circuit Judge, held that although population is the proper measure of equality in apportionment, access to the political process and not population is the barometer of dilution of minority voting strength and that repudiation of at-large elections for police jury and school board would be justified in view of confluence of factors, including past racial discrimination, supporting contention that at-large electoral scheme would have worked a diminution of black voting strength, and that fact that three black candidates had been successful in immediately preceding election did not dictate finding that at-large scheme did not in fact dilute black vote.

Panel decision reversed; judgment of district court vacated and cause remanded.

Coleman, Circuit Judge, dissented in part and filed opinion in which Ingraham, Circuit Judge, joined.

Clark, Circuit Judge, dissented and filed opinion in which Dyer, Morgan and Roney, Circuit Judges, joined.

Attorneys and Law Firms

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Before JOHN R. BROWN, Chief Judge, and WISDOM, GEWIN, BELL, THORNBERRY, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, DYER, SIMPSON, MORGAN, CLARK, INGRAHAM and RONEY, Circuit Judges.

Opinion

GEWIN, Circuit Judge:

Aristotle has written:

If liberty and equality, as is thought by some, are chiefly to be founded in democracy, they will be best attained when all persons alike share in the government to the utmost.[1]

This case evokes a consideration of the extent to which the Constitution of the United States compels adherence to this principle. Specifically, we are called upon to determine under what circumstances an apportionment scheme operates to minimize or cancel out the voting strength of racial or political elements of the voting population.[2] Appellant contends that the district court order, affirmed by a majority of a panel of this court, 467 F.2d 1381, requiring reapportionment for the school board and police juries in East Carroll Parish[3] under an at-large scheme of elections cannot pass muster under the aforementioned standard. Both the district court and a majority of a panel of this court held that an at-large scheme cannot work a dilution of black voting strength where blacks, though constituting a minority of registered voters, comprise a majority of the total population of the parish.[4] Upon rehearing en banc, this court finds the aforementioned conclusion infirm, and therefore we vacate and remand the district court's judgment.

I.

The panel opinion, recounting the facts which spawned this litigation and the protracted proceedings which it entailed, obviates the need for a full exposition of the present posture of this ***1301** case. Consequently, we shall highlight only those facts particularly germane to our disposition.

East Carroll is a rural parish located in the extreme northeast corner of Louisiana. According to the 1970 census, it has a population of 12,884, of which 7,568, or 58.7% are black. Until recently, blacks in the parish, like all blacks in Louisiana, suffered from the maintenance of dual school systems, and the interposition of an interpretation test which preconditioned qualification for voting. Additionally, from 1922 to 1962, no black resident of the Parish had been permitted to register to vote. With the removal of state and locally imposed impediments to voting, and through the efforts of federal registrars, registration statistics in the parish changed dramatically. As of October 6, 1971, there were 3,342 whites and 777 blacks registered on the East Carroll rolls and an additional 2,122 federally registered black voters in the parish.[5] Concurrent with the increased registration of black voters, elections under the predecessor ward system produced two black members of the policy jury and one black school board member.

The change from ward to at-large elections challenged herein was produced by the entry in 1968 of a district court order in a suit where petitioners sought to insure fidelity to the one-man, onevote principle of Reynolds v. Sims, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964). Three years elapsed between the entry of this order and the renewal of proceedings precipitated by instructions issued by the district court that East Carroll submit a reapportionment plan in light of the 1970 census. Pursuant to these instructions, the Parish Police Jury resubmitted the 1968 at-large plan for approval. Subsequently, appellant Marshall was permitted to intervene on behalf of himself and all other similarly situated black voters in East Carroll, and challenge the propriety of the at-large plan as contravening the fourteenth and fifteenth amendments of the Constitution and Section 5 of the Voting Rights Act of 1965.[6] After the hearing conducted on July 29, 1971, the district court found, *inter alia,* that since under the at-large plan, there was a zero population deviation, the at-large plan did not dilute the voting strength of the black population. Accordingly, the district court ordered that police jury and school board elections be conducted pursuant to an at-large scheme of voting under which the parish was divided into 7 wards. Under this scheme, 6 of the wards were to elect 1 representative to the police jury and school board, and 1 ward was to elect 3 representatives. Although candidates were required to reside in the ward from which they sought election, they were to be voted upon by registered voters in the entire county.

Marshall urged several grounds for reversal on appeal: first, that the district court was without power to order at-large elections because under Section 5 of the Voting Rights Act of 1965, the Attorney General of the United States had tendered an objection to the Louisiana Statutes which prescribed at-large elections for police juries and school boards;[7] second, that the district court ***1302** applied an improper legal standard in evaluating dilution; and third, that the district court was clearly erroneous in finding that at-large elections do not dilute the voting strength of black voters in the parish. All three contentions were rejected by the panel.[8]

On rehearing, Marshall challenged the panel's disposition on all three grounds. Since we find his last two challenges meritorious, we need not consider his first contention concerning Section 5 of the Voting Rights Act of 1965.[9]

II.

Before proceeding further, we feel it is important to emphasize the posture in which the issues are presented in the instant case. The panel understood Marshall to contend that the district court abused its discretion in adopting a plan that did not comport with Connor v. Johnson, 402 U.S. 690, 91 S.Ct. 1760, 29 L.Ed.2d 268 (1971). We do not understand Marshall to make this contention. Consequently, we need not consider whether, absent an allegation that an at-large scheme unconstitutionally dilutes the voting strength of a minority, the district court's approval of an atlarge scheme would amount to an abuse of discretion under *Connor.*

Marshall's contention here is that the judicially approved at-large plan is unconstitutional,[10] not merely indiscrete. Having identified Marshall's contention, we turn to a consideration of first, the proper standard for testing dilution, and second, whether the district court erred in finding that there was no dilution in the instant case.
We begin by noting that the concept of population in fair representation cases is not possessed of any talismanic quality. The Supreme Court recently affirmed this proposition in Gaffney v. Cummings, where it stated that "if it is the weight of a person's vote that matters, total population–even if stable and accurately taken–may not actually reflect that body of voters whose votes must be counted and weighed for purposes of reapportionment, because 'census persons' are not voters."[11] Indeed, ***1303** Reynolds v. Sims, *supra* and its progeny[12] marked a departure from statistical niceties. Consequently, to rely upon population statistics, to the exclusion of all other factors, is to give these statistics greater sanctity than that which the law permits or requires.

More fundamentally, the application of the population measure to this case is premised upon a misunderstanding of the thrust of the dilution problem presented in this case. Inherent in the concept of fair representation are two propositions: first, that in apportionment schemes, one man's vote should equal another man's vote as nearly as practicable;[13] and second, that assuming substantial equality, the scheme must not operate to minimize or cancel out the voting strength of racial elements of the voting population. Both the Supreme Court and this court have long differentiated between these two propositions.[14] And although population is the proper measure of equality in apportionment, in Whitcomb v. Chavis, 403 U.S. 124, 149-150, 91 S.Ct. 1858, 29 L. Ed.2d 363 (1971) and White v. Regester, *supra,* 412 U.S. at 765, 93 S.Ct. at 2339, 37 L.Ed.2d at 324, the Supreme Court announced that access to the political process and not population was the barometer of dilution of minority voting strength.

The district court applied a per se rule that since blacks were a majority in East Carroll Parish, the at-large plan could not possibly submerge their vote. Since in White v. Regester, *supra,* the Supreme Court affirmed a district court's finding of dilution in Bexar County even though Mexican-Americans comprised a numerical majority of the population in that county, the per se rule applied by the district court below cannot withstand scrutiny. The panel also relied upon the fact that blacks in East Carroll comprised a majority of population in reaching its conclusion, but pointing to the size of the parish's population, it qualified the standard applied by the district court. We feel that this qualification, invoked to differentiate the instant case from Connor v. Johnson, 402 U.S. 690, 692, 91 S.Ct. 1760, 29 L.Ed.2d 268 (1971) where the Supreme Court announced a preference for single-member districts in "large" districts, is of no moment where, as here, a showing of dilution has been made. The legal standards announced by the Supreme Court in Whitcomb v. Chavis, *supra,* and White v. Regester, *supra* in determining submergence admit of no distinction on the basis of size of population alone.

Concededly, in ***1304** Whitcomb v. Chavis, *supra,* 403 U.S. at 143-144, 91 S.Ct. 1858, the Supreme Court acknowledged that the aggregation of several districts into multi-member districts or an at-large scheme may enhance the potential for dilution when the population of such districts is large. But just as the magnitude of the districts did not obviate the need for petitioners to satisfy their burden of proof in *Whitcomb,* the minuteness of the population in the instant case cannot be invoked to pretermit further inquiry into the possibility of dilution in East Carroll Parish. The import attributed to population

by the majority of the panel had this preclusive effect. However, we cannot sanction the view that minorities are to be exposed and subject to apportionment schemes otherwise constitutionally infirm because the equal protection clause can be watered down on the basis of population statistics alone.[15]

We also hold that the district court erred in finding that the at-large plan did not dilute the black vote in East Carroll. In Howard v. Adams County Board of Supervisors, *supra,* 453 F.2d at 457, this court stated that to establish the existence of a constitutionally impermissible redistricting plan, plaintiffs must maintain the burden of showing either first, a racially motivated gerrymander, or a plan drawn along racial lines, or second, that ". . . designedly or otherwise, a[n] . . . apportionment scheme, under the circumstances of a particular case, would operate to minimize or cancel out the voting strength of racial or political elements of the voting population." In view of our holding that Marshall satisfied the burden with respect to the second standard, we need not entertain his contention that the departure from the firmly entrenched state policy against at-large voting in elections in police juries and school boards comes within the first standard.[16]

It is axiomatic that at-large and multi-member districting schemes are not per se unconstitutional.[17] Nevertheless, where the petitioner can demonstrate ***1305** that "its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice," White v. Regester, *supra,* 412 U.S. at 766, 93 S.Ct. at 2339, 37 L.Ed.2d at 324, Whitcomb v. Chavis, *supra,* 403 U.S. at 149-150, 91 S.Ct. 1858, such districting schemes are constitutionally infirm.

The Supreme Court has identified a panoply of factors, any number of which may contribute to the existence of dilution. Clearly, it is not enough to prove a mere disparity between the number of minority residents and the number of minority representatives.[18] Where it is apparent that a minority is afforded the opportunity to participate in the slating of candidates to represent its area, that the representatives slated and elected provide representation responsive to minority's needs, and that the use of a multimember districting scheme is rooted in a strong state policy divorced from the maintenance of racial discrimination, Whitcomb v. Chavis, *supra,* would require a holding of no dilution. *Whitcomb* would not be controlling, however, where the state policy favoring multimember or at-large districting schemes is rooted in racial discrimination.[19] Conversely, where a minority can demonstrate a lack of access to the process of slating candidates,[20] the unresponsiveness of legislators to their particularized interests, a tenuous state policy underlying the preference for multi-member or at-large districting, or that the existence of past discrimination in general precludes the effective participation in the election system, a strong case is made. Such proof is enhanced by a showing of the existence of large districts, majority vote requirements, antisingle shot voting provisions and the lack of provision for at-large candidates running from particular geographical subdistricts.[21] The fact of dilution is established upon proof of the existence of an aggregate of these factors. The Supreme Court's recent pronouncement in White v. Regester, *supra,* demonstrates, however, that all these factors need not be proved in order to obtain relief.

In *White,* the Supreme Court sustained the district court's invalidation of a multi-member districting scheme for the election of representatives to the Texas House of Representatives from Dallas and Bexar Counties. The Court held that the following findings of fact made by the district court concerning Dallas County were sufficient to warrant the relief fashioned: first, that the blacks had suffered a history of official racial discrimination which touched their right to participate in democratic processes; second, that the Texas requirements for majority vote as a prerequisite to nomination in a primary, though not themselves improper, enhanced the opportunity for racial discrimination; and third, that black candidates had merely nominal success in the past in electing Representatives due to the indifference of the Democratic Party which controlled candidate-slating ***1306** in Dallas County. White v. Regester, *supra,* 412 U.S. at 766-767, 93 S.Ct. at 2339-2340, 37 L.Ed.2d at 324-325. With respect to Bexar County, the district court made similar findings concerning the history of discrimination against Mexican-Americans and the unresponsiveness of the Bexar County legislative delegation to the interests of Mexican-Americans. The Supreme Court held that the district court's findings were sufficient to sustain the relief awarded in Bexar County. White v. Regester, *supra,* 412 U.S. at 767-769, 93 S.Ct. at 2340-2341, 37 L.Ed.2d at 325-326. While the instant case is not on all fours with White v. Regester, we hold that the record reveals facts sufficiently within its purview to warrant a repudiation of at-large elections in East Carroll Parish.

As in Dallas and Bexar Counties, minority residents in East Carroll Parish have suffered from a protracted history of racial discrimination which touched their ability to participate in the electoral process. Until 1957, they were compelled by a statute of statewide application to attend racially segregated schools until this court took action in Orleans Parish School Board v. Bush, 242 F.2d 156 (5th Cir.), cert. denied, 354 U.S. 921, 77 S.Ct. 1380, 1 L.Ed.2d 1436 (1957). Less overt but equally

invalid statewide schemes which fostered the maintenance of dual schools were operative until thwarted in 1960.[22] Until 1965, voters in East Carroll were subject to a state-required interpretation test in order to qualify to vote.[23] Finally, from 1922 to 1962, no black had been permitted to register to vote in the Parish.[24] Concededly, these impediments to participation in the electoral process have since been removed. The district court concluded that their removal vitiated the significance of the showing of past discrimination. This conclusion is untenable, however, precisely because the debilitating effects of these impediments do persist. *Cf.* Graves v. Barnes, 343 F. Supp. 704, 733 (W.D.Texas 1972), aff'd sub nom. White v. Regester, *supra.* Their persistence is manifested, in part, by the fact that although blacks in East Carroll comprise a majority of the population, they constitute a minority of registered voters.

Similarly, as in Dallas and Bexar Counties, the electoral device of a majority voting requirement is operative in East Carroll Parish.[25] This device has been severely criticized as tending to submerge a political or racial minority. Graves v. Barnes, *supra* at 725, aff'd sub nom. White v. Regester, *supra. See also* Evers v. State Board of Election Com'rs, 327 F.Supp. 640, 643 (S.D. Miss.1971). This criticism is appropriate in the instant case.

The only distinction between the instant case and White v. Regester, *supra,* is that here, there is no proof that representatives of police juries and school boards in East Carroll were particularly insensitive to the interests of minority residents. While this distinction is significant, it is not decisive.[26] ***1307** We feel that this deficiency in proof is compensated for by an additional distinction between the circumstances in the instant case and *White.* In Dallas and Bexar Counties, there was a strong tradition of multi-member districting. In contrast, in East Carroll, the firmly entrenched state policy against at-large elections for police juries and school boards had persisted until as late as 1967. Moreover, although testimony elicited by the district court emphasized the fact that the problems confronting the police jury were parish-wide and hence could best be resolved by representatives sensitive to a parish-wide electorate, there is a dearth of evidence that would suggest that the police jury formerly elected by wards inadequately served parish-wide interests in the past. Indeed, we find it rather anomalous that appellees would contend that the parish is too small for there to be a dilution of minority votes under an at-large scheme, and yet too large for ward elected representatives to be responsive to parishwide interests.

Thus, on the basis of the evidence adduced on the record, we feel constrained to find that the district court erred in rejecting Marshall's contention that the at-large electoral scheme would work a diminution of the black voting strength in East Carroll Parish. The confluence of factors presented in the instant case bring it well within the Supreme Court's holding in White v. Regester, *supra.*

Although the aforementioned analysis suffices to sustain our disposition, we are inclined to respond to an additional argument tendered by appellee in support of the panel's ruling. While acknowledging that the instant facts might theoretically present a case of dilution, appellee argued that 1971 and 1972 elections under the at-large plan, with the attendant success of 3 black candidates, dictated a finding that the at-large scheme did not in fact dilute the black vote. The significance attached to success at the polls in the instant case is unavailing, however, for two reasons. First, these results were not before the district court when it rendered the opinion we are presently reviewing. It is axiomatic that an appellate court cannot take cognizance of matters not passed upon by the trial court. Second, we cannot endorse the view that the success of black candidates at the polls necessarily forecloses the possibility of dilution of the black vote. Such success might, on occasion, be attributable to the work of politicians, who, apprehending that the support of a black candidate would be politically expedient, campaign to insure his election. Or such success might be attributable to political support motivated by different considerations–namely that election of a black candidate will thwart successful challenges to electoral schemes on dilution grounds. In either situation, a candidate could be elected despite the relative political backwardness of black residents in the electoral district. Were we to hold that a minority candidate's success at the polls is conclusive proof of a minority group's access to the political process, we would merely be inviting attempts to circumvent the Constitution. This we choose not to do. Instead, we shall continue to require an independent consideration of the record.

III.

We conclude our analysis in this case by returning to the point at which we began when we noted that this is not a case wherein a district court reapportionment plan approving at-large elections is challenged merely as an abuse of discretion. Where such a challenge is registered, our starting point would be Connor v. Johnson, *supra,* in which the Supreme Court

announced that single-member districts are preferable ***1308** to large multi-member districts. This preference is not, however, an unyielding one. As the Supreme Court admonished in Whitcomb v. Chavis, *supra,* 403 U.S. at 161, 91 S.Ct. at 1878, 29 L. Ed.2d 363, "[t]he remedial powers of an equity court must be adequate to the task, but they are not unlimited." Lest our decision today be misconstrued to narrowly circumscribe the discretion of a district court in fashioning a reapportionment plan itself free from constitutional infirmity, we would note that the preference for single-member districts may yield in two situations.

Where a district court determines that significant interests would be advanced by the use of multi-member districts and the use of single-member districts would jeopardize constitutional requirements, it can employ multi-member districts. *See* Mahan v. Howell, *supra,* 410 U.S. at 334-335, 93 S.Ct. 979, 35 L.Ed.2d 320. But these significant interests must not themselves be rooted in racial discrimination. *Cf.* Taylor v. McKeithen, *supra,* 407 U.S. at 194, 92 S.Ct. at 1982, 32 L. Ed.2d at 650 n. 3; White v. Weiser, 412 U.S. 783, 796, 93 S.Ct. 2348, 2355, 37 L. Ed.2d 335, 347 (1973).

The preference may also yield where a district court determines that multimember districts afford minorities a greater opportunity for participation in the political processes than do singlemember districts. In the process of making such a determination, a court need not be oblivious to the existence and location of minority voting strength.[27] While not required to formulate a plan that assures the success of a minority at the polls, a court may in its discretion opt for a multi-member plan which enhances the opportunity for participation in the political processes.

We acknowledge that the legal standards fashioned in this area of the law require federal courts to engage in a particularly exacting and hazardous inquiry in order to divine the proper remedial action to be taken. Justice Stewart presaged what we today acknowledge in his dissent in Sixty-Seventh Minnesota State Senate v. Beens, 406 U.S. 187, 204, 92 S.Ct. 1477, 1487, 32 L.Ed.2d 1, 14 (1972), when he noted that "the federal courts are often going to be faced with hard remedial problems" in reapportionment cases. Nevertheless, we are confident that federal courts can come to grips with such problems.

For the reasons set forth above, we reverse the decision of the panel of this court and vacate and remand the judgment ***1309** of the district court for proceedings consistent with our disposition.

COLEMAN, Circuit Judge, with whom INGRAHAM, Circuit Judge, joins (dissenting in part):

On November 17, 1972, a majority of the Judges ordered this case reheard en banc, directing counsel to file through briefs on the issue of "dilution of the franchise of black voters" as raised in the District Court and considered by the panel decision.[1] Clearly, what the en banc court intended to do was to establish some standards as to what is required to "minimize or cancel out black voting strength",[2] particularly in the context of a sparsely settled governmental unit inhabited by less than 13,000 people.

With sincere deference, I fear that the intended objective has eluded the en banc opinion. Regretfully, it leaves me with no plainly discernible idea of what the District Courts are hereafter to do with this troublesome problem. Moreover, I must disagree with the effect of those portions of the opinion which I think I do understand.

The opinion appears to be anchored, in the main, on the recent decision of the Supreme Court in White v. Regester, dealing with conditions prevailing as to the multi-member legislative districts in Dallas and San Antonio. East Carroll Parish, Louisiana, however, is a "far cry" from either of these highly populated metropolitan areas. The Parish Seat, Lake Providence, has a population of 6,183. The remaining 450 square miles of typical rural delta terrain have 6,701 inhabitants, with an average population density of fifteen persons (not voters) per square mile. In East Carroll blacks are in a heavily preponderant majority, not in the minority as were the blacks and Mexican-Americans in Dallas and San Antonio. In *White,* the Supreme Court considering the *totality of the circumstances,* was not inclined to disturb the findings of the Three Judge District Court that certain conditions in the cities had led to invidious discrimination against the minority groups. In the instant appeal, the en banc majority holds a non-cancellation, non-minimization finding of the District Court to be clearly erroneous.

Let us now turn to the undisputed facts in the case presently before us.

In round figures, the Parish population is 59% black and 41% white; the voting registration is 54% white and 46% black. *The record fails to reflect the number of eligible blacks who have chosen not to register.*
With a spread of only eight percentage points between white and black registration, even in an election conducted solely on racial considerations a switch of less than five percent would reverse the expected outcome. Does such a *thin line,* even in a formerly segregated jurisdiction, amount as a matter of law to impermissible "minimization" or "cancellation" of black voting strength? I would respond in the negative, but the en banc opinion says "yes"; that any other view is clearly erroneous. Of course, divergencies of such size in constitutionally mandated population reapportionments at state and local levels do not call for per se invalidation, White v. Regester, *supra.*

One of the factors stressed in White v. Regester was that for nearly a hundred years only two minority representatives from Dallas County and only five Mexican-Americans from Bexar County had been elected to the Texas Legislature. I do not know how many had been candidates nor what qualifications they possessed, but in East Carroll the en banc opinion declines to consider the unchallenged fact that in the at-large elections in East Carroll Parish in 1971 and 1972 three black candidates were elected ***1310** to office, including one who previously had been defeated when running in his own ward. The opinion holds that an appellate court cannot take cognizance of matters not passed upon by the trial court. It was all right for the Supreme Court to consider election results in Dallas and Bexar for the past one hundred years but when it comes to dismembering a little parish we must blind ourselves to facts asserted on oral argument and not in the least disputed. One rule for plaintiffs and the opposite for defendants. I might add that in the eight years I have served on this Court I have frequently seen it go outside the formal record in racially oriented cases for the reason that it would not blind itself to unchallenged facts.

Obviously, the election of three black candidates in at-large elections within two years after the adoption of the plan now under review, and at a time when black registration amounted to 46% and white registration came to 54%, pretty well explodes any notion that black voting strength has been cancelled or minimized. What the en banc opinion condemns as clearly erroneous turns out to be clearly right when put to the test of actual use at the ballot box rather than in the rarified atmosphere of the judicial chamber.

Additionally, in White v. Regester, the at-large candidates for the legislature were not required to live in a particular zone, so that it was possible for every legislator to be elected from outside the minority areas. Indeed, the Three Judge Texas District Court felt impelled to say, and the Supreme Court quoted it, that these legislators were "insufficiently responsive to Mexican-American interests".

In East Carroll Parish, however, the candidates were required to run from specifically designated areas.

I believe that White v. Regester was decided on the denial of access to the political process, not on cancellation or minimization of the minority vote. In any event, a decision rendered on the facts peculiar to that case and not shown to exist in East Carroll provides faint precedential support for the en banc decision now about to be rendered.

In East Carroll Parish the black people hold a predominant population majority–59% to 41%. It necessarily follows that the opinion of the Court in this case can only mean that in formerly "segregated" areas a black population majority is of no consequence in one man-one vote reapportionment cases unless it is also matched by a black registration majority when there is an effort to escape from the pocket borough method of electing county officials. The basic requirement, the fundamental goal, of population equality must yield to registration equality.

I submit that this is a serious distortion of the one man-one vote principle. It has to be premised on the idea that voters will always vote for candidates of their own race, an idea which has repeatedly failed the test of electoral experience, even in East Carroll Parish itself. It also overlooks the absolute certainty that with such a predominantly heavy population majority it is only a matter of time, and not too long at that, when there will be a black registration majority in East Carroll.

The en banc opinion is quite inconclusive as to what the District Court must do on remand. Apparently, however, no choice is left but to direct the division of the Parish into wards (districts). The Balkan must be fragmented into nine Balkans. After it had lost jurisdiction in this case, as set forth in the panel opinion, the District Court approved a redistricting plan submitted by the plaintiff-appellants by which three of the nine board members would be elected from one ward while the other six wards would be allowed to elect only one each. One ward would elect ⅓ of the Board while the other six would elect 1/9 each.

So far as ultimate power on the Board ***1311** is concerned a vote in one ward would be worth exactly three times that of a vote in any other ward. To me that certainly smells of invidious discrimination and a complete distortion of the one man-one vote rule within a small county area.

The paramount consideration in this case is that in East Carroll Parish, Louisiana, the black race is a definite majority, not a minority.[3] Thus, the ultimate question is whether a 7% deficit in black registration cancels or minimizes the black voting strength of those who hold an 18% advantage in population. The en banc opinion says that it does, as a matter of law, and that the affirmative finding of the District Court to the contrary is clearly erroneous.

Hence, we direct a change in the election machinery of a small rural parish, where the black officials elected under the old malapportioned ward plan expressed, as the record shows, a preference for the at-large plan.

I would adhere to what the panel said originally:
"We are unable to see how at-large elections in this small parish could possibly discriminate against its black citizens. They have a commanding majority of the total population. This majority would participate in the election of not one but of every police juror and every school board member in the parish. Every elected official would thus be answerable to all black citizens of the entire parish. On a single-member district plan, if such can be devised, the voters would have a voice in the election of only one member on the police jury or the school board. It would, therefore, be just as easy to say, in the exercise of discretion, that a single district plan in this parish would more clearly dilute the voting power of the blacks than would one in which every voter, black and white, has the same identical voice in the selection of not one, *but all* members of the elective body. As a matter of fact, the District Judge so found."

To the extent indicated, I respectfully dissent.

CLARK, Circuit Judge, with whom DYER, LEWIS R. MORGAN and RONEY, Circuit Judges, join (dissenting):

The majority bases its reversal of the District Court order now on appeal on two grounds: first, the District Court improperly relied on population statistics alone in evaluating the effect of the plan ordered implemented in diluting the voting strength of black citizens and second, the District Court finding of no dilution was clearly erroneous. With deference, I differ as to both grounds. Of more fundamental importance is my disagreement with Part III of the majority opinion which creates a formula to test multimember district reapportionment plans for dilution of ethnic group voting strength. The tests laid down sweep too broadly and at least they are unnecessary in view of the clear exposition of the law in this field by the Supreme Court. For all of these reasons I respectfully dissent.

I.

White v. Regester announces the legal standard to be applied in this case as succinctly and cogently as it can be put. Omitting supportive citations, the Court stated:
Plainly, under our cases, multimember districts are not *per se* unconstitutional, nor are they necessarily unconstitutional when used in combination with single-member districts in other parts of the State.

But we have entertained claims that multimember districts are being used invidiously to cancel out or minimize the voting strength of racial groups. To sustain such claims, it is not enough that the racial group allegedly ***1312** discriminated against has not had legislative seats in proportion to its voting potential. The plaintiffs' burden is to produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question–that its members had less opportunity than did other residents in the district to participate in the political processes

and to elect legislators of their choice.

The Supreme Court concluded that "on the totality of the circumstances" it would not overturn the findings of the District Court
representing as they do a blend of history and an intensely local appraisal of the design and impact of the Bexar County multi-member district in the light of the past and present reality, political and otherwise.

The majority epitomizes the District Court's order as one which based its determination of nondilution solely on the fact that the requirement of at-large elections eliminated any population deviation between voting units. However, I read the order to have a broader foundation. At the hearing held to determine the effect of the 1970 census upon the District Court's previous 1968 order for at-large elections, six plans were submitted to the court by the governmental agencies involved and by the black intervenor. None of these plans provided for single-member districts throughout the parish. Rather, they provided for various combinations of single and multimember districts and for various forms of parish-at-large elections with geographical residency requirements for the candidates for various posts. The evidence adduced during this hearing delved into what dilution would be brought about by the intervenor's proposed plans as compared with the dilution that would result from a parish-at-large reapportionment plan. Both forms of plans were also compared to the population proportions which existed under the per-1968 single-member ward system.

The District Court's decree now on appeal provided in pertinent part:
. . . the court having considered all plans presented as well as all alternate plans proposed by the parties hereto, it has made the following finding of facts:

1. That according to the 1970 U.S. Census, East Carroll Parish has a total population of 12,884 persons of which number 7,568 are blacks and 5,306 are whites and other nationalities; that the black population of East Carroll Parish, Louisiana, comprises 58.7 percent of the total population.

2. That the plan of reapportionment offered by East Carroll Parish Police Jury and East Carroll Parish School Board is more satisfactory than other plans presented because it offers a zero deviation while all other plans considered did not.

3. That the plan of reapportionment offered by East Carroll Parish Police Jury and East Carroll Parish School Board does not dilute nor discriminate against the black population as the new voting unit from which officers of the jury and the board are to be elected is comprised of 58.7 percent blacks, or a substantial majority of blacks, while other plans considered diluted the black population of different areas within the parish significantly greater than the plan offered by the jury and school board.

4. That the plan recommended by East Carroll Parish Police Jury and East Carroll Parish School Board has actually been in effect in East Carroll Parish since December 2, 1968, and the plan has not proved discriminatory against blacks.

5. That the plan represents the wishes of both public bodies, having been endorsed by two of the three black public officials now serving on these public bodies.

6. That the plan of apportionment offered by East Carroll Parish Police ***1313** Jury and East Carroll Parish School Board is a constitutionally acceptable plan and meets all of the requirements of the "one-man, one-vote" rule of law.
7. That the evidence adduced by intervenor failed to show that the plan offered by the two aforesaid public bodies would discriminate against blacks or in any manner dilute the black population.

I read this order as addressing two separate considerations. The first is compliance with the one-man-one-vote mandate of Reynolds v. Sims. The second is a factual consideration of whether parish-at-large elections, which obviously solve this problem completely, might have the effect of diluting the voting strength of black voters who, while holding a majority position in total population, comprise a slight minority of the registered voters in the entire parish. Findings 3, 4, 5 and 7 are expressly addressed to this second problem, and, when considered in the context of the hearing record in this case which directly dealt with the dilution of voter effectiveness on a racial basis, appear to me to go to the heart of the proper questions that should concern the trier of fact in such a case. Certainly they are not limited to population statistics alone.

There can be no serious quarrel with the abstract legal premise that bare population statistics cannot become a talisman for determining whether dilution of voting strength has occurred. However, this concession is no impediment to an insistence that the District Court and the prior panel opinion of this court were entitled and indeed required to consider the overall size of the population in this small rural parish in approving the apportionment plan involved. It is perfectly valid to compare the effect which an at-large voting plan would have on the strength of an ethnic group in East Carroll Parish with the result of any similar multimember district plan in a populous urban area such as those which have been involved in the previous Supreme Court cases to date. The opportunity for participation in a parish-at-large election among less than 13,000 people is *greater* than the opportunity to be a meaningful part of the elective process in a single-member district which numbers over 100,000 persons. Judge Dawkins also made a specific oral finding that the proposed plan was not racially motivated and did not have a racially deterrent effect in its operation. With all of these factors which were before the District Court and which obviously formed a part of its decisional process, I cannot agree that the District Court imposed a constitutionally infirm reapportionment plan which watered down voting rights on the basis of population statistics alone.

The almost gossamer distinction between weighing each man's vote equally and preventing the dilution of the overall voting strength of an identifiable racial element within the electorate can be an elusive concept at best. However, it is not one which in my view escaped either the attention of Judge Dawkins in his original opinion or the panel that initially heard this appeal. With full recognition that White v. Regester and the other precedents cited in footnote 2 of the en banc majority opinion discuss a panoply of factors which may help identify the existence of dilution, I find no rule requiring that every such factor must be tested for and found in every case in which a dilution issue may be raised. The common denominator which all precedents demand be weighed in reaching the required ad hoc fact adjudication is: has the plaintiff met the burden of demonstrating that members of the ethnic group in question have less opportunity than do other residents in the district to participate in the political processes and to elect legislators of their choice? Though not expressed in these terms, this is the rule Judge Dawkins applied in evaluating the design and impact of this plan.

***1314** II.

I would be quick to agree that the en banc majority is correct when it states that dilution of voting strength is a question of fact. The difference between us arises because of my view that the record establishes the decision of the trial court in this case was not clearly erroneous. For example, Judge Coleman points out with emphasis in his dissent that the record in this case fails to reflect the number of *eligible* black citizens who have chosen not to register. How the majority opinion can conclude on such a record that the plaintiffs have demonstrated that past impediments to black voting still persist in this parish and that the persistence of such impediments is manifested in the disparity between black population and black voter registration is an enigma to me.[1] Until eligibility–based on age, residence, and freedom from other disqualifications established under federal law–is compared to nonregistration, this appears to be nothing more than a tenuous assumption. However, it is an assumption which is essential to the en banc court's fact reversal of the trial court as clearly erroneous.

The proof adduced in the District Court concerning the operation of the at-large election plan which governed the 1970 elections in this parish disclosed that a black candidate in the primary election for the Police Jury was defeated by only 9 votes. Another black candidate qualified for the second primary in which he ran third, 12 votes behind the second place white candidate. A third black candidate won in his contest against the incumbent president of the Police Jury, polling more votes than any candidate, not just for this post but in the entire election.

In the 1972 election which was held for only three of the nine school board posts, two blacks and one white candidate were elected. If the focus is upon "the design and impact" of at-large elections "in the light of past and present reality, political and otherwise," it is manifest that here there was no dilution of the black vote. But the majority sets its blinders so that it cannot see the present political reality because the election results were not before the District Court when it rendered its judgment.

While I unqualifiedly endorse the view that we cannot take cognizance of issues not raised or evidence that could have been but was not introduced in the court below, we are confronted with neither of these factors here. The 1972 election was held subsequent to the District Court's judgment of August 2, 1971. The result of the election is *not disputed* and was proffered to

us on appeal. While the appellate process is going on, we can no more halt the political and electoral processes than we can stop the clock. We should not, however, turn either of them back when they are running properly. I see nothing novel or prejudicial about the consideration of current relevant *undisputed* matters brought to our attention on an appeal from an injunction decree. Indeed, our failure to do so is to shut our eyes to present political reality in East Carroll Parish and to do violence to the basic legal principle that injunction orders operate *in futuro.*

Finally, I am unable to agree with the majority that the 1972 election results should not be considered because of the purely speculative possibilities that the election of a black might serve the selfish political purposes of a white candidate, or that it would be better for a white to lose an election than to lose a law suit.

III.

White v. Regester charts a clear course for adjudicating attacks on plans ***1315** involving multimember districts–which in logic of analysis are merely one form of at-large voting, differing only in the extent of the geographic area involved. I cannot help but conclude that part III of the en banc majority opinion is diametrically at variance with the simple direct rule laid down by the Supreme Court in that case. By today's decision this court creates a rule which would limit the use of multimember districts to those instances where proof can be adduced which demonstrates that a "*greater* opportunity for participation" in the political process would be afforded to whichever race may be in the minority than would be possible in single member districts, or for a showing that the use of at-large election districts "*enhances* the opportunity" for minority participation in the political process. Without regard to the fact that such proof might be well-nigh to impossible to make, the law's announced preference for single member districts in populous areas does not mean that multimember districts must overcome some stigma to survive. To require that any particular plan be demonstrated to operate so as to afford an advantage to any minority ethnic group at the polling place is not an exercise of color-blind color consciousness but a legal mandate for reverse discrimination. It is not merely a rule out of keeping with the latest law of the Supreme Court, but is a mistake of major dimensions that will place the courts squarely in the center of the "political thicket."

The trier of fact in this case did not utilize an erroneous legal principle but rather applied considerations well within the rule just announced in White v. Regester. The record demonstrates ample evidence to indicate that the findings of fact made by the District Court were not clearly erroneous. For these reasons I would affirm the District Court. Most certainly I would refrain from creating any new rule regarding the use of multimember districts which runs counter to the most recent pronouncement of the Supreme Court. Thus, I dissent.

All Citations

485 F.2d 1297

Footnotes

1 Aristotle, Politics, Book II.

2 White v. Regester, 412 U.S. 755, 765, 93 S.Ct. 2332, 2339, 37 L.Ed.2d 314, 324 (1973); Whitcomb v. Chavis, 403 U.S. 124, 143, 91 S.Ct. 1858, 29 L.Ed.2d 363 (1971); Fortson v. Dorsey, 379 U.S. 433, 439, 85 S. Ct. 498, 13 L.Ed.2d 401 (1965); Burns v. Richardson, 384 U.S. 73, 88, 86 S.Ct. 1286, 16 L.Ed.2d 376 (1966).

3 In the absence of special legislative authority for school boards to apportion, the apportionment and reapportionment of parish school boards is dependent upon such apportionment of the police jury in the parish. Consequently, this case does not require a

distinction between the reapportionment scheme as it affects either body.

4 As shall be discussed *infra,* a majority of the panel refrained from announcing a per se rule. Rather, it qualified its application of the majority of population standards on the grounds proffered by appellees, namely the size of the parish.

5 These figures are based on the 1962 findings of the district court in the voter registration suit brought in the Parish, United States v. Manning, 205 F.Supp. 172 (W.D. La.1962), and on the State of Louisiana Board of Registration, Report of Registered Voters, month ending October 6, 1971. *See* Brief of Appellant at 3, Zimmer v. McKeithen, No. 71-2649 (5th Cir. filed Dec. 1, 1971); Brief of Appellee at 1, *id.* (5th Cir. filed March 28, 1972).

6 Although Marshall clearly raised the Voting Rights Act issue in his Complaint in Intervention, the district court in its order in 1971 did not rule on this issue. Since he preserved this contention on appeal, it was before a panel of this court.

7 Until 1968, Louisiana law prohibited atlarge elections for School Boards and Police Juries (the law required at least five wards from which the members of these bodies were to be elected). By Louisiana Acts of 1968 No. 445 Section 1 (amending La.R.S. 33:1221) and No. 561 (adding La.R.S. 17:71.1–17:71.6), Louisiana Law was amended to allow at-large elections (or elections from less than five wards) for School Boards and Police Juries.

On April 29, 1969, Acts 445 and 561 were submitted to the Attorney General of the United States pursuant to Section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c. On June 26, 1969, both Acts were rejected as having "the effect of discrimination against Negro voters on account of their race, and of denying to them an effective voice in the selection of Police Jury and School Board members." On September 10, 1969 this rejection was reaffirmed by the Attorney General of the United States, citing as a specific example of racial discrimination, the at-large scheme of elections in East Carroll Parish.

8 In all deference to the panel, we submit that they failed to give adequate consideration to Marshall's contention that the district court's finding of no dilution was clearly erroneous.

9 Marshall contended that the rule of Connor v. Johnson, 402 U.S. 690, 91 S.Ct. 1760, 29 L.Ed.2d 268 (1971) and Sheffield v. Itawamba County Board of Supervisors, 439 F.2d 35 (5th Cir. 1971) that court ordered plans resulting from equitable jurisdiction over adversary proceedings are not controlled by Section 5 is inapposite where such plans are adopted by a court in "sweetheart" lawsuits. Although there may be merit in his contention that the failure to qualify *Connor* and *Sheffield* may result in the circumvention of the Voting Rights Act, we would merely note that the dilution standard is a viable means of reconciling the disparate treatment of governmental body approved plans and court approved plans under Section 5. Furthermore, since Section 5, 42 U.S.C. § 1973c (1970), covers attempts to administer voting practices as well as attempts to enact them, *see* Roman, Section 5 Of The Voting Rights Act: The Formation of an Extraordinary Legal Remedy, 22 Am.U.L.Rev. 111, 124 (1972), the panel's decision that *Connor* and *Sheffield* govern is quite appropriate.

10 A similar contention was made in Gunderson v. Adams, 328 F.Supp. 584 (S.D.Fla. 1970) aff'd, 403 U.S. 913, 91 S.Ct. 2225, 29 L.Ed.2d 692 (1971) where a Florida plan, codifying a court ordered plan, was challenged and upheld.

11 Gaffney v. Cummings, 412 U.S. 735-746, 93 S.Ct. 2321, 2328, 37 L.Ed.2d 298, 308 (1973). Thus, census figures include aliens, nonresident military personnel, nonresident students, all of whom may be ineligible to vote. The Supreme Court and lower courts have approved apportionment based not on population but on voter registration statistics on several occasions, where such data produces a distribution of legislators not differing substantially from the use of a permissible population basis. *See, e. g.,* Burns v. Richardson, *supra,* 384 U.S. at 93, 86 S.Ct. 1286; Ely v. Klahr, 403 U.S. 108, 91 S.Ct. 1803, 29 L.Ed.2d 352 (1971); Reynolds v.

Gallion ex rel. Attorney General of Alabama, 308 F.Supp. 803 (M.D.Ala.1969); Pate v. El Paso County, Texas, 337 F.Supp. 95 (W.D. Tex.) aff'd, 400 U.S. 806, 91 S.Ct. 55, 27 L. E.2d 38 (1970).

12 E. g., Gaffney v. Cummings, *supra;* White v. Regester, *supra;* Mahan v. Howell, 410 U.S. 315, 93 S.Ct. 979, 35 L.Ed.2d 320 (1973); Abate v. Mundt, 403 U.S. 182, 91 S.Ct. 1904, 29 L.Ed.2d 399 (1971); Swann v. Adams, 385 U.S. 440, 87 S.Ct. 569, 17 L. Ed.2d 501 (1967).

13 Reynolds v. Sims, *supra,* 377 U.S. at 577, 84 S.Ct., at 1389.

14 *See* Gaffney v. Cummings, *supra,* 412 U.S. at 751, 93 S.Ct. at 2330, 37 L.Ed.2d at 311; White v. Regester, *supra,* 412 U.S. at 765, 93 S.Ct. at 2339, 37 L.Ed.2d at 324; Whitcomb v. Chavis, *supra,* 403 U.S. at 142, 91 S.Ct. 1858, 29 L.Ed.2d 363; Abate v. Mundt, *supra,* 403 U.S. at 184 n.2, 91 S.Ct. 1904; Burns v. Richardson, *supra,* 384 U.S. at 88-89, 86 S.Ct. 1286; Howard v. Adams County Board of Supervisors, 453 F.2d 455, 457 (5th Cir. 1972) cert. denied, 407 U.S. 925, 92 S.Ct. 2461, 32 L.Ed.2d 812 (1972). *See also* Troxler v. St. John the Baptist Parish Police Jury, 331 F.Supp. 222 (E.D.La.1971), appeal dismissed, 452 F.2d 1388 (5th Cir. 1972).

15 We acknowledge, however, that elections with respect to certain special governmental units of limited purpose are not subject to the fair representation mandates. *See* Associated Enterprises, Inc. v. Toltec Watershed Improvement District, 410 U.S. 743, 93 S.Ct. 1237, 35 L.Ed.2d 675 (1973); Salyer Land Company v. Tulare Lake Basin Water Storage District, 410 U.S. 719, 93 S.Ct. 1224, 35 L.Ed.2d 659 (1973).

16 Similar contentions have met with varying degrees of success. For cases upholding the claim that a reapportionment plan was racially discriminatory, *see* Gomillion v. Lightfoot, 364 U.S. 339, 81 S.Ct. 125, 5 L.Ed.2d 110 (1960); Smith v. Paris, 257 F.Supp. 901, 904 (M.D.Ala.) modified and aff'd, 386 F.2d 979 (5th Cir. 1967) on remand, United States v. Democratic Executive Committee of Barbour County, Alabama, 288 F.Supp. 943 (M.D.Ala.1968); Sims v. Baggett, 247 F.Supp. 96, 110 (M.D.Ala.1965). For cases in which such a claim was rejected, *see* Wright v. Rockefeller, 376 U.S. 52, 84 S.Ct. 603, 11 L.Ed.2d 512 (1964); Holt v. Richmond, 459 F.2d 1093 (4th Cir.)., cert. denied, 408 U.S. 931, 92 S.Ct. 2510, 33 L.Ed.2d 343 (1972).

Neither the language quoted from Howard v. Adams County Board of Supervisors, *supra,* nor the aforementioned cases should be read to hold that a reapportionment plan can be invalidated solely because of the racial motivations of those who fashioned it. In Palmer v. Thompson, 403 U.S. 217, 224-225, 91 S.Ct. 1940, 29 L.Ed.2d 438 (1971), the Supreme Court stated that although its past decisions contain language which suggests that motive or purpose behind a law is relevant to its constitutionality, these decisions, including Gomillion v. Lightfoot, 364 U.S. 339, 347, 81 S.Ct. 125, 5 L.Ed.2d 110 (1960) focused on the actual effect of the legislation being challenged, and not the reason why the legislation was enacted.

17 White v. Regester, *supra,* 412 U.S. at 765, 93 S.Ct. at 2339, 37 L.Ed.2d at 324; Mahan v. Howell, *supra,* 410 U.S. at 335, 93 S.Ct. 979; Ferrell v. Hall, 339 F.Supp. 73 (W.D. Okl.) aff'd, 406 U.S. 939, 92 S.Ct. 2045, 32 L.Ed.2d 328, petition for rehearing denied, 408 U.S. 932, 92 S.Ct. 2489, 33 L.Ed.2d 344 (1972); Gunderson v. Adams, 328 F.Supp. 584 (S.D.Fla.1970); aff'd, 403 U.S. 913, 91 S.Ct. 2225, 29 L.Ed.2d 692 (1971); Dusch v. Davis, 387 U.S. 112, 87 S.Ct. 1554, 18 L.Ed. 2d 656 (1967); Kilgarlin v. Hill, 386 U.S. 120, 121, 87 S.Ct. 820, 17 L.Ed.2d 771 (1967); Burns v. Richardson, *supra;* Fortson v. Dorsey, *supra;* Lipscomb v. Jonsson 459 F.2d 335, 337 (5th Cir. 1972); Howard v. Adams County Board of Supervisors, *supra,* 453 F.2d at 457-458.

18 *E. g.,* Whitcomb v. Chavis, *supra,* at 149, 91 S.Ct. 1858; Lipscomb v. Johnson, *supra,* 459 F.2d at 337.

19 Taylor v. McKeithen, 407 U.S. 191, at 194, 92 S.Ct. 1980, at 1982, 32 L.Ed.2d 648, at 650, n. 3. *See* Parker, County Redistricting

in Mississippi: Case Studies in Racial Gerrymandering, 44 Miss.L.J. 391, 400 (1973).

20 The Supreme Court's focus in Whitcomb v. Chavis, *supra,* 403 U.S. at 149-150, 91 S. Ct. 1858, on the access of minorities to slating procedures in Marion County, Indiana, makes clear that the standards we enunciate today are applicable whether it is a specific law or a custom or practice which causes the diminution of minority voting strength.

21 *Compare* Whitcomb v. Chavis, *supra,* 403 U.S. at 143-144, 91 S.Ct. 1858, 29 L.Ed.2d 363, *with* Graves v. Barnes, 343 F.Supp. 704, 725 (W.D.Tex.1972), aff'd sub nom. White v. Regester, *supra.* The existence and mode of operation of voting procedures which enhance dilution is outlined in Derfner, Racial Discrimination and the Right to Vote, 26 Vand.L.Rev. 523, 553-55 and accompanying notes (1973).

22 *See, e. g.,* Bush v. Orleans Parish School Board, 188 F.Supp. 916, 920 (E.D.La.1960) (documenting additional circumventive artifices).

23 Louisiana v. United States, 380 U.S. 145, 85 S.Ct. 817, 13 L.Ed.2d 709 (1965).

24 United States v. Manning, *supra.*

25 La.Rev.Stat.Ann. art. 18, § 18:358 (1969). In addition, voters in East Carroll are subject to anti-single shot voting requirements, the effects of which though mitigated as to wards 1, 2, 4, 5, 6 and 7 under the district court's plan, are still egregious in ward 3 where 3 representatives to the police jury and school board are elected. *See* La.Rev. Stat.Ann. art. 18, § 18:351 (1969).

26 It may be that the absence on the record of any criticism of the responsiveness of the police jury and school board is attributable to an omission of proof. If so, our decision should not be interpreted as acquiescing to such omissions. However, it may be that the particular functions of the police jury, for example, do not easily lend themselves to unresponsive representation. The record establishes that the primary function of the juries is the drainage of rural farmlands, maintenance of rural roads, and the overseeing of a prison farm. Were we to hold that the absence of a claim of representation unresponsive to a minority's needs foreclosed constitutional attack, the voting strength of minorities could be freely diluted without fear of constitutional restraint. The absence of proof with respect to school boards could not be explained on such grounds.

27 The Supreme Court has never ruled on the question of the extent to which the board equitable powers of a federal court in fashioning reapportionment decrees are limited by the colorblind concept of Gomillion v. Lightfoot, *supra* and Wright v. Rockefeller, *supra. See* Taylor v. McKeithen, *supra,* 407 U.S. at 194, 92 S.Ct. at 1982, 32 L.Ed.2d at 650. Several courts have intimated that the colorblind concept is in fact a limitation. *See* Mann v. Davis, 245 F.Supp. 241, 245 (E.D.Va.) aff'd sub nom. Burnette v. Davis, 382 U.S. 42, 86 S.Ct. 181, 15 L.Ed.2d 35 (1965); Ferrell v. Hall, 339 F.Supp. 73, 83 (W.D.Okla.) aff'd, 406 U.S. 939, 92 S.Ct. 2045, 32 L.Ed.2d 328; rehearing denied, 408 U.S. 932, 92 S.Ct. 2489, 33 L.Ed.2d 344 (1972).

In discussing the remedial power of federal courts to fashion reapportionment decrees, the Court has cited Swann v. Charlotte-Mecklenburg Bd. of Ed., 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971), *see, e. g.,* Taylor v. McKeithen, *supra,* 407 U.S. at 194, 92 S. Ct. at 1982, 32 L.Ed.2d at 650; Sixty-Seventh Minnesota State Senate v. Beens, *infra,* 406 U.S. at 201, 92 S.Ct. at 1486, 32 L.Ed.2d at 12 (Stewart, J., dissenting), thereby suggesting that such powers in fashioning reapportionment decrees are coterminous with those in fashioning desegregation decrees. Since *Swann* noted that it was permissible for a federal court to consider race in the latter situation, *Swann, supra,* 402 U.S. at 25, 91 S.Ct. 1267, it would also be permissible to consider race in the former situation.

Our decision in Howard v. Adams County Board of Supervisors, *supra* is not inconsistent with the view maintained herein. In Howard, we observed that the district court was correct in noting that the organization commissioned by the legislature to draw up reapportionment plans did not consider race in its plan. Howard, *supra,* 453 F.2d at 458. We did not intimate any view as to the propriety of considering race in such circumstances.

[1] The panel opinion in this case (Judge Gewin dissenting in part) is reported, 467 F.2d 1381.

[2] Burns v. Richardson, 384 U.S. 73, 86 S.Ct. 1286, 16 L.Ed.2d 376; Fortson v. Dorsey, 379 U.S. 433, 85 S.Ct. 498, 13 L.Ed.2d 401.

[3] The en banc opinion speaks of single-shot voting, run-off elections, and slating candidates, but these were not issues in the court below.

[1] For example, the 1970 census reflects that 49.6% of the black population of East Carroll Parish is under 18 years of age as compared to only 38.5% of the white population.

United States Code Annotated
Constitution of the United States
Annotated
Amendment XIV. Citizenship; Privileges and Immunities; Due Process; Equal Protection; Apportionment of Representation; Disqualification of Officers; Public Debt; Enforcement

U.S.C.A. Const. Amend. XIV

AMENDMENT XIV. CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPOINTMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Currentness

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

<Section 1 of this amendment is further displayed in separate documents according to subject matter,>

<see USCA Const Amend. XIV, § 1-Citizens>

<see USCA Const Amend. XIV, § 1-Privileges>

<see USCA Const Amend. XIV, § 1-Due Proc>

<see USCA Const Amend. XIV, § 1-Equal Protect>

<sections 2 to 5 of this amendment are displayed as separate documents,>

<see USCA Const Amend. XIV, § 2,>

<see USCA Const Amend. XIV, § 3,>

<see USCA Const Amend. XIV, § 4,>

<see USCA Const Amend. XIV, § 5,>

U.S.C.A. Const. Amend. XIV, USCA CONST Amend. XIV
Current through P.L. 118-107. Some statute sections may be more current, see credits for details.

End of Document

United States Code Annotated
Title 52. Voting and Elections (Refs & Annos)
Subtitle I. Voting Rights
Chapter 103. Enforcement of Voting Rights

52 U.S.C.A. § 10301
Formerly cited as 42 USCA § 1973

§ 10301. Denial or abridgement of right to vote on account of race or color through voting qualifications or prerequisites; establishment of violation

Effective: September 1, 2014

Currentness

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 10303(f)(2) of this title, as provided in subsection (b).

(b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided,* That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

CREDIT(S)

(Pub.L. 89-110, Title I, § 2, Aug. 6, 1965, 79 Stat. 437; renumbered Title I, Pub.L. 91-285, § 2, June 22, 1970, 84 Stat. 314; amended Pub.L. 94-73, Title II, § 206, Aug. 6, 1975, 89 Stat. 402; Pub.L. 97-205, § 3, June 29, 1982, 96 Stat. 134.)

Notes of Decisions (1352)

52 U.S.C.A. § 10301, 52 USCA § 10301
Current through P.L. 118-107. Some statute sections may be more current, see credits for details.

End of Document

West's Annotated California Codes
Elections Code (Refs & Annos)
Division 14. Election Day Procedures (Refs & Annos)
Chapter 1.5. Rights of Voters (Refs & Annos)

West's Ann.Cal.Elec.Code § 14026

§ 14026. Definitions

Effective: January 1, 2017

Currentness

As used in this chapter:

(a) "At-large method of election" means any of the following methods of electing members to the governing body of a political subdivision:

(1) One in which the voters of the entire jurisdiction elect the members to the governing body.

(2) One in which the candidates are required to reside within given areas of the jurisdiction and the voters of the entire jurisdiction elect the members to the governing body.

(3) One that combines at-large elections with district-based elections.

(b) "District-based elections" means a method of electing members to the governing body of a political subdivision in which the candidate must reside within an election district that is a divisible part of the political subdivision and is elected only by voters residing within that election district.

(c) "Political subdivision" means a geographic area of representation created for the provision of government services, including, but not limited to, a general law city, general law county, charter city, charter county, charter city and county, school district, community college district, or other district organized pursuant to state law.

(d) "Protected class" means a class of voters who are members of a race, color, or language minority group, as this class is referenced and defined in the federal Voting Rights Act of 1965 (52 U.S.C. Sec. 10301 et seq.).

(e) “Racially polarized voting” means voting in which there is a difference, as defined in case law regarding enforcement of the federal Voting Rights Act of 1965 (52 U.S.C. Sec. 10301 et seq.), in the choice of candidates or other electoral choices that are preferred by voters in a protected class, and in the choice of candidates and electoral choices that are preferred by voters in the rest of the electorate. The methodologies for estimating group voting behavior as approved in applicable federal cases to enforce the federal Voting Rights Act of 1965 (52 U.S.C. Sec. 10301 et seq.) to establish racially polarized voting may be used for purposes of this section to prove that elections are characterized by racially polarized voting.

Credits

(Added by Stats.2002, c. 129 (S.B.976), § 1. Amended by Stats.2015, c. 732 (A.B.1536), § 30, eff. Jan. 1, 2016; Stats.2015, c. 724 (A.B.277), § 2, eff. Jan. 1, 2016; Stats.2016, c. 86 (S.B.1171), § 121, eff. Jan. 1, 2017.)

Notes of Decisions (17)

West’s Ann. Cal. Elec. Code § 14026, CA ELEC § 14026
Current with urgency legislation through Ch. 1002 of 2024 Reg.Sess. Some statute sections may be more current, see credits for details.

McKinney's Consolidated Laws of New York Annotated
Civil Practice Law and Rules (Refs & Annos)
Chapter Eight. Of the Consolidated Laws
Article 32. Accelerated Judgment (Refs & Annos)
McKinney's CPLR Rule 3211

Rule 3211. Motion to dismiss

Effective: May 7, 2022

Currentness

(a) Motion to dismiss cause of action. A party may move for judgment dismissing one or more causes of action asserted against him on the ground that:

1. a defense is founded upon documentary evidence; or

2. the court has not jurisdiction of the subject matter of the cause of action; or

3. the party asserting the cause of action has not legal capacity to sue; or

4. there is another action pending between the same parties for the same cause of action in a court of any state or the United States; the court need not dismiss upon this ground but may make such order as justice requires; or

5. the cause of action may not be maintained because of arbitration and award, collateral estoppel, discharge in bankruptcy, infancy or other disability of the moving party, payment, release, res judicata, statute of limitations, or statute of frauds; or

6. with respect to a counterclaim, it may not properly be interposed in the action; or

7. the pleading fails to state a cause of action; or

8. the court has not jurisdiction of the person of the defendant; or

9. the court has not jurisdiction in an action where service was made under section 314 or 315; or

10. the court should not proceed in the absence of a person who should be a party.

11. the party is immune from liability pursuant to section seven hundred twenty-a of the not-for-profit corporation law. Presumptive evidence of the status of the corporation, association, organization or trust under section 501(c)(3) of the internal revenue code may consist of production of a letter from the United States internal revenue service reciting such determination on a preliminary or final basis or production of an official publication of the internal revenue service listing the corporation, association, organization or trust as an organization described in such section, and presumptive evidence of uncompensated status of the defendant may consist of an affidavit of the chief financial officer of the corporation, association, organization or trust. On a motion by a defendant based upon this paragraph the court shall determine whether such defendant is entitled to the benefit of section seven hundred twenty-a of the not-for-profit corporation law or subdivision six of section 20.09 of the arts and cultural affairs law and, if it so finds, whether there is a reasonable probability that the specific conduct of such defendant alleged constitutes gross negligence or was intended to cause the resulting harm. If the court finds that the defendant is entitled to the benefits of that section and does not find reasonable probability of gross negligence or intentional harm, it shall dismiss the cause of action as to such defendant.

(b) Motion to dismiss defense. A party may move for judgment dismissing one or more defenses, on the ground that a defense is not stated or has no merit.

(c) Evidence permitted; immediate trial; motion treated as one for summary judgment. Upon the hearing of a motion made under subdivision (a) or (b), either party may submit any evidence that could properly be considered on a motion for summary judgment. Whether or not issue has been joined, the court, after adequate notice to the parties, may treat the motion as a motion for summary judgment. The court may, when appropriate for the expeditious disposition of the controversy, order immediate trial of the issues raised on the motion.

(d) Facts unavailable to opposing party. Should it appear from affidavits submitted in opposition to a motion made under subdivision (a) or (b) that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion, allowing the moving party to assert the objection in his responsive pleading, if any, or may order a continuance to permit further affidavits to be obtained or disclosure to be had and may make such other order as may be just.

(e) Number, time and waiver of objections; motion to plead over. At any time before service of the responsive pleading is required, a party may move on one or more of the grounds set forth in subdivision (a) of this rule, and no more than one such motion shall be permitted. Any objection or defense based upon a ground set forth in paragraphs one, three, four, five and six of subdivision (a) of this rule is waived unless raised either by such motion or in the responsive pleading. A motion based upon a ground specified in paragraph two, seven or ten of subdivision (a) of this rule may be made at any subsequent time or in a later pleading, if one is permitted; an objection that the summons and complaint, summons with notice, or notice of petition and petition was not properly served is waived if, having raised such an objection in a pleading, the objecting party does not move for judgment on that ground within sixty days after serving the pleading, unless the court extends the time upon the ground of undue hardship. The foregoing sentence shall not apply in any proceeding to collect a debt arising out of a consumer credit transaction where a consumer is a defendant or under subdivision one or two of section seven hundred

eleven of the real property actions and proceedings law. The papers in opposition to a motion based on improper service shall contain a copy of the proof of service, whether or not previously filed. An objection based upon a ground specified in paragraph eight or nine of subdivision (a) of this rule is waived if a party moves on any of the grounds set forth in subdivision (a) of this rule without raising such objection or if, having made no objection under subdivision (a) of this rule, he or she does not raise such objection in the responsive pleading which, in any action to collect a debt arising out of a consumer credit transaction where a consumer is a defendant, includes any amended responsive pleading.

(f) Extension of time to plead. Service of a notice of motion under subdivision (a) or (b) before service of a pleading responsive to the cause of action or defense sought to be dismissed extends the time to serve the pleading until ten days after service of notice of entry of the order.

(g) Stay of proceedings and standards for motions to dismiss in certain cases involving public petition and participation. 1. A motion to dismiss based on paragraph seven of subdivision (a) of this section, in which the moving party has demonstrated that the action, claim, cross claim or counterclaim subject to the motion is an action involving public petition and participation as defined in paragraph (a) of subdivision one of section seventy-six-a of the civil rights law, shall be granted unless the party responding to the motion demonstrates that the cause of action has a substantial basis in law or is supported by a substantial argument for an extension, modification or reversal of existing law. The court shall grant preference in the hearing of such motion.

2. In making its determination on a motion to dismiss made pursuant to paragraph one of this subdivision, the court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the action or defense is based. No determination made by the court on a motion to dismiss brought under this section, nor the fact of that determination, shall be admissible in evidence at any later stage of the case, or in any subsequent action, and no burden of proof or degree of proof otherwise applicable shall be affected by that determination in any later stage of the case or in any subsequent proceeding.

3. All discovery, pending hearings, and motions in the action shall be stayed upon the filing of a motion made pursuant to this section. The stay shall remain in effect until notice of entry of the order ruling on the motion. The court, on noticed motion and upon a showing by the nonmoving party, by affidavit or declaration under penalty of perjury that, for specified reasons, it cannot present facts essential to justify its opposition, may order that specified discovery be conducted notwithstanding this subdivision. Such discovery, if granted, shall be limited to the issues raised in the motion to dismiss.

4. For purposes of this section, “complaint” includes “cross-complaint” and “petition”, “plaintiff” includes “cross-complainant” and “petitioner”, and “defendant” includes “cross-defendant” and “respondent.”

(h) Standards for motions to dismiss in certain cases involving licensed architects, engineers, land surveyors or landscape architects. A motion to dismiss based on paragraph seven of subdivision (a) of this rule, in which the moving party has demonstrated that the action, claim, cross claim or counterclaim subject to the motion is an action in which a notice of claim must be served on a licensed architect, engineer, land surveyor or landscape architect pursuant to the provisions of subdivision one of section two hundred fourteen of this chapter, shall be granted unless the party responding to the motion demonstrates that a substantial basis in law exists to believe that the performance, conduct or omission complained of such licensed architect, engineer, land surveyor or landscape architect or such firm as set forth in the notice of claim was negligent and that such performance, conduct or omission was a proximate cause of personal injury, wrongful death or property

damage complained of by the claimant or is supported by a substantial argument for an extension, modification or reversal of existing law. The court shall grant a preference in the hearing of such motion.

Credits

(L.1962, c. 308. Amended Jud.Conf.1964 Proposal No. 6; Jud.Conf.1965 Proposal Nos. 5, 6; L.1965, c. 773, § 9; Jud.Conf.1973 Proposal No. 4; L.1986, c. 220, § 12; L.1990, c. 904, § 26; L.1991, c. 656, § 4; L.1992, c. 767, § 4; L.1996, c. 501, § 1; L.1996, c. 682, § 2; L.1997, c. 518, § 2, eff. Sept. 3, 1997; L.2005, c. 616, § 1, eff. Jan. 1, 2006; L.2020, c. 250, § 3, eff. Nov. 10, 2020; L.2021, c. 593, § 8, eff. May 7, 2022.)

Editors' Notes

SUPPLEMENTARY PRACTICE COMMENTARIES

by Hon. Mark C. Dillon

2024

C3211:8 *Sua Sponte* Dismissals

Each year, these Supplemental Practice Commentaries discuss the extent to which trial courts improperly dismiss actions *sua sponte*. Each year, these commentaries discuss how the practice, when it occurs, violates due process. It is a problem that is noticed far more in the Second Department than elsewhere in the state, and more so in the area of residential mortgage foreclosure actions than in other areas of litigation.

A recent opinion rendered in the case of *Wells Fargo Bank, N.A. v St. Louis*, __ A.D. __, 2024 WL _____ (2d Dep't. ___, __ 2024) (Opinion by Dillon, J.) addressed the issue in greater detail. The opinion provided statistics about *sua sponte* dismissals, demonstrating that the improper practice has not abated from year to year despite almost-universal reversals of trial courts engaging in the practice. The rate of appellate reversals of *sua sponte* dismissals has been particularly noticeable in the Second Department. The opinion discussed various constitutional and statutory reasons as to why *sua sponte* dismissals have no place in New York jurisprudence. Chief among them is the notion of due process, that parties be given notice and an opportunity to be heard on issues that affect tangible litigation rights, particularly those that are dispositive to the outcome of a case. Beyond that, CPLR 2211 requires that notice motions and orders to show cause be served upon parties to a litigation, that CPLR 2214 and 2215 reflect the timetable for the service of opposition papers to motions and cross-motions, and that CPLR 2214(a) requires the moving party to set forth the "relief demanded and the grounds therefor." A court's determination of a dispositive issue that has not been noticed or briefed falls outside of the plain directives of CPLR 2211, 2214 and 2215, which safeguard the due process rights of parties. The opinion in *St. Louis* also noted that general relief clauses in motions--that the court grant such other and further relief as it may deem just and proper--cannot be permissibly used to grant relief that is *dispositive* to an action, citing *inter alia* an earlier opinion of the court in *Rosenblatt v St. George Health and Racquetball Assoc., LLC*, 119 A.D.3d 45, 984 N.Y.S.2d 401 [2d Dep't. 2014] [Opinion by Leventhal. J.]). It remains to be seen whether the Second Department's issuance of a signed opinion on the issue will have more impact on trial courts going forward than its prior slip decisions on the subject.

Nevertheless, the law on *sua sponte* dismissals is that they not occur except where there are extraordinary circumstances warranting them (*Anonymous v Anonymous*, 217 A.D.3d 619, 192 N.Y.S.3d 115 [1st Dep't. 2023]; *Bank of N.Y. Mellon v Stewart*, 216 A.D.3d 720, 190 N.Y.S.3d 80 [2d Dep't. 2023]; *Newrez, LLC v City of Middletown*, 216 A.D.3d 657, 188 N.Y.S.3d 606 [2d Dep't. 2023]). Until now, almost no reported decision rendered by appellate courts in the State of New York, outside the scope of CPLR 3215(c) where it is uniquely permissible, has ever recognized the existence of extraordinary circumstances justifying dismissal. That is a remarkable track record. But the case of *Morris v Zimmer,* 227 A.D.3d 696, 211 N.Y.S.3d 414 (2d Dep't. 2024) appears to be an example of where extraordinary circumstances did exist to justify the *sua sponte* dismissal of a complaint. The action presents an unusual history, as the reader might suspect. In *Morris*, the plaintiffs failed to receive from their attorney certain funds that were to be paid to them in settlement of a prior matter. The attorney who failed to pay the settlement proceeds pleaded guilty in a criminal action, and the clients, as plaintiff, commenced an action in federal court for various related causes of action, and they ultimately received a judgment in their favor which was affirmed at the Second Circuit. While the federal action was pending, the plaintiffs sought to enter a state judgment by confession in New York County, as permitted by CPLR 3218, for the net amount owed by the former attorney. Thereafter, the plaintiffs commenced an action in the Supreme Court, Westchester County, asserting the same causes of action as had been asserted in the federal action, plus a fresh claim under Judiciary Law 487. The plaintiffs sought to consolidate their CPLR 3218 confessed judgment from New York County with their Westchester action, and thereafter moved for a CPLR 3215(c) default judgment against the attorney for having failed to appear and answer in the Westchester action. The default motion included a copy of the federal judgment. The attorney, as the defendant, moved for a CPLR 3211(a) dismissal of the state action but the dismissal motion was denied as untimely. Nevertheless, the court denied the plaintiff's default motion and dismissed the action, on the ground that "orderly procedure and judicial economy require that the action be dismissed" which was, in effect, a *sua sponte* dismissal. The basis for the dismissal, notwithstanding the untimeliness of the attorney's dismissal motion, was that the federal action, which had by then resolved, operated as *res judicata* on the state action involving the same parties, transactions, and subject matter, and overrode the attorney's default. Further, the plaintiff's assertion in state court of a claim under Judiciary Law 487 could have been litigated in the federal forum had it been earlier asserted, and therefore, was also barred. The dismissal on *res judicata* grounds was affirmed on appeal. In *Morris,* the circumstances leading to the complaint's dismissal were truly unusual and extraordinary, and not representative of the *sua sponte* dismissals that prompt the much higher volume of appellate reversals.

C3211:10 Defenses Based on "Documentary Evidence"

Letters, e-mails, and affidavits do not qualify as documentary evidence for purposes of CPLR 3211(a)(1) (*Old Republic National Title Insurance Company v 1152 53 Management, LLC*, 227 A.D.3d 824, 212 N.Y.S.3d 345 [2d Dep't. 2024] [certain letters insufficient in action for fraudulent conveyance]). Text messages also do not qualify (*Nosegbe v Charles*, 227 A.D.3d 1400, 211 N.Y.S.3d 832 [4th Dep't. 2024]). Examples of non-qualifying e-mails may be found *in Goldin Real Estate, LLC v Shukla*, 227 A.D.3d 674, 212 N.Y.S.3d 117 (2d Dep't. 2024) and *Optical Communications Group, Inc. v Worms*, 217 A.D.3d 458, 188 N.Y.S.3d 498 [1st Dep't. 2023]). Also not qualifying are letters and affidavits (*7 Mansion, LLC v Calvano*, 226 A.D.3d 730, 209 N.Y.S.3d 490 [2d Dep't. 2024]), though in that case other forms of documentary evidence including the terms and conditions of a contract utterly refuted the plaintiff's claim and warranted the dismissal of the plaintiff's complaint.

C3211:11 Lack of Subject Matter Jurisdiction

The Appellate Division, Third Department, affirmed the dismissal of an incarcerated inmate's action for damages brought in the Court of Claims for lack of subject matter jurisdiction. The inmate sought a review of the denial of his inmate grievances, the conditions of his confinement, wrongful confinement, and discriminatory treatment. But the review of administrative determinations falls outside the scope of the Court of Claims' subject matter jurisdiction. The court held that the claims needed to be asserted as a special proceeding at the Supreme

Court pursuant to CPLR Article 78 (*Cumberland v State*, 217 A.D.3d 1029, 190 N.Y.S.3d 499 [3d Dep't. 2023]). In the same case, the Third Department likewise held that the Court of Claims lacked subject matter jurisdiction to hear federal constitutional claims (*Id*., at 1031. *See also Todd v State*, 207 N.Y.S.3d 341 [Ct. of Claims 2023] [Chaudhry, J.] [as to Article 78s]; *Piraino v State*, 83 Misc.3d 489, 214 N.Y.S.3d 592 ([Ct. of Claims Sept. 14, 2023] [Chaudhry, J.] [as to Article 78s]).

The monetary jurisdictional limit of the New York City Civil Court was raised by constitutional amendment in 2021 from $25,000 to $50,000. Thereafter, in *Honest Funding, LLC v Signature Hospitality Solutions LLC*, 81 Misc.3d 897, 203 N.Y.S.3d 472 (Sup. Ct. Kings Co. 2023) (Maslow, J.), the plaintiff commenced a contract action against a guarantor in the Supreme Court for an amount of money that was less than $50,000. The defendant moved to dismiss the action under CPLR 3211(a)(2), arguing that the Supreme Court lacked subject matter jurisdiction over the amount of damages. The Supreme Court correctly disagreed. It noted that while the monetary jurisdictional limit of the Civil Court was in fact raised, nothing changed the Supreme Court's unlimited general jurisdiction to hear disputes of any amount. If the defendant is determined for the action to be litigated in the Civil Court, the remedy, if any, is a transfer of the existing action to Civil Court under CPLR 325. The Civil Court would have jurisdiction to hear the case, except to the extent that the plaintiff seeks use and occupancy against the guarantor (*315 West 55th Owners Corp. v Rainbow Spa 23 Inc*., 81 Misc.3d 1204[A], 199 N.Y.S.3d 441 [Sup. Ct. N.Y. Co. 2023] [Lebovits, J.]).

Courts will look to the true nature of a claim to determine whether the claim fits within its subject matter jurisdiction. In *Severini v Department of Environmental Protection*, 80 Misc.3d 1214[A], 195 N.Y.S.3d 638 (Civ. Ct. N.Y. Co. 2023) (Marcus, J.), a *pro se* plaintiff commenced an action in the small claims part of Civil Court claiming that the New York City D.E.P. improperly prosecuted certain provisions of the city's Administrative Code. The defendant moved to dismiss the action, arguing that the substance of the action and the relief sought was in the nature of Article 78 mandamus or prohibition, which is outside the subject matter jurisdiction of the Civil Court's small claims part. The court agreed and dismissed the action, finding that only the Supreme Court is authorized to hear Article 78 proceedings. Similarly, the Court of Claims lacks subject matter jurisdiction over challenges to administrative determinations (*Hudson Neurosurgery, PLLC v State*, 81 Misc.3d 1238[A], 202 N.Y.S.3d 911 [Ct. of Claims 2023] [Marnin, J.]).

Court of Claims Act 8-b provides a right of action against the state for wrongful criminal convictions and imprisonments. The statute sets forth conditions that the claimant must meet in order to be eligible to maintain such an action. The purpose of the law is to provide recompense to individuals where it is determined after-the-fact that their convictions were truly wrongful on the ground of actual innocence, and that harm was suffered as a consequence. It does not apply to a run-of-the mill reversal of a conviction based on weight, insufficiency of the evidence, trial error, or as relevant in *Nolan v State*, 205 N.Y.S.3d 707 (Ct. of Claims 2023) (Vargas, J.), ineffectiveness of counsel. The reason is that those grounds for the vacatur of convictions do not necessarily establish the actual innocence of the accused.

C3211:14 "Other Action Pending"

A recent appellate decision underscores the operation of CPLR 3211(a)(4) dismissals for prior action pending. Such dismissals may occur where there is a prior action between the same parties arising out of the same dispute. The concept behind the statute is that courts not entertain duplicative actions. The case of *Melis v Blake Stone LLC*, 227 A.D.3d 882, 213 N.Y.S.3d 64 (2d Dep't. 2024) demonstrates the limits of what is duplicative. Two actions may be related, but not necessarily duplicative as to require the dismissal of the second on account of the first. In *Melis*, the plaintiff's property was the subject of a judgment of foreclosure and sale, and was sold to the defendant at a public auction. The plaintiff commenced a separate action for conversion and an accounting, alleging that during the time between the auction sale and the issuance of the referee's deed, the defendant took possession of the property and leased it to a third party. The defendant moved to dismiss the second action on the

ground of prior action pending, which the Supreme Court denied and the Appellate Division affirmed. Courts have discretion in deciding matters involving prior action pending. Here, the initial foreclosure action was already concluded by the time the defendant's CPLR 3211(a)(4) dismissal motion was made in the second action, so there was not truly a prior action *pending*. Moreover, the two actions, while related to the same property, involved different forms of relief based upon different sets of facts.

Further as to the necessity that the prior action be actually *pending* is the case of *Quinones v Z & B Trucking, Inc*., 220 A.D.3d 901, 198 N.Y.S.3d 565 (2d Dep't. 2023). The dispute between the parties involved an automobile accident in 2018. The plaintiff commenced an action for damages in 2019 by the filing of initiatory papers, but there was never any service upon the defendant. In 2021, the same plaintiff commenced an action arising out of the same occurrence, for the same damages, against the same defendant. The defendant sought to dismiss the second action on the ground of prior action pending. The Second Department held that because the summons and complaint in the initial action was never served, that action was never "pending," and therefore, the dismissal of the second action was, at the Appellate Division, denied.

C3211:18 Affirmative Defenses Available on Subdivision (a)(5) Motion

Infancy

CPLR 214-g, enacted as part of the Crime Victims Act, provides a revival window for civil claims or causes of action alleging intentional or negligent acts or omissions that seek to recover damages for injuries suffered as a result of, *inter alia*, conduct which would constitute a sexual offense as defined in Article 130 of the Penal Law committed against a child less than eighteen years of age. In *Schearer v Fitzgerald*, 217 A.D.3d 980, 192 N.Y.S.3d 207 (2d Dep't. 2023), the defendant in the CVA action sought to dismiss the plaintiff's complaint on the ground that Penal Law 30.30 prohibits the revival of time-barred actions, and that the CVA violates federal and state guarantees to due process. The court held that revival statutes satisfy due process if enacted if a reasonable response to remedy an injustice. The plaintiff's infancy, at the time of the alleged offense, is not a bar to an action that falls within the scope of the CVA.

Release

The Appellate Division, Second Department, found a question of fact as to the enforceability of a release executed by an automobile accident motorist to an insurer. The plaintiff sued despite the release, and the insurer sought to have the action dismissed on the ground of the release. The action is *Huang v Llerena-Salazar*, 222 A.D.3d 1033, 203 N.Y.S.3d 341 (2d Dep't. 2023). The question of fact arose from the following factors discussed by the appellate court: "The plaintiff averred, among other things, that shortly after the accident, an insurance representative for the defendants called him 'repeatedly'; that he had difficulty understanding the defendants' representative due to a language barrier; that the defendants' representative, who had him sign the release to obtain money for medical bills, never explained that the document he signed was a release or had the legal effect of a release; and that the plaintiff was not represented by an attorney at the time he signed the release. Moreover, the plaintiff raised questions of fact as to whether there was mutual mistake as to the nature of the injuries sustained by plaintiff from the alleged accident" (*Id*., at 1034). The factual questions that were of concern to the appellate court inform us of the circumstances under which a release will not necessarily be given the force of law, in opposition to a CPLR 3211(a)(5) motion to dismiss. Similarly, a release was not given force and effect where there was a question of fact raised, in opposition to dismissal, about whether the release document had actually been signed by the defendant (*Liu v Kirkwood*, 222 A.D.3d 861, 199 N.Y.S.3d 705 [2d Dep't. 2023]).

A case in contrast is *Prete v Tamares Development 1, LLC*, 219 A.D.3d 1537, 197 N.Y.S.3d 529 (2d Dep't. 2023), where the court rejected the plaintiff's averment in opposition to the defendant's motion to dismiss that he did not know the English language as used in a signed release. The court held that the excuse, standing alone, is insufficient. In *Prete*, the plaintiff did not allege that the defendant misrepresented the content of the release, nor did he claim to have made any effort to have the document translated or explained to him.

A stipulation of discontinuance with prejudice has preclusive effect on a subsequent litigation (*Busher v Barry*, 223 A.D.3d 778, 203 N.Y.S.3d 392 [2d Dep't. 2024]). The same is true of a final judgment (*Joseph v Bank of New York Mellon*, 219 A.D.3d 596, 194 N.Y.S.3d 275 [2d Dep't. 2023]).

Statute of Limitations

Statutes of limitations defenses are typically addressed by defendants seeking to dismiss plaintiffs' direct claims. But on occasion, the limitations period may be relevant to the plaintiffs seeking the dismissal of defendants' counterclaims. For that, the CPLR 3211(a)(5) defense must be read in conjunction with CPLR 203(d), as the traditional rules are different. CPLR 203(d) provides that if a counterclaim is otherwise untimely under its applicable statute of limitations, it is nevertheless valid if the counterclaim would have been timely on the date that the plaintiff commenced the action. In other words, for timeliness purposes, the date of the counterclaim dates back to the plaintiff's initiatory filing. There is a catch, however. In instances where the counterclaim is subject to the savings provision of CPLR 203(d), the defendant's recovery on the counterclaim is capped at whatever amount sets-off the plaintiff's award against the defendant. The defendant can use the counterclaim as a set-off, but not for an affirmative recovery that exceeds the amount of whatever damages are awarded to the plaintiff. The intersection of CPLR 3211(a)(5) and CPLR 203(d) is not seen often, as the number of counterclaims asserted in New York practice is a modest portion of litigation, and of those, most counterclaims face no issue of timeliness. These circumstances were seen in *Getzel Schiff & Pesce, LLP v Shtayner*, __ A.D.3d __, __ N.Y.S.3d __ (2d Dep't. 2024), where the plaintiff commenced an action to recover unpaid accounting fees and the defendant counterclaimed for, *inter alia*, professional malpractice. The counterclaim was interposed nine days beyond the three-year limitations period for professional malpractice (CPLR 214[6]) and the Supreme Court dismissed the counterclaim as untimely under CPLR 3211(a)(5). The Appellate Division reversed in finding that by application of CPLR 203(d), the operative date of the counterclaim related back to the filing of the plaintiff's complaint, rendering the counterclaim timely, but only to the extent that any recovery would offset damages awarded to the plaintiff.

Statute of Limitations and Bankruptcy

An opinion by Justice Fran Connolly of the Appellate Division, Second Department, is a must-read for anyone examining the interplay between the statute of limitations and bankruptcy stays. The opinion is in the case of *Bank of New York Mellon v DeMatteis*, 222 A.D.3d 1, 199 N.Y.S.3d 79 (2d Dep't. 2023]). The Westlaw version is preceded by 32 headnotes. The action was one for residential mortgage foreclosure. As was typical of many foreclosure actions, at least before the enactment of the Foreclosure Abuse Protection Act (FAPA), the plaintiff's first action was discontinued and a second action was later commenced. The second action was commenced more than six years from the acceleration of the debt in the first action, which would normally have rendered it untimely (CPLR 213[4]). However, the statute of limitations for the second action was tolled by the combination of the covid-related Executive Orders of Gov. Andrew Cuomo in 2020 and the defendant's bankruptcy filing, which operated as a toll under 11 U.S.C. 362(a). The opinion in *DeMatteis* analyzed that the bankruptcy filing operated as a statutory prohibition to the commencement of the second action, as recognized by CPLR 204(a). The unusual twist in *DeMatteis* was whether the bankruptcy toll of 11 U.S.C. 362(a), which applies to "debtors," applied to the defendant as the holder of the defaulted note where, prior to the foreclosure actions, the property was deeded to a third party. The Second Department held that the bankruptcy stay applied in favor of the defendant note holder notwithstanding the conveyance of the deed, as the plaintiff was prohibited from

commencing the second action while the stay was in effect. However, a different conclusion was reached as to the timeliness of the action against the party to whom the property had been deeded. The bankruptcy stay of the note holder did not extend to the party to whom the deed was conveyed, and who was never a "debtor" in any bankruptcy case. As a result, an action could have been commenced without any bankruptcy toll against the later title holder, so long as the original note holder was not named in any such action.

C3211:28 Lack of Personal Jurisdiction

These Supplemental Practice Commentaries have been following each year developments on what has become a very hot area of law, the circumstances under which a corporate defendant may be subject to the general jurisdiction of New York under CPLR 301. Last year's developments, discussed in the previous year's Supplemental Practice Commentaries, involved the impact of the U.S. Supreme Court's decision in *Mallory v Norfolk Southern Railway Co*., 600 U.S. 122, 143 S.Ct. 2028, 216 L.Ed.2d 815 (2023). There, these commentaries predicted that based on Justice Alito's concurrence in that case, the legal battlefield over whether compulsory consent statutes may provide a proper basis for the assertion of a state's general jurisdiction will shift to the commerce clause of the U.S. Constitution, but that some time will be required for that issue to work its way through the court system.

In the meantime, the New York State government has not been sitting on its hands. The legislature passed a new CPLR 301-a and an amendment to BCL 1301, to provide that a foreign corporation's application to do business in New York qualifies as consent to the assertion of general jurisdiction for all actions against the corporation, and a revocation of the corporation's registration would concomitantly revoke the state's general jurisdiction over it. The legislation was intended to nullify a holding by the Court of Appeals in *Aybar v Aybar,* 37 NY3d 274 (2021) whereby, under still-continuing law, a corporation is subject to New York's general jurisdiction only if it is incorporated within the New York or maintains its principle office within the state, or under exceptional circumstances (*see also Daimler AG v Bauman*, 571 U.S. 117, 134 S.Ct. 746, 187 L.Ed.2d 624 [2014] [Opinion by Ginsburg, J.]). None of the foregoing affects the assertion of specific jurisdiction over out-of-state entities under the longarm statute (CPLR 302).

Governor Hochul vetoed these new proposed statutory provisions in the waning days of December 2023, and the state's definition of general jurisdiction remains unchanged, at least for now. This was the second year in a row that Governor Hochul vetoed such legislation. Her rationale has been that the enactment of the proposed amended law would be bad for businesses, by discouraging them from filing certificates to do business in New York to avoid being widely subject to the state's general jurisdiction for lawsuits. It now remains to be seen whether the state legislature will attempt, for a third time, to pass a similar amendment to CPLR 301. Without any amendment to CPLR 301, the law in New York remains that general jurisdiction over corporations may only be asserted where the corporation is "at home," meaning that the corporation is incorporated in New York, or maintains its principle office within the state, or represents a truly exceptional case where the entity's operations are so substantial and of such nature as to render it at home within the state (*Daimler AG v Bauman*, *supra*).

Absent any amendment to CPLR 301, the incumbent statute is what it is.

The "department test" for general jurisdiction, for imputing liability from a subsidiary to a corporate parent, was held to not be met where the parent company was not independently subject to the general jurisdiction of New York (*KPP III CCP LLC v Douglas Development Corporation*, 222 A.D.3d 408, 202 N.Y.S.3d 15 (1st Dep't. 2023]).

C3211:32 Absence of a Person Who Should be a Party

In *Ashwood v Uber USA, LLC*, 219 A.D.3d 1289, 195 N.Y.S.3d 762 (2d Dep't. 2023), an action was not dismissed due to the absence of a person who should be a party (CPLR 3211[10]). Rather, there were two actions involving the same plaintiff, the same accident, and common questions of fact and law. The two actions were joined for trial under CPLR 602(a), which remedied the absence of necessary parties in the action where the CPLR 3211(10) dismissal motion had been denied.

C3211:35 Standards on a CPLR 3211(b) Motion

On a CPLR 3211(b) motion to dismiss one or more affirmative defenses, the allegations in the answer must be viewed in the light most favorable to the defendant. The defendant is entitled to every favorable inference, and the pleading is to be liberally construed. This construct was seen in the landlord-tenant dispute of *Soufer Family LLC v Sprague*, 80 Misc.3d 130[A], 195 N.Y.S.3d 869 (App. Term, N.Y., 1st Dep't. 2023). There, the tenant's affirmative defense was worded inartfully, but adequately conveyed at least a right of succession. The landlord's CPLR 3211(b) motion did not address the issue of succession, and on that basis the motion was denied.

C3211:42 Converting CPLR 3211 Motion Into One for Summary Judgment

While the court may, upon adequate notice to the parties, convert a CPLR 3211 motion to dismiss to a CPLR 3212 motion for summary judgment, it may not do so if is demonstrated that summary judgment would be premature (*Russo v Crisona*, 219 A.D.3d 920, 195 N.Y.S.3d 729 [2d Dep't. 2023]).

C3211:51 Single-Motion Rule

The First Department has signaled that the single-motion rule is strictly enforced. In *TRB Acquisitions LLC v Yedid*, 225 A.D.3d 508, 207 N.Y.S.3d 76 (1st Dep't. 2024), which involved a SLAPP issue, the Appellate Division declined to reach the merits of the CPLR 3211 motion on appeal, as the motion was made in violation of the single-motion rule.

However, if the first CPLR 3211 dismissal motion is not resolved on its merits, a second dismissal motion does not violate the single-motion rule (*Lane's Floor Coverings & Interiors, Inc. v DiLalla*, 226 A.D.3d 593, 207 N.Y.S.3d 529 [1st Dep't. 2024]; *Newlands Asset Holding Trust v Vasquez*, 218 A.D.3d 786, 193 N.Y.S.3d 258 [2d Dep't. 2023] [initial motion denied for its improper service upon the plaintiff]).

C3211:53 Waiving Objection Contained in Paragraphs 1, 3, 5 or 6 of 3211(a)

The defense of lack of standing is generally deemed waived under CPLR 3211(e) if not affirmatively raised in an answer or a pre-answer motion to dismiss. There is an exception in residential mortgage foreclosure actions involving home loans, as set forth in RPAPL 1302-a enacted in 2019. That statute provides that the standing defense is not waived in those actions (*Citibank, N.A. v Boyce*, 226 A.D.3d 867, 211 N.Y.S.3d 104 [2024]; *Deutsche Bank National Trust Company v Groder*, 218 A.D.3d 542, 192 N.Y.S.3d 563 [2d Dep't. 2023]). Standing is waived, if not pleaded as an affirmative defense or raised in a CPLR 3211 motion, in actions involving other than residential mortgage foreclosure, outside the scope of RPAPL 1302-a (*e.g. Perine Intern. Inc. v Bedford Clothiers, Inc.*, 143 A.D.3d 491, 40 N.Y.S.3d 27 [1st Dep't. 2016]).

C3211:69 Easier Standard for Dismissing "SLAPP" Suit

CPLR 3211(g), and for that matter CPLR 3212(h), provide that SLAPP actions be dismissed upon motion unless the responding party demonstrates that the cause of action has a "substantial basis in law or is supported by a substantial argument for an extension, modification or reversal of existing law." The First Department had an occasion to consider the meaning of the term "substantial basis" in *Reeves v Associated Newspapers, Ltd*., 228 A.D.3d 75, 210 N.Y.S.3d 25 (1st Dep't. 2024) (Opinion by Gonzalez, J.). *Reeves* involved a claim for damages arising out of alleged defamation and related torts. The court carefully examined legislative history and precedents, and concluded that "a substantial basis in law" under the SLAPP statutes means "such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact." According to the sponsor's memorandum for the enactment in 1996, it is less than a preponderance of the evidence standard *(Id*., at __). It is not measured by the standard of frivolousness (*Id*., at __). A substantial basis is "such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact," which happens to be the same definition of "substantial evidence" earlier articulated by the Court of Appeals in *300 Gramatan Ave. Associates v State Division of Human Rights*, 45 NY.2d 176, 408 N.Y.S.2d 54, 379 N.E.2d 1183 (1978). It is a more exacting analysis than the liberal notice pleading standards applicable to ordinary CPLR 3211(a)(7) motions, as the consideration of "substantial evidence" would typically require the court to look beyond the pleadings. But by the same logic, a complaint that fails to state a cause of action under CPLR 3211(a)(7) at the get-go necessarily lacks a substantial basis in law under CPLR 3211(g) (*Id*., at __; *215 West 84th St Owner LLC v Bailey*, 217 A.D.3d 488, 191 N.Y.S.3d 368 [1st Dep't. 2023]).

Justice Oing, while agreeing with the panel on the ultimate result in *Reeves*, wrote a separate concurrence about whether, *inter alia*, a CPLR 3211(a)(7) dismissal always means that the action lacks a substantial basis and is therefore subject to the other remedies of the SLAPP statutes. He noted that the trial court found the action was commenced under a cognizable legal theory and was not frivolous, even though the trial court ultimately dismissed the complaint on the ground that the alleged defamatory statements were protected by the fair report privilege. Therefore, Justice Oing concluded in concurrence, reliance upon the CPLR 3211(a)(7) dismissal as a basis for concluding the absence of "substantial evidence" was "misplaced," requiring a deeper consideration of whether the plaintiffs demonstrated a substantial basis in law for their claims.

The *Reeves* case involved the SLAPP statute in the context of CPLR 3211(g). The same term central to its analysis--"substantial basis in law"--appears in the language of CPLR 3212(h) governing summary judgment motions for SLAPP claims, and CPLR 3211(h) and 3212(i) for dismissal motions and summary judgment motions in cases involving licensed architects, engineers, land surveyors, and landscape architects. The *Reeves* analysis should be analogous and applicable to those statutes as well.

The retroactivity of the SLAPP amendments continues to be an issue of interest. As noted in these Supplemental Practice Commentaries from last year, the Court of Appeals addressed the retroactivity of the 2020 SLAPP amendments (Civil Rights Law 70-a and 76-a) in *Gottwald v Sebert*, 40 N.Y.3d 240, 197 N.Y.S.3d 694, 220 N.E.3d 621 (2023) (Garcia, J.). The Court of Appeals held that the 2020 SLAPP amendments were prospective, not retroactive. However, the same court also explained that the provisions allowing for an award of costs and attorney's fees in SLAPP actions that were "commenced or continued" without a substantial basis in law permits such assessments in favor of counterclaiming defendants, from the date of the effective date of the amendments (i.e. November 10, 2020) forward. In that sense, therefore, actions commenced prior to the 2020 SLAPP amendments received some statutory benefits in terms of potential costs and attorney's fees.

Recall that under CRL 76-a(1)(a), the amendments expanded SLAPP's remedial applicability to *inter alia* public communications regarding matters of public interest. A post-*Gottwald* twist on retroactivity arose in the case of *VIP Pet Grooming Studio, Inc. v Sproul*, 224 A.D.3d 78, 203 N.Y.S.3d 681 (2d Dep't. 2024) (Opinion by Dillon,

J.). The case arose from the alleged negligence of a dog groomer which resulted in the death of a cocker spaniel named Ranger. The defendants, who were Ranger's owners, posted critical public comments about the plaintiff groomer on Yelp and Google. The plaintiff commenced a defamation action on November 2, 2020, eight days before the effective date of the SLAPP amendments. After the SLAPP amendments became effective, the defendants moved to dismiss the defamation action under CPLR 3211(a)(7) and 3211(g), the latter subdivision being SLAPP, and for a SLAPP award of costs and attorney's fees. The defendants argued that their social media postings fit within SLAPP's expanded definition of public petition and participation. However, the Second Department held that the postings were not within the scope of SLAPP at the time the plaintiff's action was commenced. It also held that the SLAPP amendments could not be applied to retroactively, as the defendants' dismissal motion was addressed to a complaint that preceded the effective date of the amendments. The complaint therefore needed to be judged by the definition of public petition and participation as was in effect at the time of the plaintiff's complaint was filed, which did not include public comments about broad matters of public interest (*Id.,* at 89).

C3211:70 Greater Scrutiny of Complaint Where Defendant is Design Professional

The reader is referred to this year's Supplemental Practice Commentary C3211:69 for a discussion of the First Department's opinion in the case of *Reeves v Associated Newspapers, Ltd*., __ A.D.3d __, 210 N.Y.S.3d 25 (1st Dep't. 2024] [Opinion by Gonzalez, J.). The opinion addresses the meaning of the term "substantial basis in law" as used in CPLR 3211(g), 3211(h) (design professionals), 3212(h), and 3212(i).

2023

C3211:1 The Motion to Dismiss, Generally

Practitioners, beware of using Artificial Intelligence (AI) such as ChatGPT when preparing motion affidavits and memoranda of law. ChatGPT is a form of AI which became available to the public on November 30, 2022. "Chat" refers to its chat box functionality. The "GPT" stands for Generative Pre-Trained Transformer. The program has many functions, one of which is to compose letters and essays on topics selected by the user. Essays produced by ChatGPT are not based on dedicated search engines such as Westlaw, but are instead based on generally-available information which leaves room for error in the sophisticated and detail-orientated field of law.

This is just the opinion of your humble Practice Commentator, take it for whatever it is worth: Do not use ChatGPT for writing legal papers that will be served upon parties and filed with a court. Two attorneys learned that lesson the hard way in the case of *Roberto Mata v Avianca, Inc*. The plaintiff, Mata, commenced an action in the Supreme Court, New York County, seeking damages for personal injuries allegedly sustained as a result of having been struck by a metal serving cart during a 2019 airline flight bound for New York's JFK Airport. The action was removed to the federal District Court for the Southern District of New York, under Docket No. 22 CV 1461 (Castel, J.). The defendant, Avianca, Inc., later moved to dismiss the action under F.R.C.P 12(b)(6) (https://storage.courtlistener.com/recap/gov.uscourts.nysd.575368/gov.uscourts.nysd.575368.16.0.pdf), which was opposed by counsel representing the plaintiff. The opposition papers were composed by plaintiff's counsel using ChatGPT. Because of shortcomings with the ChatGPT program, the papers submitted in opposition to dismissal cited to several judicial decisions which did not, in fact, exist (https://www.documentcloud.org/documents/23826751-mata-v-avianca-airlines-affidavit-in-opposition-to-motion). The non-existent cases were accompanied by non-existent quotes from them and contained internal citations which also did not exist. Quick on the uptake, District Judge P. Kevin Castel directed that the plaintiff's attorneys show cause on June 8, 2023 as to why they should not be sanctioned for the submission (Order to Show Cause dated May 4, 2023, *available at* https://ecf.nysd.uscourts.gov/doc1/127133304220. *See also* Weiser, Benjamin, Here's What Happens When Your Lawyer Used ChatGPT, *New York Times*, May 27, 2023, *available*

at https://www.nytimes.com/2023/05/27/nyregion/avianca-airline-lawsuit-chatgpt.html).

Lawyering is never one-size-fits all. No computer program such as ChatGPT can incorporate the years of experience that an attorney brings to a matter such as in the drafting of legal papers for filing. No computer program can substitute for human judgment, strategy, nuance, emphasis, and persuasiveness. No computer program can know, like a lawyer, what type of argument may best resonate with the particular judge assigned to the matter. And if composition programs such as ChatGPT do not directly focus upon proven legal research platforms like Westlaw, legal research and analysis is rightly suspect.

Some might argue that the problem which came to light in *Mata* was not one of burgeoning technology, but the failure by counsel to double-check ChatGPT's draft to assure that the final product submitted to the court was accurate and complete (Wilkins, Stephanie, "The Problem With the 'Bogus' ChatGPT Legal Brief? It's Not the Tech," *NYLJ*, June 2, 2023, *available at* https://www.law.com/legaltechnews/2023/06/02/the-problem-with-the-bogus-chatgpt-legal-brief-its-not-the-tech/). But that begs the question. If the technology produces flawed material, should any attorney use it in the first place rather than drafting the papers from scratch using our traditional schooled methods? Do not clients deserve the traditional effort?

On June 22, 2023, Judge Castel financially sanctioned the two attorneys and their law firm who had submitted the misleading opposition papers the sum of $5,000 (Opinion and Order dated June 22, 2023, p. 34, *available at* https://ecf.nysd.uscourts.gov/doc1/127133572604). The court noted that the attorneys failed in their gatekeeping function to assure the accuracy of their filings. Further, in a separate order, the District Court dismissed plaintiff Mata's personal injury action as untimely commenced (Opinion and Order dated June 22, 2023, *available at* https://ecf.nysd.uscourts.gov/doc1/127133572662).

Aside from the shortfalls of ChatGPT, ethics rules may be implicated as well. How is counsel to bill a client for the research and drafting of legal papers actually researched and drafted by an Artificial Intelligence, which a non-lawyer could obtain by using the same computer program? How can counsel sign an attorney certification that filed papers are not frivolous, as required by 22 NYCRR 130-1.1a(b) and Federal Rule 11(b), if counsel relies upon ChatGPT research and fails to carefully review the papers to assure that there are not inaccuracies and non-existent citations? May there be disciplinary concerns under the Rules 1.1(a) or 5.1(d) of the Rules of Professional Conduct (22 NYCRR 1200.1.1(a), 1200.5.1[d]), and under other potentially-applicable Rules? The answer to all of these questions may be problematic for any attorney caught in a ChatGPT snare. As General Colin Powell once said of the Pottery Barn rule in a different context, "You break it, you own it."

We do not have a crystal ball as whether and to what extent AI might become more accurate and reliable in the future. A law office is not a drive-thru business. For now, nothing beats legal writing the old fashioned way--knowing the facts, accumulating evidence, performing legal research, drafting papers discussing the facts and law, attaching relevant exhibits, being persuasive in submissions, and filing the papers in an appropriate manner that permits you to sleep well at night.

C3211:8 *Sua Sponte* Dismissals

These Supplemental Practice Commentaries take the annual pulse of the number of plaintiffs' complaints that are erroneously dismissed by trial courts *sua sponte*. Such dismissals are to occur sparingly and only when extraordinary circumstances exist to warrant such drastic relief. The bar is set high because *sua sponte* dismissals deprive aggrieved parties of due process notice and any opportunity to be heard on the question of whether the dismissal is appropriate.

This year's crop of appellate court reversals of *sua sponte* dismissals, from the absence of extraordinary circumstances for doing so, include *Newrez, LLC v City of Middletown*, 216 A.D.3d 657, 188 N.Y.S.3d 606 (2nd Dep't. 2023); *U.S. Bank National Association v Bhagwandeen*, 216 A.D.3d 700, 187 N.Y.S.3d 115 (Mem.) (2nd Dep't. 2023); *U.S. Bank National Association v Turner,* 215 A.D.3d 889, 188 N.Y.S.3d 536 (2nd Dep't. 2023); *Deutsche Bank Trust Company Americas v Martinez*, 214 A.D.3d 704, 185 N.Y.S.3d 232 (2nd Dep't. 2023); *CRC Insurance Services, Inc. v Kullman*, 211 A.D.3d 903, 180 N.Y.S.3d 589 (2nd Dep't. 2022); *Melikov v 66 Overlook Terrace Corp*., 211 A.D.3d 537, 181 N.Y.S.3d 35 (1st Dep't. 2022); *Citimortgage, Inc. v Dedalto*, 210 A.D.3d 628, 178 N.Y.S.3d 102 (2nd Dep't. 2022); *U.S. Bank National Association v Stuart*, 208 A.D.3d 824, 172 N.Y.S.3d 625 (2nd Dep't. 2022); *Wells Fargo Bank, N.A. v Cascarano*, 208 A.D.3d 729, 174 N.Y.S.3d 394 (2nd Dep't. 2022).

Conversely, there is another side of the coin on this pesky topic. If a court dismisses an action *sua sponte*, it may, upon motion, likewise vacate its dismissal to cure its previous error of doing so (*Bank of New York Mellon v Stewart*, 216 A.D.3d 720, 190 N.Y.S.3d 80 [2nd Dep't. May 14, 2023]). In appropriate circumstances, a trial court will be reversed for failing to vacate an earlier *sua sponte* dismissal (*Wohnberger v Lucani*, 214 A.D.3d 615, 186 N.Y.S.3d 618 [1st Dep't. 2023]; *Cooper v Broems*, 214 A.D.3d 497, 186 N.Y.S.3d 159 [1st Dep't. 2023]; *Bankunited v Kaur*, 208 A.D.3d 622, 173 N.Y.S.3d 55 (2nd Dep't. 2022]).

C3211:10 Defense Based on "Documentary Evidence"

Decisional authority continues to develop on the extent to which letters, e-mails, and affidavits may qualify as documentary evidence for purposes of a CPLR 3211(a)(1) motion. Affidavits prepared for the motion never qualify (*J.D. v Archdiocese of New York*, 214 A.D.3d 561, 183 N.Y.S.3d 851 [1st Dep't. 2023]; *Davis v Henry*, 212 A.D.3d 597, 181 N.Y.S.3d 606 [2nd Dep't. 2023]). For letters and electronically-generated information such as e-mails, the general rule is that such material does not qualify as documentary evidence for purposes of CPLR 3211(a)(1) (*Xu v Van Zwienen*, 212 A.D.3d 872, 183 N.Y.S.3d 475 [2nd Dep't. 2023] [letter inadmissible]; *Bath & Twenty, LLC v Federal Savings Bank*, 198 A.D.3d 855, 156 N.Y.S.3d 316 [2nd Dep't. 2021]). The reason for the general rule is that these forms of material are too easily manipulatable by a party to be allowed to affect a dismissal motion's outcome. Case law tends to view CPLR 3211(a)(1) documentary evidence as material that is more unassailable such as judicial records, as well as documents reflecting out-of-court transactions including mortgages, deeds, contracts, and other papers the contents of which are essentially undeniable (*Xu v Van Zwienen*, 212 A.D.3d at 874). For e-mails to have any chance of being admissible for a CPLR 3211(a)(1) motion, they must fall into the category of material that is essentially undeniable. E-mails, for admissibility, must at least meet the high test of being unambiguous, authentic, and undeniable. How particular e-mails fare under that test will vary depending on the unique facts of each action. The parties' agreement in their papers that e-mails are authentic goes a long way toward meeting that test. Recently, in *Matter of Estate of Eckert v Connelly*, 217 A.D.3d 1151, 191 N.Y.S.3d 510 (3rd Dep't. June 15, 2023), the court addressed the question of whether the language of parties' e-mails constituted a binding stipulation of settlement. In *Eckert*, there was no issue between the parties as to the authenticity of their e e-mail exchanges, and as a result, the court determined the merits of the enforceability of the purported stipulation (finding in the end by a 3-2 majority that essential terms for the settlement and assent were lacking). Thus, even when authenticity is not an issue, the e-mail, once admitted, must be conclusive to the subject matter of the motion to be determinative of an outcome (*e.g. Cohen v Getzel*, 205 A.D.3d 532, 166 N.Y.S.3d 527 [1st Dep't. 2022]).

Nothing beats the decision of a Canadian court about whether a thumbs-up emoji qualifies as a binding signature for an electronic contract, finding that under section 18(1)(b) of its controlling Electronic Information and Documents Act, an emoji *is* the equivalent of a signature because it is an "icon" permissible under the language of the Act (*South West Terminal v Achter Land & Cattle*, 2023 SKKB 116 [Swift Current, Canada 2023]). Thanks goes to David Paul Horowitz and Katryna L. Kristoferson for bringing that interesting Canadian case to

the attention of the bar in a published article (Horowitz, David Paul and Kristoferson, Katryna L. " 'It Is Hereby ...' Can Emails Create a Binding Stipulation?" *NYLJ* July 17, 2023, *available at* https://www.law.com/newyorklawjournal/2023/07/17/it-is-hereby-can-emails-create-a-binding-stipulation/). New York practitioners should of course not rely on that Canadian case as legal authority, as we are subject to the terms and expectations of the General Obligations Law, and specifically GOL 5-701, for determining whether a document qualifies as an enforceable signed writing. A New York court held that a "thumbs-up" emoji was insufficient to convey a party's intent to be bound, where only minutes beforehand the same party had categorically asserted that he would never sign any document (*Lightstone Re LLC v Zinntex LLC*, 2022 WL 3757585 (Sup. Ct. N.Y. Co. 2022). In a general sense, might a "thumbs-up" reflect a party's happiness with an offer without going so far as to reflect an intent to be bound by it? Attorneys should advise clients against using the thumbs-up emoji when executing legal contracts and stipulations, and while at it, advise clients against using the happy face, the hand clap, the fireworks, the celebratory balloons, the check mark, the A-OK sign, and the red heart! Parties agreeing to the terms of a contract are better off simply placing an electronic signature at the designated signature location of the e-document. Doing so avoids ambiguities, problems, misunderstandings, and perhaps litigation. For deeper analysis, an entire law review article has been written about whether emojis should may qualify as signed writings under New York's statute of frauds, GOL 5-701 (Berliner, Moshe. "When a Picture s Not Worth a Thousand Words: Why Emojis Should Not Satisfy the Statute of Frauds' Writing Requirement," 41 *Cardozo L. Rev*. 2161 (June 2020).

E-mails may sometimes be used to establish claims or defenses in actions involving the statute of frauds (CPLR 3211[a][5]). There is further discussion of this topic specific to the statute of frauds within this year's Supplemental Practice Commentary C3211:18.

C3211:11 Lack of Subject Matter Jurisdiction

The state constitution was amended by public referendum on November 2, 2021, raising the jurisdiction of the Civil Court within the City of New York from $25,000 to $50,000. The previous amendment, which raised the Civil Court's monetary jurisdiction from $10,000 to $25,000, occurred in 1983. The primary purpose of the constitutional amendment was to adjust the Civil Court's jurisdiction for almost four decades of price inflation. The new $50,000 limit applies not only to actions for money damages, but to actions for replevin, the foreclosure of mechanics' liens, partitions, contract rescissions, and real property foreclosures, so long as the value of the subject matter fits within the new $50,000 cap. The subject matter jurisdiction of the Supreme Court is not affected by the constitutional amendment in any way, and Supreme Court therefore remains the go-to court for disputes which exceed $50,000 in value.

The increase in the Civil Court's jurisdiction presents pros and cons. The benefit of the increase is its stated purpose, of adjusting the court's subject matter jurisdiction to account for inflation. A burden of the increase is that it may add to the size of the Civil Court dockets in counties within the City of New York which are already overworked and backlogged. For disputes that are less than $50,000 in value, nothing prevents plaintiffs from commencing their actions in the Supreme Court, but doing so risks the court's discretionary removal of those actions to Civil Court under CPLR 325(d) and 22 NYCRR 202.13(a), even *sua sponte* (*Leighton v Lowenberg*, 215 A.D.3d 474, 185 N.Y.S.3d 683 [1st Dep't. 2023] [post-amendment removal from Supreme Court to Civil Court]). If an action is removed to a court of more limited jurisdiction without the parties' consent, which "higher" courts have the authority to order, the verdict or judgment is not limited to the monetary jurisdiction of the lower court and may instead be of an amount within the jurisdiction of the court where the action was originally filed (CPLR 325[d]; *Delaine v Finger Lakes Fire & Cas. Co*., 23 A.D.3d 1143, 806 N.Y.S.2d 320 [4th Dep't. 2005]). It is only when an action's removal to a court of more limited jurisdiction is on the parties' consent that the parties become bound to the monetary jurisdictional limit of the lower court (CPLR 325[c] [subject to a counterclaim-related exception]; *Hoboken Wood Flooring Corp. v Fischoff*, 10 Misc.3d 1065[A], 814 N.Y.S.2d 561 [Sup. Ct. Nassau Co. 2005]).

Pivoting to another topic, there must be a valid marriage for the Supreme Court to have the subject matter jurisdiction for granting a divorce. While that concept seems straight-forward, an interesting twist occurred in *Bernstein v Benchemoun*, 216 A.D.3d 893, 188 N.Y.S.3d 669 (2nd Dep't. May 23, 2023). The parties in *Bernstein* were New York residents. The plaintiff "wife" sought a divorce based upon a Florida marriage. The defendant "husband" moved for *inter alia* the dismissal of the action for lack of subject matter jurisdiction, claiming that the marriage in Florida was not valid absent there being a valid marriage license issued from there permitting it to be solemnized. Indeed, Florida law does not recognize the validity marriages without a license, whereas in New York marriages are valid without a license so long as they are solemnized. The defendant's dismissal motion was referred to a court attorney referee (Szochet, Ct. Att. Ref.) to determine the matter. After a fact-finding hearing, the referee determined that the Florida marriage was not valid under Florida law as it was performed without a license from that state. The plaintiff's alternative argument, that the parties' marriage was validly solemnized by a rabbi in New York under a procedure in the Jewish faith known as a ketubah, was likewise found by the referee to be invalid as the rabbi who purportedly executed the ketubah denied actually solemnizing the marriage. Absent a valid marriage for the court's subject matter jurisdiction, the plaintiff's divorce action was dismissed, and the dismissal was affirmed on appeal.

Matrimonial actions are not the only subject area where there has been recent activity in the case law on subject matter jurisdiction. In 2019, New York changed its statute of limitations for cases that may be brought by victims of various forms of sexual abuse. CPLR 208 was amended to provide, in new subparagraph (b), that for minors victimized by certain sex offenses defined by the Penal Law, actions may be commenced for damages from physical, psychological, or other injuries or conditions during a defined two and one half revival period, for victim plaintiffs that have not reached the age of 55 (CPLR 214-g). Naturally, actions have been commenced against various defendants for damages arising from alleged sexual abuse incidents dating back many years, even many decades. In actions brought against state agencies in the Court of Claims, where Court of Claims Act 11(b) requires the claimant to allege particular details as a condition to the waiver of sovereign immunity including, *inter alia,* "the time when" the claim arose (*Kolnacki v State*, 8 N.Y.3d 277, 832 N.Y.S.2d 481, 864 N.E.2d 611 [2007]), claimants are not necessarily in a position so many years after the fact to accurately specify exact dates when the alleged sexual abuse occurred. The Crime Victims Act (CVA), of which CPLR 208 is a part, creates a tension between the inability of some claimants to specify abuse dates *versus* the subject matter jurisdictional requirement that specificity be provided. As a general matter, a claimant's failure in the Court of Claims to particularize a claim, as to prevent the state from investigating it and ascertaining the existence and extent of liability, may result in the dismissal of the action (*D.G. v State of New York*, 214 A.D.3d 713, 185 N.Y.S.3d 245 [2nd Dep't. 2023]). However, courts have recognized under the new CVA some flexibility reflecting the reality that certain claimants may be unable to specify dates of abuse, and whose actions should not necessarily be dismissed as a result. Courts have held that as to the dates of alleged abuse under the CVA, absolute exactitude is not required so long as the particulars of the claim are sufficiently detailed to enable the state to conduct an investigation of the claim (*e.g. Wagner v State of New York*, 214 A.D.3d 930, 187 N.Y.S.3d 61 [2nd Dep't. 2023]; *Meyer v State of New York*, 213 A.D.3d 753, 183 N.Y.S.3d 521 [2nd Dep't. 2023]). The theory of these cases, which is sound, is that if the claimant provides a general time frame, a place, perhaps name of a perpetrator, the overall quantum of detail is sufficient to permit the investigation contemplated by Court of Claims Act 11(b), and such actions should not be dismissed for the absence of subject matter jurisdiction.

C3211:14 "Other Action Pending"

CPLR 3211(a)(4), which permits the dismissal of an action because there is a prior action pending between the same parties for the same dispute, received some exercise in *Quinones v Z & B Trucking Inc.*, __ A.D.3d __, 196 N.Y.S.3d 162 (Mem.) (2nd Dep't. 2023). The two related actions at issue were for personal injuries sustained by the plaintiff as a result of a two-vehicle automobile accident. Action #1 was commenced by the filing of initiatory papers in 2019 but process was never served upon the defendants who owned and operated one of the vehicles. Action #2 was e-filed by the same plaintiff against the same defendants in 2021 for the same underlying occurrence, but on this occasion process was effected upon the defendants. The two actions were

assigned to different justices in Queens County. The defendants moved to dismiss the second action under CPLR 3211(a)(4) arguing that there was a prior action from 2019 that was pending. At the same general time, the defendants served a motion to dismiss the first of the two actions on the ground that service of process had not been accomplished within the 120-day timeframe required by CPLR 306-b. The practicing bar might view these facts as potentially inequitable if both actions were to be dismissed and the plaintiff left without any pending case. Yet, because the two actions were assigned to two different judges, the dismissal of both actions is what happened--the first action was dismissed on September 14, 2021 for the failure to serve process, and the second action was dismissed three days later on the ground of prior action pending. Of course, RJI forms are supposed to identify the relatedness of actions so these types of inconsistencies can be avoided. One day before the dismissal of the second action, the plaintiff provided the court with a copy of the order dismissing the first action, which the court acknowledged receiving, but which was not later listed in the order of dismissal as among the papers considered. The plaintiff's motion to renew and reargue the dismissal of the second action was denied, and the denial of reargument is of course not appealable (though the denial of renewal is subject to appeal). Appeals were taken *inter alia* from both the order dismissing the second action for prior action pending, and the order denying its renewal on the ground that the earlier dismissal of the first action negated the existence of any prior action *pending.* The Second Department held that it was error for the court in the second action to find that there was a prior action pending, as the absence of any service of process in that matter meant that no prior action was actually "pending." That determination rendered academic any error that arguably existed by the court's denial of renewal. Had renewal been reached on appeal, it is likely and predictable that the Appellate Division would have reversed, as the first action had clearly been dismissed by court order prior to the dismissal of the second action for prior action pending, so that on that additional basis, there was no longer any pending prior action.

C3211:18 Affirmative Defenses Available on Subdivision (a)(5) Motion

Statute of Limitations

Governor Andrew Cuomo issued a series of Executive Orders that affected court deadlines as a means of dealing with the covid-19 virus and the disruptions and shutdowns related to it. The governor's authority to do so derived from Executive Law 29-a(1) and (2) in dealing with disaster emergencies. Executive Law 29-a(1) permits a governor by executive order to temporarily suspend specific provisions of statutes, local laws, or ordinances, or the rules or regulations of state agencies, during disaster emergencies. Executive Law 29-a(2)(d) permits the governor in such instances to alter or modify the requirements of statutes, local laws, ordinances, rules or regulations. Under that authority, the governor issued on March 20, 2020 Executive Order ("EO") 202.8 (9 NYCRR 8.202.8) directing that any time limit for the commencement, filing, or service of any legal action, notice, motion, or other process or proceeding, be tolled until April 19, 2020. Nine additional Executive Orders were issued extending the deadline extensions ultimately to November 3, 2020, a total of 228 days (EO Nos. 202.14, 202.28, 202.38, 202.48, 202.55, 202.55.1, 202.60, 202.67, 202.72, found at 9 NYCRR 8.202.14, 9 NYCRR 8.202.28, 9 NYCRR 8.202.38, 9 NYCRR 8.202.48, 9 NYCRR 8.202.55, 9 NYCRR 8.202.55.1, 9 NYCRR 8.202.60, 9 NYCRR 8.202.67, and 9 NYCRR 8.202.72). Without doubt, the Executive Orders extended, among other things, statutes of limitations.

A question naturally arose as to whether these covid-related time extensions represented a "suspension" or a "toll" of the statute of limitations. There is a difference in the nomenclature that could have a practical effect upon the timeliness of actions. A "suspension" of a statute of limitations merely extends the limitations period to the end-date of the suspension, so that limitations periods expiring in the interim do not expire during that defined time. With a suspension, a statute of limitations expiring on a date after the suspension is lifted is unaffected, meaning that the plaintiff must commence an anticipated action or proceeding within the standard limitations period. By contrast, a "toll" stops the statute of limitations clock from ticking for so long as the toll is in effect. When the toll period ceases, the amount of the tolled time is added to the end of the standard limitations period, thereby expanding the time for timely commencing an action or proceeding to a date beyond

the original end-date of the statute of limitations. Tolls may therefore more helpful and generous to plaintiffs than suspensions. Executive Law 29-a(1) clearly provides the governor with authority to temporarily "suspend" statutory provisions. Yet, the Executive Orders issued by Governor Cuomo expressly used the language of a "toll."

The Appellate Division in the Second Department squarely addressed the question of whether the covid-related Executive Orders at issue operated as suspensions or tolls to the statutes of limitations. It held in *Brash v Richards*, 195 A.D.3d 582, 149 N.Y.S.3d 560 (2nd Dep't. 2021) that the Executive Orders were tolls. The court acknowledged that the governor only has authority to toll statutory deadlines where the underlying authority of the Executive Law permits it. It found the tolling authority to exist by virtue of the language of Executive Law 29-a(2)(d), which confers upon the governor the authority to "provide for the *alteration or modification* of the requirements of such statute, local law, ordinance, order, rule or regulation suspended, and may include other terms and conditions (emphasis added)." The operative words for the Appellate Division were "alteration" and "modification," broad enough to envision the tolling of limitations periods (*Brash v Richards*, 195 A.D.3d at 585). The same reasoning has since been adopted by other judicial departments (*Murphy v Harris*, 210 A.D.3d 410, 411, 177 N.Y.S.3d 559 [1st Dep't. 2022]; *Roach v Cornell University*, 207 A.D.3d 931, 933, 172 N.Y.S.3d 215 [3rd Dep't. 2022]).

The covid tolls will be mathematically applied just like any lawful toll such as those for a defendant's absence from the state (CPLR 207), infancy (CPLR 208), insanity (CPLR 208), war (CPLR 209), the death of a party (CPLR 210), military service (Military Law 308), and bankruptcy (11 U.S.C. 362[a]). By logical extension, arguably, all causes of action that accrued in New York prior to Governor Cuomo's initial Executive Order on March 20, 2020 may be filed months or years into the future, enjoying a 228-day toll to their limitations deadlines depending on the applicable math.

The courts are beginning to see the effects of the covid tolls in litigations where the toll has enabled facially untimely actions to be timely, and thereby enable plaintiffs to survive CPLR 3211(a)(5) dismissal motions. But the arithmetic must actually work for the plaintiff to avoid such dismissals. *In Lastella v St. Joseph's Hospital*, 219 A.D.3d 1421, 196 N.Y.S.3d 162 [2nd Dep't. 2023], an administrator's action for medical malpractice and wrongful death was dismissed based on the last date the decedent was a patient at the defendant hospital as to the medical malpractice, and the date that the decedent died as to the wrongful death. The respective statutes of limitations had expired as to both causes of action by the time of the action's commencement-two and a half years for the alleged medical malpractice (CPLR 214-a) and two years for the alleged wrongful death (EPTL 5-4.1). The plaintiff argued that Governor Cuomo's 228-day covid tolls were excludable from the computations. However, even excluding those days, both causes of action were still untimely in the relation to the date the action was commenced, requiring that the entire action be dismissed for untimeliness (*Lastella v St. Joseph's Hospital*, 219 A.D.3d at 1421).

The Statute of Limitations and Standing

The plaintiff's lack of standing is a basis for the dismissal of a complaint under CPLR 3211(a)(5). The Foreclosure Abuse Prevention Act (L.2022 ch. 821) known in shorthand as FAPA, which was signed into law by Governor Hochul on December 30, 2022, affects limitations-related and standing-related dismissal motions under CPLR 3211(a)(5).

The FAPA legislation contains a number of inter-related homeowner-friendly provisions. Prior to the enactment of FAPA, if a residential mortgage foreclosure action was commenced with an acceleration of the balance due on the unpaid note, the action could be discontinued under CPLR 3217 and, according to the Court of Appeals, the discontinuance had the automatic effect of rescinding the debt acceleration. The lender could then commence a

second action at a later date within the six-year statute of limitations measured from the discontinuance of the earlier action (CPLR 213[4]), and with a new acceleration of the outstanding debt on the note (*Freedom Mortgage Corporation v Engel*, 37 N.Y.3d 1, 146 N.Y.S.3d 542, 169 N.E.2d 912 [2021]; *Bank of New York Mellon v Shurko*, 209 A.D.3d 951, 177 N.Y.S.3d 593 [2nd Dep't. 2022]). Further, a later action could be commenced *after* six years from the discontinuance of the earlier one, along with a debt acceleration, so long as the plaintiff in that earlier action lacked standing to commence it and accelerate the debt (*Hawthorne v New Century Mortgage Corp*., 207 A.D.3d 528, 169 N.Y.S.3d 814 [2nd Dep't. 2022] [action under RPAPL 1504(1)]; *Wells Fargo Bank, N.A. v Rutty*, 206 A.D.3d 862, 171 N.Y.S.3d 117 [2nd Dep't. 2022]). In those second actions, the lender argued the seemingly-counterintuitive position that the plaintiff-lender in the earlier action lacked standing which, if proven, rendered the debt acceleration in that earlier action null and void. The only limitation upon the lender in the later action was that missed payments toward the note could only be sought for the six-year limitations period preceding the commencement of the later action, plus the accelerated note balance. The accelerated note balance is usually the prayer for relief that represents the big money of these actions, and is typically more important than the value of missed monthly payments. But FAPA changed the dynamic.

FAPA amended CPLR 213 to add two new subdivisions denominated in the statute as subdivisions (4)(a) and (4)(b), which changes much of the foregoing. Under CPLR 213(4)(a), as amended, the lender in a second action is estopped from claiming that the plaintiff-lender in an earlier action against the mortgagor lacked standing to commence the action and accelerate the loan (*MTGLQ Investors, L.P. v Singh*, 216 A.D.3d 1087, 190 N.Y.S.3d 415 [2nd Dep't. 2023]). As a result, even if the plaintiff in the first action can be shown to have lacked standing, it does not matter as the plaintiff-lender in the second action, with standing, is statutorily barred from claiming that there had been an unenforceable earlier acceleration. CPLR 213(4)(a) contains one important exception: If the earlier mortgage foreclosure action was *dismissed by the court* for the lack of standing, then the plaintiff-lender in the second action may argue the invalidity of the initial acceleration, as to allow the acceleration in the later action. The court's dismissal of an earlier action for the lack of standing could be by an order granting dismissal under CPLR 3211(a)(5) or by summary judgment under CPLR 3212. But absent a judicial dismissal for lack of standing in the earlier action, the estoppel imposed against the lender by CPLR 213(4)(a) controls (*SYCP, LLC v Evans*, 217 A.D.3d 707, 191 N.Y.S.3d 433 [2nd Dep't. 2023]; *Bank of N.Y. Mellon v Stewart,* 216 A.D.3d 720, 190 N.Y.S.3d 80 [2nd Dep't. 2023]; *GMAT Legal Title Trust 2014-1 v Kator*, 213 A.D.3d 915, 184 N.Y.S.3d 805 [2nd Dep't. 2023]).

Under CPLR 213(4)(b), as amended, the same concept, described above, is applied to actions under RPAPL 1504(1) seeking to cancel and discharge mortgages.

What we are left with, insofar as standing is concerned, is the greater ability for homeowner defendants in the later of multiple actions to move to dismiss those actions for untimeliness under CPLR 3211(a)(5).

The provision of FAPA that restricts parties' rights to challenge standing in a prior related action, in order to seek recovery on a re-accelerated debt in a later action, is limited to residential mortgage foreclosure actions subject to CPLR 213(4). Other actions to collect upon defaulted notes are unaffected by the FAPA legislation, and as to those, the Court of Appeals decision in *Freedom Mortgage Corporation v Engel*, discussed above, remains good law.

The reader is referred to this year's Supplemental Practice Commentary C3217:5, which discusses the FAPA amendment to CPLR 3217 and its effect on discontinuances and the statute of limitations in residential mortgage foreclosure actions.

Statute of Limitations and CPLR 214-a

The state legislature enacted "Lavern's Law," which amended CPLR 214-a effective on January 18, 2018 (L.2018 ch. 1 sec. 6). The amendment added a discovery toll to the statute of limitations for medical malpractice claims arising out of a defendant's failure to diagnose cancer or a malignant tumor. The statute of limitations remained the same--two and a half years-but it did not begin to run until when the plaintiff knew or should have known that the defendant's alleged act or omission caused injury, subject to a seven-year cap measured from the alleged negligent act or omission. However, the revival period of the statutory amendment also was limited by its terms to medical malpractice claims that arose within two and a half years prior to its January 18, 2018 effective date, and not before. In *Ford v Lee,* 203 A.D.3d 456, 164 N.Y.S.3d 592 (1st Dep't. 2022), the defendant moved to dismiss the plaintiff's complaint for an alleged failure to diagnose cancer as the cause of action had accrued on May 16, 2014, earlier in time than the revival period defined by the statute. The First Department agreed, and the plaintiff's dismissal motion, which had been denied by the Supreme Court, was granted on appeal.

Statute of Limitations and the Crime Victims Act

The Crime Victims Act (CVA) embodied by CPLR 214-g, originally effective February 14, 2019, revived otherwise time-barred claims by plaintiffs who were victimized as minors by certain defined acts of sexual offenses committed by defendants. It must be read in conjunction with the CVA-related tolling provisions for infancy as set forth in CPLR 208(b), as also amended in 2019. The CVA is primarily a civil remedy, not a criminal one. It allows for the filing of formerly time-barred actions by individuals who were under the age of 18 at the time of certain sex offenses, for a two and a half revival period measured from the effective date of the statute, so long as the plaintiff is not 55 years old or older at the time of commencement. CPLR 208(b) otherwise extends the civil statute of limitations for actions arising from underage sex offenses to victims' 55th birthdays. CPLR 214-g was further amended effective August 30, 2020. The CVA was challenged on due process grounds. The statute was found to not violate due process, and on that basis, the denial of the defendant's motion to dismiss for a violation of the statute of limitations was affirmed on appeal (*Schearer v Fitzgerald*, 217 A.D.3d 980, 192 N.Y.S.3d 207 [2nd Dep't. June 28, 2023]). Case not dismissed.

The CVA has also been challenged on constitutional grounds, both on its face and as applied to particular defendants. The Third Department rejected the dismissal of an action on those constitutional challenges in *Matarazzo v Charlee Family Care, Inc*., 218 A.D.3d 941, 192 N.Y.S.3d 755 (3rd Dep't. 2023).

Statute of Limitations and Bankruptcy

A bankruptcy proceeding stays the running of the statute of limitations on an accrued claim that may potentially be asserted against the bankrupt party. In *Deutsche Bank National Trust Company v Lubonty*, 208 A.D.3d 142, 171 N.Y.S.3d 556 (2nd Dep't. 2022), the defendant moved for a CPLR 3211 dismissal of the second of two residential mortgage foreclosure actions on the ground of untimeliness. The defendant argued that the second action was commenced more than six years from the discontinuance by the plaintiff of the first action and was therefore untimely under CPLR 213(4). While the defendant was correct on that math, he was not correct on the law. The defendant had been under the protection of a bankruptcy court for part of the time between the two cases, which operated as a toll of the statute of limitations under 11 U.S.C. 362(a) and CPLR 204(a). The toll stayed and extended the time for commencing the plaintiff's second action long enough that the action, though commenced more than six calendar years from the discontinuance of the first action, was nevertheless timely (*Deutsche Bank National Trust Company v Lubonty*, 208 A.D.3d at 150). Case not dismissed.

Infancy

Plaintiffs in a two-vehicle automobile accident commenced an action for damages. One plaintiff was an infant who sued in her own name rather than through a parent or guardian, and the second plaintiff was the infant's mother. The defendants moved to dismiss the action of the daughter based on the infancy defense of CPLR 3211(a)(5). The plaintiffs cross-moved under CPLR 3025(b) for leave to amend their complaint to name the infant's mother as the plaintiff on behalf of her daughter. The Supreme Court, Bronx County, granted the dismissal motion and denied the cross-motion. The First Department reversed, finding that the court should have exercised its discretion to deny dismissal in favor of granting the plaintiff-mother's cross-motion to correct the problem (*Veloz v Jiddou*, 212 A.D.3d 549, 182 N.Y.S.3d 85 [1st Dep't. 2023]). The case could have alternatively been viewed as one involving the infant's lack of capacity to act as the plaintiff in the action under CPLR 3211(a)(3), though that was apparently not a defense raised by the parties or discussed in the reported decision. In any event, the failure of the initial complaint to name a proper party plaintiff was rectified. Case not dismissed.

Release

Sjogren v Board of Trustees of Dutchess Community Coll., 216 A.D.3d 836, 189 N.Y.S.3d 237 (2nd Dep't. 2023) involved a student at a college that mandated certain gym activities. The plaintiff had some physical limitations, but she signed a release discharging the defendant college "from all liability for any claim of injury" to the student's person, whether harm was "caused by the negligence of the releasees or otherwise." The release further provided that it was "intended to be broad and inclusive in keeping with state laws." The plaintiff claimed that she was injured during one of her mandated gym activities and commenced an action against the defendant college for damages. The defendant of course moved to dismiss the action under CPLR 3211(a)(5) based on the language of the release. The Second Department noted that a release constitutes a complete bar to an action on a claim which is the subject of the release. Releases are interpreted under the principles of contract law. The Second Department held that the sweeping language of the release at issue here evinced an intention of the parties that it be all-encompassing. The release included language that the plaintiff was aware of and agreed to any risks associated with her gym activities (*Sjogren v Board of Trustees of Dutchess Community Coll.*, 216 A.D.3d at 239). Case dismissed.

A similar result was reached in the Fourth Department involving the operator of a snowmobile who was involved in an accident. The plaintiff had signed a broad general release, clearly and unambiguously releasing the defendant from any claims for bodily injury of any kind. The Fourth Department found it enforceable, and on that basis, dismissed the plaintiff's complaint on appeal (*Putnam v Kibler*, 210 A.D.3d 1458, 178 N.Y.S.3d 851 [4th Dep't. 2022]).

Statute of Frauds

These Practice Commentaries have monitored developing case law addressing when and whether e-mail and other material obtained from social media may qualify as "documentary evidence" for the dismissal of an action under CPLR 3211(a)(1) (CPLR Practice Commentaries and Supplemental Practice Commentaries C3211:10). Distilled to its essence, e-mails may qualify as documentary evidence under CPLR 3211 when they are essentially unambiguous, undeniable and authentic, and for a dismissal motion to be granted upon them, conclusive.

Similar issues have arisen in the context of dismissal motions arguing non-compliance with the statute of frauds under CPLR 3211(a)(5). E-mails were found to be insufficient to establish a party's compliance with the statute of frauds where they were not subscribed in an electronic signature block by the party to be charged as to form a binding contract (*Preston v Nichols*, 216 A.D.3d 1398, 189 N.Y.S.3d 837 [4th Dep't. May 5, 2023] [texts and e-mails]).

Practitioners are referred to an analytical decision and order of Supreme Court Justice Aaron D. Maslow, which surveys appellate cases that address when e-mail has been, and has not been, admissible in determining motions under CPLR 3211(a)(1) (*590 Myrtle LLC v Silverman-Shaw Inc*., 78 Misc.3d 1218[A], 185 N.Y.S.3d 655 [Sup. Ct. Kings Co. 2023] [portions of the motions were converted to summary judgment per CPLR 3211[c]). In *590 Myrtle Avenue*, e-mail exchanges between counsel during negotiation of a $9.5 million real estate transaction were found to be admissible on the ground that they were unambiguous, authentic, and undeniable (*590 Myrtle LLC v Silverman-Shaw Inc*., 78 Misc.3d at 1218[A] *8). Indeed, the authenticity of the e-mails were not in question by the parties to the CPLR 3211(a)(1) motion which, it seems, makes it much easier for a court to find that prong of admissibility to be met. In the end, the court determined that the merits of the proffered e-mails established *inter alia* a lack of a meeting of the minds for there to be an enforceable contract between the parties.

C3211:21 Failure to State a Cause a Cause of Action, Generally

CPLR 3211(a)(7) allows for the dismissal of complaints that fail to state a cause of action on which the relief sought can be granted. The term "cause of action" has no discrete definition in the general definitional section of CPLR 105. It is readily understood as relating to allegations of fact and the invocation of law providing grounds for some form of monetary or equitable relief from another party. Causes of action do not lie for procedural devices that are merely collateral to them such as joinder, consolidation, and severance, and should not be styled as such. Relief collateral to causes of action may instead be pursued by means of a separate application to the court, brought under its own enabling statute.

The same concept is true of claims for punitive damages. Punitive damages are not a cognizable free-standing cause of action in New York and should not be pleaded as such (*Rocanova v Equitable Life Assur. Socy. of U.S*., 83 N.Y.603, 616, 612 N.Y.S.2d 339, 634 N.E.2d 940 [1997]). Punitive damages are instead a prayer for relief to be set forth in an *ad damnum* clause, which relate back to the stated causes of action from which damage awards are derived (*Trigo v Miller*, 60 Misc.3d 456, 75 N.Y.S.3d 847 [Sup. Ct. Nassau Co. 2018]).

C3211:28 Lack of Personal Jurisdiction

Service of Process

CPLR 308(2) and (4) require the filing of affidavits of service. Affidavits of service are likewise important in helping establish the proper service of process when other forms of service are used as well. Attorneys should be diligent in overseeing the work of process servers not just in connection with the timing and methods of service, but also, the accuracy of the affidavits of service prepared after the fact. The failure of a party to produce accurate affidavits of service can be fatal to the service itself, particularly when the timing or method is challenged by the defendant. An example is seen in *HSBC Bank, National Association v Rini*, 202 A.D.3d 945, 162 N.Y.S.3d 471 (2nd Dep't. 2023). In *Rini*, the defendant moved to dismiss the plaintiff's complaint for the alleged improper "suitable age and discretion" process under CPLR 308(2). The defendant produced in support of the motion the process server's affidavit which reflected an execution of the affidavit one day *prior* to the necessary mailing of a copy of the summons and complaint. In response to the motion, the plaintiff filed two amended affidavits of service, the first confirming the mailing date of the summons and complaint, and the second changing that date to three days earlier. The Supreme Court deemed the second amended affidavit as correcting the confusion on dates and denied the defendant's motion to dismiss. The Second Department reversed on the ground that the process server's inconsistent and competing affidavits raised credibility issues which required a *Traverse* hearing to determine the validity of the service of process. The court noted that while affidavits of service may be corrected under CPLR 305(c) in the exercise of judicial discretion where a

substantial right of a party is not prejudiced, the alleged erroneous mailing date reflected by the first and second affidavits of service affected a substantial right of the defendant to proper CPLR notice of the action. Of course, the problem faced by the plaintiff could have been avoided if counsel had more carefully checked the content of the original affidavit of service against the calendar incongruity apparent on its face.

General Jurisdiction

Courts continue to address issues of general jurisdiction in light of the U.S. Supreme Court's groundbreaking opinion in *Daimler AG v Bauman*, 571 U.S. 117, 134 S.Ct. 746, 187 L.Ed.2d 624 (2014) Opinion by Ginsburg, J.). As readers of these Practice Commentaries know, the U.S. Supreme Court clarified in *Daimler* that for general jurisdiction to attach against a corporate party, the entity must be "at home" in the state, meaning that it 1) be incorporated within the state, or 2) maintain its principle office within the state, or 3) qualify as a "truly exceptional case" where the entity's operations are so substantial and of such nature as to render the corporation at home within the state. In New York, general jurisdiction is recognized by CPLR 301.

The first two prongs for general jurisdiction defined by *Daimler* are objective and straight-forward, easily determined by reference to public documentation. Every corporation will have a publicly-filed document identifying its state of incorporation and principal office address. The third potential prong for general jurisdiction is more amorphous as it depends upon arguable factors that will vary from case to case, such as operations being "so substantial" within a state or being of "such nature." A number of recent reported cases have found the circumstances to *not* qualify as "truly exceptional" under *Daimler*. These include, as examples, *Machado v Hershey Entertainment and Resorts Company*, 2023 WL 1967531 (E.D.N.Y. 2023) (not exceptional where defendant engages in *inter alia* extensive television and internet advertising in New York and solicitation of business) and *Starostenko v UBS AG (A Swiss Bank)*, 2023 WL 34947 (S.D.N.Y. 2023) (not exceptional where defendant is one of the largest broker-dealers in the world with subsidiaries in New York).

The *Machado* and *Starostenko* cases, and other reported jurisdiction-related cases that may be found on Westlaw across the country, discuss one case from 1952 which is held out an example of where exceptional circumstances may exist for the assertion of general jurisdiction--*Perkins v Benquet Consol. Min. Co*., 342 U.S. 437, 72, S.Ct. 413, 96 L.Ed. 485 (1952). *Perkins* involved a defendant corporation that shut down the entirety of its mining operations in the Philippines because of World War II and relocated its operations to Ohio. The U.S. Supreme Court held in *Perkins* that the defendant was amenable to the general jurisdiction of Ohio because Ohio had become its principal, albeit perhaps temporary, place of business. The definition of a "truly exceptional case" for general jurisdiction is nosebleed high.

Of note from our state court where truly exceptional circumstances were analyzed for the possible assertion of general jurisdiction is *Jiang v Z & D Tour, Inc*., 75 Misc.3d 583, 169 N.Y.S.3d 460 (Sup. Ct. Richmond Co. 2022). The plaintiff was injured on a passenger bus operated by the defendant during a roll-over accident while the bus was travelling in Pennsylvania. The defendant, J & D Tour, Inc. (Z & D), was a New Jersey corporation whose buses traveled to many locations throughout the country. Although Z & D was not incorporated in New York and did not maintain its principal office here, it maintained a brick-and-mortar office in New York for the sale of tickets, its buses stopped in front of its office to take on and discharge passengers, the defendant's name appeared on a bus stop sign posted in New York, and the defendant had applied to the New York City Department of Transportation and lobbied the local community board for permission to post its signage. The Court held that those circumstances failed to qualify as truly exceptional under *Daimler.* The Supreme Court's analysis in *Jiang* appears to be correct, as the factors that the plaintiff relied upon for arguing in favor of general jurisdiction were simply run-of-the-mill endeavors by an out-of-state entity to transact business in New York, and were limited in and of themselves. The Supreme Court held in *Jiang* that the defendant was amendable to the specific longarm jurisdiction of New York under CPLR 302(a)(1), from its transaction of business in New York and the relatedness of its transaction to the plaintiff's claim (*Jiang v Z & D Tours, Inc*., 75 Misc.3d at 590). *Jiang*

underscores that even where general jurisdiction is lacking against a defendant under CPLR 301, that same defendant may be amenable to longarm jurisdiction under at least one of the statutory bases set forth in CPLR 302(a).

On June 27, 2023, the U.S. Supreme Court released its 5-4 decision in the case of *Mallory v Norfolk Southern Railway Co*., 600 U.S. 122, 143 S.Ct. 2028, 216 L.Ed.2d 815 (2023). The majority opinion was written by Justice Gorsuch and the dissent by Justice Barrett. It is yet another significant development in the evolving law on the assertion of general jurisdiction. It is the latest of four major developments on the subject of general jurisdiction.

The first of four major developments was the U.S. Supreme Court's 2014 decision in *Daimler AG v Bauman*, *supra*. As already noted, in *Daimler*, the Supreme Court clarified that states may assert general jurisdiction (as distinguished from specific jurisdiction) over an out-of-state corporation only when the entity is "at home" in the forum state. The court identified three circumstances when a corporation is "at home" in a state--the first being the corporation's state of incorporation, the second being the state where the corporation maintains its principal office, and the third being the "truly exceptional case" where the entity's operations are so substantial and of such nature as to render the corporation at home in the state. *Daimler* was a restrictive interpretation of federal due process in this area.

The second major development on general jurisdiction, at least in New York State, was the question of whether a corporation's registration to do business within the state confers general jurisdiction over the entity. The issue worked its way through the state courts and came to a head in a 5-2 opinion of the Court of Appeals in *Aybar v Aybar*, 37 N.Y.3d 274, 156 N.Y.S.3d 104, 177 N.E.3d 1257 (2021). *Aybar* held that a corporation's registration to do business in New York did *not* confer the state's general jurisdiction over the out-of-state entity, as it instead merely provided for the corporation's consent to service of process within the state. Service of process upon the corporation, by whatever means, still requires an underlying basis for New York's jurisdiction, and corporate registration in New York did not, in and of itself, establish general jurisdiction. Notably, *Aybar* was decided based upon New York's due process precedents and was not reliant upon *Daimler*. Plaintiffs seeking to commence actions against foreign corporations, without the availability of general jurisdiction, need under *Aybar* to look to a specific jurisdictional basis under New York's longarm statute (CPLR 302), which in some instances is trickier.

A third recent development has been the New York legislature's response to *Aybar*. The legislature did not like the holding, not one bit. Both houses of the state legislature passed a bill to legislatively nullify *Aybar* (A7769, S7253) by creating proposed CPLR 301-a and amending BCL 1301(e). The amendments provide that a foreign corporation's registration to do business in New York will constitute the corporation's consent the general jurisdiction of New York's courts, absent a withdrawal by the corporation of its registration. That legislation, however, was vetoed by Governor Hochul on December 31, 2021 on the ground that in her view, the proposed legislation would deter foreign corporations from coming to New York to do business. The state legislature was not deterred by the veto. In 2023, both houses of the legislature passed a bill once again to enact a new statute denominated as CPLR 301-a and by amending BCL 1301(e) (A7351, S7476), to provide that a foreign corporation's registration to do business in New York confers New York's general jurisdiction over the entity. Like its proposed legislative predecessor, the corporation could avoid general jurisdiction by withdrawing its New York registration. As of this writing in the summer of 2023, the amendatory bill has not yet been submitted to Governor Hochul for signature. The fate of the bill should be known by the time this Supplemental Practice Commentary is distributed in hard copy at approximately the New Year.

The fourth major development on general jurisdiction is the U.S. Supreme Court's decision in *Mallory v Norfolk Southern Railway Co., supra*. The plaintiff in *Mallory* brought a cancer-related personal injury action against the defendant, Norfolk Southern Railway Co. (Norfolk Southern) in the commonwealth of Pennsylvania under the

Federal Employers' Liability Act. The plaintiff resided in Virginia at the time the action was commenced. His exposure to carcinogens while in the former employ of Norfolk Southern was in both Virginia and Ohio. Norfolk Southern's state of incorporation and principal office were in Virginia. The corporation's only jural connection to Pennsylvania was its registration there to do business. And business it did--maintaining within the commonwealth 5,000 Pennsylvanian employees, 2,400 miles of Pennsylvania rail, eleven rail yards there, the largest locomotive shop in North America, and other Pennsylvanian activities (*Mallory v Norfolk Southern Railway Co.*, at *10). Pennsylvania is a "compulsory consent" state, meaning that any entity wishing to do business in the state is *required* to register there and *required* by that registration to consent to the general jurisdiction of the state (15 Pa. Cons. Stat. Ann. 411[a], 5301[a][2][i]). Naturally, considerations of due process are implicated.

In *Mallory*, the five-justice majority at the U.S. Supreme Court (Gorsuch, J.) upheld the assertion of general jurisdiction on the basis of the railway's consent to it, whether compulsory or otherwise. In doing so, the majority relied primarily on precedent which the court found to be squarely on point both factually and legally, the case of *Pennsylvania Fire Ins. Co. of Philadelphia v Gold Issue Min. & Mill. Co*., 243 U.S. 93, 37 S.Ct. 344, 61 L.Ed. 610 (1917) (Holmes, J.). The Gorsuch majority was unwilling to ignore the court's own century-old precedent. The four-justice dissent (Barrett, J.) disagreed, concluding that the *Pennsylvania Fire Ins. Co.* case from 1917 was implicitly overruled by the Supreme Court's due process analysis in *International Shoe Co. v State of Wash., Office of Unemployment Compensation and Placement,* 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945), and by *Daimler's* more recent pronouncement in 2014 that general jurisdiction may only be asserted when a corporation is "at home" in the state by its incorporation there, its principal office there, or in the "truly exceptional case" (*Mallory v Norfolk Southern Railway Co.*, at *26). The dissent concluded that since Norfolk Southern did not meet the *Daimler* tests for the assertion of general jurisdiction by Pennsylvania, general jurisdiction was lacking. Both the majority and the dissent made creditable points.

In his concurrence with the majority in *Mallory*, Justice Alito made an observation that is potentially significant. He questioned whether the assertion of general jurisdiction through a compulsory consent statute is constitutional under the commerce clause. He stated there was a "good prospect" that Pennsylvania's compulsory consent statute places an undue burden on interstate commerce by requiring corporations to defend themselves in the commonwealth in potentially all of its transactions, whether those transactions are related to Pennsylvania or not. He expressed a concern that businesses might elect to avoid entering new markets as a means of insulating themselves from remote litigations. Justice Alito also noted that the commerce clause, though raised in the parties' papers in the state court proceedings, was not addressed by the Pennsylvania Supreme Court and was therefore not before the U.S. Supreme Court to consider on the merits. But he invited Norfolk Southern to raise the issue upon *Mallory's* remand to the Pennsylvania court (*Mallory v Norfolk Southern Railway Co.*, at *14).

Some observations flow from *Mallory* that impacts us in New York:

Justice Gorsuch was not on the U.S. Supreme Court in 2014 when the *Daimler* case was decided, so he had a free hand to write the majority opinion in *Mallory* without particular constraint. *Mallory's* finding of general jurisdiction based on compulsory consent provides an end-run around *Daimler* for any state that has, or enacts, a sufficient compulsory consent statute. The *Daimler*r Bastille has been partially stormed. However, of equal importance is *what* the compulsory consent statute must actually say to qualify under *Mallory* for general jurisdiction.

Justice Alito's concurrence in *Mallory* that compulsory consent statutes may violate the commerce clause of the constitution is a red flare fired into the sky that will affect the focus of our still-evolving re-definition of general jurisdiction. The legal battlefield will now shift to the commerce clause. The true constitutional limitations to general jurisdiction shall continue to be litigation fodder for a handful of additional years.

The Pennsylvania statute at issue in *Mallory* requires certain paperwork guarantees, and the corporate entity must continuously maintain a registration office as a condition of its certificate to do business and for accepting the benefits and burdens of its presence in that commonwealth. The recent proposed amendments to enact in New York CPLR 301-a and amend BCL 1301(e) (A7351, S7476) which have been passed by the state legislature but as of this writing not yet sent to Governor Hochul, do not mimic the level of compulsory conditions as seen in the Pennsylvania statute. Therefore, arguably, an open question will still fester as to whether the amendatory language, if signed into law, is "enough" under *Mallory* to assert general jurisdiction absent additional language to bring it more in line with Pennsylvania's statute. That may of course be an argument of the out-of-state corporations going forward, commerce clause aside. If, *arguendo*, the proposed legislative amendments to CPLR 301-a and BCL 1301(e) are signed into law by the governor, they will be subject to the same commerce clause challenge identified by Justice Alito in his *Mallory* concurrence. We in New York may still be debating and watching developments on general jurisdiction in year 2028 as *Mallory* does not quite settle the full array of issues, which is unsatisfying. Justice Barrett may be correct in her assessment that the states may now enact broad compulsory consent statutes full of language and conditions, which will have the effect over time of gutting the restrictiveness of *Daimler*. But if she is correct on that, so be it. Chips fall where they may. But it will all be subject to future courts' interpretations of whether it passes muster under the commerce clause.

Where does *Mallory* leave *Aybar*? *Aybar* was decided as a matter of state due process law and analysis, and it should therefore be unaffected by *Mallory.* The prediction here is that if *Aybar* ever goes away, if at all, it will be by means of New York State legislative nullification.

Mallory deserves one final observation. As already noted, *Daimler* recognized three separate bases for general jurisdiction for an entity to be "at home"--the state of incorporation, the state of the principal office, and the "truly exceptional case" where an entity's operations within a state are so substantial and of such nature as to render the corporation at home there. That third prong is deserving of further federal appellate definition and refinement, going forward. If Norfolk Southern's contacts with Pennsylvania in *Mallory* were so very extensive as described by Justice Gorsuch in his majority opinion (5,000 Pennsylvanian employees, 2,400 miles of Pennsylvanian rail, eleven rail yards, and the largest locomotive shop there in North America), then *Mallory* might have been a case for considering the third prong of *Daimler* had it been argued and addressed. But instead *Mallory*'s sole focus was the different question of whether a compulsory consent statute permits the assertion of general jurisdiction. The majority and dissent seemed to talk past one another--Justice Barrett's dissent (along with three colleagues) hinged on *Daimler, Daimler, Daimler*, whereas Justice Gorsuch's reasoning focused almost exclusively on the *Pennsylvania Fire* case and only mentioned *Daimler* incidentally a couple of times during a discussion of *International Shoe*. The division behind their closed doors was probably palpable. The third prong of *Daimler* might have potentially brought the members of the court together for one side of the case or the other had that issue been part of the briefing, but the true and separate issue was compulsory consent where the divide occurred.

There is a bottom line that we can draw from *Mallory*: Beyond the three prongs of *Daimler* for general jurisdiction, there now appears to be a fourth, under *Mallory*, based on compulsory consent. *Daimler* + *Mallory* = All current available general jurisdiction grounds. General jurisdiction should be determined, under federal analyses, under what might now be called the *Daimler-Mallory* tests. If more states enact compulsory consent statutes for general jurisdiction, *Mallory* may overpower *Daimler* in the bigger future scheme. But again, word to the wise, it will all be subject to potential future developments involving the commerce clause.

C3211:42 Converting CPLR 3211 Motion Into One for Summary Judgment

A court may not properly advise the parties that it will treat a CPLR 3211 motion as one for summary judgment, and then do so, if summary judgment would itself be premature (*Russo v Crisona*, 219 A.D.3d 920, 195

N.Y.S.3d 729 [2nd Dep't. 2023] [summary judgment premature where discovery was required]).

C3211:69 Easier Standard for Dismissing "SLAPP" Suit

The SLAPP statute has generated some new activity in the courts, particularly as a consequence of the state legislature's amendment of CPLR 3211(g) which became effective on November 10, 2020. The CPLR amendment was made in conjunction with related amendments to Civil Rights Law 70-a and 76-a. CRL 70-a(1)(a), as amended, provides, *inter alia*, that costs and attorneys' fees "shall" be awarded to defendants who successfully obtain CPLR 3211(g) dismissals of SLAPP actions. CRL 70-a(1)(b) and (c) further provide for the discretionary award of compensatory and punitive damages upon plaintiffs who are shown to have commenced SLAPP actions for the purpose of harassing, intimidating, punishing, or maliciously inhibiting the free exercise of free speech, petition, or association rights. The amendments to CPLR 3211(g) directed that the court's determination of a defendant's dismissal motion under CPLR 3211 does not affect the burden of proof in the continuing action or in a subsequent action; that the making of a CPLR 3211 dismissal motion automatically stays discovery, hearings, or other motions absent the court specifically permitting limited discovery on targeted issues; and that the SLAPP provisions of CPLR 3211(g) apply to all forms of parties and pleadings (CPLR 3211[g][2], [3], [4]).

What of the 2020 amendments' retroactivity? Case law on the subject was split and evolving, ultimately leading to a decision by the state Court of Appeals that should put the issue to rest.

The Appellate Divisions in the First and Fourth Departments addressed the issue in both *Gottwald v Sebert*, 203 A.D.3d 488, 165 N.Y.S.3d 38 (1st Dep't. 2022) and *Trinh v Nguyen*, 211 A.D.3d 1623, 180 N.Y.S.3d 735 [4th Dep't. 2022]). In *Gottwald*, the First Department noted that the original SLAPP statute had been enacted almost thirty years before the amendments, and that the amendments were enacted to address shortfalls perceived in the statute's original language. The court noted the absence of any actual retroactivity language in the SLAPP amendments and therefore applied the well-worn presumption that the amendments were prospective only as measured from their effective date (*Gottwald v Sebert*, 203 A.D.3d at 488). *Gottwald* was followed by the First Department, though without much discussion, in *Cisneros v Cook*, 209 A.D.3d 519, 175 N.Y.S.3d 214 (Mem.) [1st Dep't. 2022) and *Robbins v 315 West 103 Enterprises LLC*, 204 A.D.3d 551, 164 N.Y.S.3d 823 [1st Dep't. 2022]).

Trinh, from the Fourth Department, was a case of alleged defamation and defamation *per se* that fell within the provisions of the SLAPP statute, and which was commenced prior to the 2020 amendments of the law. The interesting twist to *Trinh* was that the 2020 amendment to the cost and attorney fee provisions of CRL 70-a(1)(a) had become effective by the time the defendant's CPLR 3211(g) dismissal motion was made. The Supreme Court, Erie County, applied the cost and attorney fee provisions retroactively in favor of the successful moving defendant. But the Fourth Department held otherwise, noting that the 2020 statutory amendments contained no provision that its language was to be applied retroactively; that statutes are presumed to be prospective; and that as directly relevant here, a retroactive application of the amendments would impair the rights of the plaintiff in the form that existed when the action was initially filed, increase his liability for past conduct, and impose new duties with respect to transactions already completed (*Trinh v Nguyen*, 211 A.D.3d at 1624-25).

Readers of these Supplemental Practice Commentaries are warned that contrary decisions have been rendered from two federal district courts. Those courts determined that the 2020 SLAPP enactments were "remedial" based on certain material contained in the Bill Jacket for the amendments to CRL 70-a, and became effective immediately. Hence, said those courts, retroactive application best implemented the intent of the state legislature (*Coleman v Grand*, 523 F.Supp.3d 244, 258-59 [E.D.N.Y. 2021]; *Palin v New York Times Company*, 510 F.Supp.3d 21 [S.D.N.Y. 2020]). As of this writing, an appeal of *Coleman* is pending at the Second Circuit under

Case Number 21-800, so the fate of Coleman's reasoning, at least in the federal context, is uncertain, though it should be affected by further analysis discussed below involving the state Court of Appeals. Respectfully, the Fourth Department was correct to note, contrary to the analyses of the judges in the Eastern and Southern Districts of New York, that the "remedial" nature of a statutory amendment, which is generally at play with many amendments, is not a basis, in and of itself, for ignoring the long-standing legal presumption that new enactments be prospective particularly where there is no expressed provision that a new law be given retroactive effect. All statutory amendments are, at some level, remedial. Had the state legislature intended for its amendments to CRL 70-a and related law to be retroactive to the pre-commencement date of an action's commencement, it could have said so without any need for the federal courts to read its mind.

Of course, guidance from the New York State Court of Appeals would be most welcome on the issue, particularly given the split of reasoning between the federal district courts on the one hand and the state appellate divisions on the other. But like manna from Heaven, the *Gottwald* case of the First Department, discussed above, was granted leave to the state Court of Appeals, and the Court of Appeals determined the issue of retroactivity in a decision rendered June 13, 2023 (*Gottwald v Sebert*, __ N.Y.3d __, 186 N.Y.S.3d 611, 207 N.E.3d 577 [2023]).

Much of the Court of Appeals' analysis in *Gottwald* involves whether the plaintiff was a public figure and whether the defendant enjoyed a privilege defense under the defamation law, which is not particularly relevant here. As to retroactivity, the majority opinion written by Judge Garcia concluded that the SLAPP amendments were prospective only. The specific amendment regarding costs and attorney's fees was made applicable to actions "*commenced or continued* without a substantial basis in fact and law and could not be supported by a substantial argument for the extension, modification or reversal of existing law," citing to CRL 70-a(1)(a), which is prospective language (*Gottwald v Sebert*, 2023 WL 3959051 *6 [emphasis added]). Therefore, there is no retroactivity to the cost and attorney's fees language for the period of time between an action's commencement and the effective date of the SLAPP amendments. *But*, said the court, the statutory amendment regarding costs and attorney's fees was also expressly made applicable to actions commenced "*or continued"* without a substantial basis fact or law. As a consequence, costs and attorney's fees shall be assessed in favor of successful counterclaiming defendants in SLAPP actions as computed from the effective date of the SLAPP amendments, forward. The bottom line, therefore, is that the issue of costs and attorney's fees straddle the November 10, 2020 effective date of the SLAPP amendments, as not being awardable in actions existing prior to that date but awardable for specific costs and attorney's fees incurred in any actions "continuing" *from* that effective date. Thus, according to the Court of Appeals, the First Department's view of retroactivity under *Gottwald* (and by extension the Fourth Department's view under *Trinh*) was partially correct and partially incorrect, based on the need to straddle the effective date of the SLAPP amendments.

Practitioners should draw two lessons from *Gottwald v Sebert.* The first is that plaintiffs seeking to "continue" actions beyond November 10, 2020 should soberly assess the merits of their claims and the strength, if at all, of the defendants' SLAPP counterclaims. An award of costs and attorney's fees on the counterclaim may be a consequence of any erroneous assessment of those merits, covering the post-amendment timeframe. The same is of course true for plaintiffs who may "commence" an action after SLAPP's 2020 amendments, where all costs and attorney's fees are fair game. Second, there should now be a turnaround in the federal courts on how they view the issue of retroactivity. The Court of Appeals decision in *Gottwald v Sebert* is a matter of substantive law which federal courts must apply. The expectation here is that the Eastern and Southern District holdings in *Coleman v Grand* and *Palin v New York Times Company*, respectively, which retroactively computed SLAPP costs and attorney's fees from their date of pre-amendment commencements, will not be followed by the federal district or circuit courts in the future.

Of further recent interest for readers on the subject of SLAPP is the case of *Trump v Trump*, 79 Misc.3d 866, 189 N.Y.S.3d 430 (Sup. Ct. N.Y. Co. 2023). The action involved a claim by former President Donald J. Trump against his niece, Mary Trump, the *New York Times*, and certain named reporters of the *New York Times*, arising

from the newspaper's publication in 2018 of information obtained from Mary Trump about her uncle's taxes. The information at issue was subject to a 2001 settlement and confidentiality agreement between, *inter alia*, Donald J. Trump and Mary Trump, as reached in connection with an earlier family Surrogate's Court proceeding. Mary Trump allegedly provided tax information to a reporter at the *New York Times* in violation of her confidentiality agreement which the *Times* then published to its readers. Plaintiff Trump alleged causes of action against the *New York Times* for tortious interference with contract by inducing Mary Trump to violate the terms of the confidentiality agreement, aiding and abetting the tortious interference with contract, unjust enrichment, and negligent supervision. Notably, plaintiff Trump did not take issue with the contents of the *Times*' 2018 article, nor was there a cause of action asserted for defamation. The *New York Times* defendants moved to dismiss the action under CPLR 3211(g), arguing that the action against those defendants was in the nature of a "public petition and participation" SLAPP action under the expanded, amended version of the law. In opposition, plaintiff Trump argued that SLAPP actions were limited to claims of defamation and that no such cause of action was part of the case. The Supreme Court disagreed with plaintiff Trump, applied SLAPP to the various alleged causes of action, dismissed the case under CPLR 3211(g), and invoked the provisions of CRL 76-a(1)(a) in awarding costs and attorney's fees to the *New York Times* defendants. Noteworthy here is that *Trump v Trump* was commenced on September 21, 2021, *after* the 2020 amendments to both CPLR 3211(g) and CRL 70-a. Therefore, the retroactivity of cost and attorney fee provisions was not a relevant issue for the court to analyze and address, as costs and attorney's fees were required to be given.

A final case of note is the uniquely-named matter of *Balliet v with prejudice of the other Kottamasu*, 76 Misc.3d 906, 175 N.Y.S.3d 678 (Civ. Ct. Kings Co. 2022). The plaintiff and defendant were roommates. The plaintiff commenced an action for defamation against the defendant, for statements allegedly made by the defendant that the plaintiff had been sexually flirtatious with the defendant's significant other. The plaintiff moved to discontinue the action, and the defendant sought in response an award of attorney's fees and costs as required under the SLAPP statute (CRL 70-a[1][a]). The issue before the Civil Court was whether an action of this type fell within the scope of SLAPP. The court held that it did not. The court, while noting that the amendatory language of CRL 70-a, CRL 76-a, and CPLR 3211(g) and (h) broadened the matters that are to be of public interest or concern, the communication in *Balliet* was nevertheless of a private nature outside the intendment of SLAPP. Attorney's fees and costs, otherwise awardable under SLAPP, were therefore denied to the defendant, and appropriately so.

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C3211:6 Specifying the Ground of the Motion

While the language of CPLR 3211(a) is silent about the need for a moving party to specify the ground for a dismissal motion, CPLR 2214(a) fills the gap by requiring that the ground be specified. The specific ground for a CPLR 3211 motion should be set forth in the notice of motion in a way that is plain for the trial court, the opposing parties, and perhaps the appellate court, to see. If a party makes a motion to dismiss on one or more of the eleven specified grounds available under CPLR 3211(a), the moving party should just plainly say so.

The foregoing brings us to the case of *Grocery Leasing Corp. v P & C Merrick Realty Co*., 197 A.D.3d 628, 153 N.Y.S.3d 82 (2nd Dep't. 2021). In that matter, the defendant made a motion that was unclear about whether it was styled as one for CPLR 3211 dismissal or for CPLR 3212 summary judgment. The notice of motion appeared to be for a CPLR 3211 dismissal, but the supporting papers spoke in terms of CPLR 3212 summary judgment. The deficiency was raised by the plaintiff in opposition. In reply papers, the defendant clarified that the motion was in the nature of a CPLR 3211(a)(7) motion to dismiss for the plaintiff's failure to state a cause of action on which the relief sought could be granted. The Supreme Court granted the motion to dismiss but the dismissal was reversed by the Second Department. The reason for the appellate reversal was that since the nature and evidentiary standard for the defendant's motion was not truly revealed until the defendant's reply papers, and there was no sur-reply, the plaintiff was deprived of an opportunity to oppose the actual grounds on which

the defendant's motion was made and granted. All of the foregoing confusion could have been avoided had the defendant's initial motion papers been properly drafted to make clear in both the notice of motion and in the supporting papers that the basis for the motion was an alleged failure to state a cause of action. If the complaint actually failed to state a viable cause of action, its dismissal would have been indicated, and the ultimate result would have been a different and happier one for the defendant. Lawyering matters.

C3211:8 *Sua Sponte* Dismissals

As part of an annual observational exercise, trial courts continue to sometimes dismiss residential mortgage foreclosure complaints *sua sponte,* when the defendant is in default, only to see the orders reversed or modified on appeal (*U.S. Bank National Association v Green*, 205 A.D.3d 755, 165 N.Y.S.3d 712 [2nd Dep't. 2022]; *Deutsche Bank National Trust Company v Dicerbo*, 204 A.D.3d 884, 164 N.Y.S.3d 829 [2nd Dep't. 2022]; *Bayview Loan Servicing, LLC v Taddeo*, 199 A.D.3d 749, 157 N.Y.S.3d 82 [2nd Dep't. 2021]; *U.S. Bank National Association v Salgado*, 192 A.D.3d 1181, 141 N.Y.S.3d 337 [2nd Dep't. 2021]. *See also Binder v Tolou Realty Associates, Inc*., 205 A.D.3d 870, 166 N.Y.S.3d 551 [2nd Dep't. 2022] [alleged breach of lease]). The issue continues to be one that plagues only the Second Department. A court's authority to dismiss a plaintiff's complaint *sua sponte* must be exercised sparingly and only under extraordinary circumstances. Errors in the exercise of that limited authority continue to be made by trial courts.

C3211:10 Defense Based on "Documentary Evidence"

Case law continues to develop the circumstances under which electronically-generated information may or may not qualify as "documentary evidence" within the purview of CPLR 3211(a)(1).

Evidence, including e-mails, must be essentially undeniable and authentic to qualify as "documentary evidence" under CPLR 3211(a)(1) (*Shah v Mitra*, 171 A.D.3d 971, 98 N.Y.S.3d 197 [2nd Dep't. 2019]). Letters, e-mails, and affidavits are not "documentary evidence" (*Bath & Twenty, LLC v Federal Savings Bank*, 198 A.D.3d 855, 156 N.Y.S.3d 316 [2nd Dep't. 2021]), at least as a general rule. If letters or e-mails are found to be essentially undeniable and authentic, then their contents may be examined to determine whether they utterly refute a plaintiff's claim.

E-mails continue to be reflected in cases on an ever-increasing basis, as more and more business is conducted using that form of communication. In *Cohen v Getzel*, 205 A.D.3d 532, 166 N.Y.S.3d 527 (1st Dep't. 2022), the plaintiff taxpayer sought damages against the defendant accountant for certain IRS tax penalties and interest, imposed as a result of errors on a 2016 tax return. Apparently, the net amount of the plaintiff's recoverable damages were credited to the plaintiff against fees that were otherwise owed to the defendant, as evidenced by an uncontested e-mail from the defendant to the plaintiff. The court accepted the e-mail as evidence in support of the defendant's motion to dismiss, on the ground that the plaintiff incurred no recoverable damages, finding it a "proper case" for evidentially allowing the uncontested e-mail. Presumably, the e-mail at issue was deemed to be authentic and disposed of the plaintiff's claim. Similarly, in *Ostojic v Life Medical Technologies, Inc*., 201 A.D.3d 522, 162 N.Y.S.3d 27 [1st Dep't. 2022]), where the issue was whether the parties had reached a meeting of the minds on a federal case settlement and whether there was a breach of that contract, the state court relied upon e-mails and letters sent by the parties to the federal court in concluding that the material terms of a settlement had been reached there. Observationally, the authenticity of the e-mails and letters was aided by the fact that they were generated in real-time and addressed to a court, were directly related to the subject matter, and were uncontested.

An e-mail, while authentic, was found to be inconclusive in *Vergara v Mission Capital Advisors, LLC*, 200

A.D.3d 484, 155 N.Y.S.3d 68 (1st Dep't. 2021). In *Vergara*, the parties disputed the amount of commissions that were owed by the defendant to the plaintiff. The defendant moved to dismiss the plaintiff's complaint, arguing in part that a prior e-mailed spreadsheet by the plaintiff conclusively established that no additional commissions were owed. The court was unpersuaded, as there was no evidence that the plaintiff's calculations in the particular e-mail and spreadsheet were accurate, or more accurate than the plaintiff's later calculations showing that higher commissions were owed. The same was true in *Whitestone Construction Corp. v F.J. Sciame Construction Co. Inc*., 194 A.D.3d 532, 149 N.Y.S.3d 21 (1st Dep't. 2021), where the contents of certain chain logs and e-mails did not reflect facts that were undeniable. In other words, while the e-mail was authentic, its content did not utterly refute the plaintiff's claim for damages.

C3211:11 Lack of Subject Matter Jurisdiction

Two of the various conditions for the state's waiver of sovereign immunity is that actions be commenced against the state only in the Court of Claims, and that a notice of claim be filed and served upon the attorney general's office within 90 days of certain claims' accrual (CCA 10). Under CCA 10(2), if a claim is sought to be made by a decedent's executor or administrator, the 90-day notice period runs from the date of the executor's or administrator's appointment. If no timely notice is filed as directed by the statute, the Court of Claims has no subject matter jurisdiction to entertain the action in the first instance (*Kolnacki v State of New York*, 8 N.Y.3d 277, 832 N.Y.S.3d 481, 864 N.E.2d 611 [2007]). The statutory requirements conditioning claims are strictly construed and applied (*Lichtenstein v State*, 93 N.Y.2d 911, 690 N.Y.S.2d 851, 712 N.E.2d 1218 [1999]; *Dreger v New York State Thruway Authority*, 81 N.Y.2d 721, 593 N.Y.S.2d 758, 609 N.E.2d 111 [1992]).

Philip v State of New York, 75 Misc.3d 1205(A), 166 N.Y.S.3d 838 (Ct. Cl. 2022) is among the many recent cases that addressed the effect of covid upon time-sensitive deadlines. The claimant, as an administrator, missed the 90-day notice deadline of CCA 10(2) measured from his appointment, but relied upon governor Andrew Cuomo's pandemic-related executive orders which collectively tolled time limitations by 228 days (Executive Order Nos. 202.8, 202.14, 202.28, 202.38, 202.48, 202.55, 202.55.1, 202.60, 202.67, 202.72, 202.79). The Court of Claims applied the toll in concluding that the notice required by CCA 10(2) was filed and served upon the state timely. The strict construction and application of CCA 10, and its importance to subject matter jurisdiction, yields to law that recognizes tolling.

C3211:14 "Other Action Pending"

When an action is subject to dismissal on the ground that there is a prior action pending between the parties (CPLR 3211[a][4]), the result of the dismissal motion in the second of the two actions is not necessarily just a binary choice between granting it or denying it.

Illustrating the foregoing point is the recent decision in *Zanani v Sutton Apartments Corporation*, 193 A.D.3d 536, 146 N.Y.S.3d 257 [1st Dep't. 2021]). The plaintiff owned shares and occupied space at a cooperative apartment. The defendant cooperative commenced a holdover proceeding in Housing Court, which was the first of the two actions involving the parties. The defendant obtained a judgment of possession in the Housing Court, which the plaintiff appealed to the Appellate Term. While the appeal was pending, the plaintiff commenced the second of the parties' two actions, this one in Supreme Court, New York County, for a declaratory judgment resolving how much money was owed to the defendant. On motion, the Supreme Court dismissed the declaratory judgment action on the ground that there was a prior action pending. However, after the pre-answer dismissal of the second action, the Appellate Term reversed the judgment of possession that had been awarded to the defendant by the Housing Court. On the separate appeal of the dismissal of the second action, the First Department held that since an appeal was pending at the Appellate Term when the CPLR 3211(a)(4) dismissal motion was made, the Supreme Court might have been better advised to stay the second action pending a

determination of the appeal before the Appellate Term, and then depending on the appellate result, decide the prior action pending motion accordingly. In the appeal of the second matter, the First Department exercised its discretion in noting that that the Housing Court action was no longer pending at any level, and in the exercise of its discretion, reversed the Supreme Court's order of dismissal and denied the motion to dismiss the declaratory judgment action.

Actions are still "pending" even when on appeal. How the court handling the second of two actions, when the first is on appeal, allows for some flexibility in terms of how to best handle the procedural posture of the cases. Indeed, the *Zanani* case illustrates the importance of the language in CPLR 3211(a)(4) that "the court need not dismiss on this ground but may make such order as justice requires," which provides for results other than merely granting or denying the motions.

C3211:18 Affirmative Defenses Available on Subdivision (a) Motion

One of the frequently-seen defenses underlying CPLR 3211 dismissal motions in litigation is that of collateral estoppel and *res judicata*. Collateral estoppel has a preclusive effect on the re-litigation of a singular, identical issue, decided in a prior proceeding. *Res judicata* precludes the re-litigation of the entirety of an identical claim, which is broader. The party asserting the collateral estoppel or *res judicata* defense has the burden of establishing the duplicative identity of the already-decided issue/claim. When that burden is met, the opposing party may avoid collateral estoppel or *res judicata* by meeting its own burden, that the party lacked a full and fair opportunity to be heard at the prior proceeding (*Matter of Dunn*, 24 N.Y.3d 699, 3 N.Y.S.3d 751, 27 N.E.3d 465 [2015]).

The related doctrines of collateral estoppel and *res judicata* are usually seen in connection with matters that may have been determined at prior state or federal court proceedings. But what of administrative determinations? Do these doctrines apply to administrative law determinations rendered after evidentiary proceedings, such as those seen from the worker's compensation board, state or county agencies, and administrative review panels, but without the imprimatur of courts of law? The answer, as is heard often enough in the legal profession, is that it depends.

Instructive is the recent case of *Lennon v 56th and Park (NY) Owner Corp., LLC*, 199 A.D.3d 64, 153 N.Y.S.3d 535 [2nd Dep't. 2021] [signed opinion by Dillon, J.]). The plaintiff in *Lennon* claimed that he sustained personal injuries at a worksite during the course of employment, when a hoist elevator on which he was riding with other workers allegedly made multiple sudden rises and drops. The plaintiff filed a worker's compensation claim for knee injuries, which resulted in the conduct of an evidentiary hearing before an administrative law judge ("ALJ"). At the hearing, the plaintiff could not recall the names of any other workers on the elevator at the time of the occurrence. The general superintendent of the scaffold contractor at the site testified that safety devices which were in place would have prevented the incident from occurring in the mechanical manner described by the plaintiff, and that any such incident would have prompted a shutdown and evaluation of the equipment which did not occur. A medical administrator investigated the date in question and concluded that nothing out of the ordinary had occurred. The plaintiff was represented at the worker's compensation hearing by counsel who cross-examined witnesses and made closing arguments. The ALJ concluded that the hoist elevator did not malfunction in the manner described by the plaintiff, and described the plaintiff's "claim to be, at best, an afterthought." The worker's compensation board reviewed and affirmed the ALJ's findings and conclusions, and the payment of worker's compensation benefits were denied.

The plaintiff in *Lennon* nevertheless commenced a personal injury action against various entities alleging common law negligence and violations of Labor Law sections 200, 240(1), and 241(6). One of the issues addressed by the Second Department was whether the findings and conclusions of the ALJ, as affirmed by the

worker's compensation board, operated as collateral estoppel against the plaintiff's personal injury and Labor Law claims, and particularly, whether the underlying accident had happened at all. The court examined a range of collateral estoppel cases and determined that factors unique to each action determine whether the result of a prior administrative proceeding qualifies for *collateral estoppel*. In some instances, a mere overlap of the subject matter of two proceedings does not mean that one collaterally estops the other, if the nature of the litigated conduct or their chronology differ between them (*e.g. Auqui v Seven Thirty One Ltd. Partnership*, 22 N.Y.3d 246, 980 N.Y.S.3d 345, 3 N.E.3d 682 [2013]; *Melendez v McCrowell*, 139 A.D.3d 1018, 32 N.Y.S.3d 604 [2nd Dep't. 2016]). After all, negligence actions may sometimes involve subject matter that is broader than that addressed at an administrative proceeding, and collateral estoppel should not apply in such instances. Yet, there are other actions where a prior factual finding or legal conclusion is so central, elemental, or pivotal to the core viability of the later action in court, that collateral estoppel should be applied (*Roserie v Alexander's Kings Plaza, LLC,* 171 A.D.3d 822, 97 N.Y.S.3d 174 [2nd Dep't. 2019]; *Emanuel v MMI Mech., Inc*., 131 A.D.3d 1002, 16 N.Y.S.3d 285 [2nd Dep't. 2015]). In *Lennon*, the finding of the ALJ that the plaintiff's accident did not occur, or did not occur as described, was fatal to the plaintiff's ability to establish the common law negligence and Labor Law claims which were asserted. In other words, without an injury-producing occurrence, the court need not reach the remaining issues of the case, warranting its dismissal.

Collateral estoppel and *res judicata* are affirmative defenses set forth in CPLR 3211(a)(5). Defenses in that subdivision are waived unless raised in a pre-answer motion to dismiss or as an affirmative defense in the defendant's answer (CPLR 3211[e]). Here, *Lennon* is further instructive regarding its discussion of leave to amend pleadings under CPLR 3025(b), which was successfully accomplished by the defendants, and which allowed the collateral estoppel defense to then be presented via summary judgment.

C3211:28 Lack of Personal Jurisdiction

Developments continue to unfold in New York and elsewhere as fallout from the U.S. Supreme Court's decision in *Daimler AG v Bauman*, 571 U.S. 117, 134 S.Ct. 746, 187 L.Ed.2d 624 (2014). In *Daimler,* the Supreme Court re-examined the topic of general jurisdiction in relation to corporate entities, as distinguished from specific jurisdiction seen in state longarm statutes, and narrowed the concept of general jurisdiction to only where the entity is "at home" within the state. The U.S. Supreme Court identified three circumstances where a corporation may be at home within a state. The first is the corporation's state of incorporation. The second is the state where the corporation maintains its principal office. The third, which is more amorphous than the first two, is the "truly exceptional case," where the entity's operations are so substantial and of such nature as to render the corporation at home in the state. The absence of personal jurisdiction over a corporate party, either by general jurisdiction or longarm jurisdiction, provides a basis for the dismissal of such actions under CPLR 3211(a)(8).

New York's general jurisdiction is set forth in CPLR 301. Longarm jurisdiction is as defined in CPLR 302 and its various subdivisions. CPLR 301 reads very simply, that "[a] court may exercise such jurisdiction over persons, property, or status as might have been exercised heretofore." The *Daimler* case affects CPLR 301 only, as it leaves untouched the various bases for longarm jurisdiction under CPLR 302(a). As predicted in prior Practice Commentaries and elsewhere, the significant effect of *Daimler* would generate a new wave of case law in state and federal courts around the nation, applying, interpreting, and developing its broader impact and meaning.

Among the questions created by *Daimler's* wake is whether a corporation's registration with a state Department of State for authority to do business, and the related designation of an agent for the receipt of service of process within the state, is a sufficient predicate for the assertion of general jurisdiction. The issue, in other words, is whether the registration and designation operates as a consent to the general jurisdiction of the state.

The hot case to watch in New York on this particular issue was *Aybar v Aybar*, 37 N.Y.3d 274, 156 N.Y.S.3d 504, 177 N.E.2d 1257 (2021), which was discussed at length in 2021 Supplemental Practice Commentary C3211:28. The Court of Appeals held by a 5-2 margin that a corporation's registration to do business in New York does not confer the state's general jurisdiction over the entity, and instead is a consent for the service of process only. The result of *Aybar* is that in New York, plaintiff attorneys have a more difficult time obtaining jurisdiction over out-of-state entities. The easy path of satisfying CPLR 301, by an entity's mere registration and designation of an agent for receiving service of process, is no longer available. Instead, plaintiffs must have another independent basis for the assertion of general jurisdiction under CPLR 301, or jump through the more complicated, costly, and uncertain hoops of longarm jurisdiction under CPLR 302(a).

Of course, law is not a two-dimensional concept consisting of courts only. Law is a three-dimensional concept that involves the whole of state government, meaning the legislature, the executive, and the courts. Attorneys disappointed by *Aybar* spoke with state legislators and found sympathetic ears in Albany. Both the New York State Assembly and Senate passed bills in 2021 to enact a new CPLR 301-a and BCL 1301(e), with concomitant amendments to related statutes (A7769, S7253). The proposed enactments provided that a foreign corporation's registration to do business within New York operated as a consent to the general jurisdiction of New York courts. The proposed legislation extended the consent-to-jurisdiction to foreign associations, foreign limited partnerships, and foreign limited liability partnerships as well. The proposed statute included a proviso that if the foreign entity were to withdraw its registration to do business in New York, the entity's consent to New York jurisdiction would likewise cease upon that event. Under the proposed enactments, foreign corporations registered to do business in New York would automatically be subject to the general jurisdiction of New York courts, thereby nullifying the contrary holding of the Court of Appeals in *Aybar.* The bill went to governor Kathy Hochul for signature. On December 31, 2021, governor Hochul vetoed the enactment of the proposed legislation, explaining in her veto message that in her opinion, the proposed legislation would discourage out-of-state corporations from coming to New York to do business here, because they would be more easily amenable to suits. *Aybar* therefore remains good law and the issue *might* now be quieted, at least for the time being.

In any event, these Practice Commentaries have been annually monitoring decisional developments on general jurisdiction in light of *Daimler*, and now also, *Aybar*. The law is developing on whether and under what circumstances general jurisdiction may be obtained when there is (or might be) an "alter ego" relationship between a corporate parent and a subsidiary, so as to reach a non-New York target defendant. In New York State procedure, CPLR 3102(c) permits a party to engage is pre-action discovery, by court order, if necessary to frame a complaint or, as relevant here, determine a jurisdictional basis for commencing an action against a defendant. There is no corresponding provision in the federal Rules of Civil Procedure. In *Lensky v Yollari*, 2021 WL 4311319 (S.D.N.Y. 2021), *app. pend. Lensky v Turkish Airlines* (2nd Cir. Case No. 21-2567), the plaintiffs commenced an action against defendants Turk Hava Yallari AO (THY) and Turkish Airlines (TA). THY is a state-sponsored Turkish airline and TA is its subsidiary with offices in New York City. THY filed a motion to dismiss the plaintiffs' amended complaint pursuant to Federal Rule 12(b)(2) on the ground that it was not subject to New York's general or specific jurisdiction. The plaintiffs sought to defeat the motion by alleging that TA, which was subject to jurisdiction, was merely an alter ego of THY, and sought to engage in jurisdictional discovery on that issue. However, the plaintiffs, who noted the fact-intensive nature of an alter ego inquiry, failed to define what evidence they would seek in order to establish jurisdiction, and on that basis, the amended complaint was dismissed as to THY. The lesson for practitioners, whether in pre-action discovery under CPLR 3102(c), or in framed-issue discovery in state litigations, or in jurisdictional discovery in federal courts, is to be as specific as possible in defining the nature and scope of discovery materials relevant to jurisdictional considerations during the earliest stage of litigation.

While much of the focus from *Daimler* has been on whether entities are subject to the general jurisdiction of a state, *Daimler* has impacted the discussion of general jurisdiction as to individuals as well. Prior to *Daimler*, individuals were subject to New York's general jurisdiction by being a domiciliary or mere resident of the state upon being served with process here. The First Department went so far as to apply CPLR 301 general jurisdiction to out-of-state individuals doing business in New York and extending that jurisdiction to other

causes arising outside of New York (*ABKCO Industries, Inc. v Lennon*, 52 A.D.2d 435, 384 N.Y.S.2d 781 [1st Dep't. 1976]). Daimler has changed that. Whereas *Daimler* defined corporations "at home" in a state by being incorporated or maintaining a principal office within the state, the concept for individuals most akin to that is the individual's domicile, rather than mere residency or other non-domicile contacts (*IMAX Corp. v The Essel Group*, 154 A.D.3d 464, 62 N.Y.S.3d 107 [1st Dep't. 2017]; *Magdalena v Lins*, 123 A.D.3d 600, 999 N.Y.S.2d 44 [1st Dep't. 2014]). An individual may only have one domicile. Absent being domiciled in New York, an individual's mere ownership of residential property in New York is insufficient for the establishment of general jurisdiction under CPLR 301 (*Chen v Guo Lu*, 144 A.D.3d 735, 41 N.Y.S.3d 517 [2nd Dep't. 2016]). In other words, for individuals, the test for being "at home" in New York is domicile rather than some other form of "presence." Moreover, for general jurisdiction over an individual in the course of business, it must be shown that the person's activities within New York were undertaken on an individualized basis rather than on behalf of a corporate entity (*IMAC Corp. v The Essel Group, supra*).

If a non-domiciliary is passing through New York and personally served with process under CPLR 308, as if "tagged" in the state, may CPLR 301 general jurisdiction be recognized? No, says the Supreme Court, Kings County, in *Ford v Bhatoe*, 58 Misc.3d 1201(A), 92 N.Y.S.3d 703 [Sup. Ct. Kings County 2017]).

Switching gears to a different jurisdictional issue, there is an appellate decision that reflects the interplay between CPLR 3211(a)(8) and General Business Law (GBL) 13. The latter statute provides that service of process may not be effected upon any individual on a Saturday, where the process server knows that the defendant observes that day of the week as a holy time. Our Jewish brothers and sisters are the primary beneficiaries of GBL 13, when postured as defendants in actions. In *Wells Fargo Bank, N.A. v Gross*, 202 A.D.3d 882, 162 N.Y.S.3d 444 (2nd Dep't. 2022), nail and mail service (CPLR 308[4]) was effected at the Orthodox Jewish defendants' residence on a Saturday, and the impropriety of service was raised as a defense in their answer. However, the motion to dismiss the action for improper service was not made until after the 60-day timeframe for contesting service measured from the answer and affirmative defense, as dictated by CPLR 3211(e). The defendants did not assert any undue hardship that prevented them from making a timely dismissal motion. The Second Department held that the failure of a timely motion, without an excusable hardship, required the denial of dismissal, on the ground of a waiver occasioned by the untimeliness of the motion. The defendants may have had a viable ground for dismissing the complaint on the ground of improper service, but failed to make their motion within the required timeframe. The CPLR can lead a horse to water, but can't make it drink. Practitioners must take the 60-day deadline for contesting service of process under CPLR 3211(a)(8) and CPLR 3211(e) seriously, absent the ability to argue and demonstrate an undue hardship in doing so.

C3211:37 Motion to Dismiss Defense May Lead to "Searching the Record"

CPLR 3211 dismissal motions are unlike motions for summary judgment under CPLR 3212. There are several differences between the two statutes, one of which is that on summary judgment a court may search the record, assess the sufficiency of the parties' evidence, and on that basis grant judgment in favor of one party or another. In contrast, the CPLR 3211 motion to dismiss merely examines the adequacy of the pleadings which are assumed true (CPLR 3212[b]; *Spearance v Snyder*, 73 Misc.3d 769, 156 N.Y.S.3d 809 [Sup. Ct. Onondaga County 2021], *citing Davis v Boeheim,* 24 N.Y.3d 262, 998 N.Y.S.2d 131, 22 N.E.3d 999 [2014]).

There is only one means by which a court may appropriately search the record upon a CPLR 3211 motion to dismiss. That is if a dismissal motion is converted into one for a summary judgment under the procedures set forth in CPLR 3211(c) (*Sitt v Sitt*, 200 A.D.3d 440, 154 N.Y.S.3d 768 [1st Dep't. 2021]). Once converted, searching the record in an appropriate instance becomes fair game. The circumstances and procedures for converting dismissal motions into summary judgment motions are discussed in Practice Commentary C3211:42 and its corresponding Supplemental Practice Commentaries.

C3211:42 Converting CPLR 3211 Motion Into One for Summary Judgment

CPLR 3212(a) spells out a general rule that a party may move for summary judgment in any action, but not until after issue has been joined. The provision of CPLR 3211(c) that courts may, upon adequate notice to the parties, treat a pre-answer dismissal motion as one for summary judgment, is therefore an exception to the general rule. Summary judgment determinations are not front-loaded in litigation except 1) when sought in lieu of a complaint under CPLR 3213, or 2) when a CPLR 3211 dismissal motion is treated upon notice as a motion for summary judgment.

There are three ways that a CPLR 3211 dismissal motion can properly be treated and decided as a motion for summary judgment. The first is when the parties jointly request that the motion be treated as one for summary judgment. The second is when the parties, through their conduct in prosecuting or defending the motion, lay bare their respective proofs as to deliberately chart a summary judgment course. The third is when the court gives adequate notice to the parties of its intention to treat the dismissal motion as a summary judgment motion, as authorized by CPLR 3211(c) (*Hendrickson v Philbor Motors, Inc*., 102 A.D.3d 251, 955 N.Y.S.2d 384 [2nd Dep't. 2012] [signed opinion by Dillon, J.]). In all such instances, the court has the final say as to whether the motion warrants summary judgment treatment. Absent one of those three described circumstances, the rule against premature summary judgment motions is adhered to strictly (*City of Rochester v Chiarella*, 65 N.Y.2d 92, 490 N.Y.S.2d 174, 479 N.E.2d 810 [1985]).

When a court chooses at its own initiative to treat a dismissal motion as one for summary judgment, the notice that courts are required to give to the parties presupposes that the motion papers have been read prior to or after the return date, with the parties offered an opportunity to thereafter make submissions or supplemental submissions addressing summary judgment standards and evidence. The transition of a motion from dismissal to summary judgment should not be handled by the court in a way that catches any party flat-footed. Due process and an opportunity for parties to be heard matters.

Whether a CPLR 3211 dismissal motion should be treated as a summary judgment motion is a determination that cannot be unilaterally forced upon a court and an adversary party by means of a premature summary judgment motion prior to the joinder of issue (*SHG Resources, LLC v SYTR Real Estate Holdings LLC*, 201 A.D.3d 610, 162 N.Y.S.3d 325 [1st Dep't. 2022]). If a summary judgment motion is made prior to the joinder of issue, without the parties stipulating to its treatment as summary judgment, and without the dismissal motion otherwise qualifying for summary judgment under CPLR 3211(c), it will be denied (*Id*.). The same is true if a defendant makes a pre-answer CPLR 3211 motion to dismiss and the defendant responds with a cross-motion for summary judgment. The cross-motion will be denied absent one of the exceptions qualifying it for summary judgment treatment (*New York Bus Operators Compensation Trust v American Home Assurance Co*., 71 Misc.3d 630, 144 N.Y.S.3d 820 (Sup. Ct. Suffolk County 2021).

C3211:43 Notice of the Conversion

While CPLR 3211(c) statutorily requires that courts provide the parties with notice if it intends to treat a dismissal motion as one for summary judgment, formal notice is excused by decisional authority if the dispositive issue is strictly a matter of law that is argued by the parties (*Mihlovan v Grozavu*, 72 N.Y.2d 506, 534 N.Y.S.2d 656, 531 N.E.2d 288 [1985]). Due process concerns are satisfied if the issue of law has already been addressed by the parties. That said, if there is no notice to the parties of the motion's conversion to summary judgment, and if the action does not involve purely legal issues that have been briefed, a conversion by the trial court is improper (*Balay v Manhattan 140 LLC*, 204 A.D.3d 491, 167 N.Y.S.3d 62 [1st Dep't. 2022]; *Davis v Augoustopoulos*, 198 A.D.3d 528, 156 N.Y.S.3d 168 [1st Dep't. 2021]).

C3211:51 Single-Motion Rule

If a defendant moves to dismiss a plaintiff's complaint, and the plaintiff thereafter amends the complaint to assert new factual allegations, is a motion to dismiss barred as to the amended complaint under the single motion rule? No. So says the Supreme Court, New York County, in *People v National Rifle Association*, 74 Misc.3d 998, 165 N.Y.S.3d 234 [Sup. Ct. New York County 2022]). There, the People of the State of New York, by its Attorney General, brought a suit against the NRA and various individual defendants, and certain of the named defendants including the NRA made motions to dismiss the causes of action on various grounds. The action was stayed by a bankruptcy filing of the NRA, which was ultimately dismissed by the federal bankruptcy court. Thereafter, the People amended the complaint to add 90 additional factual allegations detailing the defendants' wrongdoing that allegedly occurred during the 12 months since the commencement of the action, and certain defendants including the NRA then moved to dismiss causes of action reflected by the amended complaint. The Supreme Court mentioned, though in a footnote, that the single motion rule did not prohibit the defendants from filing a CPLR 3211 motion to dismiss as against the amended complaint, citing as authority *Barbarito v Zahavi*, 107 A.D.3d 416, 968 N.Y.S.2d 422 (1st Dep't. 2013). The result makes sense. If the single motion rule were to be interpreted as prohibiting defendants from seeking the dismissal of amended complaints, the defendants would be unable to ever challenge under CPLR 3211 new non-corresponding allegations of an amended complaint compared with the original complaint.

C3211:67 Motion Automatically Extends Responding Time

In the event a motion to dismiss is denied, the defendant's time to answer the plaintiff's surviving complaint is extended by 10 days after service of the court's order with notice of entry (CPLR 3211[f]). Therefore, no answer is due from the defendant while the motion is pending, plus the 10 days from the order's entry. The same is of course true in reverse, if a plaintiff makes a CPLR 3211 motion to dismiss the defendant's counterclaim and the motion is denied. Under that circumstance, the time for a Reply to the counterclaim is extended for 10 days, as set forth by CPLR 3211(f).

The Second Department addressed an unusual but significant issue in *DLJ Mtge. Capital, Inc. v Christie*, 202 A.D.3d 913, 162 N.Y.S.3d 464 [2nd Dep't. 2022]), involving the interplay between CPLR 3211(f) and CPLR 306-b. In *Christie*, the plaintiff sought summary judgment and an order of reference in a mortgage foreclosure action, on default. The defendants cross-moved under CPLR 3211(a)(8) for *inter alia* the dismissal of the plaintiff's complaint based on the failure of proper service of process. The court directed a *Traverse* hearing and, at its conclusion, granted the cross-motion by finding that process was not properly served, and therefore denied the plaintiff's motion for an order of reference. Within approximately a month, the plaintiff "re-served" process upon the defendants, and thereafter moved for leave to deem the re-service effective *nunc pro tunc*. The defendants not only opposed the motion, but cross-moved to dismiss the complaint pursuant to CPLR 3211(a)(5) and (a)(8) for untimeliness under the statute of limitations and lack of proper service of process. The court granted the CPLR 306-b motion and denied the defendants' cross-motion. Several months elapsed before the defendants served an answer, which the plaintiff treated as untimely. The court's order recognizing the re-service *nunc pro tunc* did not address the time within which the defendants were to serve an answer. However, CPLR 3211(f) says that upon denial of a CPLR 3211 dismissal motion, the defendants have 10 days within which to answer the complaint. Thus, the *nunc pro tunc* treatment of re-service did not place the defendants into an "automatic default," as CPLR 3211(f) provides such defendants with 10 days to serve an answer measured from the order's notice of entry. Observationally, because the defendants made a cross-motion to dismiss under CPLR 3211, they subjected themselves to the provision of CPLR 3211(f) that if their motion was denied, they would have 10 days in which to answer the plaintiff's complaint. The appeal was ultimately decided on other procedural issues unrelated to CPLR 3211(f), but the other issues do not detract from the court's analysis of the 10-day rule of CPLR 3211(f).

C3211:69 Easier Standard for Dismissing "SLAPP" Suit

Law regarding the Strategic Lawsuit Against Public Participation ("SLAPP") was fairly quiet from 1992 when it was enacted into CPLR 3211(g) (L.1992, ch. 767, sec. 4) until 2020, when it was amended (L.2020, ch. 250, sec. 3). SLAPP suits, as the reader knows, involve litigation commenced by property owners, real estate developers, and others seeking public approvals for projects. The suits are brought against members of the public who, through public participation, oppose the project. Causes of action are asserted under various theories such as defamation, prima facie tort, and tortious interference with contractual relations. The concern behind the law is that the suits are motivated to intimate the public from speaking out against proposed projects. CPLR 3211(g), and parallel provisions of CPLR 3212(h), were enacted to provide protections to members of the public from such suits. The 1992 law enabled defendants to move for the dismissal of the plaintiff's complaint, as well as cross-claims and counterclaims, by merely establishing that the claim qualifies as a SLAPP suit. The 1992 law provided that the dismissal "shall be granted" unless the party opposing the motion establishes that the cause(s) of action has (or have) a substantial basis in law, or is/are supported by a substantial argument for an extension, modification, or reversal of existing law. A primary significance of CPLR 3211(g) is that the statute, in effect, flips the burden of proof from the moving party to demonstrate a dispositive legal defense to an action, to the opposing party to demonstrate that the action has merit. The law accomplished it purpose of making it more difficult for plaintiffs to prosecute SLAPP suits beyond the pleading stage.

As noted in the Supplemental Practice Commentaries for 2021, the recent amendment to CPLR 3211(g), which became effective on November 10, 2020, divided SLAPP analysis into four subdivisions. The first subdivision retained the language from the earlier statute about the working and burdens of motions to dismiss, as described above (CPLR 3211[g][1]). The second requires that the pleadings be attached to the moving papers for examination by the court, along with supporting and opposing affidavits. What is "new" about this requirement is its direction that any factual determination by the court is not admissible later in the action or in a subsequent action, and has no effect upon the burden of proof required in the continuing or subsequent action. The third change of the 2020 amendment is the direction in CPLR 3211(g)(3) that while the dismissal motion is pending, all discovery, hearings, or other motions are stayed, pending a determination of the dismissal motion. If the court, upon reviewing the papers, determines that limited discovery is needed for properly deciding the dismissal motion, it may order specified discovery. The mechanism is akin to that which exists in CPLR 3212(d), where the court may order a continuance of a summary judgment motion pending targeted discovery for facts essential to justify opposition to the motion. Finally, the 2020 amendment added CPLR 3211(g)(4), which explains that the overall provisions of the statute apply to all forms of pleadings and all potential posturing of parties.

The 2020 amendments were accompanied by a parallel amendment to Civil Rights Law (CRL) 76-a, which defines SLAPP actions and the meaning of "public petition and participation." The amendment to CRL 76-a (L.2020, ch. 250, sec. 1) added language to include claims based upon "any communication in a place open to the public or a public forum in connection with an issue of public interest" (CRL 76-a[1][a][1]). That amendment has been described as "broaden[ing] the scope of the law and afford[ing] greater protections to citizens facing litigation arising from their public petition and participation" (*Marble Assets, LLC v Rachmanov*, 192 A.D.3d 998, 146 N.Y.S.3d 147 [2nd Dep't. 2021]). The amendatory language applying SLAPP to "any communication ... in a public forum" extends the statute beyond just property owners and developers, to a far wider range of law suits intended to intimidate or punish public comments.

These amendments have had an additional year to bake into the CPLR and for cases to address the amendatory language. A continuing issue is what conduct by the public constitutes matters of "public petition and participation" (CPLR 3211[g]; Civil Rights law 76-a). Clearly, the statute has been easily applied to suits commenced against members of the public by property owners and developers seeking municipal approvals for projects. But what about public commentary about more private matters? Some late breaking guidance on that

question is provided by *Aristocrat Plastic Surgery, P.C. v Silva*, 206 A.D.3d 26, 169 N.Y.S.3d 272 (1st Dep't. 2022). There, the defendant underwent a procedure from a plastic surgeon who practiced medicine through the plaintiff, a professional corporation. The defendant was dissatisfied with her results, and posted a negative review on two websites which provide public commentaries about various businesses. The plaintiff, believing it had been defamed, commenced an action against the defendant for defamation, intentional interference with prospective contractual relations, intentional infliction of emotional distress, and prima facie tort. The defendant moved to dismiss the action as a SLAPP suit, and also sought an award of damages under CRL 76-a and attorney's fees. The First Department was called upon to interpret the recent amendment to CRL 76-a, whereby SLAPP protections were extended to claims based upon "any communication in a place open to the public or a public forum in connection with an issue of public interest" (Civil Rights law 76-a[1][a][1]). The court held that the defendant's posts concerning the plastic surgery performed upon her qualified as an exercise of her constitutional right of free speech and a comment on a matter of legitimate public concern and public interest--that is, medical treatment rendered by a physician's professional corporation and the physician performing surgery under its auspices. In other words, even though the plastic surgery was performed as a private matter, the defendant's right to express her opinion about the plastic surgeon's quality was of sufficient public interest as to fall within the expanded language of SLAPP.

It remains to be seen how wide the barn door has been thrown open to law suits that may not arguably qualify for SLAPP protections. Predictably, this issue will receive attention in future supplemental practice commentaries.

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C3211:5 Grounds for Dismissal

A party moving for a CPLR 3211 dismissal may argue more than one ground in the papers, directed at the same cause or causes of action. Perhaps best illustrating the point is *Monaco v Van Meerendonk*, 190 A.D.3d 968, 136 N.Y.S.3d 790 (2nd Dep't. 2021). In *Monaco*, the plaintiff's cause of action for fraud was dismissed by the court because it was not adequately pleaded, *and* was time-barred under the applicable statute of limitations, *and* was precluded by the *res judicata* doctrine, *and* was barred by a prior settlement and release. In other words, the meat was turned over on the grill multiple times to assure that the result was well done. Different grounds also may be argued as to different causes of action.

C3211:8 *Sua Sponte* Dismissals

Our decisional law continues to be plagued with reported appellate cases where trial judges are reversed for dismissing complaints *sua sponte*, on grounds not raised by the defendant in the underlying CPLR 3211 moving papers. It is an ongoing, annual problem as the trial judges doing so are either refusing to get the precedential message, or are not listening to it. The problem continues to be centered in the Second Department and almost exclusively in the field of residential mortgage foreclosure actions. The Appellate Division has consistently and repeatedly held that the court's power to dismiss a complaint *sua sponte* is to be used sparingly, and only when extraordinary circumstances exist to warrant dismissal (*e.g. Deutsche Bank Natl. Trust Co. v Winslow*, 180 A.D.3d 1000, 120 N.Y.S.3d 81 [2nd Dep't. 2020]; *JP Morgan Chase Bank, N.A. v Laszlo*, 169 A.D.3d 885, 94 N.Y.S.3d 343 [2nd Dep't. 2019]; *OneWest Bank, FSB v Fernandez*, 112 A.D.3d 681, 976 N.Y.S.2d 405 [2nd Dep't. 2013]; *HSBC Bank USA, N.A. v Taher*, 104 A.D.3d 815, 962 N.Y.S.2d 301 [2nd Dep't. 2013]; *U.S. Bank, N.A. v Emmanuel*, 83 A.D.3d 1047, 921 N.Y.S.3d 320 [2nd Dep't. 2011]). There has been no equivocation of that rule on the part of the Appellate Division. Nor does the rule engender ambiguity. The reason that *sua sponte* dismissals should occur sparingly, and only where there are extraordinary circumstances for doing so, is that a *sua sponte* dismissal of a complaint deprives the plaintiff of basic due process to which that party is entitled-notice, and an opportunity to be heard. Courts should be the last forum where due process rights are violated, yet, for reasons unique to residential mortgage foreclosure actions, the violations repeat, then repeat

some more, and repeat again. The discussion of the subject in this section of the Practice Commentaries has become an annual event.

Examples of this practice during the year prior to this writing include as follows:

U.S. Bank N.A. v Salgado, 192 A.D.3d 1181, 141 N.Y.S.3d 337 (2nd Dep't. 2021) (*sua sponte* dismissal of compliant by Supreme Court, Queens County [Latin, J.] for plaintiff's violation of a status conference order, reversed on appeal).

Bank of N.Y. v Ramirez, 186 A.D.3d 1472, 131 N.Y.S.3d 104 (2nd Dep't. 2020) (*sua sponte* dismissal of a complaint by Supreme Court, Queens County [Grays, J.], and an order of the same court denying its vacatur [Velasquez, J.] relative to an order of reference, reversed in the absence of any extraordinary circumstances).

Lehman Bros. Bank v Hickson, 186 A.D.3d 1348, 129 N.Y.S.3d 2 (2nd Dep't. 2020) (order of the Supreme Court, Kings County [Baynes, J.] modified on appeal to delete therefrom the branch that *sua sponte* dismissed the plaintiff's complaint on a personal jurisdiction ground not raised by any party).

The established track record suggests that these *sua sponte* dismissals almost never survive appeal.

C3211:10 Defense Based on "Documentary Evidence"

Motions to dismiss on the basis of documentary evidence raise, by definition, two primary considerations for attorneys and courts. One consideration is what type of documents qualify under the statute. The second consideration is the legal standard that must be applied for determining whether qualifying documentary evidence warrants, or fails to warrant, the dismissal of all or part of a plaintiff's complaint. The same discussion applies to motions that may be interposed to dismiss counterclaims, third party complaints, cross-claims (CPLR 3211[a]), and affirmative defenses set forth in parties' answers (CPLR 3211[b]). For ease of reference, this discussion presumes that dismissal is sought of a plaintiff's complaint on the basis of documentary evidence.

The legal standard that courts must apply in determining motions under CPLR 3211(a)(1) is the easier of the two considerations, because the standard is straight-forward. For dismissal, the proffered documents must "utterly refute" the allegations in the plaintiff's complaint, "conclusively establishing a defense as a matter of law" (*Himmelstein, McConnell, Gribben, Donoghue & Joseph, LLP v Matthew Bender & Co., Inc.*, 34 N.Y.3d 908, 115 N.Y.S.3d 782, 139 N.E.3d 406 [2021]; *Shephard v Friedlander*, 195 A.D.3d 1191, 151 N.Y.S.3d 184 [3rd Dep't. 2021]; *Hart 230, Inc. v PennyMac Corp.*, 194 A.D.3d 789, 149 N.Y.S.3d 134 [2nd Dep't. 2021]). Note the extremism of the burden of proof-that the documentary evidence not only refute the allegations of the plaintiff's complaint, but "utterly" do so, and that defense not only be established as a matter of law, but that it "conclusively" do so. There is no room for daylight. Wiggle room is not countenanced. Close calls are not enough. Gray areas have no place within the ambit of CPLR 3211(a)(1). The document that is proffered must clearly say what it says and mean what it means. Courts will not grant motions brought under CPLR 3211(a)(1) on account of documentary evidence, and dismiss a plaintiff's complaint in lieu of an answer, unless the basis for doing so is clear, unambiguous, and absolute.

Which brings the discussion to the *type* of documents that may qualify under the statute. Many documents do not qualify for CPLR 3211(a)(1) consideration. Others, of course, do.

E-mails continue to be an evolving area of law where some qualify as CPLR 3211(a)(1) documentary evidence, and some do not. As a general rule, letters, e-mails, and affidavits prepared for the CPLR 3211 motion are not documentary evidence contemplated by the statute (*Shah v Mitra*, 171 A.D.3d 971, 98 N.Y.S.3d 197 [2nd Dep't. 2019]). Those forms of material are too easily manipulated for the purpose that the moving party seeks to achieve. The standard that appears to be evolving is that for e-mails to be treated as documentary evidence under CPLR 3211(a)(1), their content must be "essentially undeniable" and quintessentially authentic at the time of their creation. (*Id.*) If the content does not undeniably refute the plaintiff's contentions, it will not suffice for the dismissal of the plaintiff's complaint (*Whitestone Constr. Corp. v F.J. Sciame Constr. Co., Inc.*, 194 A.D.3d 532, 149 N.Y.S.3d 21 [1st Dep't. 2021]).

Facebook postings are even more problematic for defendants moving for CPLR 3211(a)(1) dismissals. Unlike e-mails, which are business-like, Facebook postings are almost-exclusively social. In *W & G Wines LLC v Golden Chariot Holdings LLC*, 46 Misc.3d 1202(A), 7 N.Y.S.3d 245 (Sup. Ct. Kings County 2014), the court held that printouts of the plaintiff's Facebook postings were subject to interpretations, and their reliability had not been established.

C3211:11 Lack of Subject Matter Jurisdiction

Motions to dismiss for a court's lack of subject matter jurisdiction is recognized in CPLR 3211(a)(2).

Subject matter jurisdiction has been described as the power of the court to adjudge a general question involved in a matter, and is not dependent on the facts that may appear in a particular case arising, or claimed to have arisen, under the general question (*Thrasher v United States Liab. Ins. Co.*, 19 N.Y.2d 159, 278 N.Y.S.2d 793, 225 N.E.2d 503 [1967]; *21st Century Pharmacy v American Intl. Group*, 195 A.D.3d 776, 145 N.Y.S. 3d 810 [2nd Dep't. 2021]). Even for courts of general jurisdiction, such as the state Supreme Court, there are forms of disputes that cannot be heard where subject matter jurisdiction is lacking. An example of matters that the Supreme Court cannot hear are those where the State of New York is sued and which may only be heard in the Court of Claims. Another example are matters that are within the exclusive province of the federal courts, such as bankruptcy, suits against the United States, and federal tax matters. Also, state courts lack subject matter jurisdiction over issues that have been legislatively preempted by federal law (*Klingsberg v Council of School Supervisors and Administrators--Local 1*, 181 A.D.3d 949, 122 N.Y.S.3d 335 [2nd Dep't. 2020] [preemption of the parties' dispute by the Federal Labor Management Relations Act]). The "lower courts" in New York State at the village, town, city, county, and district level have no subject matter jurisdiction to hear matters that exceed the authorized monetary limits of those respective courts. Specialized courts, such as Family Courts and Surrogate Courts, also lack subject jurisdiction to hear matters outside of their defined ambits.

Subject matter jurisdiction must inherently exist with a court for it to hear and resolve a matter on the merits. Parties may not confer subject matter jurisdiction upon a court that otherwise lacks it, not by consent or otherwise (*Matter of Metropolitan Transp. Auth.*, 32 A.D.3d 943, 823 N.Y.S.3d 88 [2nd Dep't. 2006]). Relatedly, the absence of a court's subject matter jurisdiction is a defense that is not waived by a party's failure to raise it at any particular time in a litigation, as it may instead be raised at any time (*Financial Indus. Regulatory Auth., Inc. v Fiero*, 10 N.Y.3d 12, 853 N.Y.S.2d 267, 882 N.E.2d 879 [2008]). Indeed, the issue is one area that may be raised by the court at its own initiative, *sua sponte* (*Id.*), since it is so fundamental. The lack of subject matter jurisdiction is understandably not listed as among the various defenses of CPLR 3211(e) that are waived if not raised as an affirmative defense or in a pre-answer motion to dismiss. If a court determines that it does not have the jurisdiction to hear the subject matter of an action, the action must be dismissed. Period, end of story. If a court renders a judgment in a matter where subject matter jurisdiction was lacking, the judgment is void as a matter of law (*Manhattan Telecom. Corp. v H & A Locksmith, Inc.*, 21 N.Y.3d 200, 969 N.Y.S.2d 424, 991 N.E.2d 198 [2013]; *Caffrey v North Arrow Abstract & Settlement Servs., Inc.*, 160 A.D.3d 121, 73 N.Y.S.3d

70 [2nd Dep't. 2018]).

In actions against the State of New York, a claimant must file a claim within 90 days from the accrual of a cause of action (CCA 10, 11), akin to notices of claims that must be served upon other municipal entities under General Municipal Law 50-e and 50-i. The failure of a claimant to satisfy that aspect of the Court of Claims Act divests the Court of Claims of subject matter jurisdiction to hear the action (*Criscuola v State of New York*, 188 A.D.3d 645, 134 N.Y.S.3d 67 [2nd Dep't. 2020]). Likewise, Court of Claims Act 11(b) requires that claims against the state be verified in the same manner as a complaint in the Supreme Court. The absence of a proper verification on claims against the state is a jurisdictional defect that divests the Court of Claims of subject matter jurisdiction over the matter (*Flowers v State of New York*, 175 A.D.3d 1724, 109 N.Y.S.3d 508 [3rd Dep't. 2019]).

Religious disputes sometimes spill into the state court system. Some are justiciable, some are not. Courts lack subject matter jurisdiction over issues that involve the interpretation of religious doctrine or which involve particular doctrinal beliefs (*Matter of Congregation Yetev Lev D'Satmar, Inc. v Kahana*, 9 N.Y.3d 282, 849 N.Y.S.3d 463, 879 N.E.2d 1282 [2007]; *Russian Orthodox Convent Novo-Diveevo, Inc. v Sukharevskaya*, 166 A.D.3d 1036, 91 N.Y.S.3d 101 [2nd Dep't. 2018]). The reason is that the state courts must avoid becoming entangled in essentially religious controversies or intervening on behalf of groups espousing particular doctrines or beliefs. Conversely, courts possess subject matter jurisdiction over parties who happen to be involved in religious organizations or controversies, where the dispute is capable of resolution by the application of neutral principles of law without reference to religious principles (*Id. See also Jones v Wolf*, 443 U.S. 595, 99 S.Ct. 3020, 61 L.Ed.2d 775 [1979]). When the issue is raised, courts must part the Red Sea, so to speak, between deciding issues that can be resolved by application of neutral civil law, versus those that are so intertwined with religious doctrines or principles that subject matter jurisdiction is lacking.

In *Laguerre v Maurice*, 192 A.D.3d 44, 138 N.Y.S.3d 123 (2nd Dep't. 2020), the plaintiff sued the defendant for defamation, and the defendant moved to dismiss the action under CPLR 3211(a)(2) for lack of subject matter jurisdiction. The defendant argued that the alleged statement--that the plaintiff was a homosexual who viewed gay pornography from a church computer, was intertwined with religious doctrine, and therefore, not justiciable in a civil court. The Supreme Court and the Second Department disagreed, finding that the statement's defamatory content, if any, could be resolved without reference to religious principles, doctrines, or practices. Thus, disputes that happen to involve religious persons or organizations, such as not only defamation, but the interpretation of by-laws or the enforcement of contracts, are within the subject matter of the courts. Disputes that are inextricably intertwined with religious doctrine, or which go to the judgment and discretion of church elders, are not.

Attorneys commencing litigations should therefore be careful of subject matter jurisdiction, as it must be a difficult conversation to later explain to a client why the action was brought in the wrong court.

C3211:14 "Other Action Pending," Generally

While CPLR 3211(a)(4) vests the court with authority to dismiss an action if there is already another action pending between the same parties for the same cause of action, a dismissal of the second action is never mandatory. The statute qualifies the authority of the court, that it "need not dismiss upon this ground but may make such order as justice requires." In other words, the trial court has discretion to fashion a remedy that best suits the circumstances of the parties and the case.

An example of the statute's flexibility was recently seen in *U.S. Bank N.A. v Karnaby*, 190 A.D.3d 1005, 136

N.Y.S.3d 886 (2nd Dep't. 2021). The plaintiff commenced two actions against the same defendant, the first in 2010 and the second at a later time. The defendant moved to dismiss the second of the two actions. The 2010 action was in the process of being discontinued, and was in fact discontinued while the motion to dismiss was pending in the second action. The Supreme Court's denial of the dismissal motion was affirmed on appeal. Yes, the two actions overlapped in terms of the parties, the subject matter of the litigation, and time. But as a practical matter, there was no need for the court to dismiss the second action under CPLR 3211(a)(4) if the first action was in the process of being discontinued while the dismissal motion was pending and was in fact discontinued by the time the motion was decided.

The circumstances addressed by CPLR 3211(a)(4) may be a little more compelling in the context of two duplicitous residential mortgage foreclosure litigations. The reason is that under RPAPL 1301(3), an action to recover upon a mortgaged debt prohibits the commencement of a second such action. The purpose of the statute is to protect the mortgagor of the expense and annoyance of two separate actions at the same time with reference to the same debt (*Central Trust Co. v Dann*, 85 N.Y.2d 767, 628 N.Y.S.2d 259, 651 N.E.2d 1278 [1995]; *U.S. Bank v Stern*, 189 A.D.3d 1313, 134 N.Y.S.3d 272 [2nd Dep't. 2020]). The statute allows an exception, that a second action may be commenced if permission is obtained from the court where the first action is already pending. In *21st Mtge. Corp. v Ahmed*, 173 A.D.3d 951, 105 N.Y.S.3d 467 (2nd Dep't. 2019), the plaintiff commenced two actions against the same defendant homeowner over the same debt, one in 2007 and one in 2015. Leave of court was not sought prior to the commencement of the second action. A stipulation discontinuing the 2007 action had been executed but had not been filed prior to the commencement of the 2015 action. The stipulation of discontinuance was filed after the commencement of the 2015 action but before the defendant in that action moved to dismiss it on the ground of prior action pending. The court denied dismissal of the 2015 action, noting that while under the circumstances leave of court should have been sought and obtained before the commencement of the second action, there was no prejudice to the defendant and no substantive violation of RPAPL 1301(3).

Indeed, dismissal of the second action need not be ordered even where the first action has not been discontinued or been in the process of a discontinuance. In *Bank of N.Y. Mellon v Porfert*, 187 A.D.3d 1110, 134 N.Y.S.3d 57 (2nd Dep't. 2020), two duplicative foreclosure actions were commenced against the same defendant in 2006 and 2014, respectively. There was no activity in the 2006 action since its commencement. The Second Department, in affirming the Supreme Court, held that judicial discretion permitted the denial of the defendant's motion to dismiss the second action under CPLR 3211(a)(4), presumably because of the moribund nature of the earlier of the two actions.

By contrast, where the prior action is not discontinued or in the process of discontinuing, and is not otherwise moribund as in *Porfert*, the dismissal of the second action is warranted (*HSBC Bank USA, N.A. v Pena*, 187 A.D.3d 724, 130 N.Y.S.3d 354 [2nd Dep't. 2020]).

In comparing two actions under CPLR 3211(a)(4), it is not necessary that the precise legal theories presented in the first action also be presented in the second, as long as the *relief* is the same or substantially the same (*Board of Mgrs. of the 1835 E. 14th St. Condominium v Singer*, 186 A.D.3d 1477, 132 N.Y.S.3d 25 [2nd Dep't. 2020]).

C3211:18 Affirmative Defenses Available on Subdivision (a) Motion

CPLR 3211(a)(5) is a grab bag of different forms of affirmative defenses that have been batched together in a single subdivision of the statute. Each has its own elements which, when established by a moving defendant, may result in the dismissal of the plaintiffs' complaints.

CPLR 3211 may be used against not only complaints, but also cross-claims, counterclaims, and third party complaints. Relatedly, CPLR 3211(b) permits a plaintiff to move for the dismissal of one or more defenses, on the ground that the stated defense has no merit. Therefore, while CPLR 3211 is typically seen in the context of dismissal motions made against plaintiffs' complaints, the applicability of the statute is actually broader. A recent example of a motion by a defendant to dismiss the cross-claims of a co-defendant is *Jaber v Elayyan*, 191 A.D.3d 964, 142 N.Y.S.3d 601 (2nd Dep't. 2021).

Arbitration and Award

The CPLR 3211(a)(5) defense of arbitration and award is easily applied when the same dispute between the parties has already been *resolved* by an earlier arbitration, and where the arbitration has been or is subject to confirmation by the courts under CPLR Article 75. However, if an action is commenced before an agreed-upon arbitration has begun or concluded, the circumstances are more murky. A signed opinion by Justice Linda Christopher, *Wilson v PBM, LLC*, 193 A.D.3d 22, 140 N.Y.S.3d 276 (2nd Dep't. 2021), addressed the issue. She and the Second Department noted that a mere *agreement to arbitrate* a dispute is not a CPLR 3211(a)(5) defense to an action and may therefore not provide a basis for a motion to dismiss (*citing Allied Bldg. Inspectors Intl. Union of Operating Engrs., Local Union No. 211, AFL-CIO v Office of Labor Relations of City of N.Y.*, 45 N.Y.2d 735, 408 N.Y.S.2d 476, 380 N.E.2d 303 [1978]). In *Wilson*, the Supreme Court had granted a motion to compel arbitration, and under those circumstances, the Second Department held that rather than dismiss the plaintiff's complaint, the action should instead have been stayed pending the arbitration. *See also Matter of County of Nassau v Detectives Assn., Inc. of Police Dept. of Nassau County*, 188 A.D.3d 1049, 137 N.Y.S.3d 77 (2nd Dep't. 2021).

Collateral Estoppel

Prior Practice Commentaries have focused largely on the circumstances where summary judgment determinations either do or do not have *collateral estoppel* effect on later actions. The same is true for the related topic of *res judicata*, which is also ground for the dismissal of actions under CPLR 3211(a)(5).

A recent decision, *Matter of BZ Chiropractic, P.C. v Allstate Ins. Co.*, 197 A.D.3d 144, 154 N.Y.S.3d 46 [2nd Dep't. 2021]) [signed opinion by Dillon, J.]), addressed whether a court's advisory opinion--which is very rare and to be typically avoided by the courts--is subject to either doctrine. In *BZ Chiropractic*, the Appellate Term for the 2nd, 11th and 13th Judicial Districts addressed an issue of whether certain interest should have been tolled on an insurance-related judgment, and if so, whether a satisfaction should have been entered on the judgment. The Appellate Term determined that no toll of interest was indicated, but then gratuitously stated that the non-tolled interest be computed at the 9% rate of CPLR 5004 rather than at the more specific 2% per month compounded rate of Insurance Law 5106(a). In determining a later motion brought to clarify its holding, the Appellate Term described its language about the *rate* of interest as "advisory" only and not on the merits. An aggrieved party commenced a hybrid turnover proceeding/declaratory judgment action related to the same dispute for various forms of relief, including a declaration that it was entitled to the higher rate of interest on the judgment as authorized by Insurance Law 5106(a). At issue in the Supreme Court, and on appeal, was whether the Appellate Term's advisory language that the parties' judgment was subject to 9% interest under CPLR 5004 collaterally estopped the plaintiff/petitioner from arguing the same issue anew at the Supreme Court on the merits. The Second Department held that the Appellate Term's advisory opinion, and for that matter dicta from the courts, are by nature not determinations of contested issues rendered on the merits after a full and fair opportunity to be heard. Therefore, when an advisory opinion is rendered, however rare, the doctrine of collateral estoppel does not bar consideration of the same issue on the merits in a later court proceeding. Further, the Second Department held that since Insurance Law 5106(a) was the more specific interest statute applicable to the dispute, it trumped the general provision of CPLR 5004, and required that the interest be computed at the higher rate of 2% per month, compounded.

C3211:28 Lack of Personal Jurisdiction

The law nationally and in New York continues to mold itself around the U.S. Supreme Court's groundbreaking opinion in *Daimler AG v Bauman*, 571 U.S. 117, 134 S. Ct. 746, 187 L.Ed.2d 624 (2014). In *Daimler*, general jurisdiction over corporate entities has been narrowly defined to entities "at home" in a state, meaning 1) the state of the entity's incorporation, or 2) the state where the entity maintains its principal place of business, or 3) in truly exceptional cases, where the entity's operations are so substantial and of such nature as to render the corporation at home in the state. New York's general jurisdiction statute is CPLR 301. The absence of personal jurisdiction over a party, including a corporate entity not subject to New York's general or longarm jurisdiction, is a basis for the dismissal of an action under CPLR 3211(a)(8).

The First Department adhered to *Daimler* in its holding rendered in *Okoroafor v Emirates Airlines*, 195 A.D.3d 540, 145 N.Y.S.3d 807 (1st Dep't. 2021). There, the defendant, Emirates Airlines, was headquartered and maintained its principal office in Dubai, UAE. It also maintained an office in New York County, but that office was not the airline's "principal" one. On that basis, the First Department held that the defendant was not amenable to the general jurisdiction of New York State and dismissed the plaintiff's complaint.

The Second Department saw its own share of the action on general jurisdiction in *Aybar v Aybar,* 169 A.D.3d 137, 93 N.Y.S.3d 159 (2nd Dep't. 2019) (signed opinion by Braithwaite-Nelson, J.), which has been followed with interest and discussed in the 2019 and 2020 CPLR Practice Commentaries, C3211:28. The Second Department held in *Aybar* that a corporation's mere registration with the Secretary of State designating it as an agent for the service of process, in connection with obtaining authority to do business within the state, does not constitute consent to the general jurisdiction of New York under CPLR 301, as it is instead a mere convenience to be used for service when jurisdiction may already independently exist.

The *Aybar* case has been closely followed because leave to appeal was granted by the Court of Appeals, which then put its own imprint on the issue in a 5-2 determination rendered on October 7, 2021 (*Aybar v Aybar*, ___ N.Y.3d ___, ___ N.Y.S.3d ___, ___ N.E.3d ___, 2021 WL 4596367, 2021 N.Y. Slip Op. 05393) (Singas, J.). The majority of the Court of Appeals affirmed what had been found by the Second Department; namely, that a foreign corporation's compliance with the relevant statutory provisions for registering with the Secretary of State for authority to do business in New York, and the concomitant designation of the Secretary of State as an agent of the corporation for the service of process, is consent to service of process *only*. It does not establish New York's general jurisdiction over the foreign corporation in and of itself. Interestingly, the Court of Appeals specifically based its conclusion on an analysis of New York precedents, without reaching whether any consent to general jurisdiction by registration would comport with federal due process under *Daimler*. Yet, it appears that the conclusion of the Court of Appeals in *Aybar* is consistent with *Daimler's* directive that that general jurisdiction is cognizable only where a corporate entity is "at home" in a state, defined as being incorporated in the state or maintaining its principal place of business there, or there being other truly exceptional and rare circumstances that do not appear applicable here. Thus, for New York, the issue is now put to rest, that a corporation's registration to do business in New York, standing alone, is not enough to trigger general jurisdiction under CPLR 301. Practitioners seeking to commence actions in New York against foreign corporations with principal offices elsewhere must therefore look away from the ease and convenience of CPLR 301, were it applicable, and instead look to the more complicated longarm provisions of CPLR 302 for obtaining jurisdiction over the entity. CPLR 301 will still remain available for the assertion of general jurisdiction for entities incorporated in New York or which maintain their principal place of business in New York.

General jurisdiction based upon *Daimler's* third jurisdictional prong, that a corporate entity's operations be so substantial in a state as to represent an exceptional circumstance basis for recognizing general jurisdiction, was

found to be lacking in *Lowy v Chalkable, LLC*, 186 A.D.3d 590, 129 N.Y.S.3d 517 (2nd Dep't. 2020).

Daimler left unanswered the question of whether, under an "alter ego test," a parent corporation may be subject to the general jurisdiction of a state based upon the conduct of its subsidiary entity. Cases still remain elusive on this issue. Cases which have come close to addressing this issue have found that the quantum of proof for finding dominion and control by the principal over the subsidiary was lacking, and that the secondary issue of whether an "alter ego" relationship was sufficient to impute general jurisdiction to the principal, if at all, did not then need to be reached (*e.g. Branson v Alliance Coal, LLC*, No. 4:19-CV-00155-JHM, 2021 WL 1031002 [W.D. Kent. Mar. 17, 2020] [but also permitting some discovery on the issue]; *Zia Agricultural Consulting, LLC v Tyson Foods, Inc.*, No. 1:20-CV-445-KWR-JHR, 2021 WL 245686 [D. N.M. Jan. 25, 2021]; *Rivera v Invitation Homes, Inc.*, No. 18-cv-03158-JSW, 2020 WL 8910882 [N.D. Cal. Oct. 29, 2020]). We should expect that the federal courts, where so many cases are based upon the diversity of the parties' citizenship, will be the forums most likely to encounter and address these still-unresolved issues.

General jurisdiction under CPLR 301 should not be confused with longarm jurisdiction under CPLR 302(a)(1) through (4). A defendant not amenable to the general jurisdiction of New York under CPLR 301 may still be independently subject to New York jurisdiction under the longarm statute of CPLR 302.

C3211:29 Jurisdictional Basis Depending on Complaint

There are varied bases for the assertion of longarm jurisdiction over non-domiciliary defendants under CPLR 302, each dependent upon the nature of the defendant's contacts with New York State, or with the defendant, or with the tort or contract at issue in the plaintiff's complaint, or with real property that is the subject of an action.

Subdivision (a)(1) speaks to defendants who transact business in New York State, or who contract anywhere to supply goods or services to New York. Longarm jurisdiction under this subdivision may exist for cases sounding in either tort or contract, but at a minimum must involve the provision of goods within the state. The "transaction" of business in New York refers to a purposeful activity here, even if irregular, where the defendant avails itself of the privileges and protections of New York law. The CPLR 302(a)(1) jurisdictional inquiry is twofold: under the first prong, the defendant must have conducted sufficient activities to have transacted business in the state, and under the second prong, the claims must arise from the transactions (*Skutnik v Messina*, 178 A.D.3d 744, 113 N.Y.S.3d 195 [2nd Dep't. 2019]). "Purposeful activities" are those with which a defendant, through volitional acts, avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws (*Fischbarg v Doucet*, 9 N.Y.3d 375, 849 N.Y.S.2d 501, 880 N.E.2d 22 [2007]). The requirement of purposeful activities is not met by a single phone call to New York requesting the shipment of goods (*Parke-Bernet Galleries v Franklyn*, 26 N.Y.2d 13, 308 N.Y.S.2d 337, 256 N.E.2d 506 [1970], *citing M. Katz & Son Billiard Prods. Inc. v Correale & Sons*, 20 N.Y.2d 903, 285 N.Y.S.2d 871, 232 N.E.2d 864 [1967]), the transitory presence of a corporate official in New York (*McKee Elec. Co. v Rauland-Borg Corp.*, 20 N.Y.2d 377, 283 N.Y.S.2d 34, 229 N.E.2d 604 [1967]), or communications from an out-of-state physician serving as a consultant to a New York physician (*Etra v. Matta*, 61 N.Y.2d 455, 474 N.Y.S.2d 687, 463 N.E.2d 3 [1984]). The nature and quality of the contacts are what are important for determining whether a defendant's activities are sufficiently purposeful with New York as to amount to the transaction of business within the state. The defendant need not personally ever be in New York, as the inquiry is whether the defendant's *activities* related to New York were purposeful and there is a substantial relationship between the transaction and the cause of action asserted by the plaintiff (*Paterno v Laser Spine Inst.*, 24 N.Y.3d 370, 998 N.Y.S.2d 720, 23 N.E.2d 988 [2014]; *Glazer v Socata, S.A.S.*, 170 A.D.3d 1685, 96 N.Y.S.3d 791 [4th Dep't. 2019]; *Robert M. Schneider, M.D., P.C. v Licciardi*, 65 Misc.3d 254, 108 N.Y.S.3d 720 [Sup. Ct. Greene County 2019]).

Subdivision (a)(2) speaks to defendants who allegedly commit a tort within New York, except for defamation. The tortious conduct may be negligent or intentional. This general longarm basis makes sense. If an out-of-state defendant commits a civil battery at a tavern within New York and, in so doing, injures a New York plaintiff during the altercation, New York has an obvious interest in exercising jurisdiction over the parties and the related cause of action. The same can be said of out-of-state defendants who may engage in other forms of tortious conduct within the state borders of New York. For this longarm subdivision to apply, the defendant must be physically within the state of New York at the time the tort is committed (*Feathers v McLucas*, 15 N.Y.2d 443, 261 N.Y.S.2d 8, 209 N.E.2d 68 [1965]). CPLR 302(a)(2) looks to the non-domiciliary defendant's *conduct* that is physically within the state as its basis for jurisdiction, as distinguished from conduct elsewhere that may merely have a residual *effect* in New York.

Subdivision (a)(3) was added to the statute in 1966, after the original version of the 1962 statute had been enacted, to extend longarm jurisdiction to out-of-state defendants who commit torts outside of the state and where the resultant injury is caused to persons or property within the state, except for defamation. The reason for the addition of this subdivision was to close a perceived loophole in the law. The original 1962 version of the longarm statute did not contain any specific provision applicable to strict products' liability claims where a product is defectively designed, manufactured, or sold from outside of New York, and where the effect of the product defect causes injury within New York. The Court of Appeals held so in *Feathers* that non-residents could not be subjected to New York jurisdiction for tortious conduct committed out-of-state under the then-existing language of CPLR 302. *Feathers* involved a Florida defendant that negligently loaded propane gas for delivery in Vermont, which ignited in New York while en route to the beautiful Green Mountains. The state legislature responded to *Feathers* in 1966 by adding CPLR 302(a)(3) to the statutory scheme, expressly and logically extending the longarm concept to out-of-state defendants whose out-of-state conduct causes harm within New York.

CPLR 302(a)(3) contains qualifiers, however. For longarm to apply, even where the foregoing factual underpinnings are in place, the out-of-state defendant must also regularly do or solicit business in New York, or engage in any other persistent course of conduct in New York, or derive substantial revenue from interstate or international commerce, *or* expects or reasonably should expect its acts to have consequences in New York while also deriving substantial revenue from interstate or international commerce. For persons trained in the law, CPLR 302(a)(3) is a veritable gold mine of debatable legal nomenclature which uniquely impacts the cases from one to the next-the meaning of words like "regularly," "solicits," "persistent," "substantial," and "expects consequences." Each is briefly discussed below:

Does or Solicits Business: While the "transaction" of business under CPLR 302(a)(1) involves a defendant availing itself of the benefits and protections of New York law, regularly "doing business" or "soliciting business" under the language of CPLR 302[a][3][i]) is broader. It connotes a non-domiciliary defendant's presence in New York that is not merely casual or occasional, but which represents a fair measure of permanence and continuity here (*AirTran, N.Y., LLC v Midwest Air Group, Inc.*, 46 A.D.3d 208, 844 N.Y.S.2d 233 [1st Dep't. 2007]). An entity doing business in New York can be sued in the state, whether the subject of the lawsuit relates to a particular aspect of the business or not.

Persistent Course of Conduct: Persistence regards the ongoing nature of the defendant's activities in New York. A long-term lease in New York, or a series of business transactions within the state, may qualify under CPLR 302(a)(1)(i) (*Williams v Beemiller Inc.*, 33 N.Y.3d 523, 106 N.Y.S.3d 237, 130 N.E.3d 833 [2019] [Feinman, J., concurrence]).

Derives Substantial Revenue: The concept of deriving "substantial" revenue from New York is a relative term based upon the uniqueness of each individual defendant. A large national corporation might derive only a small percentage of its sales from New York, but because of the entity's "bigness," even a small percentage of overall

revenue amounts to a substantial sum of money. Conversely, a small non-domiciliary company, with limited revenue, may derive a substantial percentage of its revenue from New York and thereby be found to derive substantial revenue from the state (*Id.*). The examination of "substantial revenue" under CPLR 302(a)(3)(ii) is therefore not only *sui generis*, but also, both quantitative and qualitative in nature.

The Expectation of Consequences. The statutory prong of CPLR 302(a)(3)(ii) that the defendant may alternatively be subject to longarm jurisdiction when it expects or should reasonably expect its act to have consequences in New York, speaks to foreseeability. The defendant need not foresee the specific injury-producing event in New York. Instead, the statute speaks to foreseeability in a more general sense, such as that the out-of-state manufacture or sale of a product which turns out to be defective would be used in New York and cause injury there (*Darrow v Hetronic Deutschland*, 119 A.D.3d 1142, 990 N.Y.S.2d 150 [3rd Dep't. 2014]).

CPLR 302(a)(4) is a straight-forward basis for longarm jurisdiction, and not one that generates much decisional law. It establishes longarm jurisdiction against non-domiciliary defendants who own, use, or possess real property situated within the state of New York. The lawsuit, incidentally, must relate to that same property within New York (*Zeidan v Scott's Dev. Co.*, 173 A.D.3d 1639, 103 N.Y.S.3d 707 [4th Dep't. 2019]).

Different longarm prongs may overlap with others. Conceivably, a defendant may be subject to more than one basis of longarm at the same time. The plaintiff need only have one such basis to obtain a jurisdictional predicate against the out-of-state defendant. Put another way, a plaintiff seeking to defeat a CPLR 3211(a)(8) motion to dismiss, based on the lack of personal jurisdiction over the defendant, need only provide *prima facie* evidence tending to establish one of the four statutory longarm bases to succeed in defeating the motion.

A statute related to the longarm is VTL 253. For out-of-state motorists, VTL 253 deems the New York Secretary of State as the agent for service of process upon non-domiciliary defendants whose vehicular operation is the subject of a suit in New York. The statute directs that service be effected upon the office of the Secretary of State personally or by mail, plus service by certified mail, return receipt requested, to the defendant at his or her out-of-state address, and then by regular mail if acceptance of the certified mailing is refused at its destination address (VTL 253[2]). The statute also provides other mechanisms for effecting service upon the out-of-state defendant.

For matrimonial actions, CPLR 302(b) allows for New York jurisdiction over a non-domiciliary if New York was the matrimonial domicile before the parties' estrangement, or if the defendant abandoned the marriage from New York, or if the cause of action accrued under New York law such as by a New York separation agreement or a New York prenuptial agreement (*Levy v Levy*, 185 A.D.2d 15, 592 N.Y.S.2d 480 [3rd Dep't. 1993]; *Klette v Klette*, 167 A.D.2d 197, 561 N.Y.S. 2d 580 [1st Dep't. 1990]).

The plaintiff need not allege a longarm jurisdictional basis in the complaint. The lack of a jurisdictional basis is an affirmative defense to be pleaded in an answer (CPLR 3211[a][8]). However, where the jurisdictional predicate is contested, the ultimate burden of proving a basis of jurisdiction, whether it be general or longarm or otherwise, rests with the plaintiff. In opposing a CPLR 3211(a)(8) motion to dismiss, the plaintiff need only make a *prima facie* showing that jurisdiction exists (*Skutnik v Messina*, 178 A.D.3d 744, 113 N.Y.S.3d 195 [2nd Dep't. 2019]; *Hopstein v Cohen*, 143 A.D.3d 859, 40 N.Y.S.3d 436 [2nd Dep't. 2016]). Parties moving to dismiss actions based upon an alleged lack of longarm jurisdiction, and those defending against such motions, must look closely at the particulars of the relevant subdivisions of CPLR 302(a), and key their arguments into the presence or absence of qualifying facts and criteria.

C3211:32 Absence of a Person Who Should be a Party

CPLR 1001 and 1003 afford the courts with wide latitude in the addition or deletion of parties. The absence of a necessary party may therefore be raised at any stage in the proceedings by any party, or by the court on its own motion (*Migliore v Manzo*, 28 A.D.3d 620, 813 N.Y.S.2d 762 [2nd Dep't. 2006]).

C3211:55 Waiving Objection Contained in Paragraphs 8 or 9 of 3211(a)

A defendant with a basis for seeking the dismissal of the plaintiff's complaint on the ground that personal jurisdiction is lacking (CPLR 3211[a][8]) cannot sit on the right. CPLR 3211(e) requires that the right to seek such a dismissal is waived under either of three procedural circumstances. One is where the defendant unsuccessfully moves to dismiss the complaint under any grounds set forth in CPLR 3211(a) but does not raise the lack of personal jurisdiction as one of those grounds. The second circumstance is where the defendant serves an answer to the complaint which does not contain the lack of personal jurisdiction as an affirmative defense. The third circumstance is where the lack of personal jurisdiction is raised in the answer as an affirmative defense but the defendant does not move to dismiss on that basis within 60 days of the answer's service. In other words, the issue of personal jurisdiction has a fixed shelf life, and must be raised by the defendant early in the course a litigation.

Much of foregoing presumes that the defendant has, in fact, appeared and answered the plaintiff's complaint. The mere filing of a notice of appearance by counsel, without an answer raising a jurisdictional objection and without a motion to dismiss under CPLR 3211(a)(8), has the same effect of waiving the defense (*U.S. Rof III Legal Tit. Trust 2015-1 v John*, 189 A.D.3d 1645, 140 N.Y.S.3d 59 [2nd Dept. 2020]). An interesting twist occurred in the notice of appearance case of *Federal Nat. Mortg. Assoc. v Beckford*, 196 A.D.3d 546, 147 N.Y.S.3d 466 [2nd Dep't. 2021]), where a defendant sought to vacate a default judgment on the ground that *inter alia* she had never been properly served with process. There, the defendant denied that an attorney was ever authorized to appear for her in the action prior to the default, and was supported by an affirmation of the attorney that his name on a document earlier submitted to the court had been the product of an unfortunate scrivener's error. The Supreme Court denied the defendant's vacatur motion on the ground that the proffered jurisdictional defense had been waived. The Second Department disagreed and remitted the matter for a Traverse hearing, finding from the documentation that the attorney's purported appearance was unauthorized and therefore failed to trigger a waiver of the defendant's affirmative defense that personal jurisdiction was never obtained over her.

C3211:69 Easier Standard for Dismissing "SLAPP" Suit

"SLAPP" is an acronym for the "strategic lawsuit against public participation." It involves suits commenced by property owners, real estate developers, or others who seek public approval for proposed projects, such as those needing a permit, a variance, municipal approvals, or licenses. Persons who oppose the project by means of public petition and participation have been known to be sued for doing so, upon a variety of legal theories such as defamation, prima facie tort, and tortious interference with contractual relations, i.e., the SLAPP suit. The public policy concern is that SLAPP suits could potentially be designed and initiated to stifle public opposition to what is proposed, which is contrary to the importance society places upon the right to free-expression. The legislature, seeking to protect the public's right to petition and participation, had enacted in 1992 subdivision (g) to CPLR 3211, which is specific to SLAPP suits (L.1992, ch. 767, sec. 4). By that amendment, defendants may move for the dismissal of the plaintiff's complaint, cross-claim, or counterclaim by merely establishing that the claim qualifies as a SLAPP suit as defined by Civil Rights Law 76-a(1)(a). Such a dismissal motion "shall be granted" unless the opposing party demonstrates that the cause of action has a substantial basis in law or is supported by a substantial argument for an extension, modification, or reversal of existing law (CPLR 3211[g]). Clearly, the statute is written to make it difficult, though still possible in creditable cases, for plaintiffs to litigate

SLAPP suits beyond the pleading stage. But gone for SLAPP suits is the concept embodied by CPLR 3026, applicable to other actions generally, that pleadings be "liberally construed."

CPLR 3211(g) was amended effective November 10, 2020. The amendments break CPLR 3211(g) into four subdivisions, with the new material contained in CPLR 3211(g)(2) through (4).

CPLR 3211(g)(2) states that the court shall examine the pleadings and the supporting and opposing affidavits of the parties in determining subdivision (g) dismissal motions. While that language might appear at first glance to add little to our jurisprudence, the only other statute that has specifically addressed attaching a copy of the pleadings to the moving papers, until now, was CPLR 3212(b) for summary judgment. CPLR 3211(g)(2) further states that the fact a determination was made on the motion, and the content of the determination itself, is not admissible later in the action, or in any subsequent action. In other words, the CPLR 3211(g) determination is "evidence" of nothing. The legislature also clarifies in subdivision (g)(2), as if to underscore the foregoing point, that the motion determination does not affect the burden of proof in the continuing action or in any subsequent action. That latter directive is well-taken, as CPLR 3211(g) reverses the burden of proof that normally lies with the moving party, to the party opposing dismissal, requiring the proponent of the SLAPP claim to establish its "substantial" legal basis in order to survive the claim's dismissal. As the recent amendment to CPLR 3211(g)(2) makes clear, that altered burden of proof does not carry beyond the dismissal motion itself and its determination.

CPLR 3211(g)(3) directs that once a dismissal motion is made in a SLAPP case, all discovery, hearings, or other motions are stayed, pending determination of the dismissal motion. Typically, since CPLR 3211 dismissal motions are made early in a litigation and in lieu of an answer, actions will not have progressed to discovery, hearings, or motions in any event. The amendment to (g)(3) removes all doubt, and under all relevant circumstances including those where, for whatever reason, a dismissal motion is made later in a litigation. Wisely, the state legislature realized that there may be occasions where the party opposing dismissal needs some measure of discovery in order to present facts essential to justify its opposition. After all, the burden of proof has effectively been flipped to the SLAPP party, and it would be unjust to expect a party with that burden to be simultaneously prohibited from obtaining any discovery that might be reasonably necessary for opposing the dismissal motion. Subdivision (g)(3) therefore provides a Solomonic solution, permitting the court, upon receipt of a motion made on notice, to order specified discovery limited to the issues raised by the motion to dismiss. While the statute does not expressly say so, it impliedly requires that under such circumstances, the court will hold the CPLR 3211(g) dismissal motion in abeyance pending the parties' conduct of the specified discovery. In that regard, the treatment is similar to that expressly permitted for summary judgment motions in CPLR 3212(d), where, *inter alia*, considerations of summary judgment may be subject to a "continuance" to permit discovery of facts essential to justify opposition to the motion.

CPLR 3211(g)(4) has been added to the statute to prevent any ambiguity from arising over what is subject to the overall provisions of subdivision (g); namely, it applies to complaints, cross-complaints, petitions, plaintiffs, cross-complainants, petitioners, defendants, cross-defendants, and respondents.

C3211:70 Greater Scrutiny of Complaint Where Defendant is Design Professional

CPLR 3211(h) is not seen very often, as the number of actions that might implicate it are limited. When an appellate division addresses subdivision (h) of CPLR 3211, it is worth noting.

Subdivision (h) was enacted in 1996 as a special aid to licensed architects, engineers, land surveyors or landscape architects who are sued in the courts of the state. To understand the statute, one must first read CPLR 214-d. CPLR 214-d(1) provides that when a person seeks damages for personal injuries, wrongful death, or

injury to property against a licensed architect, engineer, land surveyor or landscape architect or their business entities, based upon the acts or omissions of their professional performance more than 10 years before the claim, such defendant is entitled to a written notice of claim. The notice of claim is to be served at least 90 days before the commencement of the action, including a description of the performance, the acts or omissions complained of on information and belief, and shall include a request for general and special damages. A copy of the notice of claim and proof of its service is to be filed with the court within 30 days from the commencement of the action to which they apply. Compliance with the procedural requirements of CPLR 214-d is a condition precedent to any lawsuit against the licensed architects, engineers, land surveyors, and landscape architects. In fact, compliance with the condition precedent must be affirmatively pleaded in the complaint and proven when CPLR 214-d is applicable (*Kretschmann v Board of Educ. of Corning Painted Post School Dist.*, 294 A.D.2d 39, 744 N.Y.S.2d 106 [4th Dep't. 2002]; *Dorst v Eggers Partnership*, 265 A.D.2d 294, 696 N.Y.S.2d 478 [2nd Dep't. 2002]).

That all said, CPLR 3211(h) provides that for actions subject to CPLR 214-d(1), the moving defendant's CPLR 3211 motion to dismiss, brought under (a)(7) of the statute, "shall be granted unless the party responding to the motion demonstrates that a substantial basis in law exists to believe that the performance, conduct, or omission was a proximate cause" of the damages claimed "or is supported by a substantial argument for an extension, modification, or reversal of existing law." In essence, CPLR 3211(h) flips the burden of proof, which is normally on the movant, to the party opposing the motion to establish proximate cause between the negligent acts or omissions on the one hand and the personal injury, wrongful death, or property damage claimed on the other, or to articulate early in the litigation a "substantial" argument for the extension, modification, or reversal of existing law. The statute's treatment of the dismissal motion is similar to the changed burden imposed by CPLR 3211(g) for dismissal motions in SLAPP suits. The statute does not affect any statute of limitations. CPLR 3211(h) must be viewed in tandem with CPLR 3211(g), which accomplishes the same inversion of the burden of proof for dismissal motions in SLAPP suits, and CPLR 3212(i), which likewise inverts the burden of proof for qualifying actions involving licensed architects, engineers, land surveyors, and landscape architects in the context of summary judgment.

In addition to the various protections afforded to the qualifying professionals and entities named in CPLR 214-d and CPLR 3211(h), the latter statute confers upon those professionals the additional benefit that their dismissal motions shall be given a preference. These protections, collectively, reflect a public policy goal of the state legislature that for acts or omissions of qualifying professionals from more than 10 years before, only the most credible of those actions be permitted to survive beyond the stage of a motion to dismiss in lieu of an answer.

The operation of CPLR 3211(h) is seen in *Golby v N & P Engrs. & Land Surveyor, PLLC*, 185 A.D.3d 792, 128 N.Y.S.3d 34 (2nd Dep't. 2020). *Golby* is a tragic case. The plaintiff's decedent, who was in a wheelchair, rolled off a pier into the water and died the next day as a result of the occurrence. A defendant had been an engineer involved in the design of pier renovations performed in the mid-1990s. The plaintiff alleged that the pier was defectively designed in the area where boats were not moored, by not placing protective pedestrian railings there. The defendant moved to dismiss the action in lieu of an answer, and the Supreme Court and Second Department applied the heightened standard of CPLR 3211(h). In opposition to the dismissal motion, the plaintiff presented a transcript of the defendant's representative, which was taken as part of pre-action discovery, that railings are used on pedestrian piers to prevent persons from falling into the water. The Second Department, affirming the Supreme Court, found that under the heightened evidentiary standard, the plaintiff raised a material question of fact proximately linking the defendant's failure to recommend use of a pedestrian railing to the decedent's injuries and death.

The official texts of CPLR 3211(h) and 3212(i) each contain a typographical error. The statutes incorporate by reference, in long form, CPLR 214(1). In fact, the legislature intended to incorporate CPLR 214-d(1), which is the only way that CPLR 3211(h) and 3212(i) make any sense. CPLR 214(1) involves the statute of limitations in actions brought against sheriffs, constables, or other officers for the non-payment of money collected upon an execution and has nothing to do with the actual subject matter here.

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C3211:5 Grounds for Dismissal

The dismissal of actions under CPLR 3211 may occur when there is a specified ground for doing so under one of the enumerated grounds of subdivision (a)(1) through (11) of the statute. CPLR 3211 does not include a "catch-all" provision for the dismissal of actions for non-enumerated grounds. While complaints may be stricken or dismissed for other reasons set forth in the CPLR, such as the dismissal of complaints for willful and contumacious discovery non-compliance under CPLR 3126 or summary judgment under CPLR 3212, the grounds for dismissal under CPLR 3211 are exclusive and restricted. The point is illustrated by whether an action may be dismissed by a plaintiff's non-compliance with the Certificate of Merit requirement of CPLR 3012-a applicable to medical, dental, and podiatric malpractice actions.

For actions sounding in medical, dental, or podiatric malpractice, complaints shall be accompanied by a certificate executed by the plaintiff's attorney declaring that the attorney has reviewed the facts of the case and has consulted with at least one licensed physician, dentist, or podiatrist who the attorney believes to be knowledgeable about the relevant issues of the action, and that as a result of such review and consultation, the attorney has concluded that the action has a reasonable basis. The purpose of the requirement is to discourage frivolous litigations that raise the insurance premiums charged to physicians and thereby help control health care costs within the state. While there are certain exceptions to when the certificate of merit be filed such as those based upon time constraints, the unavailability of medical or hospital records, the plaintiff's reliance solely upon a theory of *res ipsa loquitor*, and actions commenced by plaintiffs pro se (CPLR 3012-a[2], [3]), the bulk of medical malpractice actions require the filing of certificate and the bar honors the statutory requirement for it.

What if the plaintiff's attorney in a medical malpractice action erroneously believes that the action does not require a certificate of merit and does not file one? What are the remedies of the statute if there is a failure of compliance? Notably, CPLR 3012-a does not contain any language whatsoever about how courts are to deal with non-compliance.

These issues were extensively discussed in *Rabinovich v. Maimonides Medical Center*, 179 A.D.3d 88, 113 N.Y.S.3d 198 (2d Dep't. 2019) (opinion by Dillon, J.). The first of two primary issues in the case was whether the plaintiff's action raised issues of medical malpractice, which would require a certificate of merit, or ordinary negligence, which would not. The plaintiff claimed damages for personal injuries sustained as a result of the negligent performance of a blood draw at a blood donation center in Brooklyn, resulting in the plaintiff experiencing an adverse reaction, the loss of consciousness, and a fall down. The defendant moved to dismiss the action for non-compliance with CPLR 3012-a. In opposition, the plaintiff argued that the gravamen of the action was ordinary negligence as the plaintiff's blood had not been drawn by a physician, but by a phlebotomist. On that issue, the appellate opinion surveyed decisional authorities that addressed the dividing line between medical malpractice and ordinary negligence, noting that the former exists when the task performed by the professional bears a substantial relationship to the rendition of medical treatment. In *Rabinovich*, the plaintiff's complaint and bill of particulars described the defendant's negligence in detailed medical terms, including failing to screen for health problems, failing to monitor the plaintiff's physical conditions and hemoglobin levels, and failing to keep the plaintiff at the donation site for a proper interval of observation. The court concluded that these allegations involved medical judgments beyond the knowledge of ordinary persons that style the action as one for medical malpractice. Indeed, the court noted that actions have been recognized as involving medical malpractice against non-physicians including phlebotomists, nurses, emergency medical technicians, and x-ray technicians. A CPLR 3012-a certificate of merit was therefore required of plaintiff's counsel given the particular nature of the case.

Remedially, the *Rabinovich* opinion noted that CPLR 3012-a does not contain any language for non-compliance with the statute. There was no reason in *Rabinovich* for the court to believe that the failure to provide a certificate of merit was motivated by anything other than a good faith but erroneous assessment by plaintiff's counsel that none was required. The Second Department therefore declined to dismiss the action, and instead provided the plaintiff's attorney with a 60-day window to comply with CPLR 3012-a measured from service upon him of a copy of the appellate order.

CPLR 3012-a performs a ministerial function of reducing the commencement of medical malpractice actions that lack sufficient merit. The statute does not regard the ultimate substantive merits of actions, and hence, non-compliance with the statute does not implicate the dismissal provisions of CPLR 3211 or the summary judgment provisions of CPLR 3212. *Rabinovich* should not be read to suggest that courts are without authority to enforce CPLR 3012-a. Non-compliance should be dealt with in the first instance ministerially, or by court order, and failing that, perhaps with monetary sanctions against the recalcitrant attorney under 22 N.Y.C.R.R. 130-1.1.

C3211:8 *Sua Sponte* Dismissals

Trial judges continue, from time to time, dismissing plaintiffs' complaints on *sua sponte* grounds. The occasional practice continues despite the fact that there has been a long and consistent line of cases, developed over many years, routinely reversing trial judges who do so. The reason that a court's *sua sponte* dismissal is problematic is that a dismissal, which is dispositive, is ordered without the plaintiff being given the due process of notice and an opportunity to be heard. *Sua sponte* dismissal, however many or few there are in a given year, typically occur when a defendant moves to dismiss a plaintiff's complaint under CPLR 3211 under stated grounds, which the plaintiff may or may not oppose. The court, unable or unwilling to grant dismissal on a noticed ground, then does so on another ground not raised in the moving papers.

The law governing these circumstances is clear: a court's power to dismiss a complaint *sua sponte* is to be used sparingly and only when extraordinary circumstances exist to warrant dismissal (*Deutsche Bank National Trust Company v Winslow*, 180 A.D.3d 1000, 120 N.Y.S.3d 81 [2d Dep't. 2020]). Extraordinary circumstances virtually never exist. Reversals of *sua sponte* dismissals include where the court's dismissal is for the plaintiff's lack of prosecution despite having made a motion for an order of reference (*Deutsche Bank National Trust Company v Winslow*, 180 A.D.3d at 1002), the plaintiff's failure to comply with foreclosure-related administrative orders (*J.P. Morgan Chase Bank, N.A. v Laszlo*, 169 A.D.3d 885, 94 N.Y.S.3d 343 [2d Dep't. 2019]; *LaSalle Bank National Association v Lopez*, 168 A.D.3d 697, 91 N.Y.S.3d 259 [2d Dep't. 2019]), the alleged failure of the plaintiff to comply with RPAPL 1303 (*HSBC Bank USA, N.A. v Lopez*, 178 A.D.3d 679, 111 N.Y.S.3d 223 [2d Dept. 2019]), and the plaintiff's alleged lack of standing (*Consumer Solutions, LLC v Charles*, 137 A.D.3d 952, 27 N.Y.S.3d 216 [2d Dep't. 2016]). The reader may note that improper *sua sponte* dismissals arise almost exclusively in the Second Department, and within that department almost exclusively in the realm of residential mortgage foreclosure actions, which have in recent years become a significant portion of civil actions filed in certain counties of New York City and its suburbs, and on appeal.

Practitioners may, if they be so advised, move to reargue *sua sponte* dismissals that arise from noticed motions, or appeal them to an appellate court, as the odds of reversing the determination, particularly on appeal, are statistically very, very good.

C3211:10 Defense Based on "Documentary Evidence"

The Practice Commentaries for 2020 noted that while e-mails are not generally material that qualifies as "documentary evidence" for CPLR 3211(a)(1) purposes, decisional authorities were increasingly recognizing

circumstances where e-mails can qualify under the statute for potential dismissals. As noted then, e-mails may be properly considered by courts determining CPLR 3211(a)(1) motions when the e-mails themselves are central to a party's cause of action, such as whether statements in an e-mail are a non-defamatory opinion as a matter of law (*International Pub. Concepts, LLC v Locatelli*, 46 Misc.3d 1213[A], 9 N.Y.S.3d 593 [Sup. Ct., New York County 2015]), or where e-mails establish the absence of a gross disregard of the truth in defense of a defamation action (*Stone v Bloomberg, L.P.*, 163 A.D.3d 1028, 83 N.Y.S.3d 78 [2d Dept. 2018]), or when an e-mail chain between parties may or may not establish a meeting of the minds between parties about the material terms of an alleged extended contact (*Kolchins v Evolution Markets, Inc*. 31 N.Y.3d 100, 73 N.Y.S.3d 519, 96 N.E.3d 784 [2018]).

Since publication of the last Practice Commentaries, further decisional authority has been rendered suggestive of a continuing and growing flexibility by courts to consider e-mail as a proper basis for potential CPLR 3211(a)(1) dismissals. In an action involving legal malpractice, the First Department considered the content of e-mails exchanged between the plaintiff/clients and the defendant/attorneys, and other materials, in determining that the clients understood the terms of business transactions they had entered into, as well as alternative options. The e-mails were found by the Supreme Court, New York County, and by the First Department, as conclusively establishing the absence of legal malpractice by the attorneys as a matter of law (*Binn v Muchnick, Golieb & Golieb, P.C.*, 180 A.D.3d 598, 121 N.Y.S.3d 13 [1st Dep't. 2020]).

In *Flink v Smith*, 66 Misc.3d 1229[A], 125 N.Y.S.3d 529 (Sup. Ct., Albany County 2020), the court likewise held that e-mails exchanged between parties in a breach of contract action were properly admissible in deciding a CPLR 3211(a)(1) motion, on the ground that the e-mails were "unambiguous and of uncontested authenticity." Notably, the court's reliance upon an "unambiguous and of uncontested authenticity" standard was derived from the First Department's determination in *Kolchins v Evolution Markets, Inc*., 128 A.D.3d 47, 8 N.Y.S.3d 1 (1st Dep't. 2015) which, as the reader knows, was later affirmed in 2018 by the Court of Appeals. Yet, in *Flink*, the e-mails that were proffered by the moving party, once considered by the court, were found to insufficiently set forth a basis for the dismissal of the plaintiff's complaint under CPLR 3211(a)(1).

The legal standard that e-mails be unambiguous and authentic, to be considered by courts in deciding whether to grant CPLR 3211(a)(1) motions, appears to be a reasonable, responsible, and prudent evidentiary standard. The Second Department employed the same concept, using very similar language in *S & J Service Center, Inc. v Commerce Commercial Group Inc*., 178 A.D.3d 977, 112 N.Y.S.3d 584 (2d Dep't. 2019). In that breach of contract matter, the Second Department determined that e-mails proffered by the defendant in support of a CPLR 3211(a)(1) dismissal did not qualify as documentary evidence, as the e-mails "were not essentially undeniable." The Second Department recognized a general legal standard that qualifying e-mails be "unambiguous, authentic, and undeniable" (*S & J Service Center, Inc. v Commerce Commercial Group Inc*., 178 A.D.3d at 978, *citing Grenada Condominium III Ass'n v Palomino*, 78 A.D.3d 996, 913 N.Y.S.2d 668 [2d Dep't. 2010]. *See also, Seaman v Schulte, Roth & Zabel LLP*, 176 A.D.3d 538, 111 N.Y.S.3d 266 [1st Dep't. 2019]).

What this developing case law should tell practitioners is that counsel preparing dismissal motions should not only provide e-mails that help establish the grounds for the motion, but also address the lack of ambiguity, authenticity, and undeniability of the e-mails themselves, so that they may be considered on their merits. Conversely, for plaintiff attorneys opposing CPLR 3211(a)(1) dismissal motions, the argument should be made, where appropriate, that the proffered e-mails are ambiguous, or arguably inauthentic, or deniable. Less clear, for now, is whether the same legal standards will be applied to alleged communications made on more casual forms of social media such as Twitter and Instagram, but expect case law to develop as to those platforms in the years ahead.

C3211:11 Lack of Subject Matter Jurisdiction

The Supreme Court, which is a court of general and unlimited jurisdiction, is not, in fact, unlimited. Matters that are exclusive to the state Court of Claims, or to the federal courts, are the categories of matters that should not be brought in the Supreme Court.

Recent examples of cases involving the absence of subject matter jurisdiction include those where a cause of action is pre-empted by federal law (*Klingsberg v Council of School Supervisors and Administrators-Local 1*, 181 A.D.3d 949, 122 N.Y.S.3d 335 [2d Dep't. 2020]), non-judiciable internal church disputes based on religious rather than secular principles (*Eltingville Lutheran Church v Rimbo*, 174 A.D.3d 856, 108 N.Y.S.3d 39 [2d Dep't. 2019]), the absence of a timely notice of claim as required for actions in the state Court of Claims (*Jones v State*, 171 A.D.3d 1362, 98 N.Y.S.3d 366 [3d Dep't. 2019]), and the failure by the plaintiff to exhaust administrative remedies (*City of New York Human Resources Administration v Hewitt*, 120 N.Y.S.3d 571 [App. Term, New York 2020]; *IKON Business Group, Inc. v Police Athletic League, Inc.*, 65 Misc.3d 1226[A], 119 N.Y.S.3d 700 [Sup. Ct. New York County 2019]).

C3211:12 Plaintiff's Lack of Capacity

As noted in the 2020 Practice Commentaries and other legal literature, the language of CPLR 3211(a)(3), which authorizes the dismissal of actions for plaintiffs' lack of capacity, has been interpreted as also applying to plaintiffs' lack of standing even though the term "standing" is absent from the statute itself. New York State's legislature enacted a significant amendment to the Real Property Actions and Proceedings Law (RPAPL) regarding the defense of standing, effective December 23, 2019. The amendment at issue here, RPAPL 1302-a (2019 NY Sess. Laws, c. 739, sec. 1), involves only residential mortgage foreclosure actions involving defaulted home loans.

Until December 23, 2019, standing in residential mortgage foreclosure actions was a defense waived by the defendant homeowner if not asserted as a basis for dismissal in either a pre-answer motion to dismiss or as an affirmative defense in the defendant's answer. This principal was concretized in *Wells Fargo Bank Minn., N.A. v Mastropaolo*, 42 A.D.3d 239, 837 N.Y.S.3d 247 (2d Dept. 2007), and followed by courts in countless foreclosure actions in the years that followed.

However, RPAPL 1302-a has nullified a significant body of case law that had, until now, been recognized throughout the State on New York on the issue of standing. The amendment adds to the RPAPL an entirely new section, 1302-a (2019 NY Sess. Laws, c. 739, sec. 1). The new RPAPL 1302-a provides that in qualifying foreclosure actions, a defendant's failure to raise standing as a defense in a responsive pleading or motion to dismiss does not constitute a waiver.

The purpose of the law is to help assure that standing issues be resolved on their merits, so that only lenders who own a loan by direct lending, purchase, or assignment are permitted to collect upon the mortgaged debt (NY Sponsor's Memorandum, 2019 S.B. 5160 [April 14, 2019]).

The statutory enactment that the standing defense is not waived was placed by the state legislature specifically in the RPAPL, and not in the CPLR that governs all actions generally. RPAPL 1302-a is expressly limited to residential mortgage foreclosure actions. The amendment therefore creates an odd legal dichotomy, that the failure to raise standing as an affirmative defense does constitute a waiver in qualifying residential mortgage foreclosure actions, but the same defense continues to be waived in all other litigations outside the scope of RPAPL 1302-a. The procedural rules of standing will therefore vary from now on, depending on the nature of the litigation at issue.

If a foreclosure defendant files a motion to dismiss on grounds other than standing, and is unsuccessful, a logical construction of the new statute is that the defendant may then include standing as an affirmative defense in the answer that follows. This is true because the language of RPAPL 1302-a is notwithstanding any of the provisions of CPLR 3211(e).

RPAPL 1302-a does not apply to all mortgage foreclosure actions, but only those involving a "home loan" as that term is defined by RPAPL 1304(6). Commercial and other secured loans are outside the scope of the statute's standing-related protections. The incumbent version of RPAPL 1304(6) was scheduled to sunset on January 14, 2020, and a newer definition of "home loan" was to become effective from January 14, 2020, forward. However, the new definition that was scheduled to take effect was itself repealed (L. 2019, c. 55, part VV), as a result of which the incumbent definition contained within RPAPL 1304(6) remains in effect.

RPAPL 1304(6)(a)(1) and (2) define home loans as those involving natural persons in family dwellings and condominiums within the state, occupied or intended to be occupied by the borrower(s) in whole or in part as a personal residence, inclusive of reverse mortgages. Actions involving any other forms of loans are outside the scope of the new standing-related homeowner protection afforded by RPAPL 1302-a.

RPAPL 1302-a became effective on the date it was signed, which was December 23, 2019. It applies not only to residential foreclosure actions that will be filed in the future, but also to actions already pending in the courts as of its effective date.

Limiting language in the newly-enacted RPAPL 1302-a provides that the standing defense is waived if the action has already resulted in a foreclosure sale, except when the judgment was rendered on the default of the defendant. Defendants who have lost their cases on the merits, after a full and fair opportunity to be heard, may not seek to now litigate standing for the first time, if a judgment of foreclosure and sale has already been rendered. The provision of RPAPL 1302-a allowing for standing to be raised and contested by defaulted homeowners, even after a foreclosure judgment has been rendered and the property has been sold, might prove the law of unintended consequences. The obvious purpose of the provision is to assist homeowners, but as noted by Melissa Clement in the March 2020 issue of the Albany Bar Association's *Bar News*, potential buyers may be less inclined to purchase real property at foreclosure sales if there is uncertainty over whether the sale might be set aside in the future for the bank's lack of previously-unlitigated standing. Such uncertainty may have the effect of depressing foreclosure sale prices, generate fewer funds for homeowners to apply toward deficiency judgments, and dissuade lenders from financing the purchase of distressed properties (Clement, Melissa, "The Good, The Bad, and The Ugly: RPAPL 1302-a and Residential Foreclosure Proceedings" 25, *Bar News* [March 2020]). In other words, the portion of the new statute that allows for a standing defense to be raised after the property has been foreclosed upon may cause unintended harm to the homeowners that the law is intended to protect.

While the issue of a plaintiff's lack of capacity is often presented to courts in the context of whether the individual is subject to a disqualifying disability such as infancy or mental illness, capacity may also be an issue as to the plaintiff's corporate form and legal ability to bring an action in a New York forum. The latter was an issue in *Montvale Surgical Center, LLC v State Farm Mutual Automobile Insurance Co.*, 66 Misc.3d 1215[A], 120 N.Y.S.3d 720 (Dist. Ct. Suffolk County 2020). The plaintiff assignee in *Montvale Surgical Center* was a New Jersey limited liability company that commenced an action to recover No Fault benefits paid for medical and surgical services provided to the assignor. The defendant No Fault insurer sought to dismiss the action on the ground of lack of capacity to sue, as the plaintiff had never registered with the New York Department of State to authorize its conduct of business in New York pursuant to BCL 1312(a). Indeed, there was no question between the parties that the plaintiff was a New Jersey entity with no BCL registration at the Department of State. The

District Court denied the defendant's motion to dismiss, finding that under the circumstances of the action, the plaintiff's litigation efforts in New York were incidental to its business, rather than systematic, as a result of which no BCL registration was required of it. In the alternative, the court also noted that the absence of a registration with the Department of State, if required, was not a jurisdictional defect, but a curable one at any time prior to the resolution of the action (*Montvale Surgical Center, LLC v State Farm Mutual Automobile Insurance Co*., 66 Misc.3d 1215[A], at *3).

Capacity may also involve the legal authorization of an administrator to bring an action on behalf of an estate, as in *Rodriguez v River Valley Care Center, Inc*., 175 A.D.3d 432, 108 N.Y.S.3d 126 (1st Dep't. 2019). *Rodriguez* involved causes of action for damages arising from alleged medical malpractice, and for wrongful death. The first of two actions was commenced by the named plaintiff as a "proposed administrator," which was dismissed for lack of capacity since no letters of administration had been issued. Facing a ticking clock on certain statutes of limitations, the same named plaintiff commenced a second action as the estate's "voluntary administrator," again without the benefit of letters of administration at the time of commencement, and the defendants once again moved to dismiss the action for lack of capacity. However, while the dismissal motion was pending in the second action, the Surrogate's Court issued the plaintiff his long-awaited letters of administration, on a date that was within six months from the dismissal of the first action. The First Department, reviewing the matter on appeal, held that while the plaintiff lacked capacity when commencing his actions, the defect was cured by his ultimate receipt of letters of administration and by timely application of the six-month savings provision of CPLR 205(a).

Capacity, and more precisely standing, also arises in the context of cases where a plaintiff has filed for the protection of a bankruptcy court. Upon the filing of a Chapter 7 or 11 bankruptcy petition, all property that the debtor owns, including the civil cause of action, vests in the bankruptcy estate (11 U.S.C. 541[a][1]; *Keegan v Moriarty-Morris*, 153 A.D.3d 683, 59 N.Y.S.3d 779 [2d Dep't. 2017]). The plaintiff's cause of action becomes an asset of the bankruptcy court which is to be disclosed as such on the appropriate bankruptcy schedules. The failure to disclose the cause of action on the bankruptcy schedule of assets deprives the plaintiff of the legal capacity to sue on the claim (*Keegan v Moriarty-Morris*, 153 A.D.3d at 684). Upon filing for bankruptcy and the disclosure of the cause of action as a bankruptcy asset, the party that has standing to prosecute the civil action is not the plaintiff who was allegedly caused damages, but the appointed bankruptcy trustee, and the commencement of an action by the plaintiff-debtor can be dismissed under CPLR 3211 (*Burbacki v Abrams, Fensterman, Fensterman, Eisman, Formato, Ferrara, & Wolf, LLP*, 172 A.D.3d 1300, 99 N.Y.S.3d 671 [2d Dep't. 2019]).

An action commenced by a plaintiff in bankruptcy will typically be dismissed for the absence of standing, whether the cause of action is disclosed on the bankruptcy schedule of assets or not. Since standing and capacity-related dismissals are not on the merits, the bankruptcy trustee may commence a new civil action for the debtor so long as the statute of limitations has not expired in the meantime. However, plaintiffs and their trustees have the benefit of the six-month grace provision of CPLR 205(a), and the timeliness of a second action will not be a problem so long as the trustee commences it within the six-month window measured from service of the order dismissing the first action (*Goodman v Skanska USA Civil, Inc*., 169 A.D.3d 1010, 95 N.Y.S.3d 243 [2d Dep't. 2019]) with notice of its entry.

C3211:15 Same Parties, Same Causes of Action

CPLR 3211(a)(4) permits the dismissal of a plaintiff's complaint if there is already another action pending between the same parties for the same cause of action in New York, or another state, or in a federal court. The dismissal of an action is a discretionary determination of the trial court, addressed in connection with the "second" of the two actions or proceedings.

The statute is most frequently applied when the same party is the plaintiff in two separate actions. But there are variations to that general concept. A dismissal for "prior action pending" may be obtained to dismiss a defendant's counterclaim in an action, if the counterclaiming defendant has asserted in an already-pending action a cause of action for the same relief based on the same facts between the same parties (*744 E. 215 LLC v Simmonds*, 65 Misc.3d 1234[A], 119 N.Y.S.3d 828 [Civ. Ct. City of New York 2019]).

C3211:18 Affirmative Defenses Available on Subdivision (a) Motion

CPLR 3211(a)(5) contains a veritable grab bag of grounds on which defendants may move to dismiss complaints.

Infancy of Other Disability of the Moving Party

The infancy or other disability of a defendant is a basis for seeking dismissal of a plaintiff's complaint under CPLR 3211(a)(5), but mere proof of a minor's age or of other disability is not necessarily enough for the defendant to actually win the motion. More is required per the holding in *US Bank National Association for Deutsche Bank, Alt-A Securities Mortgage Loan Trust Series 2007-2 v McGown*, 60 Misc.3d 808, 80 N.Y.S.3d 643 (Sup. Ct. Kings County 2018). In that action, the plaintiff's predecessor in interest had loaned money in 2007 to the defendant, James McGown (McGown) in exchange for an $816,000 promissory note and mortgage upon the property. Later that year, McGown transferred title to the property to his minor child, A.M., pursuant to the Uniform Transfer to Minors Act (UTMA). The deed and recording documents did not reveal the relationship between McGown and A.M., the UTMA, or that A.M. was a minor. Upon the loan's default, the plaintiff commenced an action against McGown and A.M., and process was served upon both at their home by means of suitable age and discretion method of CPLR 308(2). No answer was served and an order of reference was granted. A.M., by her mother and natural guardian, moved to vacate the default and dismiss the action on the ground that A.M. was a minor under the age of 14. Although a birth certificate evidenced A.M.'s age, the Supreme Court denied dismissal of the action. The court held that for the plaintiff to be subject to the special service provisions for minors set forth in CPLR 309, the plaintiff must have actual or constructive notice that the party to be served is, in fact, a minor. The Supreme Court further held that the defendant, as moving party, bore the initial burden of proving actual constructive notice that A.M. was a minor, which was not accomplished where the deed transfer made no mention of A.M.'s age, did not mention the UTMA, and where service was effected upon an adult of suitable age and discretion. The court noted that under the UTMA, McGown was required to identify A.M. as a minor, and that his failure to do so secreted A.M.'s age from the bank.

Release

As a general rule, the existence of a valid release constitutes a complete bar to an action on a claim that is the subject of the release (*Centro Empresarial Cempresa S.A. v America Movil, S.A.B. de C.V.*, 17 N.Y.3d 269, 929 N.Y.S.2d 3, 952 N.E.2d 995 [2011]). A release is a contract and its construction is governed by contract law. When a defendant moving to dismiss an action under CPLR 3211(a)(5) produces a copy of a signed release from the plaintiff's claim, the burden shifts to the plaintiff to show, under well-established contract principles, that the release was a product of fraud, coercion, duress, mutual mistake, or other conduct sufficient to void it (*Cames v Craig*, 181 A.D.3d 851, 119 N.Y.S.3d 888 [2d Dep't. 2020]). A plaintiff's failure to controvert a facially valid and relevant release will result in the dismissal of the cause of action.

Statute of Limitations

The determination of motions to dismiss for alleged untimeliness under CPLR 3211(a)(5) is similar to the procedures used for determining summary judgment motions for alleged untimeliness under CPLR 3212. The party moving for a CPLR 3211(a)(5) dismissal has the initial burden of establishing *prima facie* that the plaintiff's time to sue had expired (*Horowitz v Foster*, 180 A.D.3d 783, 120 N.Y.S.3d 49 [2d Dep't. 2020]). Such proof can be typically established by reference to the date of accrual typically ascertainable from the plaintiff's complaint, the date of commencement ascertainable from the filing date reflected on the summons or in the e-filing system, and a mathematical overlay of the controlling statute of limitations. If the moving defendant fails to meet the *prima facie* burden of proof, the dismissal motion will be denied (*Horowitz v Foster*, 180 A.D.3d at 784), at least as to its statute of limitations grounds. Where a complaint alleges more than one cause of action, the defendant should take care to apply the same exercise to each separate cause of action within the scope of the motion, as different causes of action may have different dates of accrual or be subject to different limitations periods. If the moving defendant meets the *prima facie* burden of proof, the plaintiff then undertakes the burden of raising a question of fact that the action is timely, such as by there being a later date of accrual, the existence of a limitations toll or extension, or a revival of a limitations period (*e.g.*, *U.S. Bank National Association v Vitolo*, 182 A.D.3d 627, 120 N.Y.S.3d 791 [2d Dep't. 2020]; *Mello v Long Island Vitreo-Retinal Consultant, P.C.*, 172 A.D.3d 849, 99 N.Y.S.3d 414 [2d Dep't. 2019]).

Statute of Frauds

One of the CPLR 3211(a)(5) grounds for dismissal is that the plaintiff's cause of action may not be maintained on account of the statute of frauds. The determination of these motions may sometime depend on which statute of frauds provision in the General Obligations Law is controlling of the action. This parsing of the statute of frauds was recently seen in *Korman v Corbett*, 183 A.D.3d 608, 123 N.Y.S.3d 192 (2d Dep't. 2020). The plaintiff sought specific performance of an alleged oral agreement with a decedent, where the plaintiff cared for the decedent prior to her death in exchange for the plaintiff being given an option to buy the residence from her estate for $1.2 million. The decedent's estate moved to dismiss certain causes of action under CPLR 3211(a)(5) on the ground that the alleged agreement, which was never memorialized in writing, was unenforceable under the statute of frauds. At issue at the trial level, and on appeal, was whether the causes of action were governed by G.O.L. 5-701, which requires agreements involving the purchase of real property be in writing and contains no language authorizing courts to grant specific performance, and G.O.L. 5-703, which more specifically enables courts to award specific performance of real property agreements where there is evidence of partial performance. As between the two statutes, the Appellate Division held that G.O.L. 5-703 was the statute more specific to the plaintiff's factual and legal claims, and on that basis, held that the dismissal of the relevant causes of action was not appropriate.

C3211:28 Lack of Personal Jurisdiction

Last year's Practice Commentary for CPLR 3211(a)(8) reviewed the significant legal developments arising from the U.S. Supreme Court's decision on general jurisdiction in *Daimler AG v Bauman*, 571 U.S. 117, 134 S. Ct. 746 (2014). The Supreme Court clarified the law on general jurisdiction, by requiring that corporations be "at home" in a state to be subject to its general jurisdiction and be sued for any claim there. A corporation is "at home" in a state where 1) it is incorporated, or 2) maintains its principal place of business, or 3) in truly exceptional circumstances, where the corporation's operations are so substantial and of such nature as to render the corporation at home in the state. *Daimler* does not affect the states' exercise of specific jurisdiction, such as longarm jurisdiction recognized in New York under CPLR 302. While *Daimler* does not extend general jurisdiction liability between parent corporations and subsidiaries under an "agency" theory, which the Supreme Court directly addressed, it left unresolved the question of whether general jurisdiction can be extended between a parent corporation and a subsidiary under the parallel "alter ego" theory, which was not addressed. Last year's Practice Commentary predicted that future federal and state cases will be needed to definitively address whether general jurisdiction may be asserted between corporate parents and subsidiaries on an "alter ego" basis, and to

flesh out the true meaning of *Daimler's* third basis for the assertion of general jurisdiction regarding truly exceptional cases where a corporation's operations are so substantial and of such nature as to render the entity "at home" in the state.

New York's general jurisdiction statute is CPLR 301. Decisions are slowly trickling in on issues related to that statute post-*Daimler*.

In one reported decision, a complaint was dismissed under CPLR 3211(a)(8) where a corporate president established in an affidavit that the defendant principal office was in New Jersey rather than New York, thereby depriving the plaintiff of general jurisdiction (*Robins v Procure Treatment Centers, Inc*., 179 A.D.3d 412, 116 N.Y.S.3d 35 [1st Dep't. 2020]).

On the issue of whether an "alter ego" relationship between a corporate parent and subsidiary permits the assertion of general jurisdiction, where a party is not incorporated in the state and does not maintain a principal office here, an early canary in a coal mine may be *RP Business Marketing, Inc. v Timlin Industries, Inc*., 67 Misc.3d 1205(A), 2020 WL 1856604 (Sup. Ct. New York County 2020) (Barrok, J.). The defendant, Timlin Industries, Inc. (Timlin), was in the telemarketing business and was sued by RP Business Marketing, Inc. (RPB) for allegedly breaching the exclusivity provisions of an agreement and by the improper sharing of proprietary information. Contractually, RPB and Timlin had agreed that any disputes between them would be governed by the law of the state of New York, and that any litigation between them would be venued in a state or federal court within New York. The party that Timlin allegedly worked with in breach of the contractual exclusivity provision was SM Consulting, LLC (SMC), which was also named as a defendant in the action, but which was not incorporated in New York and did not maintain its principal office within the state. SMC moved to dismiss the plaintiff's action against it on the ground that it was not subject to the general jurisdiction of the New York courts. The court focused on evidence about whether SMC was so dominated and controlled by Timlin as to be an alter ego or Timlin. Although the court held that SMC was subject to New York's longarm jurisdiction under CPLR 302, which rendered questions of general jurisdiction academic, it alternatively held that SMC was also subject to the general jurisdiction of New York courts as an alter ego of Timlin. Traditionally, New York has recognized a principal's domination and control over a subsidiary as an "alter ego" basis for the assertion of general jurisdiction. New York has avoided the nomenclature of "alter ego" in favor of what it instead calls the "department test" focused on whether the parent corporation's domination of control of a subsidiary is so extensive that the subsidiary is rendered a mere department of the parent. The court's recognition of an alter ego (department) basis for general jurisdiction addressed an issue that the U.S. Supreme Court did not address in *Daimler*, that an alter ego basis may be properly used for asserting general jurisdiction, but may arguably be called into question by *Daimler*. *RP Business* will not be the last word on the subject, as significant federal and, likely, appellate determinations in New York, should be expected.

The establishment of *Daimler's* third basis for general jurisdiction, based on exceptional circumstances, will not be easy for plaintiffs to meet. One reason is that the U.S. Supreme Court limited this basis to circumstances that are not just exceptional, but "truly exceptional." The Supreme Court further limited the basis to circumstances where the corporate defendant's operations within the state are "so substantial and of such nature" as to render the entity at home in the state. The bar is raised high. It was not met in *Aybar v Goodyear Tire & Rubber Company*, 175 A.D.3d 1373, 106 N.Y.S.3d 361 (2d Dep't. 2019).

Complaints and answers may be properly examined to determine whether the plaintiff has a basis for general jurisdiction in New York. In *Gibson v Air & Liquid Systems Corporation*, 173 A.D.3d 519, 103 N.Y.S.3d 391 (1st Dep't. 2019), the plaintiff's complaint alleged that the defendant was a corporation duly organized in the state of New York, which the defendant did not deny in its answer. The First Department concluded that the allegation of incorporation was admitted and binding upon the defendant, notwithstanding the fact that the answer had been prepared prior to the U.S. Supreme Court's determination in *Daimler*. General jurisdiction therefore existed

based on an admission in the pleadings.

On the issue of whether general jurisdiction can be asserted against a parent corporation through the New York presence of a subsidiary, practitioners should be aware of *Sabol v Bayer Healthcare Pharm., Inc*., 439 F.Supp.3d 131 (2020) (Marrero, J.). A metal called gadolinium is used as a contrast agent for persons undergoing MRIs, and is supposed to be eliminated from the body through the kidneys. The plaintiff, who underwent 23 MRIs, alleged that she was caused physical injuries because the contrast agent was retained in her body, and sought damages under theories of negligence and strict products' liability for the defendants' failure to warn. The defendants included General Electric Healthcare (GEHC), which manufactured and distributed some of the gadolinium-based contrast agents. GEHC moved to dismiss the plaintiff's amended complaint on the ground, *inter alia*, that it was neither headquartered nor incorporated in New York. The plaintiff argued that GEHC was amenable to the court's general jurisdiction as it was a wholly-owned subsidiary of co-defendant General Electric Company (GE), a New York corporation. The court noted, as this Practice Commentary did last year, that it is unusual for a party to seek to extend jurisdiction over a subsidiary through its parent, rather than *vice versa*. The Southern District found that general jurisdiction was lacking over GEHC for two reasons. The first was that under *Daimler*, an agency theory between the parent and subsidiary was expressly rejected by the U.S. Supreme Court for the assertion of general jurisdiction through one entity to another. Second, as to the "alter ego" basis for extending general jurisdiction from one related entity to another, as discussed in *Ranza v Nike, Inc*., 793 F.3d 1059 (9th Cir. 2015), the court stopped short of accepting "alter ego" as a jurisdictional path. Instead, the court said that *if* general jurisdiction could be imputed to a subsidiary under an alter ego analysis, the plaintiff would need to assert more than just the parent-subsidiary relationship between the parties. Indeed, in this instance, there appears from the court's decision to be no evidence from the plaintiff meeting New York's long-standing "department" test for establishing the parent's domination and control over its subsidiary, including the most important element of the parent's 100% stock ownership of the subsidiary.

Thus, for plaintiff practitioners, the message from *Sabel* v *Bayer Healthcare Pharm., Inc*. is that New York courts have not yet adopted *Ranza's* alter ego basis for the imputation of general jurisdiction, and may or may not do so. If the day comes when it does so, the parent-subsidiary relationship, in and of itself, will not be sufficient for the assertion of general jurisdiction, and the plaintiffs should be prepared to meet the four-part "department test" for the assertion of such jurisdiction; namely, 100% stock ownership by the parent of the subsidiary, the financial dependency of the subsidiary upon the parent, the parent's influence on the composition of the subsidiary's board, and the parent's control over the marketing and operational responsibilities of the subsidiary (*Volkswagenwerk Aktiengesellschaft v Beech Aircraft Corp*., 751 F.2d 117 [2nd Cir. 1984]; *Varga v McGraw Hill Financial Inc*., 2015 WL 4627748 [Sup. Ct. New York County 2015]).

In *Homeward Residential, Inc v Thompson Hine, LLP*, 172 A.D.3d 459, 100 N.Y.S.3d 233 (1st Dep't. 2019), the defendant was a limited liability partnership formed in Ohio with a principal office in that state. When the defendant moved to dismiss the action for lack of general jurisdiction, the plaintiff argued that the defendant should be estopped from asserting the defense that general jurisdiction was lacking, as the defendant had allegedly misrepresented that it maintained its principal place of business in New York upon which the plaintiff relied in commencing the action in New York. The Supreme Court, New York County, and the Appellate Division in the First Department, were unimpressed with the plaintiff's argument, as the plaintiff's reliance upon the defendant's alleged representations for venue-selection purposes was found to not be reasonable.

Discovery is of course permissible between parties to help determine whether a defendant is, or is not, subject to New York's general jurisdiction. To be entitled to jurisdictional discovery, the plaintiff must merely make an initial showing that is a "sufficient start," establishing facts that *may* exist for the exercise of personal jurisdiction (*Best v Guthrie Medical Group, P.C*., 175 A.D.3d 1048, 107 N.Y.S.3d 258 [4th Dep't. 2019]). Conversely, the absence of any initial showing, such as would contradict the defendant's readily-available evidence of non-New York incorporation and principal office location, does not provide a basis for fishing-expedition discovery on personal jurisdiction (*Qudsi v Larios*, 173 A.D.3d 920, 103 N.Y.S.3d 920 [2d Dep't. 2019]).

The pre-action discovery procedures of CPLR 3102(c) are generally available for acquiring material that is relevant to the potential assertion of general jurisdiction against a party in New York. Pre-action discovery, when sought, is requested by a petition in a special proceeding. In *Matter of Legal Aid Society of Suffolk County to Compel Production of Documents From Indeed, Inc. Prior to Commencement of Action*, 66 Misc.3d 1212(A), 120 N.Y.S.3d 720 (Sup. Ct. Suffolk County) (St. George, J.), the target entity, Indeed, Inc. (Indeed), was a Delaware corporation with a principal office located in Texas. Under *Daimler*, therefore, there would be no basis for general jurisdiction over Indeed, unless the circumstances were truly exceptional in maintaining operations in New York that were so substantial and of such nature as to render the entity at home in New York. While Indeed had registered to do business in New York, the court correctly noted that registration is not sufficient under *Daimler* to support the assertion of general jurisdiction over an entity, particularly as New York's registration statutes do not require the foreign corporation to consent to the general jurisdiction of the New York courts (BCL 1301, 1304[a]). No basis was stated in the pre-action discovery petition for the assertion of longarm jurisdiction over Indeed. As a consequence, the Supreme Court, Suffolk County, denied the petition for pre-action discovery from Indeed, as the petitioner failed to provide any basis for jurisdiction. A similar result was reached in *Kline v Facebook, Inc. and Google, Inc*., 62 Misc.3d 1207(A), 112 N.Y.S.3d 875 (Sup. Ct. New York County) (Freed, J.), where the petitioner seeking pre-action discovery failed to establish that the respondents, who were not incorporated in New York and did not maintain their principal offices here, was nevertheless potentially subject to New York's general jurisdiction.

C3211:32 Absence of a Person Who Should be a Party

Actions may be dismissed under CPLR 3211(a)(10) when the court should not proceed in the absence of a necessary party. The language of CPLR 3211(a)(10) is a little misleading, because the plaintiff's mere failure to name a necessary party does not automatically mean that the action will be dismissed. A party is defined as "necessary" when his or her presence is needed for complete relief to be accorded between persons who are parties to the action or who might be inequitably affected by a judgment in the action (CPLR 1001[a]).

The first issue, therefore, is whether a party is necessary. By nature and definition, the issue arises under CPLR 3211(a)(10) only where a potentially affected party is *not* named in the caption of the action, as the party's presence in the action would obviate consideration of a dismissal on this statutory ground.

The second issue that a court must address in determining CPLR 3211(a)(10) dismissal motions is whether the absent party is amenable to the personal jurisdiction of the court. If so, the court is not to dismiss the action in a kneejerk fashion, but instead, shall order the necessary party "summoned" (CPLR 1001[b]; *Deutsche Bank National Trust Company v Bandalos*, 173 A.D.3d 1136, 105 N.Y.S.3d 489 [2d Dep't. 2019]). If the summoned party enters the case, the problem of the party's absence is resolved, and no continuing legal basis exists for the dismissal of the action.

A third issue arises if the necessary party is not amenable to jurisdiction in response to the second or refuses to voluntarily appear. The court still does not automatically dismiss the action, but must engage in a balancing of five statutory factors set forth in CPLR 1001(b). These factors include the availability of other remedies in the event of a non-joinder, the prejudice that might accrue from non-joinder to the defendant or the party not joined, whether and by whom prejudice might be avoided in the future, the feasibility of a protective provision by order of the court or in the judgment, and whether an effective judgment may be rendered in the absence of the person not joined. No one factor is determinative (*Red Hook/Gowanus Chamber of Commerce v New York City Bd. of Standards and Appeals*, 5 N.Y.3d 452, 805 N.Y.S.2d 525, 839 N.E.2d 878 [2005]), and granting a dismissal of the action will only occur if, upon a balancing of the delineated factors, it is reached as a last resort (*JP Morgan Chase, National Association v Salvage*, 171 A.D.3d 438, 98 N.Y.S.3d 6 [1st Dep't. 2019]). CPLR 3211(a)(10)

motions therefore tend to be complicated, and do not lend themselves to easy resolution such as a black-and-white determination of a mathematical statute of limitations dismissal, or dismissals based upon uncontroverted documentary evidence, payment, release, arbitration and award, *res judicata*, and other potential grounds.

There is authority that the absence of a necessary party may be raised for the first time on appeal (*City of New York v Long Island Airports Limousine Service Corp.*, 48 N.Y.2d 469, 423 N.Y.S.2d 651, 399 N.E.2d 538 [1979]). If so, the appellate court has no authority to order that an additional party be added to an action, and by extension cannot dismiss an action on that basis, but must instead remit the question to the trial court for an initial determination of whether the matter should proceed in the absence of the party (*Velez v New York State, Department of Corrections and Community Supervision*, 163 A.D.3d 1210, 80 N.Y.S.3d 719 [3d Dep't. 2018]).

C3211:53 Waiving Objection Contained in Paragraph 1, 3, 4, 5, or 6 of 3211(a)

Last year's Practice Commentary for C3211:53 discussed a significant case from the Second Department regarding the waiver of affirmative defenses, *U.S. Bank National Association v Nelson*, 169 A.D.3d 110, 93 N.Y.S.3d 138 (2d Dept. 2019). *Nelson* is a residential mortgage foreclosure action where the plaintiff included in its complaint an allegation that it had standing to seek a judgment of foreclosure, even though standing is not an element of the cause of action that need to be pleaded. The defendant's answer responded to the allegation by denying knowledge or information sufficient to form a belief ("DKI"), but did not plead the lack of standing as a separate affirmative defense. The issue on appeal was whether a defendant's denial ("D") or DKI could be construed as an implicit and cognizable assertion of the standing defense, which could be raised, and not be waived, at the time of a lager dispositive motion. The Second Department held in a 3-1 decision that the standing defense is waived unless raised as a separate affirmative defense in the defendant's answer. The reasoning is the difference between CPLR 3018, which draws a clear statutory distinction between denials, which places the burden of proof upon plaintiffs, from affirmative defenses, which raise a new defensive matter which the defendant is obligated to prove. Any conflation of the two concepts can cause surprise and confusion at trial, which CPLR 3018 is designed to avoid.

As noted on C3211:12, the state legislature enacted RPAPL 1302-a, effective December 23, 2019, which provides that in residential mortgage foreclosure actions only, standing is not waived by the defendant's failure to raise it as an affirmative defense in the answer. The enactment of RPAPL 1302-a therefore renders academic the portion of *Nelson* that addressed whether a standing defense may be implicitly recognized by a defendant's denial or DKI of related allegations or whether a separate affirmative defense is required to preserve the defense. However, *Nelson's* general holding that defendants must actually plead standing as an affirmative defense in order to preserve it remains relevant and good law as to all actions---tort, contract, or otherwise---that do not involve residential mortgage foreclosures under RPAPL 1302-a. Therefore, per *Nelson*, if a defendant in any action outside of RPAPL 1302-a has a good faith basis to challenge the plaintiff's standing in the answer, the defendant should follow the well-known colloquial maxim: use it or lose it.

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C3211:10. Defense Based on "Documentary Evidence"

CPLR 3211(a)(1) permits dismissal of an action where "a defense is founded upon documentary evidence." While the language seems straight-forward, the operative inquiry is what specific types of documentation qualify as "documentary evidence" under the statute. A motion to dismiss under CPLR 3211(a)(1) may be granted only where the documentary evidence utterly refutes the plaintiff's factual allegations, conclusively establishing a defense as a matter of law (*Goshen v Mut. Life Ins. Co. of New York*, 98 N.Y.2d 314, 746 N.Y.S.2d 858 [2002]).

Sequentially, a proffered document must first be of the type that qualifies under the statute, and if so, the court then determines whether its contents provide a defense warranting the dismissal of the action as a matter of law. Decisional authorities have not examined the issue in terms of a two-step sequence, but that is, in effect, the steps that courts must take. Documents that have traditionally qualified for evidentiary consideration under CPLR 3211(a)(1) are those which are 1) unambiguous, 2) of undeniable authenticity, and 3) reflect content that is essentially undeniable (*Koziatek v SJB Dev. Inc*., 172 A.D.3d 1486, 99 N.Y.S.3d 480 [3d Dep't. 2019]; *VXI Lux Holdco S.A.R.L. v SIC Holdings, Inc., LLC,* 171 A.D.3d 189, 98 N.Y.S.3d 1 [1st Dep't. 2019]; *Mehrhof v Monroe-Woodbury Central School District*, 168 A.D.3d 713, 91 N.Y.S.3d 503 [2d Dep't. 2019]). Documents that have been found to qualify as documentary evidence have included judicial records, mortgages, deeds, contracts, and other papers the contents of which meet the requirements of being essentially unambiguous, authentic, and undeniable *(Magee-Boyle v Reliastar Life Ins. Co. of New York*, 173 A.D.3d 1157, 105 N.Y.S.3d 90 [2d Dep't. June 26, 2019]). In a recent case, a copy of an insurance policy was found to be documentary evidence permitting the dismissal of the plaintiff's cause of action for breach of contract, where the defendant insurer had denied the plaintiff coverage for a claimed loss under the policy's terms (*Calhoun v Midrox Ins. Co.*, 165 A.D.3d 1450, 86 N.Y.S.3d 769 [3d Dep't. 2018]).

Conversely, documents that tend to be self-serving or prepared for litigation do not qualify as documentary evidence for 3211(a)(1) dismissals, such as letters, affidavits, e-mails (*Magee-Boyle,* 173 A.D.3d 1157, 105 N.Y.S.3d 90; *Phoenix Grantor Tr. v Exclusive Hosp., LLC,* 172 A.D.3d 923, 101 N.Y.S.3d 175 [2d Dep't. 2019]; *First Choice Plumbing Corp. v Miller Law Offices, PLLC*, 164 A.D.3d 756, 84 N.Y.S.3d 171 [2d Dep't. 2018]; *Phillips v Taco Bell Corp*., 152 A.D.3d 806, 60 N.Y.S.3d 67 [2d Dep't. 2017]) and text messages (*Kalaj v 21 Fountain Place, LLC*, 169 A.D.3d 657, 94 N.Y.S.3d 106 [2d Dep't. 2019]).

The use of e-mails has been a source of vigorous argument and continuing controversy on the question of whether they are the type of document that may be considered by courts within the intended scope of CPLR 3211(a)(1). Courts often grapple with legal issues that arise from ever-changing technology, oftentimes one step behind. There are a fair number of cases where e-mails have not found traction as appropriate documentary evidence. E-mails were recently found to not be documentary evidence within the scope of CPLR 3211(a)(1) in *Members of DeKalb Avenue Condominium Association v Klein* (172 A.D.3d 1196, 102 N.Y.S.3d 207 [2d Dep't. 2019]) and in *First Choice Plumbing Corp.* (164 A.D.3d 756, 84 N.Y.S.3d 171 [2d Dep't. 2018]).

Nevertheless, the propriety and use of e-mails as documentary evidence in support of a CPLR 3211(a)(1) dismissal motion has been evolving, and is seen with some increasing flexibility. In *Kolchins v Evolution Markets, Inc.,* 31 N.Y.3d 100, 73 N.Y.S.3d 519 (2018), the Court of Appeals had occasion to consider whether e-mails exchanged between an employer and employee evidenced the existence of an employment contract. The plaintiff employee and defendant employer had entered into two separate three-year employment agreements that ended in 2009 and 2012, respectively. As the end of the second agreement approached, the defendant sent an e-mail to the plaintiff stating *inter alia* that the essential terms of its offer were the same as those of the parties' existing contract; the plaintiff responded by sending e-mail accepting the offer; and the defendant replied by e-mail with congratulations. When the terms of a written contract document could not later be agreed upon, the plaintiff was notified that his employment had ceased at the conclusion of the second contract in 2012. The plaintiff commenced an action for breach of contract, arguing that the e-mail exchanges between the parties evidenced the existence and terms of a third contract which incorporated by reference the terms of the second contract. The defendant moved to dismiss, arguing that the e-mails did not evidence the parties' mutual assent to material contract terms, and that indefiniteness rendered any purported contract invalid as a matter of law. The Court of Appeals ultimately determined that the e-mails failed to conclusively establish the absence of material terms or indefiniteness, as would be required to permit dismissal of the plaintiff's complaint. The Court of Appeals found that the e-mails permitted competing inferences about whether a new and enforceable contract had been reached, rendering a CPLR 3211(a)(1) dismissal inappropriate (*see also Tozzi v Mack*, 169 A.D.3d 547, 92 N.Y.S.3d 648 [1st Dep't. 2019]).

How, then, may *Kolchins* be reconciled with *Members of DeKalb Avenue Condominium Association, First Choice Plumbing Corp*., and many other reported cases that have disavowed the appropriateness of e-mails as documentary evidence for purposes of CPLR 3211(a)(1) dismissals? The answer appears to lie in the fact that in *Kolchins*, the e-mails that were exchanged by the parties bilaterally suggested an offer and an acceptance of a contract, or at least failed to refute that an offer and acceptance had occurred beyond mere preliminary and non-binding communications. The fact that the e-mails were exchanged, and the nature and authenticity of their contents, were not contested by the parties. E-mails in other conceivable actions sent by a party unilaterally, or which fail to authentically establish an offer and acceptance of the material and enforceable contractual terms, would likely fail to qualify as documentary evidence under *Kolchins* for 3211(a)(1) dismissals.

Of course, if the e-mails are themselves central to a cause of action or defense, they should qualify as documentary evidence for CPLR 3211(a)(1) purposes. For instance, in an action of alleged defamation, a news media outlet was able to establish that its reporting did not represent a gross disregard for the truth, by providing *inter alia* an e-mail chain between its reporters and police regarding the investigation that was reported upon (*Stone v Bloomberg, L.P.*, 163 A.D.3d 1028, 83 N.Y.S.3d 78 [2d Dep't. 2018]). Another example is where the e-mails are central to the cause of action, such as alleged defamation contained in the e-mail itself, and the e-mail is proffered as evidence to establish that the statements constituted non-actionable opinion warranting dismissal of the cause of action under CPLR 3211(a)(7) (*International Pub. Concepts, LLC v Locatelli*, 46 Misc.3d 1213[A], 9 N.Y.S.3d 593 [Sup. Ct., New York County 2015]). The appropriateness of letters, e-mails, or texts as documentary evidence therefore depends in many instances upon the nature and circumstances of the action or its available defenses.

C3211:12. Plaintiff's Lack of Capacity

The concepts of "capacity" and "standing" have been described as difficult to distinguish and as "twins" (David D. Siegel and Patrick M. Connors, N.Y. Practice § 136 at 349 [6th ed.]). Nevertheless, the two concepts are distinct. Both fall within the scope of CPLR 3211(a)(3), permitting the dismissal of actions on either ground by means of a pre-answer motion (David D. Siegel, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR C3211:13 [2011]). The difference between the concepts is that "capacity" regards the ability of a plaintiff to competently bring an action in a civil court, without being afflicted by a disqualifying disability such as infancy or mental illness (*Community Bd. 7 of Borough of Manhattan v Schaffer*, 84 N.Y.2d 148, 615 N.Y.S.2d 644 [1994]; *HSBC Bank USA Nat. Ass'n v Roumiantseva*, 39 Misc.3d 1239[A], 975 N.Y.S.2d 709 [Sup. Ct., Kings County 2013]). In contrast, "standing" involves whether a plaintiff with capacity to litigate has a sufficiently cognizable stake in the outcome of the action or proceeding as cast the dispute in a form traditionally capable of judicial resolution (*Community Bd. 7 of Borough of Manhattan,* 84 N.Y.2d 148, 615 N.Y.S.2d 644). Defense attorneys wishing to dismiss an action for lack of standing may do so under CPLR 3211(a)(3), even though the word "standing" is missing from the grounds specifically listed in the subdivision.

The defense of lack of capacity under CPLR 3211(a)(3), if asserted as an affirmative defense in a defendant's answer, is not waived by the defendant's participation in the defense of the action (*Gulledge v Jefferson County*, 172 A.D.3d 1666, 101 N.Y.S.3d 493 [3d Dep't. 2019]).

C3211:15. Same Parties, Same Cause of Action

An action may be dismissed under CPLR 3211(a)(4) if there is already another action pending between the same parties for the same cause of action in a court of any state or the United States. The purpose of CPLR 3211(a)(4) is to prevent a party from being harassed or burdened by having to defend against multiple law suits from the

same plaintiff (*LaBuda v LaBuda*, 175 A.D.3d 39, 105 N.Y.S.3d 585, [3d Dep't. July 3, 2019]).

Dismissal is always discretionary, as the statute specifically provides that the court "may" dismiss the action, not "shall." In exercising that discretion, courts may examine the circumstances under which the second action is brought. In *LaBuda*, a second action was commenced by a substituted attorney to merely add new claims ahead of an expiring statute of limitations, though with 20/20 hindsight the attorney might have more easily sought leave to amend the original complaint. The Appellate Division, Third Department, was satisfied that the second action was commenced for credible, non-harassment purposes, reasoning that a joinder or consolidation of the two actions could be the more appropriate remedy for fostering judicial economy under the circumstances of that case.

The cases seen under this subdivision of the CPLR tend to involve whether two actions truly involve 1) the same parties, 2) the same causes of action, and 3) the same requested relief. The mere relatedness of causes of action or parties is not sufficient to justify CPLR 3211(a)(4) dismissals. The CPLR contemplates something more.

A complete identity of the parties is not necessary for a dismissal under CPLR 3211(a)(4) so long as there is a "substantial" identity of parties, which generally requires that there be at least one plaintiff and one defendant common to both actions (*Jaber v Elayyan*, 168 A.D.3d 693, 93 N.Y.S.3d 315 [2d Dep't. 2019]).

Similarly, for CPLR 3211(a)(4) remedies to apply, the precise legal theories and prayers for relief presented in both actions need not be precisely identical, so long as they are at least "substantially the same" (*Id*.).

An example of causes of action being related, but not quite similar enough for CPLR 3211(a)(4), is *Spicer v Spicer*, 162 A.D.3d 886, 80 N.Y.S.3d 328 (2d Dep't. 2018). *Spicer* involved a mother and a father who were already divorced. An action was commenced in the Supreme Court, Nassau County, where the parties executed an agreement modifying their custody arrangement, and the agreement was awaiting a So Ordered signature of the assigned justice. As that was pending, the mother commenced a proceeding in the Family Court, Nassau County, seeking to hold the father in contempt for allegedly violating the terms of the modification agreement. While the court attorney referee was found on appeal to have erred in dismissing the Family Court petition for failing to state a cause of action, a related issue on appeal was whether the Family Court should have dismissed its proceeding on the ground that a prior action between the same parties was pending at the Supreme Court. As to that issue, the Second Department held that while the parties were identical in both proceedings, the relief sought by them in each forum was very different--one involved a modification of custody, and the other involved alleged contempt and its related remedies. *Spicer* makes clear that a mere connection between the parties and the relief sought in the two forums is not enough, as CPLR 3211(a)(4) speaks more to avoiding an actual duplication of causes in different courts.

If a prior action is pending, but abandoned, dismissal of the second action is not warranted (*MLB Sub I, LLC v Grimes*, 170 A.D.3d 992, 96 N.Y.S.3d 594 [2d Dep't. 2019]). In *MLB Sub I*, the plaintiff had moved to discontinue its first action against the defendant, commenced the second action three weeks later, and the Supreme Court granted the discontinuance of the first action six weeks after that. The Supreme Court and Appellate Division, Second Department, held that the defendant was not entitled to a dismissal of the second action, as the first action had effectively been abandoned by the time the defendant's CPLR 3211(a)(4) motion to dismiss was made.

RPAPL 1301(3) prohibits the commencement of a mortgage foreclosure action if a prior action for the same relief is active, absent leave of court (*U.S. Bank Tr., N.A. v Humphrey*, 173 A.D.3d 811, 103 N.Y.S.3d 98 [2d Dep't. June 5, 2019]; *Deutsche Bank Nat. Tr. Co. v Fandetta*, 60 Misc.3d 1220[A] [Sup. Ct., Suffolk County

2018]).

Actions should not be dismissed on the ground of prior action pending by courts acting *sua sponte* (*DLJ Mortg. Capital v Mahadeo*, 166 A.D.3d 512, 89 N.Y.S.3d 26 [1st Dep't. 2018]).

C3211:18. Affirmative Defenses Available on Subdivision (a) Motions

Statute of Limitations

One of the staple grounds asserted in support of motions to dismiss is the statute of limitations, which is among the grab bag of grounds set forth in CPLR 3211(a)(5). A signed opinion of Justice Robert Miller of the Appellate Division, Second Department, resolved at the appellate level an issue of first impression that had divided several trial-level courts. In *Bank of New York Mellon v Dieudonne*, 171 A.D.3d 34, 96 N.Y.S.3d 354 (2d Dep't. 2019), a lender commenced a residential mortgage foreclosure action against a homeowner who allegedly defaulted in the payment of the installment loan obligation. The note underlying the mortgage contained language in Paragraph 22 setting forth conditions that needed to be satisfied for the lender to accelerate the full balance due on the note. Separately, Paragraph 19 of the note provided that upon default, the homeowner had the right to reinstate the note and mortgage by paying all monies due up to the time of, *inter alia,* the final judgment. The balance of the *Dieudonne* loan debt was duly accelerated by the lender in June of 2010 but the action was not commenced until October of 2016, beyond the six year statute of limitations of CPLR 213(2). The homeowner moved to dismiss the action pursuant to CPLR 3211(a)(5) and CPLR 213(2). In opposition, the lender argued, with reliance upon certain trial-level decisional authority, that because the homeowner possessed the right to reinstate the loan and mortgage under the conditions defined in Paragraph 19 of the note, the statute of limitations did not begin to run until the homeowner's reinstatement rights were extinguished. In effect, the lender argued that the statute of limitations had not even begun to run, as the homeowner's contractual right to reinstatement continued until the time of the entry of final judgment which had not yet occurred.

The Second Department held in *Dieudonne* that the lender's action was untimely and dismissed the complaint. It reasoned that Paragraphs 19 and 22 of the note were independent of one another, and that the lender's right to accelerate the outstanding loan debt expressly preceded the exercise or extinguishment of the homeowner's reinstatement rights. The court's holding makes sense. If the lender's legal argument were taken to its logical conclusion, a homeowner's right to reinstatement until the time of the final judgment, or until some other contractually-defined deadline late in the foreclosure process, would essentially nullify any statute of limitations from applying to residential mortgage foreclosure actions, and provide quite a boon to the banks. The lender's legal argument that the statute of limitations had not begun to run despite the acceleration of the full outstanding loan debt, while clever, fell short of earning a congratulatory cigar.

By virtue of *Dieudonne*, the following reported trial-level decisions, which had agreed with the same or similar bank arguments, are no longer good law and should not be followed: *U.S. Bank Nat'l Ass'n v Nail*, 2018 NY Slip Op. 32897(U), 2018 WL 6172080 (Sup. Ct., Westchester County 2018); *Wells Fargo Bank, N.A. v Fetonti*, 2018 NY Slip Op. 30193(U), 2018 WL 823782 (Sup. Ct., Westchester County 2018); *HSBC Bank, USA, NA v Margineanu*, 61 Misc.3d 973, 86 N.Y.S.3d 694 (Sup. Ct., Suffolk County 2018); *U.S. Bank Trust, N.A. v Monsalve*, 2017 NY Slip Op. 32764(U), 2017 WL 6994224 (Sup. Ct., Queens County 2017); and *Nationstar Mortgage, LLC v MacPherson*, 56 Misc.3d 339, 54 N.Y.S.3d 825 (Sup. Ct., Suffolk County 2017).

Res Judicata

The well-worn definition of res judicata is that it prohibits re-litigation of a matter when an earlier action disposed of the same transaction or series of transactions, involving the same parties, and there was a full and fair opportunity for the parties to be heard in the prior forum (*Paramount Pictures Corp. v Allianz Risk Transfer AG,* 31 N.Y.3d 64, 73 N.Y.S.3d 472 [2018]; *Wilson v Dantas,* 29 N.Y.3d 1051, 58 N.Y.S.3d 286 [2017]; *O'Brien v City of Syracuse*, 54 N.Y.2d 353, 445 N.Y.S.2d 687 [1981]).

An instructive case about res judicata and the identity of parties is *Aponte v Estate of Aponte*, 172 A.D.3d 970, 101 N.Y.S.3d 132 (2d Dep't. 2019). In *Aponte*, the plaintiff sought the appointment of an administrator for his son's estate, claiming that he had retained an attorney to commence an action against the estate to recover monies allegedly owed to him as a result of business dealings. The Surrogate's Court, Queens County, appointed the son's wife as the estate's administratrix, who filed a final account with the Surrogate's Court that the plaintiff did not oppose in that forum. Approximately one month after the Surrogate's Court issued a final decree settling the final account for the estate, the plaintiff commenced an action in Supreme Court for various forms of relief against the son's estate, the son's wife, and a corporate entity allegedly owned by the wife, in connection with the business dealings between them. The issue for the Supreme Court, and on appeal, was whether the Supreme Court action was barred by the doctrine of res judicata. The Second Department applied a pragmatic test analyzing how the facts of the two proceedings were related in time, space, origin, and motivation, whether the facts formed "a convenient trial unit," and whether treating the facts as a unit "conform[ed] to the parties' expectations or business understanding" (*Aponte*, 172 A.D.3d at 972, 101 N.Y.S.3d at 133). The Second Department concluded that causes of action for damages and for a constructive trust in connection with the business should have been dismissed on the ground of res judicata under CPLR 3211(a)(5), as those claims could have and should have been asserted against the estate in the Surrogate's Court proceeding. Indeed, the Second Department specifically held that res judicata applies with equal force to judicially-settled accounting decrees. However, the Second Department also held that as to causes of action in the Supreme Court against the son's wife, res judicata did not apply or warrant dismissal, since her appearance in the Surrogate's Court proceeding was in an administratrix capacity whereas her appearance in the Supreme Court action was in an individual capacity. The corporate entity was not a party to the Surrogate's Court proceeding at all, and therefore was also not entitled to a dismissal of the Supreme Court action against it on account of res judicata. The case demonstrates how courts may parse individual parties, and individual causes of action, in determining which, if any, should be dismissed from an action on the ground of res judicata.

A stipulation of discontinuance with prejudice, without a reservation of right or limitation of the claim disposed by it, is entitled to res judicata effect (*Wells Fargo Bank Nat'l Ass'n v Enbar*, 173 A.D.3d 938, 104 N.Y.S.3d 183, 2019 WL 2439783 [2d Dep't. June 12, 2019]).

The res judicata defense applies to arbitration awards (*Piller v Princeton Realty Assoc., LLC*, 173 A.D.3d 1298, 104 N.Y.S.3d 344, 2019 WL 2375424 [3d Dep't. June 6, 2019] [signed opinion by Mulvey, J.]). If a party fails to comply with a confirmed arbitration award, the remedy is an enforcement or contempt application in the action or proceeding which confirmed the arbitration award (CPLR 7502[a][iii]), as a separate later action is subject to dismissal on the ground of res judicata (*Id.*).

Release

While the existence of a release is a basis for the dismissal of a plaintiff's complaint under CPLR 3211(a)(5), the dismissal motion should be denied where the release is a product of fraud or duress in its procurement (*Paulino v Braun*, 60 Misc.3d 1201[A] [Sup. Ct., Bronx County 2018]). A release is a species of contract, and as such, is governed by the principles of contract law in its execution, interpretation, and enforcement. In *Paulino*, the defendant seeking dismissal met his initial burden of proof by submitting an authenticated copy of a release executed by the plaintiff, a copy of a $6,000 check forwarded to the plaintiff, and an affidavit of the defendant's insurance adjustor that the release and payment pertained to the same automobile accident that became the

subject of the plaintiff's complaint. But in opposition, the defendant raised questions of fact about whether the release was signed under circumstances of unfairness and overreaching, which were described. Thus, while the existence of a release is a defense permitting the dismissal of actions, the release itself must be a product of proper attainment.

C3211:21. Failure to State a Cause of Action, Generally

Where the plaintiff is a contractor asserting a cause of action against a consumer, and the contractor is required by state or local law to be licensed, the complaint must allege that the plaintiff was duly licensed at the time that services were provided, and shall identify the license's name, number, and the of governmental agency of its issuance (CPLR 3015[e]). If a complaint fails to reflect such information, the defendant may move for dismissal of the complaint under CPLR 3211(a)(7) for its failure to state a cause of action (CPLR 3015[e]). The policy behind CPLR 3015(e) is to protect consumers. Additionally, if a contract between an unlicensed contractor and a consumer is illegal by virtue of the contractor's failure to obtain a license, the courts cannot provide the contractor with relief for the consumer's non-payment. The contractor's unlicensed status forecloses a recovery for both money damages and in quantum meruit (*Holistic Homes, LLC v Greenfield*, 138 A.D.3d 689, 27 N.Y.S.3d 892 [2d Dep't. 2016]).

Certainly, unlicensed contractors have been caught unaware of this pleading requirement, and have suffered the dismissal of their actions as a result of non-compliance with licensing laws (*Kristeel, Inc. v Seaview Development Corp.,* 165 A.D.3d 1243, 87 N.Y.S.3d 600 [2d Dep't. 2018]). A new twist occurred in *Rusin v Design-Apart USA, Ltd.*, 173 A.D.3d 1231, 104 N.Y.S.3d 675 (2d Dep't. 2019). In *Rusin*, it was the consumer, rather than the unlicensed contractor, who commenced an action for breach of contract, seeking as damages the return of monies previously paid to the contractor. What is good for the goose is good for the gander. The court held on appeal that when a consumer obtains a benefit of services from an unlicensed contractor, as here, a recoupment of monies already paid is not permitted. As stated by the Appellate Division, "The parties, in these circumstances, should be left as they are" (*Rusin v Design-Apart USA, Ltd.*, 173 A.D.3d at 1231, *citing Segrete v Zimmerman*, 67 A.D.2d 999, 413 N.Y.S.3d 732 [2d Dep't. 1979]).

C3211:28. Lack of Personal Jurisdiction

General Jurisdiction Under CPLR 301

The U.S. Supreme Court caused a moderate earthquake in 2014 with the opinion it rendered in *Daimler AG v Bauman*, 571 U.S. 117, 134 S. Ct. 746 (2014) regarding the issue of all-purpose general jurisdiction against corporate defendants. Professor Patrick M. Connors of Albany Law School was one of the earliest observers out of the gate to recognize the procedural significance of *Daimler* to New York practice (Patrick M. Connors, *Impact of Supreme Court Decisions on New York Practice*, NYLJ, June 18, 2014). The shockwaves of *Daimler* are being felt nationwide generally, and in New York specifically, and it is predicted here that a few years of litigation will be required to fine-tune secondary issues that arise from the case.

Daimler involved several Argentinian plaintiffs who sued a corporate defendant, Daimler AG ("Daimler") in federal court in California, seeking damages for the alleged criminal actions committed in Argentina by a Daimler subsidiary. Daimler is a German entity headquartered in Stuttgart, Germany. The plaintiffs sought to assert general jurisdiction over Daimler in California based upon the presence there of yet another Daimler subsidiary that distributed automobiles in California and elsewhere. The difference between "general jurisdiction" and "specific jurisdiction" is that with the former, a forum state may hear any and all claims against the entity, because the entity's affiliations with the state are so continuous and systematic as to render it

essentially "at home" there (*Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 131 S.Ct. 2846 [2011]). However, in *Goodyear*, the Supreme Court stopped short of defining how and under what circumstances a corporate entity is considered "at home" in a state, keeping its tradition of not deciding questions beyond what is immediately before it. By contrast, "specific jurisdiction" depends on an identifiable affiliation between the state and the underlying controversy, principally activity or an occurrence that takes place in the forum state, or having effect in the forum state, and is therefore subject to the state's regulation (*Id*.).

The issue of whether Daimler was subject to the general jurisdiction of California courts made its way to the U.S. Supreme Court. The majority opinion, written by Justice Ginsburg, held that even assuming the California subsidiary's activities were jurisdictionally imputable to Daimler, Daimler was still not subject to the general jurisdiction of the California courts. The reason is that the Supreme Court re-defined--or perhaps we should say "clarified"--the definition of general jurisdiction over corporate entities. Previously, such jurisdiction derived in New York and elsewhere from a corporation's permanence and continuity within a state (*Tauza v Susquehanna Coal Co.*, 220 N.Y. 259 [1917]), the so called "doing business" test (*Frummer v. Hilton Hotels Intl*. (19 N.Y.2d 533, 281 N.Y.S.2d 41 [1967]). The Supreme Court in *Daimler* gave a much narrower focus to general jurisdiction, holding, as it did in *Goodyear*, that such jurisdiction applies only when the corporate entity is "at home" in the state. However, for the first time, the Supreme Court defined a corporation as being "at home" only in a state 1) where it is incorporated, or 2) where it maintains its principal place of business, or 3) in truly exceptional cases, where the corporation's operations are so substantial and of such nature as to render the corporation at home in the state. Otherwise, the corporation is not "at home" in a state, and is not subject to that state's general jurisdiction.

The effect of *Daimler* was to obliterate New York's "doing business" test with both barrels, wiping out New York's construct for general jurisdiction that has been utilized for several decades. One of the biggest casualties of New York case law was *Frummer v. Hilton Hotels International*, not to mention its progeny.

The first two definitions of being "at home" in a state, based upon the places of the entity's incorporation and principal office, are clear-cut, objective, and documented. Like pregnancy, it exists or it does not with no ground for argument in between. The "third" definition of being "at home" is what may require further litigation to clarify, to determine more precisely the meaning and permutations of having operations so substantial and of such nature as to be tantamount to the corporation being at home in a state, even though its incorporation and principal office lies elsewhere. The language of the U.S. Supreme Court that this third basis for general jurisdiction is "exceptional" suggests that the plaintiffs, rather than the defendants, will face the uphill climb in convincing courts that general jurisdiction be applied on a case-by-case basis to out-of-state corporations.

Daimler represented such a jurisdictional departure from what had previously been understood that the U.S. Supreme Court felt the need to reaffirm its holding three years later in *BNSF Ry. Co. v Tyrrell*, __ U.S. __, 137 S. Ct. 1549 (2017).

A plaintiff who is unable to obtain general jurisdiction over a foreign corporation is not necessarily out of luck in maintaining an action in New York, or forced to travel to another jurisdiction where the corporate defendant is at home. General jurisdiction, which is embodied in CPLR 301, is distinctly different from specific jurisdiction which is embodied in CPLR 302. New York's longarm statute, CPLR 302(a), may independently provide a basis for the assertion of specific jurisdiction, especially where the causes of action in the complaint relate to the foreign corporation's New York activities (*Qudsi v Larios*, 173 A.D.3d 920, 103 N.Y.S.3d 492, 2019 NY Slip Op. 04742 [2d Dep't. June 12, 2019]). These may include, for example, breach of contract actions involving the supply of goods or services to New York, or cases involving the foreign defendant's alleged commission of a tortious act within New York, or product liability cases involving acts outside New York which have an effect within New York (CPLR 302[a][1], [2], [3]).

May the liability of a subsidiary at home in a state where the action is pending be jurisdictionally imputed to a corporate parent not at home in the state? Justice Ginsburg's opinion in *Daimler* shuts down the question, holding that the corporate parent must itself be at home in the state to be subject to its general jurisdiction, *if* the basis for extending jurisdiction over the out-of-state parent is merely an "agency" relationship between the corporate parties. Justice Ginsburg's majority opinion in *Daimler* did not address whether jurisdiction over a subsidiary at home in the state may be extended to an out-of-state parent under an "alter ego" relationship between the corporate parties. The difference between corporate "agency" and corporate "alter ego," and the significance of the two theories to the extension of general jurisdiction, is discussed below.

And what of the converse? May an entity incorporated in New York or maintaining a principal office here be held vicariously liable for the acts of its non-New York subsidiary, perhaps through a piercing of the corporate veil? May the contacts of a parent company incorporated or headquartered in New York be extended to a foreign subsidiary for the assertion of general jurisdiction over that subsidiary? There, the questions become more dicey.

So far, there is no reported case in New York that directly addresses the question of whether an "at home" parent corporation may be held liable for the acts of a foreign subsidiary not "at home" in the forum state. One case of potential guidance, from the West Coast, is *Ranza v Nike, Inc*., 793 F.3d 1059 (9th Cir. 2015). *Ranza* involved a plaintiff's claim for age and sex discrimination allegedly committed against her by her employer, Nike European Operations Netherlands, B.V. (NEON) in Hilversum, Netherlands. NEON's parent company is Nike, Inc. (Nike), which is headquartered and "at home" in Oregon. The plaintiff commenced her action in the federal District Court, District of Oregon. The Ninth Circuit determined that NEON was not incorporated or headquartered in Oregon, and that its contacts with Oregon were not so extraordinary, continuous, and systematic as to render it essentially at home in the forum state. NEON's contacts with Oregon might have been sufficient for the assertion of specific jurisdiction if there had been some connection between the conduct complained of and NEON's contacts with Oregon, but there was no such connection and specific jurisdiction was not an issue in the action. The Ninth Circuit then considered whether Nike's contacts with Oregon could be imputed to its subsidiary, NEON. It determined that a mere parent-subsidiary relationship, standing alone, is insufficient to permit the imputation, because corporate separateness insulates a parent corporation from the liabilities of its subsidiary absent circumstances permitting a piercing of the corporate veil. Prior to *Daimler*, federal courts had allowed the corporate veil to be pierced for jurisdictional purposes under either of two tests, the "agency test" and the "alter ego test". The "agency test" requires the plaintiff to demonstrate that there were tasks so important to the parent corporation that if the subsidiary did not perform them, the parent corporation's own officials would undertake them. The "alter ego test" looks to whether the parent and subsidiary are not truly separate entities, if the parent dominates and controls the subsidiary's internal affairs or daily operations. More specifically, the alter ego test examines whether there is such unity of interest and ownership that the separate personalities of two corporate entities no longer exist, and if so, whether the failure to disregard their separate identities would result in fraud or injustice (*e.g*. *Williams v Yamaha Motor Co. Ltd*, 851 F.3d 1015 [9th Cir. 2017]). According to the Ninth Circuit, *Daimler* invalidated the agency test but left intact the alter ego test. Under the facts of *Ranza*, the Ninth Circuit determined that the plaintiff failed to provide evidence that Nike and NEON did not observe their separate corporate formalities, and on that basis, general jurisdiction was not permissible under the alter ego test. The holding in *Ranza* assuredly suggests that had the alter ego test been satisfied by the plaintiff, Nike's contacts with Oregon, where it was "at home," would have permitted the extension of general jurisdiction over NEON, its foreign subsidiary.

The reasoning of *Ranza* was followed at the federal District Court level in *Maple Leaf Adventures Corporation v Jet Tern Marine Co. Ltd.*, 15-CV-02504-AJB-BGS, 2016 WL 3063956 (S.D. Cal. 2016). There, the court found that the plaintiff failed to establish that a foreign parent corporation was an alter ego of its California subsidiary, but granted the plaintiff the alternative relief of conducting jurisdictional discovery so the issue could be revisited later.

Notably, the entity at home in California in *Maple Leaf Adventures Corporation* was the subsidiary, while the entity at home in Oregon in *Ranza* was the corporate parent. Should it matter to general jurisdiction, for imputation purposes, whether the "at home" entity is the parent or the subsidiary? That question was addressed by the Ninth Circuit in *Ranza*, acknowledging that it is more typical for the subsidiary to be the "at home" entity, with the plaintiff's efforts to extend general jurisdiction directed at the foreign parent corporation. That said, the Ninth Circuit held that where the alter ego test is satisfied for the imputation of general jurisdiction, it does not matter whether the corporate parent or the subsidiary is the "at home" party or which entity is foreign. Its analysis was supported by a federal District Court case and by a law review article that analyzed why it should not matter which of the related entities was at home and which was not (*In re Chocolate Confectionary Antitrust Litig.*, 674 F.Supp.2d 580, 599 n. 25 [M.D. Pa. 2009]; Lea Brilmayer and Kathleen Paisley, *Personal Jurisdiction and Substantive Legal Relations: Corporations, Conspiracies, and Agency*, 74 Calif. L. Rev. 1, 13-15 [1986]). Notwithstanding the analysis in *Ranza*, it actually seems that if two entities are to be treated as one under an alter ego theory, it makes more sense that the "home" of the dominated entity definitionally be the state where the parent is incorporated or maintains its headquarters, as would have been the case in *Ranza* had alter ego evidence been established. If that were to be the case, then general jurisdiction may be extended by a forum state to a foreign subsidiary.

What should make *Ranza* particularly compelling to New York practitioners is that our state recognizes its own alter ego test, though New York courts refer to it as a "department test" with slightly different definitional nomenclature. New York's "department test," roughly similar to the "alter ego test" recognized in Oregon, California, and elsewhere, examines whether a parent corporation's control over the foreign subsidiary's operations is so complete that the subsidiary is, in fact, merely a "department" of the parent (*Delagi v. Volkswagenwerk A.G. of Wolfsburg, Germany*, 29 N.Y.2d 426, 328 N.Y.S.2d 653 [1972]; *Pub. Adm'r of Cnty. of N.Y. v. Royal Bank of Can.*, 19 N.Y.2d 127, 278 N.Y.S.2d 378 [1967]; *Benefits by Design Corp. v Contractor Management Servs., LLC*, 75 A.D.3d 826, 905 N.Y.S.2d 340 [3d Dep't. 2010] [signed opinion by Garry, J.]; *Varga v McGraw Hill Financial Inc.*, 2015 WL 4627748 [Sup. Ct., New York County 2015]; *Transasia Commodities Ltd. v Newlead JMEG, LLC*, 45 Misc.3d 1217[A] [Sup. Ct., New York County 2014]). New York courts consider four factors when assessing whether a mere "department" relationship exists between a parent and a subsidiary; namely: (1) an identical ownership interest, (2) the financial dependency of the subsidiary upon the parent, (3) the parent's influence on the composition of the board and operations of the subsidiary, and (4) the parent's control over the marketing and operational responsibilities of the subsidiary (*Volkswagenwerk Aktiengesellschaft v. Beech Aircraft Corp.*, 751 F.2d 117 [2d Cir. 1984]; *Varga,* at 2015 WL 4627748). The first of the four factors is regarded as essential, while the remaining three factors are merely important (*Volkswagenwerk Aktiengesellschaft,* 751 F.2d at 120-22). The first factor, that there be identical ownership between the corporate parent and the subsidiary, requires the parent to own 100% of the subsidiary, or nearly so (*Volkswagenwerk Aktiengesellschaft,* 751 F.2d at 120 [wholly-owned subsidiary established the common ownership factor]; *OneBeacon Am. Ins. Co. v Newmont Mining Corp.*, 82 A.D.3d 554, 918 N.Y.S.2d 470 [1st Dep't. 2011] [general jurisdiction inapplicable as corporate parent owned only 51% of its subsidiary]). From that standpoint, New York's "department test" may be somewhat more detailed and sophisticated than the "alter ego test" that focuses primarily upon the corporate parent's domination and control if its subsidiary.

If the alter ego test survives future U.S. Supreme Court review for the assertion of general jurisdiction over a foreign entity, then New York's decisional authorities regarding its department test should probably remain viable as well. If, on the other hand, the U.S. Supreme Court determines in the future that the alter ego test is no longer applicable to the assertion of general jurisdiction over a foreign entity, then a portion of New York's jurisprudence may be overruled. Thus, the true parameters of general jurisdiction, extending or not extending through an "at home" entity to related foreign entities, will not be fully known until the U.S. Supreme Court takes up this issue in a future appeal. Only a reader of tea leaves might predict whether the Supreme Court will decide if, in addition to a vicarious relationship between the two entities, a New York entity and a related foreign entity must each be at home for general jurisdiction to attach to them, or whether proof of an alter ego relationship between them may suffice to extend general jurisdiction over the foreign entity.

As *Ranza* demonstrates, if a general jurisdictional extension is permissible against a foreign subsidiary and/or parent, the plaintiffs will need to provide *evidence* sufficient to satisfy the alter ego test, and general jurisdiction will not be sustained if that test is not satisfied. The same would be true of New York's "department test."

What if a corporation is registered to do business in a state for service of process and has designated the Secretary of State as its agent for service of process (BCL 1301, 1312[a]), but is incorporated in and maintains its principal office elsewhere? Is registration equivalent to an incorporation or principal office for general jurisdictional purposes? A signed opinion of Justice Valerie Brathwaite-Nelson of the Appellate Division, Second Department, holds that a mere corporate registration allowing for service of process upon a designated agent within the state is not a consent to the general jurisdiction of that state, but is instead merely a convenience to be utilized when jurisdiction exists (*Aybar v Aybar*, 169 A.D.3d 137, 93 N.Y.S.3d 159 [2d Dep't. 2019]. *See also Amelius v Grand Imperial LLC*, 57 Misc.3d 835, 64 N.Y.S.3d 855 [Sup. Ct., New York County 2017]). It appears that state and federal courts throughout the nation agree with the same reasoning (*Brown v Lockheed Martin Corp.,* 814 F.3d 619 [2d Cir. 2016]; *Gorton v Air & Liquid Sys. Corp.*, 303 F.Supp.3d 270 [M.D. Pa. 2018]; *Gulf Coast Bank v Designed Conveyor Sys., LLC,* No. 16-412-JJB-RLB, 2017 WL 120645 [M.D. La. 2017]; *Perez v Air and Liquid Sys. Corp.,* No. 3:16-CV-00842-NJR-DGW, 2016 WL 7049153 [S.D. Ill. 2016]; *Genuine Parts Co. v Cepec*, 137 A.3d 123 [Del. 2016]; *DeLeon v BNSF Ry Co.* 426 P.3d 1 [Mont. 2018]; *State ex rel. Norfolk S. Ry. Co. v Dolan*, 512 S.W.3d 41 [Mo. 2017]; *Segregated Account of Ambac Assurance Corp. v Countrywide Home Loans, Inc*., 898 N.W.2d 70 [Wis. 2017]. *But see Bailen v Air & Liquid Sys. Corp*., 2014 NY Slip Op. 32079(U), 2014 WL 3885949 [Sup. Ct., New York County 2014]). The holding in *Aybar* makes sense, as the mere doing of business within a state is not enough under *Daimler* to render a corporation "at home" in the state, unless in a given action the third definition in *Daimler* applies--that it be a truly exceptional case where the corporation's operations are so substantial and of such nature as to render the corporation at home in the state.

A contractual forum selection clause naming New York as the forum for litigation is enforceable notwithstanding *Daimler*, as the forum selection clause represents the formal consent of the defendant to the personal jurisdiction of New York courts (*Zucker v Waldman,* 46 Misc.3d 1214[A], 9 N.Y.S.3d 596 [Sup. Ct., Kings County 2015]; *Putnam Leasing Co., Inc. v Pappas*, 46 Misc.3d 195 [Dist. Ct., Nassau County 2014]).

Daimler's restriction of general jurisdiction to states where a corporate defendant is at home does not extend to proceedings to recognize or enforce a foreign judgment against a foreign entity. In doing so, the court is merely performing a ministerial function in according recognition to a foreign judgment of unquestioned finality (*AlbaniaBEG Ambient Sh.p.k. v Enel S.p.A*., 160 A.D.3d 93, 73 N.Y.S.3d 1 [1st Dep't. 2018]).

The state that may be most affected by *Daimler* is Delaware, the one state out of 50 where many national corporations tend to incorporate, regardless of their principal office locations. Suits may always be maintained against corporate entities in their state of incorporation, which may increase the volume of suits filed against corporate defendants in Delaware now that *Daimler* has restricted the meaning of general jurisdiction.

The absence of general jurisdiction is an affirmative defense to actions, within the grounds contemplated by CPLR 3211(a)(8) (*Time Equities, Inc. v Naeringsbygg 1 Norge III AS*, 50 Misc.3d 1221[A], 36 N.Y.S.3d 50 [Sup. Ct., New York County 2016]). That basis for dismissal is therefore subject to a strict 60-day deadline for the filing of a dismissal motion, measured from the service of the defendant's answer with its affirmative defense that personal jurisdiction is lacking. Thus, if a defendant is not subject to general or specific jurisdiction of the New York courts, the party should not sit on its right but instead file a motion to dismiss within the limited time constraints of CPLR 3211(e).

The plaintiff bears the ultimate burden of establishing personal jurisdiction over the defendant, via general jurisdiction or otherwise. Since time-sensitive dismissal motions are made early in litigations, a plaintiff, in

opposing a jurisdiction-based dismissal motion, may not yet be possessed of complete information for establishing the existence of general jurisdiction over the defendant. This is particularly true if the basis for general jurisdiction is the defendant having operations in the forum state so substantial and of such nature as to be tantamount to the corporation being "at home" there, or if the jurisdictional basis requires evidence of an alter ego (i.e. "department") relationship between the related domestic and foreign entities. When that is the case, the plaintiff opposing the dismissal motion may, in addition to providing the court with whatever opposition evidence is available, alternatively request discovery on the jurisdictional issue. To successfully oppose a CPLR 3211(a)(8) motion to dismiss on the ground that discovery on the issue of personal jurisdiction is necessary, the plaintiff not need make a *prima facie* showing of jurisdiction, but rather, must only set forth "a sufficient start, and [show its] position not to be frivolous"(*Marist College v. Brady*, 84 A.D.3d 1322, 1323, 924 N.Y.S.2d 529, 531 [2d Dep't. 2011]*, quoting Petersen v. Spartan Indus*., 33 N.Y.2d 463, 467, 354 N.Y.S.2d 905, 908 [1974]. *See Archer-Vail v LHV Precast Inc*., 168 A.D.3d 1257, 92 N.Y.S.3d 434 [3d Dep't. 2019]).

Indeed, CPLR 3211(d) provides that if facts essential to justify opposition to a motion to dismiss exist, but cannot then be stated, the court may deny the motion so that the defendant may assert the affirmative defense in a responsive pleading if that pleading has not yet been served, with leave to renew the motion upon the completion of discovery (*Qudsi v Larios*, 173 A.D.3d 920, 103 N.Y.S.3d 492 [2d Dep't. June 12, 2019]), or alternatively, hold the dismissal motion in abeyance to permit discovery about the jurisdictional issue (*Fernandez v DaimlerChrysler, A.G.*, 143 A.D.3d 765, 40 N.Y.S.3d 128 [2d Dep't. 2016]). The plaintiff's opposition to dismissal on general jurisdiction grounds cannot be based upon mere speculation, conjecture, surmise, wishful-thinking, fortune telling, or unsupported allegations to justify a denial of the motion with leave to renew, or to justify a continuance of the motion pending discovery. The plaintiff must instead tender at least some tangible evidence or basis which refutes the defendant's argument that general jurisdiction is lacking (*Robins v Procure Treatment Centers, Inc*., 157 A.D.3d 606, 70 N.Y.S.3d 457 [1st Dep't. 2018]). Plaintiffs have been denied disclosure, and had their actions dismissed, where they failed to make credible non-frivolous showings that facts *may exist* to support the exercise of personal jurisdiction (*Glazer v Socata*, *S.A.S*., 170 A.D.3d 1685, 96 N.Y.S.3d 791 [4th Dep't. 2019]; *Abad v Lorenzo*, 163 A.D.3d 903, 82 N.Y.S.3d 486 [2d Dep't. 2018]).

Prohibited Service on the Religious Sabbath

General Business Law 11 prohibits service of process on Sundays, and relatedly, General Business Law 13 prohibits service on Saturdays as to any persons who observe that day as a holy time. The Sunday prohibition, which was enacted in 1965 (L. 1965, c. 1031, sec. 45), is consistent with local "blue laws" that existed at that time where businesses were closed for rest on the Lord's Day. The Saturday prohibition, which is protective of Jewish defendants, goes so far as to render a violation of the statute by a process server a misdemeanor. In any event, service of process in violation of GBL 11 or 13 renders the service void (*Foster v. Piasecki,* 259 A.D.2d 804, 686 N.Y.S.2d 184 [3d Dep't. 1999] [Sunday service]; *JP Morgan Chase Bank, Nat'l Ass'n. v Lilker*, 153 AD3d 1243, 61 N.Y.S.3d 578 [2d Dep't. 2017] [Saturday service upon an observant]), and subjects the plaintiff to a dismissal of the complaint for failing to obtain personal jurisdiction over the defendant.

For a defendant that observes Saturdays as a holy time, dismissal of the complaint for improper service is only warranted where 1) the defendant is not merely Jewish, but observes Saturday as a no-work holy time, *and* 2) the timing of service is motivated by malice. Malice speaks to the state of mind of the process server, or perhaps by imputation to that of the plaintiff's attorney (*Hirsch v. Ben Zvi*, 184 Misc.2d 946, 712 N.Y.S.2d 238 [Civ. Ct., Kings County 2000]). Dismissals will be denied if the defendant fails to establish that he or she is, in fact, observant (*e.g., Chase Manhattan Bank, N.A. v Powell*, 111 Misc.2d 1011, 445 N.Y.S.2d 928 [Sup. Ct., Nassau County 1981]), or where the necessary element of malice is not shown (*e.g.*, *Matter of Kushner*, 200 AD2d 1; 613 N.Y.S.3d 363 [1st Dept. 1994]). Malice can be demonstrated by the drawing of a reasonable inference from the circumstances, or from actual knowledge that the defendant is religiously observant on Saturdays (*Hirsch v. Ben Zvi*, 184 Misc.2d at 948, 712 N.Y.S.2d at 238).

These issues arose in *Hudson City Savings Bank, FSB v Schoenfeld,* 172 A.D.3d 692, 99 N.Y.S.3d 389 [2d Dep't. 2019]). Few details of the service of process were discussed in the published decision. However, in *Schoenfeld*, a Jewish defendant was served with process on Sukkot, which did not fall that year on a Saturday or Sunday. The defendant moved to dismiss the action on the ground that, *inter alia*, the service of process on Sukkot violated GBL 13. The Appellate Division, Second Department agreed with the Supreme Court that on the record before it, a dismissal of the complaint for improper service was not warranted under CPLR 3211(a)(8) or GBL 13. The Second Department determined that since the contested service did not occur on a Saturday, there was no actual violation of GBL 13, and in any event, the defendant failed to establish that the timing of service was motivated by a malicious intent.

The plain language of GBL 13 does not protect Jewish defendants from being served with process on any holy days, except for when they occur on Saturdays, or in the case of everyone, Sundays under GBL 11. Thus, service on Passover or Yom Kippur is not statutorily prohibited upon a Jewish defendant unless the holy day happens to fall on a Saturday (GBL 13) or a Sunday (GBL 11). Similarly, service of process upon a Christian defendant is permissible on various non-Sunday holy days, but is never allowed on Easter because that holy day always falls by definition on a Sunday (GBL 13).

One may question whether the statutory dichotomy between weekly holy days and annual holy days makes sense, as the public policy for not permitting service of process on Sundays, or on Saturdays for those who are observant then, is no less compelling than for major annual holy days that receive as much or more sincere religious attention. Conversely, were GBL 11 and 13 interpreted to apply to non-weekend holy days, or if the statutes were amended by the legislature to say so, would process be off limits upon observant Jewish defendants during all eight days of Chanukah? Or the entire 30-day month of Ramadan for defendants observant of the Muslim faith? The issue of extending the prohibition of service to non-Saturday or non-Sunday religious holy days would necessarily raise difficulties for the secular legislature in defining which holy days of each religion is significant *enough* to warrant protections against the service of process on those days, and which secondary holy days would not qualify for that protection. One can imagine the problems inherent in drawing such Christian, Jewish, Muslim, and other religious denominational lines. The current language of GBL 11 and 13 sets forth lines that are bright. The Second Department's holding in *Schoenfeld* therefore appears to be correct to the extent it is based upon the plain and unambiguous language of GBL 13.

That said, there is no excuse for process servers to effect process on Sundays in violation of GBL 11, and in virtually all instances, they know better. The statute applies in favor of all defendants and the prohibition is clear-cut. Service on Saturdays is arguably more dicey, particularly if the plaintiff or process server knows or has reason to know that the defendant is Jewish, but does not know the depth of the defendant's religiosity. If a Jewish defendant is located for service of process at a work place on a Saturday, the service should survive jurisdictional challenge as a defendant engaged in employment should be unable to simultaneously claim the religious observance protection of GBL 13. If a Jewish defendant is found elsewhere, and the extent of religiosity is not known, the process server might be advised to speak to the defendant about the process before effecting it, or alternatively, be even better advised to effect process on another day that avoids the complications and pitfalls of GBL 13.

C3211:53. Waiving Objection Contained in Paragraph 1, 3, 4, 5, or 6 of 3211(a)

Since the time Moses parted the Red Sea, or at least since 1962, CPLR 3211 has identified certain affirmative defenses which, if not raised in the defendant's answer or in a pre-answer motion to dismiss, are waived by the defendant. CPLR 3018(b) also provides that defendants must plead affirmative defenses of matters which, if not pleaded, would likely surprise the plaintiff. If a defendant merely denies an allegation in a complaint which

requires the plaintiff to then prove the matter, may a court deem the denial the equivalent of an "affirmative defense," even though no separate affirmative defense is actually pleaded in the answer? There have been conflicting appellate decisions on this issue, but recently, the Second Department rendered an extensive analytical opinion that answers the question with a definitive "No."

This pleading issue came to a head in the context of a residential mortgage foreclosure appeal, though it could have appeared as easily in other types of civil litigations. There have been foreclosure actions where plaintiff lenders asserted allegations in their complaints to establish their standing to commence the foreclosure actions against the defaulted homeowners and their collateralized properties. In certain of those appeals, defendant homeowners had served answers either denying the standing-related allegations outright ("D") or denying information sufficient to form a belief ("DKI"), but without separately interposing an affirmative defense that the lenders lacked standing. If a mere "D" or "DKI" of allegations were to qualify as an implicit and cognizable affirmative defense that standing is lacking, the plaintiff lenders would be required to prove those allegations as part of their *prima facie* burden when moving for summary judgment. Otherwise, not. The adequacy of moving papers hung in the balance at the trial courts and on appeal. The reader can substitute allegations about standing with those about the statute of limitations, or the statute of frauds, or other legal mainstays, and the query raised here is the same.

The significance of the issue, particularly for defendants, is that several defenses are waived under CPLR 3211(e) unless set forth as an affirmative defense in the responsive pleading or as a ground for a pre-answer dismissal motion. These waivable defenses include many of the staples relied upon by defense attorneys including, among others, the plaintiff's lack of capacity to sue, standing, collateral estoppel, res judicata, the statute of limitations, and the statute of frauds.

A 3-1 holding was rendered by the Appellate Division, Second Department in *U.S. Bank National Association v Nelson,* 169 A.D.3d 110, 93 N.Y.S.3d 138 (2d Dep't. 2019) (signed opinion by Mastro, J.), which now definitively holds that affirmative defenses are *not* cognizable by a defendant's mere denial or "DKI" of allegations contained in the complaint. Instead, for affirmative defenses to be cognizable and preserved, they must specifically be set forth in the answer as such. The reason is found in CPLR 3018, which draws a distinction between denials, which place at issue proofs that the plaintiff must provide at trial, from affirmative defenses, which raise new defensive matter beyond the elements that plaintiffs must affirmatively plead in a complaint and then prove. Without separately pleaded affirmative defenses, plaintiffs could be surprised by defenses raised later, which CPLR 3018(b) expressly seeks to avoid.

Moreover, though not mentioned in the *Nelson* opinion, a clearly-defined separation between complaint allegations on the one hand, and affirmative defense allegations on the other, properly directs the parties' respective burdens of proof to their own allegations. Since standing is not an element that plaintiffs must plead and prove, and is instead purely in the nature of a defense, the denial or "DKI" of allegations that incidentally implicated standing failed in *Nelson* to qualify as an "affirmative defense." One appellate justice dissented, arguing that mere denials, and "DKIs" that are to be treated for pleading purposes as denials under CPLR 3018(a), raise affirmative defenses by putting plaintiffs to their burden of proving the matters actually asserted in the complaint.

To argue that a mere "D" in response to an allegation qualifies as an affirmative defense is problematic, and if adopted would wreak havoc upon practitioners and courts. While CPLR 3014 provides that pleadings shall consist of plain and concise statements containing as far as practicable a single allegation, it is not unusual for practitioners to craft pleadings that contain multiple fragmented allegations within a single paragraph. The defendant answering the complaint may provide a fragmented response in the answer, or may deny the entirety of a complaint paragraph even if only one specific allegation within the paragraph is deniable. Where a multi-allegation paragraph is answered with a blanket "D," the plaintiff does not necessarily know which one or

more fragments of the complaint paragraph prompted the denial of the entire paragraph. In some of those circumstances, it would be impossible for the plaintiff or the court to know what, if any, affirmative defense is supposedly and implicitly invoked by the defendant's responsive denial of the paragraph in the complaint. Complicating matters further are answers consisting of a "general denial," where the defendant denies in a single sentence all of the allegations in a plaintiff's complaint. While general denials tend to be seen in response to shorter, simpler complaints, the omnibus denial makes it likely difficult or impossible for the plaintiff's attorney or the court to discern what affirmative defense(s) the general denial is intended to convey by implication. Thus, the best practice for lawyers, litigants, and courts, is to follow the well-reasoned logic of *Nelson* by requiring defendants who are vested of defenses to plead them as affirmative defenses in their answers, especially where the failure to do so results in a waiver of those defenses (CPLR 3211[e]).

Even more problematic is the argument that a mere "DKI" is sufficient to implicitly raise an affirmative defense against the complaint paragraph that it is responds to, without more. The reason is that if a defendant responds to an allegation using a "DKI," the defendant is saying in good faith that he or she does not know whether to admit or deny the allegation. If the defendant does not know whether to admit or deny because sufficient information is lacking, how can it simultaneously be said that the defendant knows enough to assert an affirmative defense against that same allegation? The two concepts are irreconcilable with each other, and untenable considering that many answers are verified by a party or counsel (CPLR 3020[b]) and all answers contain good faith attorney and *pro se* certifications as required by the Rules of the Chief Administrator (22 NYCRR 130-1.1-a). Thus, while CPLR 3018(a) provides that a "DKI" "shall have the effect of a denial," that statutory provision should be interpreted as meaning that "D" and "DKI" are treated the same only in regard to issues of proof at trial, and not be used as a substitute for the separate requirement of CPLR 3018(b) that affirmative defenses be expressly pleaded at the outset of the litigation. Once again, the *Nelson* opinion provides sage guidance that avoids the confusion that would result if a mere "D" or "DKI" were to be allowed by courts to constitute affirmative defenses, without actually pleading the defenses as such.

The *Nelson* case, while postured as one for summary judgment and an order of reference, says more about the assertion of affirmative defenses under CPLR 3211(a) than it says about CPLR 3212.

Based on the majority holding in *Nelson*, the following Second Department cases which held to the contrary are no longer good law and should not be followed in that department: *Bank of America, N.A. v. Barton*, 149 A.D.3d 676, 50 N.Y.S.3d 546 (2d Dep't. 2017), *Nationstar Mortgage, LLC v. Wong*, 132 A.D.3d 825, 18 N.Y.S.3d 669 (2d Dep't. 2015), *Bank of America, N.A. v. Paulsen*, 125 A.D.3d 909, 6 N.Y.S.3d 68 (2d Dep't. 2015), and *U.S. Bank National Association v. Faruque*, 120 A.D.3d 575, 991 N.Y.S.2d 630 (2d Dep't. 2014). If factual or legal defenses exist for defendants, counsel should robustly assert them as affirmative defenses in the answers, or in CPLR 3211 motions to dismiss, and fulfill the true purpose of CPLR 3018(a) as intended by the state legislature, which is to prevent surprise to adversary parties.

SUPPLEMENTARY PRACTICE COMMENTARIES

by John R. Higgitt

2018

C3211:6. Specifying the Ground of the Motion.

CPLR 2214, an important motion-requirement statute of general applicability, Commentary C3211:3, directs a movant to specify in the notice of motion, among other things, the grounds for the motion. CPLR 2214(a). "Grounds" means the legal reasons why the relief sought in the motion is warranted. In the CPLR 3211(a) context, identifying the specific paragraphs of subdivision (a) (e.g., CPLR 3211(a)(3), 3211(a)(7)), or stating the specific grounds (e.g., lack of capacity, failure to state a cause of action), should satisfy CPLR 2214(a). *See* Commentary 3211:6 (main vol.).

Violations of CPLR 2214(a) are not uncommon. The failure of a movant to specify in the notice of motion the grounds for the relief sought can be--but is not necessarily--fatal to the motion. If the grounds for the motion are clearly expressed in the papers supporting the motion, such as an affirmation in support or memorandum of law, and the party opposing the motion has not been prejudiced by the CPLR 2214(a) violation, the court may overlook the procedural misstep. *See* Commentary 3211:6 (main vol.). In determining whether to overlook a CPLR 2214(a) violation, a court will also consider whether the notice of motion contains a broadly-worded "wherefore" clause, i.e., a provision stating that, in addition to the specific relief sought, the movant requests "such other, further, or different relief as th[e] court may deem just and proper." *See* Commentary, C2214:5, at 114-115 (main vol.); *see also Kreamer v. Town of Oxford*, 96 A.D.3d 1130, 946 N.Y.S.2d 284 (3d Dep't 2012); *Llano v. Leading Insurance Services, Inc.*, 45 Misc.3d 131(A), 3 N.Y.S.3d 285 (table), 2014 W.L. 6638365 (App. Term, 1st Dep't 2014).

That a court *may* consider a ground that is not apparent from the face of a notice of motion doesn't mean that it *will* do so. *See Abizadeh v. Abizadeh,* 159 A.D.3d 856, 72 N.Y.S.3d 566 (2d Dep't 2018) ("Supreme Court providently exercised its discretion in denying the plaintiff's cross motion on the ground that the plaintiff's notice of cross motion was deficient. The plaintiff's notice of cross motion failed to sufficiently specify the relief sought, against whom it was sought, and the grounds therefor. Although the plaintiff's supporting papers supplied the missing information, a court is not required to comb through a litigant's papers to find information that is required to be set forth in the notice of motion") (internal citations omitted). Whether a court will overlook the movant's failure to specify the grounds for the motion is a matter of discretion. *See* CPLR 3211:6 (main vol.).

C3211:10. Defense Based on "Documentary Evidence."

A Plaintiff Can Respond to "Documentary Evidence" With Other Evidence ("Documentary" or Not) in an Effort to Defeat a CPLR 3211(a)(1) Motion.

In the main volume, we observe that, "[i]n opposing a CPLR 3211(a)(1) motion, a plaintiff is free to submit evidence demonstrating that the defendant's [documentary] evidence does not conclusively resolve the action." Commentary C3211:10, at 27. In *Matter of Koegel*, 160 A.D.3d 11, 70 N.Y.S.3d 540 (2018, Austin, J.), the Second Department highlighted the virtue of opposing a CPLR 3211(a)(1) motion with evidence. There, the party confronted with a "documentary evidence" motion beat it back by tendering some of her proof. The party against whom the motion was made submitted affidavits that suggested that, notwithstanding the movant's "documentary evidence," the challenged pleading may be meritorious. Thus, *Matter of Koegel* highlights additionally that, although a defendant is required to submit "documentary evidence" in support of a CPLR 3211(a)(1) motion, a plaintiff opposing such a motion "is free to submit [any] evidence demonstrating that the defendant's evidence does not conclusively resolve the action (or challenged causes of action)." Commentary C3211:10, at 27 (main vol.).

Court Reviews the Ways in Which Documentary Evidence May be Used to Dismiss Defamation Claims.

Defamation--libel or slander, depending on the manner in which the offensive comments were communicated--is a complex tort. Many defamation actions involve the intersection of federal constitutional and state tort law. Defamation law is beyond the scope of these Commentaries. *Cf.* 2A P.J.I.2d 3:23, et seq. In *Greenberg v. Spitzer*, 155 A.D.3d 27, 62 N.Y.S.3d 372 (2d Dep't 2017), the court, in an opinion by Justice Chambers, reviews various uses of "documentary evidence" for a defamation defendant seeking dismissal under CPLR 3211(a)(1).

C3211:12. Plaintiff's Lack of Capacity.

Court of Appeals Reviews the Issue of Whether a "Public Benefit Corporation" has the Capacity to Challenge the Constitutionality of a State Statute.

"Municipalities and other local governmental corporate entities and their officers [generally] lack capacity to mount constitutional challenges to acts of the State and State legislation." *City of New York v. State of New York*, 86 N.Y.2d 286, 289, 631 N.Y.S.2d 553, 655 N.E.2d 649 (1995, Levine, J.). That's to say that municipalities and other local governmental entities and their officers usually don't have the power to attack in court the constitutionality of state policy and state laws. *See* Commentary C3211:12 (main vol.). Does this rule apply to a "public benefit corporation"?

First of all, what is a public benefit corporation? It's one of three types of "public corporations," the other two being "municipal corporations" and "district corporations." *See* General Construction Law § 65(b). The public benefit corporation is "organized to construct or operate a public improvement wholly or partly within the [S]tate, the profits from which inure to the benefit of this or other states, or to the people thereof." General Construction Law § 66(4). These entities fund public works projects while insulating the State from direct, long-term debt. *Schulz v. State of New York*, 84 N.Y.2d 231, 244, 616, N.Y.S.2d 343, 639 N.E.2d 1440 (1994, Kaye, C.J.). Although created by the State, the public benefit corporation is independent of the sovereign.

Can a public benefit corporation, which bears some of the marks of a state entity and some of the marks of a private one, assert in court that a state statute is unconstitutional? Phrased differently, is the rule preventing municipalities and other public entities from leveling constitutional challenges against state policies and state laws applicable to public benefit corporations?

The Court of Appeals considered the subject in *Matter of World Trade Center Lower Manhattan Disaster Site Litigation*, 30 N.Y.3d 377, 67 N.Y.S.3d 547, 89 N.E.3d 1227 (2017). In an opinion by Judge Feinman, the Court concludes that "public benefit corporations have no greater stature to challenge the constitutionality of state statutes than do municipal corporations or other local governmental entities." 30 N.Y.3d at 393, 67 N.Y.S.3d at 558, 89 N.E.3d at 1238 (rejecting the argument that a court must engage in a "particularized inquiry" to determine whether a public benefit corporation should be treated like a municipal corporation).

Above, we noted the general rule that municipalities and other local governmental entities and their officers lack the capacity to challenge the constitutionality of state action. However, a state-created or sanctioned entity does have capacity to make such challenges if the Legislature expressly authorizes that entity to do so; that's "a question of legislative intent and substantive state law." 30 N.Y.3d at 384, 67 N.Y.S.3d at 551, 89 N.E.3d at 1231. Additionally, "special circumstances" occasionally permit a public entity to bring a constitutional challenge. 30 N.Y.3d at 386-387, 67 N.Y.S.3d at 553, 89 N.E.3d at 1233. The special circumstances exceptions are ad hoc and narrow. 30 N.Y.3d at 387, 67 N.Y.S.3d at 553, 89 N.E.3d at 1234. Therefore, a public benefit corporation, like a municipality, may rebut the presumption that it lacks capacity to challenge the constitutionality of a state action by demonstrating that the public benefit corporation was expressly authorized to bring that challenge or that special circumstances warrant a dispensation from the general rule.

C3211:15. Same Parties, Same Cause of Action.

An Open Question as to Whether the Plaintiff Could Get Full Relief in a Federal Action Precludes Dismissal Under CPLR 3211(a)(4) of a Similar New York State Court Action.

CPLR 3211(a)(4) provides a remedy for a defendant to a New York action "where there is another action pending between the same parties for the same cause of action in a court of any state or the United States." To disturb an action under that paragraph, the action in which the 3211 relief is sought and the other action must involve the same parties and the same cause of action. Commentary C3211:15 (main vol.). Two actions involve the same parties and the same cause of action where the following elements of the actions are substantially similar: (1) the parties; (2) the causes of action; and (3) the relief sought. *Id*.

The court in *Rothschild v. Braselmann*, 157 A.D.3d 1027, 69 N.Y.S.3d 375 (3d Dep't 2018, Pritzker, J.), identified a unique concern that may be present when the other action pending is in federal court.

The plaintiff in *Rothschild* was an inmate at New York State correctional facilities. During his incarceration, the plaintiff suffered serious urological problems that led to hospitalization for septic shock. The plaintiff initiated three actions in three different courts seeking redress for injuries stemming from his medical ordeal. First, the plaintiff commenced a 42 U.S.C. § 1983 action in federal court, alleging that, in violation of the federal constitution's prohibition of cruel and unusual punishment, he received inadequate medical care. Second, the plaintiff filed a claim in the New York State Court of Claims, alleging negligence and medical malpractice by doctors who treated him and their employees. Third, the plaintiff commenced an action in Supreme Court; the claims of negligence and malpractice in the Supreme Court action were similar to the claims lodged in the Court of Claims action.

As is relevant here, two of the medical doctor defendants who provided contractual medical services to the inmate-plaintiff sought dismissal of the Supreme Court action as against them on the basis that the federal court and Court of Claims actions related to the same parties and same cause of action as the Supreme Court action. (We'll refer to these physicians as "the moving defendants.") Supreme Court granted that relief.

The Third Department reinstated the Supreme Court complaint as against the moving defendants. With respect to the federal action, the Third Department provided the following analysis: the federal court had subject matter jurisdiction over the plaintiff's action by virtue of his federal law claim (§ 1983); the federal law claim provided a predicate for the federal court to exercise supplemental jurisdiction over the plaintiff's state law negligence and medical malpractice claims; stringent proof is required to prevail on a § 1983 claim and, therefore, the plaintiff's federal law claim might ultimately be dismissed by the federal court; in the event the federal court dismissed the federal law claim, that court could--but would not be required to--retain jurisdiction over the related state law claims; because the Appellate Division could not ascertain whether the federal court would retain jurisdiction over the state law claims and, relatedly, whether the federal court would ultimately adjudicate those claims on their merits, the plaintiff might be unable to obtain full relief in the federal action. 157 A.D.3d at 1028-1029, 69 N.Y.S.3d at 379. Thus, the Third Department declined to find that the federal court and Supreme Court actions involved the same parties for the same cause of action. 157 A.D.3d at 1029, 69 N.Y.S.3d at 379 ("Because it is impossible to speculate whether the federal court would dismiss or retain jurisdiction in this situation, the federal action cannot be said to be duplicative, as plaintiff may be unable to obtain full relief therein.").

Regarding the relationship between the Supreme Court and Court of Claims actions, the Third Department noted

that the legal theories in the actions were nearly identical, and that both actions arose out of the same set of facts. However, there was a chance that the plaintiff could prevail in the Court of Claims action, but be left with a judgment that was wholly or partially unenforceable.

It's a possibility that exists by virtue of the relevant state-actor indemnification statutes: Correction Law § 24-a and Public Officers Law § 17. Under those provisions, a physician who provided medical care to an inmate at the request of the State Department of Correction is entitled to indemnification and a defense from the State, unless it's determined that the physician engaged in intentional wrongdoing.

If the Court of Claims determined--in that court, the judge serves as the finder of fact (see Court of Claims Act § 12(3))--that one or both of the moving defendants engaged in intentional wrongdoing, the plaintiff's recovery in that action might be diminished. That's because a plaintiff in a Court of Claims action can recover damages from the State, but not individuals. Thus, if the State doesn't owe statutory indemnity to a state actor for his or her conduct, the plaintiff will not be compensated in the context of the Court of Claims action for the fault of the state actor.

Given the factual allegations and theories of liability in the Court of Claims action, a determination that the moving defendants engaged in intentional wrongdoing was "unlikely." But the potential was there; the State neither conceded nor admitted in any of its Court of Claims submissions that the State was bound to indemnify the moving defendants. Therefore, dismissal of the Supreme Court action under CPLR 3211(a)(4) and the concomitant elimination of a forum in which the plaintiff could seek redress directly from the moving defendants was not warranted. Instead, the Third Department stayed the Supreme Court action pending the outcome of the Court of Claims action, a result that "effectively preserve[d] any rights of recovery that [the] plaintiff ha[d] available, prevent[ed] disparate outcomes and limit[ed] duplicative and costly litigation." 157 A.D.3d at 1030, 69 N.Y.S.3d at 379; *see* Commentary C3211:17 (main vol.).

C3211:21. Failure to State a Cause of Action, Generally.

A Court Reviewing a CPLR 3211(a)(7) Motion Must Focus on the Allegations in the Complaint.

CPLR 3211(a)(7)--the failure-to-state-a-cause-of-action dismissal ground--is the workhorse of subdivision (a). No other paragraph gets more exercise. That's because it allows for dismissal where the plaintiff fails to plead a cognizable claim or where the defendant submits evidence rebutting the plaintiff's factual allegations. *See* Commentary C3211:21 (2018 Pocket Part "CPLR 3211(a)(7): the Most Versatile of the Dismissal Grounds" entry).

Regardless of which type of CPLR 3211(a)(7) motion is made against a complaint, a plaintiff is aided by three rules of decision: (1) give the complaint a liberal construction, (2) accept the allegations as true, and (3) provide the plaintiff with the benefit of every possible favorable inference. Commentary C3211:21 (main vol.).

In *Nomura Home Equity Loan, Inc., Series 2006-FM2 v. Nomura Credit & Capital, Inc.*, 30 N.Y.3d 572, 69 N.Y.S.3d 520, 92 N.E.3d 743 (Stein, J., 2017), the Court of Appeals highlighted important caveats to those rules of decision: the court must focus on the allegations in the complaint, and avoid reading into the complaint assertions or theories that are contrary to those that were expressly pleaded by the plaintiff. *See Connaughton v. Chipotle Mexican Grill, Inc.*, 29 N.Y.3d 137, 53 N.Y.S.3d 598, 75 N.E.3d 1159 (Rivera, J., 2017) ("We may not read into [the plaintiff's] allegations a claim for cognizable damages, which he did not actually incur, under the guise of liberally construing the complaint."). The application of these caveats proved critical in *Nomura*.

The majority in *Nomura* applied the familiar rules of decision to the allegations and claims asserted by the plaintiff, and concluded that the complaint could not survive the defendants' CPLR 3211(a)(7) motion. The majority declined to construe the complaint as asserting a theory that was not expressed in the complaint and was contrary to plaintiff's allegations.

CPLR 3211(a)(7): the Most Versatile of the Dismissal Grounds.

Most of the grounds in CPLR 3211(a) are narrow, allowing for dismissal under specific circumstances. Paragraph 1 provides for dismissal based on "documentary evidence"; paragraph 2 provides for dismissal based on lack of subject matter jurisdiction; paragraph 3 provides dismissal for lack of capacity or standing; paragraph 4 provides remedies where there is another action pending relating to the same matter; paragraph 5 provides dismissal for certain enumerated affirmative defenses; paragraph 6 provides for dismissal for a non-interposable counterclaim; paragraph 8 provides for dismissal for want of personal jurisdiction; paragraph 9 provides for dismissal for want of rem or in rem jurisdiction; paragraph 10 provides remedies for failure to join an important individual or entity as a party; and paragraph 11 provides for dismissal in favor of certain uncompensated officials of not-for-profit organizations. Paragraph 7, however, is a broad dismissal ground.

That's because under CPLR 3211(a)(7), the failure-to-state-a-cause-of-action tool, dismissal can eventuate for either a pleading defect or because an allegation material to a facially-sufficient complaint has been bested by evidence. *See* *Lubonty v. U.S. Bank National Association*, 159 A.D.3d 962, 74 N.Y.S.3d 279 (2d Dep't 2018) ("By showing [with evidence] that a material fact as claimed by the plaintiff was not a fact at all, [the defendant] established its entitlement to dismissal of the action pursuant to CPLR 3211(a)(7)").

Let's count the number of situations in which a paragraph 7 motion can generate the dismissal of a complaint (or a particular aspect of it):

1. Where the complaint does not identify a cause of action cognizable at law, e.g., civil conspiracy, educational malpractice.

2. Where the complaint identifies a cognizable cause of action, but fails to plead all of the material elements of it. *See* Commentaries C3013:3, C3013:15A (main vol.).

3. Where the complaint identifies a cognizable cause of action and pleads all of the material elements of it, but fails to set forth "[s]tatements ... sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions intended to be proved." CPLR 3013; *see* *Mid-Hudson Valley Federal Credit Union v. Quartararo*, 31 N.Y.3d 1090, 78 N.Y.S.3d 703, 103 N.E.3d 774 (2018); Commentaries C3013:2, C3013:15A (main vol.). Concrete factual allegations must be asserted in the complaint supporting or tending to support the elements of the cognizable cause of action. *See* *Sager v. City of Buffalo*, 151 A.D.3d 1908, 58 N.Y.S.3d 796 (4th Dep't 2017). Allegations consisting of bare legal conclusions will not suffice. *See* *Connaughton v. Chipotle Mexican Grill, Inc.*, 29 N.Y.3d 137, 53 N.Y.S.3d 598, 75 N.E.3d 1159 (2017); *Mid-Hudson Valley Federal Credit Union v. Quartararo*, 155 A.D.3d 1218, 64 N.Y.S.3d 389, *aff'd* 31 N.Y.3d 1090, 78 N.Y.S.3d 703, 103 N.E.3d 774.

4. Where the complaint identifies a cognizable cause of action, pleads all of the material elements of it, and contains sufficient factual allegations supporting those elements, but the defendant submits evidence

convincingly refuting a material allegation in the complaint. *See Lubonty v. U.S. Bank National Association*, *supra*. Just how powerful must defendant's evidence be to warrant dismissal? The courts aren't in agreement on this important question. See Commentary C3211:23 (main vol.)

5. Where the complaint identifies a cognizable cause of action, pleads all of the material elements of it, and contains sufficient factual allegations supporting those elements, but the plaintiff's submissions in opposition to the motion to dismiss convincingly refute a material allegation in the complaint. *See M & B Joint Venture, Inc. v. Laurus Master Fund, Ltd*., 12 N.Y.3d 798, 879 N.Y.S.2d 812, 907 N.E.2d 690 (2009) ("Because plaintiff's own evidentiary submissions 'conclusively establish that it has no cause of action,' dismissal of the complaint as to [certain defendants] is appropriate," quoting *Rovello v. Orofino Realty Co.,* 40 N.Y.2d 633, 636, 389 N.Y.S.2d 314, 357 N.E.2d 970 [1976]) (internal brackets omitted).

An additional feature of CPLR 3211(a)(7): it can be raised either pre-or post-answer. CPLR 3211(e). Therefore, there are four different classes of CPLR (a)(7) motions: (1) a pre-answer motion unsupported by evidence, (2) a pre-answer motion supported by evidence, (3) a post-answer motion unsupported by evidence, and (4) a post-answer motion supported by evidence. Commentary C3211:26 (main vol.).

C3211:28. Lack of Personal Jurisdiction.

CPLR 3211(a)(8) Can be Used to Seek Dismissal of an Action on the Ground of Improper Joinder.

CPLR 3211(a)(8) allows a defendant to seek dismissal of a complaint on the basis that the court lacks personal jurisdiction over her. When employing this dismissal ground, the defendant is asserting that, under the circumstances of the case, the court does not have the power to render a judgment binding on her. Commentary C3211:28 (main vol.). The defendant can use paragraph 8 to raise any defect relating to personal jurisdiction. *Id*. Such defects include the absence of any basis upon which the court may exercise its jurisdiction over the defendant (i.e., the court lacks general or specific jurisdiction over the defendant), the failure of the plaintiff to effect proper service on the defendant, and the failure of the plaintiff to commence properly the action. *See id*.

Another defect touching on the court's personal jurisdiction over a defendant is the improper joinder of that party. "Improper joinder" refers to the situation where a plaintiff fails to comply with CPLR article 10 when attempting to add an individual or entity as a party--usually a defendant--to the action.

A plaintiff's failure to obtain leave of court to add the new party is an issue that arises in this context. CPLR 1003, part of the CPLR article 10 club, provides that "[p]arties may be added at any stage of the action by leave of court or by stipulation of all parties who have appeared, or once without leave of court within twenty days after service of the original summons or at any time before the period for responding to that summons expires or within twenty days after service of a pleading responding to it."

The Second Department summarized the improper joinder/personal jurisdiction subject this way:

"[t]he failure to obtain leave required under CPLR 1003 create[s] the opportunity for a defendant to claim that the court lacks personal jurisdiction over it because the summons and complaint served were nullities. The purported defect in joinder thus requires a prompt motion to dismiss [under CPLR 3211(a)] or preservation by way of defense in the answer, lest it be deemed waived (CPLR 3211, subd. [e])." *McDaniel v. Clarkstown Central District No. 1*, 83 A.D.2d 624, 441 N.Y.S.2d 532 (1981); *see Public Administrator of Kings County v. McBride*, 15 A.D.3d 558, 791 N.Y.S.2d 570 (2d Dep't

2005); *see also Yonker v. AMOL Motorcycles, Inc.*, 161 A.D.2d 638, 555 N.Y.S.2d 416 (2d Dep't 1990); *Warner v. Kain*, 52 Misc. 3d 1209(A), 41 N.Y.S.3d 722 (table), 2016 W.L. 3884726 (Sup. Ct., St. Lawrence County 2016, Muller, J.).

There is no shortage of examples of instances in which a defendant has waived an improper-joinder argument. *See Zheng v. American Friends of the Mar Thoma Syrian Church of Malabar, Inc.*, 67 A.D.3d 639, 889 N.Y.S.2d 55 (2d Dep't 2009); *Santopolo v. Turner Construction Co.*, 181 A.D.2d 429, 580 N.Y.S.2d 755 (1st Dep't 1992); *Gross v. BFH Co., Inc.*, 151 A.D.2d 452, 542 N.Y.S.2d 241 (2d Dep't 1989); *Gavigan v. Gavigan*, 123 A.D.2d 823, 507 N.Y.S.2d 439 (2d Dep't 1986); *Wolfsohn v. Seabreeze Estate LLC*, 28 Misc. 3d 1239(A), 958 N.Y.S.2d 311 (table), 2010 W.L. 3700276 (Sup. Ct., Queens County 2010, McDonald, J.); *Moses v. City of New York*, 18 Misc. 3d 1113(A), 856 N.Y.S.2d 499 (table), 2008 W.L. 89661 (Sup. Ct., Kings County 2008, Battaglia, J.).

In *Martin v. Witkowski*, 158 A.D.3d 131, 68 N.Y.S.3d 603 (2017, NeMoyer, J.), the Fourth Department had occasion to make the point that a defendant seeking to interpose the defense of improper joinder must, under the pains of waiver, raise it in a timely CPLR 3211(a)(8) motion to dismiss, *see* Commentaries C3211:48, 55, or an answer to the amended complaint. (An amended complaint should be the title of the pleading adding a party to an action. *See* Commentaries C1003:2 [main vol.], C3025:3A [main vol.]; Siegel & Connors, New York Practice §§ 49, 65 [6th ed.].)

The court dealt with the improper-joinder subject in the context of a dispute as to who, as between a father and son of the same name, constituted the defendant in the action. The plaintiff had commenced the action against a single defendant, employing the shared name of the father and son without including a suffix (i.e., Sr. or Jr.). Because of the absence of a suffix following the defendant's name in the caption of the action, issues arose as to which gentleman was the actual defendant in the action and whether service of process was effected on the actual defendant. To identify the actual defendant and address the various procedural issues manifested by the plaintiff's failure to supply a suffix to the defendant's name, the *Martin* court reviewed thoroughly the way the law distinguishes between a father and son sharing the same name and, relatedly, the consequences of the presence or absence of "Sr." or "Jr." with the name of a party.

C3211:34. Motion to Dismiss Defense, Generally.

Motion to Dismiss a Defense Under CPLR 3211(b) Can be Made at Any Time and is Not Subject to *Brill v. City of New York.*

CPLR 3211(b) provides for the motion to dismiss a defense. The typical beneficiary of subdivision (b) is the plaintiff, but any party who has asserted an affirmative claim (e.g., counterclaim, cross claim) can invoke that subdivision to challenge a defense lodged against the claim. *See* Commentary C3211:34 (main vol.). (We'll assume here that it's the plaintiff that wants to employ CPLR 3211[b].) The plaintiff can seek dismissal of a defense on the ground that it has not been stated or that it has no merit. CPLR 3211(b) therefore sanctions both facial-sufficiency and merits-based challenges to a defense. Commentary C3211:36 (main vol.). One of paragraph (b)'s greatest virtues (in the eyes of the party invoking it) is that it may be made at any time. Commentary C3211:34 (main vol.).

That virtue was displayed in *Zarnoch v. Luckina*, 148 A.D.3d 1615, 50 N.Y.S.3d 709 (4th Dep't 2017). The plaintiff commenced an action to recover damages for injuries he sustained when was working on a construction project. The plaintiff, who was employed by the project's general contractor, brought the action against a subcontractor. The subcontractor obtained leave to amend its answer to assert as an affirmative defense that the plaintiff was its "special employee." (If the plaintiff was the subcontractor's special employee, the plaintiff could be barred, under the exclusivity provisions of the Workers' Compensation Law, from maintaining a tort action

against the subcontractor. *See* 1B N.Y. P.J.I.3d 2:218 [2018].) The plaintiff sought dismissal of the special-employee affirmative defense under CPLR 3211(b) or summary judgment dismissing that defense. The motion court denied the plaintiff's motion on the basis that it was an untimely summary judgment motion. Apparently the plaintiff's motion in *Zarnoch* was made after the deadline for summary judgment motions and no satisfactory explanation was offered for the untimely motion. *See Brill v. City of New York*, 2 N.Y.3d 648, 781 N.Y.S.2d 261, 814 N.E.2d 431 (2004).

On appeal, however, the Fourth Department determined that the motion court erred in denying as untimely the plaintiff's motion to dismiss the special-employment affirmative defense because, "[t]o the extent that the ... motion sought relief pursuant to CPLR 3211(b), [the motion] was not subject to the time limit for summary judgment motions under CPLR 3212(a)." (The plaintiff won the procedural battle but lost the substantive war; the motion was denied because he failed to show that the affirmative defense was without merit as a matter of law. *See* Commentaries C3211:35, 36.)

C3211:43. Notice of the Conversion.

The Charting-a-Summary-Judgment-Course Exception to the Notice Requirement Only Applies Where the Parties Signal Unequivocally That They Are Laying Bare Their Proof.

CPLR 3211(c) allows a court to convert a motion to dismiss into one for summary judgment, provided the court gives the parties notice of its intention to do so and an opportunity to submit additional papers. *See* Commentary C3211:43 (main vol.). The notice requirement is important; it gives the parties, who are otherwise operating under the assumption that the motion is subject to the rules of decision and res judicata and collateral estoppel principles applicable to a CPLR 3211 motion, a chance to assemble a summary judgment record. *See Nonnon v. City of New York*, 9 N.Y.3d 825, 842 N.Y.S.2d 756, 874 N.E.2d 720 (2007).

The notice requirement has the following exceptions: (1) where conversion is requested by all parties; (2) where the motion raises a pure question of law that was addressed by the parties; and (3) where the parties deliberately chart a summary judgment course. *See* Commentary C3211:43 (main vol.). Exception number three receives the most attention, and was the subject of a decision by the Appellate Term, Second Department, in *Pesce v. Leimsider*, 59 Misc.3d 23, 72 N.Y.S.3d 760 (2018).

In *Pesce*, plaintiffs commenced a property damage case against defendants, one of whom sought dismissal relief under CPLR 3211(a)(7) (failure to state a cause of action). The motion court acknowledged that a motion to dismiss was before it, and converted it to a summary judgment motion without notice. The court did so because, in its estimation, the parties had charted a summary judgment course (exception number three). Upon converting the motion, the court granted summary judgment to the movant.

The Appellate Term disagreed with the motion court's conversion of the motion without notice to the parties, stating that they neither laid bare their proof nor " 'were ... put on notice of their obligation to make a complete record and to come forward with any evidence that could possibly be considered.' " 59 Misc.3d at 26-27, 72 N.Y.S.3d at ___, quoting *Nonnon v. City of New York*, 9 N.Y.3d at 827, 842 N.Y.S.2d at 758, 874 N.E.2d at 722. Had notice been provided, the plaintiffs could have asked for material discovery or sought to obtain evidence in admissible form to oppose the motion. Therefore, the defendant's CPLR 3211(a)(7) motion should have been adjudicated as such. (Because the parties to the appeal briefed the merits of the CPLR 3211 motion, the Appellate Term reviewed whether the defendant was entitled to relief under that statute and concluded that he was not.)

C3211:53. Waiving Objection Contained in Paragraph 1, 3, 4, 5, or 6 of 3211(a).

Raising a Ground in a Pre-Answer Motion to Dismiss May Preserve the Ground Even if the Motion is Denied and the Ground is Not Included in the Subsequent Answer.

To preserve an objection under paragraph 1 (documentary evidence), 3 (capacity), 4 (other action pending), 5 (affirmative defenses) or the rarely-exercised 6 (non-interposable counterclaim), a defendant must do one of the following: raise the objection in a timely CPLR 3211(a) motion or assert it in an answer. *See* CPLR 3211(e). If the defendant wants to interpose one of these objections but doesn't do so by pre-answer motion *or* in the answer, the objection is waived. *See* C3211:53. (main vol.). (The waiver is presumptive; the court may allow the defendant to amend her answer to include an otherwise waived defense. *See* C3211:58 [main vol.].)

Here are some common waiver scenarios:

• A defendant raises a given 1/3/4/5/6 objection in a pre-answer motion and the court grants the motion, leading to dismissal of the complaint (or challenged portion of it).

• A defendant raises the 1/3/4/5/6 objection in her answer and subsequently seeks dismissal based on the objection by way of a summary judgment motion or at trial.

• The defendant doesn't raise the 1/3/4/5/6 objection in a pre-answer motion or in the answer, and the objection is therefore waived--unless the court allows for an amendment of the answer to include the previously omitted objection.

How about this: a given 1/3/4/5/6 objection is lodged in a CPLR 3211(a) motion, the motion is denied, and the defendant wants to pursue the objection again at a later juncture, after the disclosure process has flushed out the facts. Must the defendant in this situation raise the objection in her answer to preserve it? The Second Department looked at this issue in *Outlook Clothing Corp. v. Schneider*, 153 A.D.3d 717, 60 N.Y.S.3d 302 (2017).

The plaintiffs in *Outlook Clothing* commenced an action against two defendants. As against defendant A, the plaintiffs asserted a cause of action for breach of fiduciary duty (A had been an officer and shareholder of one of the plaintiff-corporations, and after resigning as an officer and selling his shares in the corporation, A entered into a lease for commercial space previously occupied by the corporation, which had been evicted from the leasehold.) The defendants made a pre-answer motion under CPLR 3211(a)(5) to dismiss the cause of action asserted against A, claiming that the cause of action was barred by a release given by the corporation to A. Supreme Court denied the motion as "premature," and the defendants (including A) interposed an answer, which didn't include the affirmative defense of release. (Following the denial of the pre-answer CPLR 3211[a] motion, the defendants had 20 days to answer the complaint. See Commentary C3211:67.) The defendants subsequently sought summary judgment dismissing, among other things, the cause of action asserted against A. Their argument: the release barred the cause of action. Supreme Court granted A summary judgment, and the plaintiffs appealed.

The plaintiffs contended that A waived the affirmative defense of release because it was not pleaded in the answer. Rejecting that contention, the Second Department wrote that:

"As with the other defenses and objections listed in CPLR 3211(a)(5), the affirmative defense of release is waived unless it is raised in a pre-answer motion to dismiss or in a responsive pleading. Here, the defendants avoided waiving the affirmative defense of release by raising it in their pre-answer motion to dismiss, and they were thereafter entitled to seek summary judgment based on that defense despite its absence from the answer." 153 A.D.3d at 718, 60 N.Y.S.3d at 304. Internal citations omitted.

What's more, the appellate court affirmed the granting of summary judgment to A.

Query whether *Outlook Clothing* will apply to the other paragraphs of subdivision a (i.e., 1, 2, 3, 4, 6, 7, 8, 9, 10, and 11)? Note that objections under paragraph 8 are the most susceptible to waiver, see Commentary C3211:55, while objections under paragraphs 2, 7 and 10 are least likely to be waived (an objection under paragraph 2--lack of subject matter jurisdiction--can't be waived). See Commentary C3211:54.

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C3211:5. Grounds of Dismissal.

Dismissal Grounds Outside of CPLR 3211(a).

In the main volume, we note that "CPLR 3211(a) is the central dismissal device, but it is not the only one," Commentary C3211:5, at 19 (main vol.), and list the following sources of dismissal that reside outside of subdivision (a): CPLR 327 (forum non conveniens), CPLR 3012(b) (failure to serve complaint), CPLR 3215(c) (failure to take default judgment proceedings timely), CPLR 3126(3) (recalcitrance in disclosure proceedings), and CPLR 3216 (failure to comply with 90-day notice to prosecute action).

Recent decisions bring to mind two other non-CPLR 3211(a) dismissal grounds.

Rosenblatt v. Doe, 54 Misc.3d 145(A), 2017 N.Y. Slip Op. 50289(U), 2017 W.L. 923496 (App. Term, 2d Dep't 2017), touched on CPLR 1021, which allows for the dismissal of an action (or part of it) in which the substitution of a party is required but the motion for substitution is not made within a reasonable time after the event necessitating the substitution, e.g., the death of a plaintiff. What constitutes a reasonable time in a given case is dictated by the particular circumstances of the case. It's a sui generis question. The court should consider various factors, including the length of time between the substitution-necessitating event and the application for substitution, the extent of prejudice to the other parties, the reasonableness of the excuse (if any) proffered for the delay, and the potential merits of the plaintiff's claim. Commentary C1021:2 (main vol.); *see Alejandro v. North Tarrytown Realty Assoc.*, 129 A.D.3d 749, 10 N.Y.S.3d 616 (2d Dep't 2015).

In *Rosenblatt*, the plaintiff commenced a personal injury action. He subsequently passed away. There was a lengthy delay in securing the appointment of the administrator of the decedent's estate, then another delay in seeking substitution for the decedent-plaintiff. The motion court permitted the substitution, thereby allowing the action to go forward. The Appellate Term, Second Department, affirmed the order allowing the substitution, finding that the motion court did not abuse its discretion in granting the motion, stressing that the defendant failed to show that she would be prejudiced by the substitution.

A dissenting Justice concluded that the action-sustaining substitution should have been denied because of the

delays underlying the substitution, the substitute plaintiff's failure to demonstrate a reasonable excuse for those delays, the absence of an affidavit of merit, and the potential prejudice to the defendant stemming from the delays. 54 Misc.3d 145(A), at *2, 2017 N.Y. Slip Op. 50289(U), at *2, 2017 W.L. 923496, at *1 (Weston, J.). The dissenting Justice would've dismissed the complaint, sua sponte, upon the denial of the motion to substitute.

A couple of observations regarding dismissal under CPLR 1021.

First, the question of whether dismissal is warranted under that statute can arise in a few different ways. A party may move for dismissal; a party may cross-move to dismiss in response to a motion to substitute a party; or a court might dismiss sua sponte.

Where a proposed substitute plaintiff moves for substitution, the defendant opposes the motion but does not formally cross-move to dismiss the action, and the court concludes that the movant did not seek substitution within a reasonable time of the substitution-necessitating event, sua sponte dismissal by the court might seem appropriate. After all, the finding that substitution was not sought within a reasonable time can serve to bar a substitution, and without a proper plaintiff how can the action go forward? However strong the allure of a sua sponte dismissal may be in a particular case, the court (and the defendant, who would benefit from the dismissal) must be cognizant of the dim view the appellate courts have of sua sponte dismissals. *See* Commentary C3211:8 (main vol.). An additional impediment to a sua sponte dismissal in the context of CPLR 1021: the last sentence of the statute ("whether or not it occurs before or after final judgment, if the event requiring substitution is the death of a party, and timely substitution has not been made[,] the court before proceeding further, *shall, on such notice as it may in its discretion direct*, order the persons interested in the decedent's estate to show cause why the action ... should not be dismissed") (emphasis added).

Second, as we noted above, the issue of what constitutes a reasonable amount of time within which to seek substitution is case-specific and determined by consideration of several factors. One of those factors is the length of delay between the occurrence of the substitution-necessitating event and the point at which substitution is sought (or a defendant seeks dismissal for want of compliance with CPLR 1021). *See* Commentary C1021:2. Some delay is typically associated in identifying and securing a proper substitute for the affected party (e.g., getting letters testamentary to administer a party-decedent's estate). The proposed plaintiff should show that she exercised diligence in seeking substitution, specify any bureaucratic or court delay that accounts for the delay in seeking substitution, and corroborate any such bureaucratic or court delay with appropriate documentation. For her part, the defendant should note the extent of delay and demonstrate how she has been prejudiced by it.

Dismissal for want of compliance with CPLR 3012-a was addressed by the Third Department in *Calcagno v. Orthopedic Assoc. of Dutchess County, PC*, 148 A.D.3d 1279, 48 N.Y.S.3d 832 (2017, Garry, J.). That statute applies in medical malpractice actions, requiring a plaintiff in such an action to submit with the summons and complaint a certificate of merit from counsel declaring that he or she has consulted with at least one physician who (1) is knowledgeable regarding the relevant issues in the action, (2) has reviewed the facts, and (3) has concluded that a reasonable basis exists for the commencement of the action. *See* CPLR 3012-a(a). (The certificate-of-merit requirement also applies in dental and podiatrical malpractice actions.)

Some courts, such as the panel in *Kolb v. Strogh* (158 A.D.2d 15, 558 N.Y.S.2d 549 [2d Dep't 1990, Bracken, J.]) and the court in *Dye v. Leve* (181 A.D.2d 89, 586 N.Y.S.2d 69 [4th Dep't 1992]), have concluded that dismissal as a sanction for a plaintiff's failure to comply with the certificate-of-merit requirement is not permissible. (Although dismissal is permissible if a court issues an order directing a plaintiff to file an adequate certificate of merit but the party fails to do so. *See Kolb v. Strogh*, *supra*; *Dye v. Leve*, *supra*; *see also Monzon v. Chiaramonte,* 140 A.D.3d 1126, 35 N.Y.S.3d 371 [2d Dep't 2016] [court conditionally granted defendant's motion to dismiss complaint unless plaintiff filed and served sufficient CPLR 3012-a(a)(1) certificate of merit

within 30 days after notice of entry of order].)

Other courts permit dismissal if a plaintiff seeks but is denied an extension of time within which to file a CPLR 3012-a certificate of merit. A plaintiff's application for such an extension is governed by CPLR 2004, which allows a court to extend most procedural deadlines, provided the party seeking the extension demonstrates "good cause." *See* Commentary to CPLR 2004; *see also* Higgitt, *Requests to Extend Deadlines and the Reach of the CPLR*, Oct. 2, 2013 N.Y.L.J. If a plaintiff seeks a CPLR 2004 extension of the time within which to file a certificate of merit and the court denies the extension, a defendant's motion to dismiss for want of compliance with CPLR 3012-a may be granted. *Calcagno v. Orthopedic Assoc. of Dutchess County, PC, supra*. Dismissal is particularly appropriate in that situation if plaintiff's counsel, in opposing a defendant's motion to dismiss, is unable to make the CPLR 3012-a declaration that a reasonable basis exists for the commencement of the action. *Horn v. Boyle*, 260 A.D.2d 76, 79, 699 N.Y.S.2d 572, 575 (3d Dep't 1999, Carpinello, J.).

Calcagno highlights the need for plaintiff's counsel to take seriously the CPLR 3012-a certificate-of-merit requirement. If an application for an extension of time to comply with CPLR 3012-a is required, attention to CPLR 2004's good cause element is demanded, as is attention to the quality of the papers supporting the application. Of course, timely compliance with CPLR 3012-a--a sufficient certificate of merit accompanying the summons and complaint--prevents any litigation on the matter.

C3211:8. Sua Sponte Dismissal.

Appellate Division Decisions Show the Frailty of Sua Sponte Dismissals.

A sua sponte dismissal occurs when a court, without the prompting of a motion by a party, discards a complaint or some other affirmative claim (e.g., a counterclaim). The Appellate Division has shown little tolerance of sua sponte dismissals. Absent statutory or regulatory authority for a sua sponte dismissal (e.g., CPLR 3215[c], CPLR 3404, 22 NYCRR 202.27), a court's power to dismiss sua sponte should be exercised "sparingly and only when extraordinary circumstances exist to warrant" that ultimate relief. *First United Mortgage Banking, Corp. v. Lawani,* 147 A.D.3d 912, 48 N.Y.S.3d 190 (2d Dep't 2016); *Citimortgage Inc v. Lottridge*, 143 A.D.3d 1093, 40 N.Y.S.3d 573 (3d Dep't 2016, Peters, P.J.). Examples of "extraordinary circumstances" are few. *See* Commentary C3211:8 (main vol.). The limited power of a court to dismiss sua sponte is constrained further by due process. Even if extraordinary circumstances exist, sua sponte dismissal cannot occur unless the plaintiff had notice that dismissal could eventuate and an opportunity to be heard before the court renders the dismissal. *See Citimortgage, Inc. v. Lottridge*, *supra*; *see also First United Mortgage Banking Corp. v. Lawani, supra.*

First United Mortgage Banking Corp. and *Citimortgage, Inc.* evince the Appellate Division's understandable hostility toward sua sponte dismissals and provide a couple of lessons relating to them.

First United Mortgage Banking Corp. discourages trial courts from straying from the factual record adduced by the parties in deciding motions (save for matter that is subject to proper judicial notice, *see* Bench Book for Trial Judges--New York § 7:3 [2015-2016 ed.]). In *First United Mortgage Banking Corp.*, the plaintiff in a residential mortgage foreclosure action made a motion against the defendants for a default judgment and an order of reference. That motion was not opposed. The motion "court conducted an independent Internet investigation of certain records and digital tax maps purportedly maintained by, among others, the New York City Department of Finance. Based upon the court's research ... [it] concluded that certain discrepancies warranted [sua sponte] dismissal of the action." 147 A.D.3d at 913, 48 N.Y.S.3d at 190. The Second Department reversed the order of dismissal and remitted the matter to Supreme Court for a determination of the plaintiff's motion (sans information obtained from the Internet). The appellate court found that extraordinary circumstances were not

present and, therefore, sua sponte dismissal was not warranted. Additionally, the court "caution[ed] that dismissal based almost entirely upon an independent Internet investigation, especially one conducted without providing notice of and an opportunity to be heard by any party, is improper and should not be repeated." *Id.*; *see HSBC Bank USA, NA v. Taher*, 104 A.D.3d 815, 962 N.Y.S.2d 301 (2d Dep't 2013); *see also* Hon. David B. Saxe, *"Toxic" Judicial Research*, 87 N.Y. St. B.J. 36 (Sept. 2015).

In *Citimorgtage, Inc.*, the plaintiff commenced but did not diligently prosecute a residential mortgage foreclosure action. Among other transgressions, the plaintiff allowed the action to "languish" for two years. Supreme Court attempted to spur the plaintiff to pursue the case: the court directed the plaintiff to make an application for a default judgment by a date certain. The plaintiff failed to follow the directive and the court, sua sponte, dismissed the complaint under CPLR 3215(c), which provides that "[i]f the plaintiff fails to take proceedings for the entry of judgment within one year after the default, the court shall not enter judgment but shall dismiss the complaint as abandoned ... unless sufficient cause is shown why the complaint should not be dismissed."

The Third Department reversed an order denying the plaintiff's motion to vacate the sua sponte dismissal order and granted the motion, thereby restoring the complaint. Dismissal was not warranted under CPLR 3215(c) because the plaintiff did take proceedings for the entry of judgment within one year of the defendants' default. The plaintiff sought (and was granted) an order of reference within the one year period, such "proceedings" manifested an intent not to abandon the action, and the action therefore could not be dismissed for the reason identified by Supreme Court. *See* Commentary C3215:12.

And the dismissal could not be sustained as a proper exercise of the court's power to dismiss sua sponte. "[W]hile plaintiff's conduct [in delaying prosecution of the action and violating a directive of the court] was certainly worthy of criticism," the record did not support a finding of a pattern of willful noncompliance with court-ordered deadlines, conduct that could provide extraordinary circumstances justifying a sua sponte dismissal. 143 A.D.3d at 1095, 40 N.Y.S.3d at 575; *see* Commentary C3211:8 at 22-23 (main vol.). That a plaintiff's conduct "frustrates our justice system," standing alone, is not sufficient to constitute extraordinary circumstances. 143 A.D.3d at 576, 40 N.Y.S.3d at 1095. Additionally, sua sponte dismissal was not appropriate because the record did not indicate that the plaintiff was on notice that dismissal might occur.

Two important observations relating to sua sponte dismissals. First, "courts do not possess the power to dismiss an action [in the pre-note of issue phase] for general delay where [the] plaintiff has not been served with a [CPLR 3216(b)] demand." *Chase v. Scavuzzo*, 87 N.Y.2d 228, 233, 638 N.Y.S.2d 587, 590, 661 N.Y.2d 1368, 1371 (1995, G.B. Smith, J.); *see* Commentary C3216:4A, Cumulative Supplementary Pamphlet, 2017 entry. Second, our "courts ... are empowered to grant the sanction of dismissal only when it has been authorized either by the [L]egislature or by court rules consistent with existing legislation." *Tewari v. Tsoutsouras*, 75 N.Y.2d 1, 7, 550 N.Y.S.2d 572, 574, 549 N.E.2d 1143, 1145 (1989, Alexander, J.). Thus, a dismissal ought to be tethered to an identifiable legal basis--a statute, a regulation, a case law principle. Mere frustration with the lack of progress of a case, while understandable and worthy of criticism, shouldn't result in the ultimate penalty of dismissal.

C3211:10. Defense Based on "Documentary Evidence."

Can an E-Mail Constitute Documentary Evidence Under CPLR 3211(a)(1)?

A defendant may seek dismissal of a complaint (or part of it) based on a defense "founded upon documentary evidence." Whether a particular document constitutes documentary evidence under CPLR 3211(a)(1) has been the subject of a lot of litigation. Rarely does the defendant succeed in persuading the court that her evidence is "documentary." That's because the test for determining whether a paper qualifies as "documentary evidence" is

quite stringent; the paper must be unambiguous, of undeniable authenticity, and its contents must be essentially undeniable. Commentary C3211:10, at 25 (main vol.).

In the main volume, we note that an e-mail may (emphasize "may") constitute "documentary evidence"; it's a question that seems to have divided the First and Second Departments. *See id.* The First Department has stated that "[e]-mails can suffice as documentary evidence for purposes of CPLR 3211(a)(1)" (provided, of course, the subject e-mail satisfies the three-element test noted above). *Calpo-Rivera v. Sirioka*, 144 A.D.3d 568, 568, 42 N.Y.S.3d 19, 20 (1st Dep't 2016). The Second Department has signaled that an e-mail cannot be "documentary" in character. *See 25-01 Newkirk Avenue., LLC v. Everest National Ins. Co.*, 127 A.D.3d 850, 851, 7 N.Y.S.3d 325, 326 (2d Dep't 2015) ("letters, e-mails, and affidavits fail to meet the requirements for documentary evidence").

A recent article provides a thorough review of this inter-Department conflict and explores whether an e-mail can constitute documentary evidence under CPLR 3211(a)(1). *See* Bruce H. Lederman, *Role of Emails in CPLR 3211(a)(1) Motions*, vol. 22, no. 1 NYLitigator, N.Y.S.B.A., at 18-22 (Spring 2017).

C3211:12. Plaintiff's Lack of Capacity.

A Plaintiff Who has Attained the Age of Majority is Presumed Competent and a Defendant has the Burden of Demonstrating Otherwise.

Those are the take-away points from *Vasilatos v. Dzamba*, 148 A.D.3d 1275, 49 N.Y.S.3d 194 (3d Dep't 2017, Lynch, J.). There, the defendants moved to dismiss the complaint of the plaintiff, who claimed that, as an infant, she was exposed to and poisoned by lead particles at the defendants' respective properties. The defendants argued, among other things, that the plaintiff lacked legal capacity (i.e., the power) to bring the lawsuit. *See* Commentary C3211:12 (main vol.). The defendants relied on the complaint--verified by plaintiff's counsel--that contained an allegation that, as a result of the lead poisoning, the plaintiff had been "under a disability pursuant to CPLR 208 since infancy, which never ceased, and [the plaintiff] continues to be insane, deprived of an overall ability to function in society, of unsound mind and/or unable to protect her legal rights." Apparently the defendants offered nothing else to support their assertion that the plaintiff lacked the legal capacity to bring the action. Noting that a plaintiff's competence to commence an action is presumed, that a defendant seeking dismissal under CPLR 3211(a)(3) bears the burden of demonstrating that a plaintiff was not legally competent, and that the plaintiff in *Vasilatos* had not been judicially declared incompetent, the Court determined that "plaintiff's acknowledged cognitive and mental defects[, standing alone,] did not prevent her from commencing th[e] action in her own name." 148 A.D.3d at 1276, 49 N.Y.S.3d at 196.

Court Reviews Considerations Relevant to Whether Governmental Entity Created by a Legislative Enactment has Capacity to Sue.

"Capacity" concerns a plaintiff's power to appear before and bring an action in court. Commentary C3211:12, at 29 (main vol.). "Governmental entities created by legislative enactment ... present capacity problems." *Community Board 7 of Borough of Manhattan v. Schaffer*, 84 N.Y.2d 148, 155, 615 N.Y.S.2d 644, 647, 639 N.E.2d 1, 4 (1994, Titone, J.). The Fourth Department reviews those problems in *Matter of Citizen Review Board of the City of Syracuse v. Syracuse Police Department,* 150 A.D.3d 121, 125-126, 51 N.Y.S.3d 708, 711-712 (2017, Curran, J.), and offers factors that can be employed to ascertain whether a given legislatively-created governmental entity has the capacity to commence an action. (Hint: The answer typically lies in legislation creating and governing the entity. *See Excess Line Ass'n of New York v. Waldorf &. Associates*, 30 N.Y.3d 119, 65 N.Y.S.3d 85, 87 N.E.3d 117 (Oct. 19, 2017), 2017 N.Y. Slip Op. 07301.) The Court provides guidance too on

the question of whether a legislatively-created governmental entity has standing to bring an action. Capacity and standing are discreet issues; the former is concerned with whether, in the eyes of the law, the plaintiff has the power to bring a case, and the latter asks whether the plaintiff has a sufficient stake in the outcome of the litigation. *See* Commentary C3211:13 (main vol.).

Filing for Bankruptcy Does Not Necessarily Strip a Plaintiff of Standing to Sue; the Character of Bankruptcy Protection--Chapter 7, 11 or 13--is Determinative.

Generally, "[t]he failure of a plaintiff to disclose a cause of action as an asset in a prior bankruptcy proceeding, the existence of which the plaintiff knew or should have known existed at the time, deprive[s] the plaintiff of the [standing] to sue subsequently on that cause of action." *Whelan v. Longo,* 23 A.D.3d 459, 460, 808 N.Y.S.2d 95, 96 (2d Dep't 2005). But the chapter of the debtor/plaintiff's bankruptcy proceeding determines whether the general rule applies.

Chapter 7 and 11 debtors lose standing to maintain civil suits. That which is lost by the chapter 7 or 11 bankruptcy proceeding debtor is found by her bankruptcy trustee; the chapter 7 or 11 bankruptcy trustee has standing to bring or maintain an action for the benefit of the bankruptcy estate. *Collins v. Suraci,* 110 A.D.3d 1214, 973 N.Y.S.2d 828 (3d Dep't 2013, Egan, Jr., J.). A debtor in a chapter 13 bankruptcy proceeding, however, does not lose standing to bring a civil suit. *See Nicke v. Schwartzapfel Partners, P.C.,* 148 A.D.3d 1168, 51 N.Y.S.3d 121 (2d Dep't 2017). Why do chapter 13 debtors retain standing while chapter 7 and 11 debtors lose it? Because "in a chapter 13 proceeding, 'the creditors' recovery is drawn from the debtor's earnings, not from the assets of the bankruptcy estate; hence, it is only the chapter 13 debtor who stands to gain or lose from efforts to pursue a cause of action that is an asset of the bankruptcy estate.' " *Collins v. Suraci,* 110 A.D.3d at 1215, n, 973 N.Y.S.3d at 830, n, quoting *Olick v. Parker & Parsley Petroleum Co.,* 145 F.3d 513, 516 (2d Cir. 1998).

Some courts have indicated that the failure of a plaintiff to disclose a cause of action as an asset in a prior bankruptcy proceeding affects the plaintiff's "capacity" to sue subsequently on that cause of action. As mentioned above, capacity and standing are separate (albeit allied) concepts. *See* Commentary C3211:13 (main vol.). Capacity concerns a party's legal power to bring an action, asking whether the plaintiff is the proper bearer of the lawsuit. Commentary C3211:12 (main vol.). Standing concerns itself with whether the plaintiff suffered an injury or other harm as a result of the defendant's alleged conduct or inaction, i.e., whether the plaintiff has a sufficiently cognizable stake in the outcome of the litigation. Commentary C3211:13.

As the language from the *Collins* decision suggests, the bankruptcy issue we are discussing here seems to concern standing. In the chapter 7 and 11 contexts, the debtor's "property," including any cause of action the debtor had, vests in the debtor's bankruptcy estate. Because a cause of action that had been the property of the debtor becomes the property of the bankruptcy estate, it is the estate that has a cognizable stake in the outcome of any litigation relating to the cause of action. Thus, the bankruptcy estate, acting through a bankruptcy trustee, has standing to pursue such a cause of action. In the chapter 13 context, it is the debtor "who stands to gain or lose" from the cause of action. *Collins v. Suraci,* 110 A.D.3d at 1215, n, 973 N.Y.S.3d at 830, n. Bankruptcy therefore affects which individual or entity has a direct stake in the outcome of a litigation.

C3211:14. "Other Action Pending," Generally.

The Importance of Service of a Complaint in Both the Present and the Prior Actions.

CPLR 3211(a)(4) authorizes (but does not require) dismissal of an action on the ground that there is another action pending in any court within the United States. Dismissal of the present action, i.e., the New York action in which the CPLR 3211(a)(4) motion is made, is only appropriate if the present action and the other action involve the same parties and the same cause of action. Commentaries C3211:14, 15 (main vol.). The present action and the other action involve the same parties and the same cause of action if the following elements of the two actions are substantially similar: (1) the parties; (2) the cause of action; and (3) the relief sought. Commentary C3211:15; *see Cellino & Barnes, P.C. v. Law Office of Christopher J. Cassar, P.C.*, 140 A.D.3d 1732, 35 N.Y.S.3d 606 (4th Dep't 2016).

To ascertain whether two actions are substantially similar, a court should compare the allegations in the pleadings of the respective actions. *See Security Title & Guaranty Co. v. Wolfe,* 56 A.D.2d 745, 392 N.Y.S.2d 30 (3d Dep't 1977); *see also* Siegel, New York Practice § 262 (Connors 5th ed.). Therefore, service of a complaint (or other appropriate pleading, i.e., a petition) in both the present action and the other action is typically necessary before the present action can be dismissed under CPLR 3211(a)(4). *See Wharton v. Wharton*, 244 A.D.2d 404, 664 N.Y.S.2d 73 (2d Dep't 1997); *Graev v. Graev*, 219 A.D.2d 535, 631 N.Y.S.2d 685 (1st Dep't 1995); *Sotirakis v. United Services Auto Ass'n*, 100 A.D.2d 931, 474 N.Y.S.2d 843 (2d Dep't 1984); *John J. Canpagna, Inc. v. Dune Alpin Farm Associates*, 81 A.D.2d 633, 438 N.Y.S.2d 132 (2d Dept. 1981); Siegel, New York Practice § 262; *see also Security Title & Guaranty Co. v. Wolfe*, *supra*. Use of information outside of the pleadings to compare the actions has not been permitted. *Louis R. Shapiro, Inc. v. Milspenes Corp.*, 20 A.D.2d 857, 857, 248 N.Y.S.2d 85, 87 (1st Dep't 1964) ("it is not permissible to show by parol proof what an action is for") (internal quotation mark omitted).

If there is another action pending in any court within the United States that involves the same parties and the same cause of action as the present action, the court must consult the first-in-time rule, which provides that generally the action that was commenced first will be the one that is allowed to proceed. Commentaries C3211:14, 15. The general rule favoring the action that was commenced first is not ironclad; the presence of special circumstances permits a court to depart from the first-in-time rule and favor the later-commenced action. Commentary C3211:16.

In *Quatro Consulting Group, LLC v. Buffalo Hotel Supply Co., Inc.*, 55 Misc.3d 615, 49 N.Y.S.3d 252 (Sup. Ct., Monroe County 2017, Rosenbaum, J.), the court seemed to question the prudence of the principle that service of the complaints in both actions is required before a CPLR 3211(a)(4) motion to dismiss the present action will lie.

The parties to the *Quatro Consulting Group, LLC,* action had entered into an agreement under which B provided consulting services to A. B sent a demand for payment to A, claiming that B was owed money for services rendered to A. A responded by commencing a declaratory judgment and damages action against B in Supreme Court, Erie County, by electronically-filing a summons with notice on November 22, 2016. The summons with notice allowed A to commence its action without filing and serving a complaint. (The complaint would come later, upon B's demand. *See* Siegel, New York Practice §§ 60, 231.) Approximately one week later, B commenced a breach of contract action against A in Supreme Court, Monroe County, by filing a summons and complaint with the Monroe County Clerk's Office.

In the context of its Monroe County action, B moved to consolidate that action with A's Erie County action. A then moved (also within the context of the Monroe County action) to dismiss the Monroe County action under CPLR 3211(a)(4).

Supreme Court, Monroe County, granted A's motion to dismiss the Monroe County action. The court reasoned that, under CPLR 304, A's Erie County action was commenced on November 22, 2016, approximately one week before B commenced its Monroe County action, and that, under the first-in-time rule, A's action should get

priority. The court rejected B's argument, premised on case law such as *Wharton* and *Graev*, that A's action did not constitute a "prior action pending" because it was commenced by summons with notice. Stressing the plain language of CPLR 304, the court observed that an action is commenced by the filing of a summons and complaint *or* summons with notice, and, therefore, A's summons-with-notice initiated action, which was commenced before B's action, was first-in-time.

Is there any tension between the case law concluding that service of a complaint in both the present action and the other action is necessary before a CPLR 3211(a)(4) motion will lie, and the *Quatro Consulting Group, LLC* court's reasoning? Maybe, maybe not.

The court seemed to question the prudence of the principle that service of the complaints in both actions is a precondition to a CPLR 3211(a)(4) motion to dismiss the present action. But the reason for that principle is to allow the court, based on a comparison of the allegations in the complaints, to ascertain whether both actions involve the same parties and the same cause of action. That inquiry apparently wasn't necessary in *Quatro Consulting Group, LLC.* Rather, the court seemed to operate on the premise that the two actions were substantially similar, and the court focused on the order in which the actions were commenced for the purpose of applying the first-in-time rule.

Perhaps the parties in *Quatro Consulting Group, LLC*, expressly or implicitly acknowledged that the actions involved the same parties and the same cause of action. Or perhaps it was obvious to the court from the submissions on the competing motions that the actions were substantially similar. (Although resort to information outside of the pleadings to compare the actions is generally not permitted. *Louis R. Shapiro, Inc v. Milspenes Corp.*, *supra.*)

In any event, the court apparently did not need to resolve the issue of whether the two actions were substantially similar--the issue on which the principle requiring service of the complaints in both actions bears. The court's comments regarding that principle came in the context of the court's analysis of the separate and distinct issue of which action was commenced first for the purpose of applying the first-in-time rule. Therefore, the tension between the service-of-the-complaints principle and the *Quatro Consulting Group, LLC* decision may not be all that tense.

A final note on *Quatro Consulting Group, LLC*. Recall that A commenced a declaratory judgment action against B in response to B's demand for payment. Was A, which used a summons with notice to commence the action, in a hurry to get into court before B?

This matter is important because the first-in-time rule, which generally favors the action that was commenced first, yields where special circumstances are present. One factor in the special circumstances calculus: whether the prior action was filed preemptively after the plaintiff in that action learned that the opposing party intended to commence a case. Commentary C3211:16. That the prior action was brought in the form of a declaratory judgment action may serve as a strong signal that it was commenced preemptively. *Id*. That the prior action was commenced by the expedient of a mere summons with notice-instead of a summons and complaint-might be another signal of a preemptive filing. If the first action was filed preemptively, special circumstances are likely present and the later-commenced action is given priority, as the law seeks to discourage a race to the courthouse, an exercise that is not compatible with responsible litigation. *Id*.

C3211:21. Failure to State a Cause of Action, Generally.

Court Reviews the Special Principles Applicable to a Motion to Dismiss a Declaratory Judgment Action.

"An action for a declaratory judgment is one that seeks to have the court establish and promulgate the rights of the parties on a particular subject matter." Commentary C3001:1, at 257-258 (main vol.). The declaratory judgment plaintiff seeks no relief that can be enforced through the enforcement mechanisms in CPLR article 52 or by the court's contempt powers, Siegel, New York Practice § 436 (Connors 5th ed.); the plaintiff will be satisfied with a judicial declaration of the rights of the parties. Commentary C3001:1. The utility of a declaratory judgment action is that it may "serve some practical end in quieting or stabilizing an uncertain or disputed jural relation either as to present or prospective obligations." *James v. Alderton Dock Yards*, 256 N.Y. 298, 305, 176 N.E.401, 404 (1931, Crane, J.).

When a defendant in a declaratory judgment action seeks to dismiss it under CPLR 3211(a)(7)--the failure-to-state-a-cause-of-action provision--the ordinary rules of decision apply. *See* Commentary C3211:21, at 47 (main vol.) ("the pleadings must be given a liberal construction, the allegations accepted as true, and the plaintiff accorded every possible favorable inference"); *see also Connaughton v. Chipolte Mexican Grill, Inc.*, 29 N.Y.3d 137, 53 N.Y.S.3d 598, 75 N.E.3d 1159 (2017, Rivera, J.). Some additional special rules apply that reflect the unique nature of the declaratory judgment action.

Guthart v. Nassau County, 55 Misc.3d 827, 52 N.Y.S.3d 821 (Sup. Ct., Nassau County 2017, Palmieri, J.), contains a recitation of those special rules. Here they are:

• A pre-answer CPLR 3211(a)(7) motion to dismiss a declaratory judgment action presents only the issue of whether a cause of action for declaratory relief is set forth, not the question of whether the plaintiff is entitled to a favorable declaration

• Where a cause of action is sufficient to invoke the court's power to render a declaratory judgment, the motion to dismiss should generally be denied

• A court may reach the merits of a well-pleaded cause of action for declaratory judgment on a CPLR 3211(a)(7) motion if no questions of fact are presented by the parties' controversy

• If the controversy presents no questions of fact, the CPLR 3211(a)(7) motion may be treated as a motion for a declaration in the defendant's favor

See also Professor Connors' treatment of the *North Oyster Bay Baymen's Association* decision in Commentary C3001:22, Pocket Part, 2016 entry.

C3211:28. Lack of Personal Jurisdiction.

Fundamental Rules of Decision Applicable to Several CPLR 3211(a) Grounds Apply to Lack-of-Personal-Jurisdiction Motion.

Afford the complaint a liberal construction. Accept the facts alleged in the complaint as true. Accord the plaintiff the benefit of every possible favorable inference. Those commandments apply to motions made on several CPLR

3211(a) grounds, such as dismissal founded on documentary evidence (paragraph 1), dismissal founded on an affirmative defense (paragraph 5), and dismissal for failure to state a cause of action (paragraph 7). (They essentially apply as well to a motion to dismiss an affirmative defense [CPLR 3211(b)].) Compliments of the Court of Appeals' decision in *Rushaid v. Picket & Cie*, 28 N.Y.3d 316, 45 N.Y.S.3d 276, 68 N.E.3d 1 (2016, Rivera, J.), they apply too when the motion to dismiss is based on paragraph 8, want of personal jurisdiction.

In *Rushaid*, the issue was whether the New York court had personal jurisdiction over the defendants under the transacts-any-business aspect of New York's long arm jurisdiction statute. *See* CPLR 302(a)(1); Siegel New York Practice § 86 (Connors 5th ed.). In evaluating whether the court has personal jurisdiction over a defendant under CPLR 302(a)(1), the court asks whether (1) the defendant conducted sufficient activities to have transacted business in New York, and (2) the plaintiff's claims arise from the transactions. *Rushaid*, 28 N.Y.3d at 323, 45 N.Y.S.3d at 282, 68 N.E.3d at 7. In the course of concluding that the New York courts had personal jurisdiction over the defendants under CPLR 302(a)(1), the Court of Appeals applied to the complaint the pleader-friendly principles associated with other CPLR 3211(a) grounds.

Note that it matters not whether a plaintiff can ultimately prove the factual allegations on which the court is relying to impose personal jurisdiction over a defendant. The inquiry is whether the pleadings set forth facts establishing a basis on which to impose personal jurisdiction over the defendant. *See Licci v. Lebanese Canadian Bank,* 20 N.Y.3d 327, 340, 960 N.Y.S.2d 695, 703, 984 N.E.2d 893, 901 (2012, Read, J.).

C3211:58. Initially Raising Objection in Amended Pleading.

Defendant's Motion for Leave to Amend Answer to Include Statute of Limitations Defense That had Been Waived Under CPLR 3211(e) is Denied Based on Delay in Seeking Leave and Prejudice to Plaintiff.

CPLR 3211(e) directs that most subdivision (a) dismissal grounds must be raised in an answer or made the subject of a timely motion to dismiss. *See* Commentaries C3211:53, 55. This direction is backed by subdivision (e)'s waiver provision: a non-exempted ground is generally waived if neither interposed in the answer nor raised in a CPLR 3211(a) motion to dismiss. We say "generally" because the waiver is presumptive not absolute.

Defenses seemingly waived under subdivision (e) may be interposed by way of an amended answer. Sometimes the amendment can be made as of right under CPLR 3025(a). Owing to the narrow window afforded for an amendment as of right, the amendment is usually sought by leave of court under CPLR 3025(b). *See generally* Commentary C3211:58. The amendment by leave is to be "freely" given. CPLR 3025(b). Leave to amend an answer to include an otherwise waived subdivision (a) ground should be granted unless the plaintiff would be prejudiced from the delay in seeking leave, or the proposed amendment is palpably insufficient or patently devoid of merit. That said, the court, in exercising its CPLR 3025(b) discretion, should consider how long the defendant was aware of the facts upon which its motion for leave is predicated and whether the defendant has a reasonable excuse for its delay. The liberality with which leave is to be afforded dissipates where the motion for leave is made long after the filing of the trial-ready signifying documents, the note of issue and certificate of readiness. In considering such a belated motion, judicial discretion in allowing amendments should be circumspect.

In a pair of similarly captioned but separate decisions, the Second Department reviews these important amendment-by-leave principles and highlights the danger to the defendant of waiting to seek leave until the action is in the post-note-of-counsel phase. *Civil Service Employees Association v. County of Nassau,* 144 A.D.3d 1075, 43 N.Y.S.3d 390 (2d Dep't 2016); *Civil Service Employees Association v. County of Nassau,* 144 A.D.3d 1077, 44 N.Y.S.3d 50 (2d Dep't 2016). In each of the actions the defendant sought leave to amend its

answer (1) approximately six years after service of the initial answer, (2) after discovery had been completed, and (3) after the note of issue and certificate of readiness had been filed. Additionally, in each of the actions the facts underlying the defendant's proposed statute of limitations defense were known to the defendant at the time the initial answer was interposed, and the defendant offered no excuse for its lengthy delay in seeking leave to amend. In light of the circumstances, the plaintiff in each action suffered significant prejudice as a result of the defendant's delay, and the Appellate Division concluded that leave to amend the answers must be denied.

PRACTICE COMMENTARIES

By John R. Higgitt

In General

C3211:1. The Motion to Dismiss, Generally.

CPLR 3211 is the principal dismissal motion in New York civil practice. The motion is available to any party against whom a cause of action has been asserted; it can be used to challenge defenses as well. The availability of the motion to a party in a given situation depends on the party's negotiation of the requirements of CPLR 3211.

Here is a snapshot of CPLR 3211:

• Subdivision (a) lists the grounds on which a motion to dismiss a cause of action may be made.

• Subdivision (b) provides the motion to dismiss a defense.

• Subdivision (c) concerns the evidence permitted on a CPLR 3211 motion, the conversion of a dismissal motion into one for summary judgment, *see* CPLR 3212, and the availability of an immediate trial of issues related to a CPLR 3211 motion.

• Subdivision (d) offers a remedy to a party opposing a motion to dismiss who needs time to gather evidence.

• Subdivision (e), an unwieldy provision, contains significant rules regarding the time for making a CPLR 3211(a) motion and the waiver of certain subdivision (a) grounds, and provides the "single motion rule."

• Subdivision (f) extends a CPLR 3211 movant's time to serve a responsive pleading.

• Subdivisions (g) and (h) prescribe special standards on CPLR 3211(a)(7) motions relating to actions involving public petition and participation ("SLAPP" suits) and certain actions involving licensed architects, engineers, land surveyors, and landscape architects.

CPLR 3211 is a purely mechanical device, a procedural statute through and through. It authorizes a party to seek dismissal of a cause of action on certain grounds (or a defense on any ground) and sets forth the manner in which

the party may do so. CPLR 3211 therefore provides a means by which a party may present its arguments for dismissal to the court. Whether dismissal is warranted in a given situation will depend on law (substantive, procedural or both) that comes from outside CPLR 3211's borders.

An important note: these commentaries focus on contemporary matters, with reference to the history of a provision or the history underlying a particular issue reserved for those instances in which historical context will aid the reader in understanding the law in its current state.

C3211:2. Considerations for the Potential CPLR 3211(a) Movant.

A defendant served with a summons and complaint (or some other form of initiatory papers) can make a pre-answer motion to dismiss the complaint (or parts of it). (As we discuss below, Commentary C3211:4, any party against whom an affirmative claim is asserted can make a CPLR 3211[a] motion.) Alternatively, the defendant can interpose a timely answer that contains CPLR 3211(a) grounds and seek relief on the pleaded grounds at some later time, e.g., on summary judgment. Whether a defendant should make a pre-answer CPLR 3211(a) motion is a case-specific inquiry driven by the contents of the complaint, the information and evidence available to the defendant, the litigation goals of the defendant, and the resources of the defendant. Here are some basic considerations for the defendant pondering whether to make a CPLR 3211(a) motion:

• What potential grounds exist for the motion?

• Will one or more of those grounds terminate the entire action?

• Will some or all of the causes of action be resolved conclusively by the potential grounds for dismissal, i.e., can the potential grounds serve as an absolute bar to a future action, or can the potential objections be remedied and allow for a new action?

• How strong are the arguments in support of the potential grounds?

• What expense would be incurred by the defendant in making the motion and is the defendant willing to incur it?

For an additional discussion of the matters that defense counsel should review when determining whether to make a CPLR 3211(a) motion, *see* Robert L. Haig, Commercial Litigation in New York State Courts, § 8:25 (4th ed.).

C3211:3. General Motion Considerations.

CPLR 3211 is just one motion in the expansive universe of New York civil procedure. CPLR 3211 has of course its own unique requirements, which will be reviewed below. But a CPLR 3211 motion is subject to all of the basic rules of motion practice, and a party's failure to abide by those rules can have significant consequences: for a CPLR 3211 movant, the loss of the right to have the motion potentially determined on its merits (and, therefore, additional litigation that the movant could have potentially avoided); for the party opposing the motion, the loss of the opportunity to put before the court arguments, evidence or both that might persuade the court to deny the motion. We highlight some important general rules of motion practice that sometimes cause trouble for the parties on a CPLR 3211 motion. The particulars of these general rules are covered in more detail by Professor Connors in

both his Practice Commentaries and book, initially crafted by the late Professor David D. Siegel, New York Practice. Reference to those resources is recommended.

Important General Rules of Motion Practice:

• A notice of motion must "specify the time and place of the hearing of the motion, the supporting papers upon which the motion is based, the relief demanded and the grounds therefore." CPLR 2214(a); *see* Commentary C2214:3; Siegel, New York Practice § 246 (Connors 5th ed.); *see also* Commentary C3211:6.

• A motion must be served so as to comply with the notice requirements of CPLR 2214(b), and a cross motion must be served so as to comply with the notice requirements of CPLR 2215. *See* Commentaries C2214:6-21, C2215:1A-1C; Siegel, New York Practice §§ 247, 249.

• The parties must furnish the court with all papers necessary to the court's consideration of the motion. CPLR 2214(c); Commentaries C2214:22-23; Siegel, New York Practice § 246. A component of this requirement is that the CPLR 3211 movant submit a copy of the pleading challenged on the motion. *See* Commentary C3211:41.

• In an e-filed action, the parties must provide the court with "working copies" of the documents that were e-filed in connection with the motion (if required to do so by the court). *See* 22 NYCRR 202.5-b(d)(4); 22 NYCRR 202.5-bb(a)(1); Commentary C2214:23 (2014 entry), Siegel, New York Practice § 246.

Subdivision (a)

C3211:4. Parties Who May Use Subdivision (a).

Any party against whom an affirmative claim is interposed may utilize CPLR 3211(a)'s dismissal grounds to seek dismissal of a claim. CPLR 3211(a) is most commonly employed by defendants to seek dismissal of complaints (or parts of them), and the defendant-moving-against-the-complaint is the example we will use in these Commentaries (unless context calls for a different example). But others can invoke subdivision (a)--a plaintiff against whom a counterclaim has been interposed, *see Hyman v. Schwartz*, 127 A.D.3d 1281, 6 N.Y.S.3d 732 (3d Dep't 2015), a defendant against whom a co-defendant has asserted a cross claim, *see Darby Group Companies, Inc. v. Wulforst Acquisition, LLC*, 130 A.D.3d 866, 14 N.Y.S.3d 143 (2d Dep't 2015), and a third-party defendant against whom a third-party complaint has been served, *see Front, Inc. v. Khalil*, 24 N.Y.3d 713, 4 N.Y.S.3d 581, 28 N.E.3d 15 (2015). A non-party cannot move to dismiss under 3211(a) for the simple and obvious reason that no affirmative claim can be asserted against a non-party. *See U.S. Bank, N.A. v. Patterson*, 102 A.D.3d 858, 959 N.Y.S.2d 216 (2d Dep't 2013).

The motion to dismiss a defense is covered by subdivision (b). *See* Commentaries C3211:34-39.

If a defendant (or other party against whom an affirmative claim is interposed) purports to seek dismissal of a complaint (or part of it) under CPLR 3211(b), the court can disregard the mislabeling and treat the motion as made under CPLR 3211(a), provided the specific subdivision (a) grounds upon which the defendant is relying are clear from the moving papers and the plaintiff is not prejudiced by the mislabeling. *See* CPLR 2001; Commentary C3211:6; *see also D'Agostino v. Harding*, 217 A.D.2d 835, 629 N.Y.S.2d 524 (3d Dep't 1995).

C3211:5. Grounds for Dismissal.

A motion to dismiss a complaint (or part of it) under CPLR 3211(a) must be founded on a ground provided by that subdivision. The Legislature provided this dismissal device and that body determines which grounds can serve as predicates for dismissal. So, the CPLR 3211(a) movant must find one or more grounds from the list on which to rest its motion. The good news for that party: the list is long and, thanks to the generous interpretation given to it by many courts, the motion to dismiss for failure to state a cause of action, CPLR 3211(a)(7), is a broad ground. *See* Commentary C3211:23; *see also* Commentary C3211:13 (lack of capacity ground includes lack of standing).

CPLR 3211(a) is the central dismissal device, but it is not the only one. A motion to dismiss based on a plaintiff's failure to serve a complaint in an action started with a summons with notice lies under CPLR 3012(b); a motion to dismiss based on a plaintiff's failure to take timely proceedings for the entry of default judgment is in CPLR 3215(c); a motion to dismiss based on a plaintiff's failure to satisfy its obligations in the disclosure process is in CPLR 3126(3); a motion to dismiss based on a plaintiff's failure to comply with a duly served 90-day demand is authorized by CPLR 3216; a motion to dismiss under the doctrine of forum non-conveniens comes from CPLR 327. When a dismissal motion is predicated on CPLR 3211(a) grounds, the motion must comply with the various requirements of CPLR 3211; when the dismissal motion is based on a device other than subdivision (a), the motion is subject to the requirements of the particular statute or court rule giving life to it.

C3211:6. Specifying the Ground of the Motion.

Must the CPLR 3211(a) movant specify the grounds for the motion? CPLR 3211 does not answer that question. But CPLR 2214(a), one of those important motion rules of general applicability, *see* Commentary C3211:3, offers guidance on the point. It requires that a notice of motion specify, among other things, the grounds for the motion. That requirement can be satisfied by stating the grounds in the notice of motion, e.g., lack of personal jurisdiction, statute of limitations, failure to state a cause of action. *See, e.g., Blauman-Spindler v. Blauman*, 68 A.D.3d 1105, 1106, 892 N.Y.S.2d 143, 144 (2d Dep't 2009) ("there is no requirement that a movant identify a specific statute or rule in the notice of motion"). Alternatively, the movant could identify the specific paragraphs of subdivision (a) on which the motion is based, e.g., CPLR 3211(a)(8), 3211(a)(5), 3211(a)(7). *See* Commentary C2214:3.

Note that specification of the grounds should appear in the notice of motion. If they don't, but are clearly laid out elsewhere, such as in an affirmation in support of the motion, the court can overlook the movant's failure to comply with CPLR 2214(a), provided the non-moving party was not prejudiced. *See Matter of LiMandri*, 171 A.D.2d 747, 567 N.Y.S.2d 303 (2d Dep't 1991). So, too, can the court disregard a non-prejudicial mislabeling of a ground--for instance, styling a motion as one to dismiss for failure to state a cause of action when it is in reality one to dismiss under the statute of limitations. *See* Siegel, New York Practice § 258 (Connors 5th ed.). The key is prejudice (or lack thereof): if the party opposing the motion is hindered in the preparation of its opposition papers, the court should not overlook or disregard the movant's failure to comply with CPLR 2214(a). Also, the court should not treat the motion as made under a ground that is neither specified in the notice of motion nor addressed in the movant's papers supporting the motion. *See Matter of Tognino*, 87 A.D.3d 1153, 930 N.Y.S.2d 46 (2d Dep't 2011); *see also Bowen v. Nassau County*, 135 A.D.3d 800, 24 N.Y.S.3d 143 (2d Dep't 2016). That a court can overlook a movant's failure to comply with CPLR 2214(a) does not mean that it will; it is a discretionary call for the judge. *See, e.g., Pace v. Perk*, 81 A.D.2d 444, 440 N.Y.S.2d 710 (2d Dep't 1981).

C3211:7. Subdivision (a) Grounds Available by Motion or Answer.

As noted above, *see* Commentary C3211:2, a party can (but is not required to) raise subdivision (a) grounds in a pre-answer CPLR 3211 motion. The motion is optional, with the other option being to raise the grounds in an answer and seek relief on them later. *See* CPLR 3211(e). As our overview of each of the paragraphs of subdivision (a) will disclose, most grounds must be raised in a pre-answer CPLR 3211 motion or an answer, some grounds can be raised at any time, and a couple grounds must be raised in a pre-answer motion or taken by answer and moved

on with dispatch. While a defendant is free to raise some by motion and others by answer, a defendant is permitted only one CPLR 3211 motion, *see* Commentary C3211:51, and waiver provisions are associated with most of the subdivision (a) grounds. *See* Commentaries C3211:53-55. Discussions of the "single motion rule" (CPLR 3211[e]) and the nuances of the various waiver provisions are deferred to later in the Commentaries.

C3211:8. Sua Sponte Dismissals.

CPLR 3211(a) provides a lengthy (but not quite exhaustive) list of dismissal grounds. *See* Commentaries C3211:5. Most of these grounds require or at least contemplate a motion by a party invoking one or more of them. Does the law permit a court to dismiss a complaint sua sponte; that is, on its own accord without the prompting of a party? "Yes, but rarely." That is the answer to glean from the recent case law on the subject, which has been receiving some attention in the realm of residential mortgage foreclosure litigation.

In that unique world, the question often arises whether a plaintiff has standing to maintain an action. *See* Commentary C3211:13. This is an outgrowth of the prevalence of the assignment (or other manner of transfer) of notes and mortgages from the original lenders to other banks, financial institutions and financial service companies. Such assignments and transfers were fueled by the rise of the secondary mortgage market. Because of both the volume of these transactions and that a note and the mortgage related to it may be held by separate entities, nailing down the entity that has standing to commence a particular residential mortgage foreclosure action can pose a challenge.

Some trial courts, frustrated by failures of residential mortgage foreclosure plaintiffs to demonstrate standing, have taken to dismissing complaints sua sponte. The Appellate Division has not indulged these dismissals, reversing them and stressing that a court's power to dismiss a complaint sua sponte should be exercised "sparingly and only when extraordinary circumstances exist to warrant dismissal." *E.g.,* *U.S. Bank Nat. Ass'n v. Ahmed*, 137 A.D.3d 1106, 29 N.Y.S.3d 33 (2d Dep't 2016); *U.S. Bank Nat. Ass'n v. Flowers*, 128 A.D.3d 951, 11 N.Y.S.3d 186 (2d Dep't 2015); *Citimortgage, Inc. v. Chow Ming Tung*, 126 A.D.3d 841, 7 N.Y.S.3d 147 (2d Dep't 2015); *see* *Deutsche Bank Nat. Trust Co. v. Meah*, 120 A.D.3d 465, 991 N.Y.S.2d 92 (2d Dep't 2014). In New York Practice, standing generally does not relate to a court's subject matter jurisdiction over an action; it is an affirmative defense that must be raised by a defendant or it is waived. *See* *Wells Fargo Bank Minnesota, N.A. v. Mastropaolo*, 42 A.D.3d 239, 837 N.Y.S.2d 247 (2d Dep't 2007); *see also* Commentary C3211:13. Because standing is an affirmative defense that a defendant can waive, a plaintiff's failure to demonstrate its standing to maintain a residential mortgage foreclosure action does not present extraordinary circumstances warranting a sua sponte dismissal.

With all of the dismissal grounds authorized by CPLR 3211(a) and elsewhere, why would a court get involved in the sua-sponte-dismissal business? Maybe the court perceives a conclusive affirmative defense to an action but the defendant failed to raise or waived it. Maybe the court believes that a plaintiff is wasting the court's time with a baseless suit. *See* *Hurd v. Hurd*, 66 A.D.3d 1492, 885 N.Y.S.2d 655 (4th Dep't 2009); *Myung Chun v. North American Mortgage Co.*, 285 A.D.2d 42, 729 N.Y.S.2d 716 (1st Dep't 2001). Or maybe the court is offended at the conduct of a plaintiff. In light of the case law, it is unlikely that either of the first two scenarios provide sufficient cause for a court to dismiss sua sponte. The third scenario, however, might. The Court in *Chun* suggested that "egregious" conduct by a plaintiff that "flout[ed] the integrity of th[e Court]" could allow for a sua sponte dismissal. *Cf.* *CDR Creances, S.A.S. v. Cohen*, 23 N.Y.3d 307, 991 N.Y.S.2d 519, 15 N.E.3d 274 (2014) (finding that court has "inherent power" to address conduct meant to undermine truth-seeking function of judicial system and place in question integrity of courts and justice system [i.e., "fraud on the court"]); Commentary C3126:12, 2014 Supplementary Practice Commentaries; *Wells Fargo Bank, N.A. v. Pabon*, 138 A.D.3d 1217, 31 N.Y.S.3d 221 (3d Dep't 2016) (sua sponte dismissal inappropriate; record neither supported Supreme Court's finding that affidavit on which plaintiff relied was perjured nor showed fraud by plaintiff).

The Second Department has suggested that "a pattern of willful noncompliance with court-ordered deadlines" may also provide for extraordinary circumstances justifying such a dismissal. *U.S. Bank Nat. Ass'n v. Polanco*, 126 A.D.3d 883, 7 N.Y.S.3d 156 (2d Dep't 2015); *see Williams v. North Shore LIJ Health System*, 119 A.D.3d 935, 990 N.Y.S.2d 260 (2d Dep't 2014) (affirming Supreme Court's order dismissing complaint sua sponte based on plaintiff's failure to comply with multiple directives to file a bill of particulars setting forth alleged negligence of each of over 100 defendants in medical malpractice action); *cf. Citimortgage, Inc. v. Petragnani*, 137 A.D.3d 1688, 27 N.Y.S.3d 780 (4th Dep't 2016) (missing single court-ordered deadline by one week did not warrant sua sponte dismissal).

But given the paucity of examples of sua sponte dismissals that have been upheld, it is hard for a judge to dismiss a complaint sua sponte with much confidence. Should a statute or other authority expressly authorize a court to dismiss sua sponte, the court can have at it, but instances in which a court is so authorized are few. *See* 22 NYCRR 202.27 (authorizing a trial court to dismiss based on a plaintiff's failure to appear for or be ready to proceed at any duly scheduled court appearance); *see also Grant v. Rattoballi*, 57 A.D.3d 272, 869 N.Y.S.2d 53 (1st Dep't 2008); *see generally Tirado v. Miller*, 75 A.D.3d 153, 160, 901 N.Y.S.2d 358, 363-364 (2d Dep't 2010) ("there are circumstances when courts may act sua sponte and others when courts may not do so. The telltale sign of the difference, for many but not all circumstances, is the enabling language of the relevant statutory provision pursuant to which the court acts").

Putting aside the circumstances under which a court might be able to dismiss a complaint in the absence of a motion by a party, due process concerns abound when a court acts sua sponte, particularly when it acts to terminate a proceeding. In *Chun v. North American Mortgage Co.*, *supra*, the Court highlighted the due process territory on which a sua sponte dismissal intrudes, observing that the plaintiff is deprived of the venerable due process duo of notice and an opportunity to be heard. Thus, a court considering, sua sponte, the ultimate relief of dismissal should gauge whether the plaintiff had any prior notice that dismissal could occur, and whether the plaintiff might have anything to offer by way of legal argument or evidence that could persuade the court not to dismiss the action. On the notice score, a prior court order, correspondence from the court, or on-the-record statements made by the court during an appearance might suffice. If the court finds that the plaintiff lacked notice, that the plaintiff could present arguments or factual submissions that may persuade the court not to dismiss the action, or both, the court should consider notifying the parties that it is contemplating dismissal and inviting submissions by the parties. *See Bank of New York v. Castillo*, 120 A.D.3d 598, 991 N.Y.S.2d 446 (2d Dep't 2014) (when a court exercises the power to grant relief sua sponte, it must afford the parties a reasonable opportunity to be heard); *see also U.S. Bank, N.A. v. McCrory*, 137 A.D.3d 1517, 29 N.Y.S.3d 594 (3d Dep't 2016); *cf. Cadichon v. Facelle*, 18 N.Y.3d 230, 938 N.Y.S.2d 232, 961 N.E.2d 623 (2011) (discussing the process a court should afford the parties before dismissing a complaint under CPLR 3216 on the court's own motion).

C3211:9. CPLR 3211(a) Motion Contrasted With Summary Judgment.

Usually, a CPLR 3211(a) motion must be made before a defendant's answering time expires. It is therefore thought of as the pre-answer dismissal device. A summary judgment motion cannot be made until issue has been joined; that is to say until a responsive pleading, such as an answer, has been served. Thus, summary judgment is the post-answer dismissal device.

A motion to dismiss under CPLR 3211(a) must be predicated on one or more grounds enumerated in that subdivision, *see* Commentary C3211:5, while summary judgment may be sought on any basis (including a CPLR 3211[a] ground) that resolves part or all of the case. *See* Siegel, New York Practice § 278 (Connors 5th ed.).

An order granting a CPLR 3211(a) motion is not a disposition on the merits of the action (unless the motion was properly converted to a summary judgment motion). Rather, it is res judicata of whatever was determined. Siegel, New York Practice § 276. The res judicata effect of a granted CPLR 3211(a) motion is explored below. *See*

Commentaries C3211:62-65. Conversely, an order granting summary judgment is usually entitled to full res judicata treatment. *See* Commentary C3212:21; Siegel, New York Practice § 287.

The phenomenon known as "searching the record," the power of a court to review the motion record before it and, if warranted, grant judgment to a non-moving party even in the absence of a request to do so, is available to a court adjudicating a summary judgment motion. *See* CPLR 3212(b); Commentary C3212:23. "Searching the record" is not permissible on a CPLR 3211(a) motion. *Torrance Construction, Inc. v. Jaques*, 127 A.D.3d 1261, 8 N.Y.S.3d 441 (3d Dep't 2015); *cf* Commentary C3211:42.

Paragraph 1

C3211:10. Defense Based on "Documentary Evidence."

CPLR 3211(a)(1) allows a defendant to seek dismissal of a complaint (or part of it) based on a defense "founded upon documentary evidence." The ground did not exist prior to the enactment of the CPLR. It was included as a backup provision, providing a dismissal mechanism in situations where a defendant has a document that defeats a cause of action but the defendant is unable to point to one of the more specific grounds listed in subdivision (a). 221 Siegel's Practice Review 2, *Second Department Shows Futility of Relying Exclusively on "Documentary Evidence" Standard of CPLR 3211(a)(1) When What Party Really Wants is Summary Judgment* (May 2010); *see Fontanetta v. John Doe 1*, 73 A.D.3d 78, 84, 898 N.Y.S.2d 569, 574 (2d Dep't 2010) ("According to th[e] [1957 First Preliminary Report of the Advisory Committee on Practice and Procedure], the purpose of CPLR 3211(a)(5) was to cover the most common affirmative defenses founded upon documentary evidence, specifically, estoppel, arbitration and award, and discharge in bankruptcy, whereas section 3211(a)(1) was enacted to 'cover all others that may arise as for example, a written modification or any defense based on the terms of a written contract' ") (citing 1957 NY Legis. Doc. no. 6[b] at 85).

A motion pursuant to CPLR 3211(a)(1) must be made within the defendant's time to respond to the complaint or raised in an answer, otherwise it is waived.

CPLR 3211 does not define the phrase "documentary evidence," but its ordinary meaning suggests that anything reduced to paper could qualify. "Documentary evidence" actually encompasses precious few documents, making CPLR 3211(a)(1) a decidedly narrow ground on which to seek dismissal. *See* Higgitt, *CPLR 3211(a)(1) and (a)(7) Dismissal Motions--Pitfalls and Pointers*, 83 New York State Bar Journal 32 (Nov./Dec. 2011). A paper qualifies as "documentary evidence" if--and only if--it satisfies the following criteria: (1) it is unambiguous; (2) it is of undeniable authenticity; and (3) its contents are essentially undeniable. *See Fontanetta v. John Doe 1*, *supra*. Most motion submissions cannot satisfy this standard. *See*, *e.g.*, *Eisner v. Cusumano Construction, Inc.*, 132 A.D.3d 940, 18 N.Y.S.3d 683 (2d Dep't 2015) (affidavits and text messages); *JP Morgan Chase Bank, N.A. v. Balliraj*, 113 A.D.3d 821, 979 N.Y.S.2d 533 (2d Dep't 2014) (deposition testimony); *Mason v. First Central National Life Ins. Co. of N.Y.*, 86 A.D.3d 854, 927 N.Y.S.2d 694 (3d Dep't 2011) (medical records); *Integrated Construction Services, Inc., v. Scottsdale Ins. Co.*, 82 A.D.3d 1160, 920 N.Y.S.2d 166 (2d Dep't 2011) (letters). Notably, an affidavit cannot constitute "documentary evidence" because its contents can be controverted by other evidence--such as another affidavit. *See, e.g., J.A. Lee Electric, Inc. v. City of New York*, 119 A.D.3d 652, 990 N.Y.S.2d 223 (2d Dep't 2014); *Flowers v. 73rd Townhouse, LLC*, 99 A.D.3d 431, 951 N.Y.S.2d 393 (1st Dep't 2012); *Lopes v. Bain*, 82 A.D.3d 1553, 920 N.Y.S.2d 792 (3d Dep't 2011); *cf. Reiss v. Deutsche Bank National Trust Co.*, ___ Misc. 3d ___, ___ N.Y.S.3d ___, 2016 WL 4431025 (Sup. Ct., Westchester County 2016) (affidavit prepared by plaintiffs in connection with their application for loan modification could constitute "documentary evidence"; affidavit reflected out-of-court transaction). (However, an affidavit may have an important role to play on a CPLR 3211[a][1] motion, see below).

What type of evidence can attain the rank of "documentary"? Judicial records and documents reflecting out-of-court transactions, e.g., notes, mortgages, deeds and contracts, may. *Fontanetta v. John Doe 1*, *supra*; *see* Siegel, New York Practice § 259 (Connors 5th ed.); *see also Sunset Café, Inc. v. Mett's Surf & Sports Corp.*, 103 A.D.3d 707, 959 N.Y.S.2d 700 (2d Dep't 2013) (lease); *Nisari v. Ramjohn*, 85 A.D.3d 987, 927 N.Y.S.2d 358 (2d Dep't 2011) (insurance policy); *Cochard-Robinson v. Concepcion*, 60 A.D.3d 800, 875 N.Y.S.2d 224 (2d Dep't 2009) (contract); *Crepin v. Fogarty*, 59 A.D.3d 837, 874 N.Y.S.2d 278 (3d Dep't 2009) (deed); *150 Broadway N.Y. Assoc, L.P. v. Bodner*, 14 A.D.3d 1, 784 N.Y.S.2d 63 (1st Dep't 2004) (contract). So too can e-mails, maybe. *Compare Mendoza v. Akerman Senterfitt, LLP*, 128 A.D.3d 480, 10 N.Y.S.3d 18 (1st Dep't 2015); *Kolchins v. Evolution Markets, Inc.*, 128 A.D.3d 47, 8 N.Y.S.3d 1 (1st Dep't 2015); *Art and Fashion Group Corp. v. Cyclops Production, Inc.*, 120 A.D.3d 436, 992 N.Y.S.2d 7 (1st Dep't 2014); and *Amsterdam Hospitality Group, LLC* v. *Marshall-Alan Associates, Inc.*, 120 A.D.3d 431, 992 N.Y.S.2d 2 (1st Dep't 2015) *with JBGR, LLC v. Chicago Title Ins. Co.*, 128 A.D.3d 900, 11 N.Y.S.3d 83 (2d Dep't 2015); *25-01 Newkirk Ave., LLC v. Everest National Insurance Co.*, 127 A.D.3d 850, 7 N.Y.S.3d 325 (2d Dep't 2015); *Zellner v. Odyl, LLC*, 117 A.D.3d 1040, 986 N.Y.S.2d 592 (2d Dep't 2014).

If the evidence on which the defendant relies is not "documentary" the motion must be denied. *Fontanetta v. John Doe 1*, *supra*.

Above, we went on record that an affidavit prepared in connection with litigation cannot constitute "documentary evidence." Does that mean that an affidavit can play no role on a CPLR 3211(a)(1) motion? We think there is room, albeit limited, for the affidavit. One of the criteria a paper must satisfy before it gets stamped "documentary" is that it be undeniably authentic. Therefore, unless the plaintiff stipulates to or otherwise acknowledges the authenticity of a document, a defendant proffering it on a CPLR 3211(a)(1) motion should be able to tender evidence showing the document to be authentic. An affidavit (or, where appropriate, an affirmation [*see* CPLR 2106]) should be permissible for the important (but limited) purpose of authenticating the "documentary evidence." *Hefter v. Elderserve Health, Inc.*, 134 A.D.3d 673, 22 N.Y.S.3d 454 (2d Dep't 2015); *Muhlhahn v. Goldman*, 93 A.D.3d 418, 939 N.Y.S.2d 420 (1st Dep't 2012); *see VIT Acupuncture P.C. v. State Farm Automobile Ins. Co.*, 28 Misc.3d 1230(A), 958 N.Y.S.2d 64 (table), 2010 WL 3463735 (Civil Court of City New York, Kings County 2010). The affidavit would not serve as the "documentary evidence" on which the CPLR 3211(a)(1) motion is premised, but rather would demonstrate that the purported "documentary evidence" qualifies as such.

Assuming the movant has adduced "documentary evidence" in support of its CPLR 3211(a)(1) motion, what must that evidence show to warrant dismissal? Relief is appropriate where the evidence conclusively refutes the plaintiff's allegations or conclusively establishes a defense to the action. *See Spoleta Construction, LLC v. Aspen Ins. UK Ltd.*, 27 N.Y.3d 933, 30 N.Y.S.3d 598, 50 N.E.3d 222 (2016); *Goshen v. Mutual Life Ins. Co. of New York*, 98 N.Y.2d 314, 746 N.Y.S.2d 858, 774 N.E.2d 1190 (2002). In gauging whether the defendant's evidence accomplishes that feat, the familiar pro-pleader rules of decision must be applied: the complaint is to be afforded a liberal construction, the facts as alleged in the complaint accepted as true, and the plaintiff accorded the benefit of every favorable inference. *Leon v. Martinez*, 84 N.Y.2d 83, 87-88, 614 N.Y.S.2d 972, 974, 638 N.E.2d 511, 513 (1994).

In opposing a CPLR 3211(a)(1) motion, a plaintiff is free to submit evidence demonstrating that the defendant's evidence does not conclusively resolve the action (or challenged causes of action). Moreover, a plaintiff can invoke CPLR 3211(d) to forestall a decision on the merits of the motion if the plaintiff needs time to gather evidentiary materials necessary to frame its opposition. Under subdivision (d), a court can deny a subdivision (a) motion or adjourn it to allow the plaintiff an opportunity to procure affidavits or pursue disclosure. *See* Commentaries C3211:46-47.

A couple of miscellaneous matters. A valid forum selection clause dictating that an action be brought in a forum other than New York does not deprive a New York court of subject matter jurisdiction over the matter. *See* CPLR

3211(a)(2). Rather, a defendant to a New York action who believes that a forum selection clause requires the dispute to be litigated in the courts of another jurisdiction should raise the issue by motion under CPLR 3211(a)(1). Why is this the proper procedural path? Because a contractual forum selection clause may constitute "documentary evidence." *Lischinskaya v. Carnival Corp.*, 56 A.D.3d 116, 865 N.Y.S.2d 334 (2d Dep't 2008); *see Lowenbraun v. McKeon*, 98 A.D.3d 655, 950 N.Y.S.2d 381 (2d Dep't 2012). An agreement to arbitrate a dispute is not a defense to an action brought on that dispute; the proper remedy for the party seeking arbitration is to move to compel it. *Allied Building Inspectors International Union of Operating Engineers, Local Union No. 211, ALF-CIO v. Office of Labor Relations of the City of New York*, 45 N.Y.2d 735, 738, 408 N.Y.S.2d 476, 478-479, 380 N.E.2d 303, 305 (1978). Thus, an agreement to arbitrate cannot be the basis for a motion to dismiss under CPLR 3211(a)(1). *Curran v. Estate of Curran*, 87 A.D.3d 607, 928 N.Y.S.2d 463 (2d Dep't 2011).

As to the interplay between CPLR 3211(a)(1) and (a)(7) (failure to state a cause of action), *see* Higgitt, *CPLR 3211(a)(1) and (a)(7) Dismissal Motions--Pitfalls and Pointers*, 83 New York State Bar Journal 32, 34-35 (Nov./Dec. 2011). In closing, a thought for the careful practioner. Only an attorney both familiar with the limited utility of CPLR 3211(a)(1) and armed with the right evidence should rely solely on the "documentary" evidence ground. The wise move for the attorney who wants to invoke paragraph 1 is to raise paragraph 7 too.

Paragraph 2

C3211:11. Lack of Subject Matter Jurisdiction.

Subject matter jurisdiction is a question of competence: does a court have the competence to entertain a given action? *Lacks v. Lacks*, 41 N.Y.2d 71, 390 N.Y.S.2d 875, 359 N.E.2d 384 (1976). That competence comes from the New York State Constitution and statutes; the constitution, a statute or both can provide a court with the authorization to hear and decide a particular type of controversy. A court may have broad subject matter jurisdiction--the New York State Supreme Court (*Thrasher v. U.S. Liability Ins. Co.*, 19 N.Y.2d 159, 278 N.Y.S.2d 793, 225 N.E.2d 503 [1967])--or very narrow jurisdiction--a local "Justice Court" (*see* Siegel, New York Practice § 22 [Connors 5th ed.]). A court lacks subject matter jurisdiction over an action if "the matter before the court [i]s not the kind of matter on which the court ha[s the] power to rule." *Manhattan Telecommunications Corp. v. H & A Locksmith, Inc.*, 21 N.Y.3d 200, 203, 969 N.Y.S.2d 424, 426, 991 N.E.2d 198, 200 (2013).

CPLR 3211(a)(2) provides the means by which a party can seek dismissal of an action for want of subject matter jurisdiction. So fundamental is this particular objection that it can be raised any time, CPLR 3211(e); Commentary C3211:49, and cannot be waived. *Lacks v. Lacks*, 41 N.Y.2d at 75, 390 N.Y.S.2d at 878, 359 N.E.2d at 387. If the court concludes that it does not have subject matter jurisdiction over a case, it can dismiss the action on its own initiative. *Robinson v. Oceanic Steam Navigation Co.*, 112 N.Y. 315, 19 N.E. 625 (1889).

Our State Supreme Court has almost limitless subject matter jurisdiction, the significant limitations being where the federal courts have exclusive jurisdiction over a matter and where the Court of Claims has exclusive jurisdiction. Siegel, New York Practice § 12. There are some other limitations that occasionally cause the issue of subject matter jurisdiction to arise. *See Hafif v. Rabbinical Council of Syrian & Near Eastern Jewish Communities in America*, 140 A.D.3d 1017, 34 N.Y.S.3d 160 (2d Dep't 2016) (courts lack subject matter jurisdiction over certain religious disputes); *Wells Fargo Bank, N.A. v. Chukchansi Economic Development Auth.*, 118 A.D.3d 550, 988 N.Y.S.2d 160 (1st Dep't 2014) (courts lack subject matter jurisdiction over the internal affairs of Indian tribes); *Hunt Construction Group, Inc. v. Oneida Indian Nation*, 53 A.D.3d 1048, 862 N.Y.S.2d 423 (4th Dep't 2008) (courts generally lack subject matter jurisdiction over damages suits against Indian tribes). Therefore, issues relating to subject matter jurisdiction are most likely to arise in New York's lower trial courts, e.g., New York City Civil Court, city courts outside of New York City, County Courts, etc. *See* Higgitt, *A Nullity or Not?--The Status of a Default Judgment Entered Absent Compliance with CPLR 3215(f)*, 73 Alb. L. Rev. 807, 824, n.75 (2010).

A plaintiff's lack of "standing" does not affect a New York State court's subject matter jurisdiction over the action; the issue of standing is treated on par with the issue of capacity. *See* Commentary C3211:13.

An enforceable forum selection clause does not deprive a New York Court of subject matter jurisdiction over an action brought here in contravention of the clause. *Lischinskaya v. Carnival Corp.*, 56 A.D.3d 116, 865 N.Y.S.2d 334 (2d Dep't 2008). A defendant looking to enforce a forum selection clause should employ CPLR 3211(a)(1). *See* Commentary C3211:10.

Paragraph 3

C3211:12. Plaintiff's Lack of Capacity.

"Capacity" concerns a plaintiff's power to appear before and bring an action in court. *Community Board 7 of Borough of Manhattan v. Schaffer*, 84 N.Y.2d 148, 155, 615 N.Y.S.2d 644, 647, 639 N.E.2d 1, 4 (1994). "Legal capacity to sue, or lack thereof, often depends purely on the [plaintiff's] status, such as that of an infant, an adjudicated incompetent, a trustee, certain governmental entities or ... a business corporation." *Security Pacific Nat. Bank v. Evans*, 31 A.D.3d 278, 279, 820 N.Y.S.2d 2, 3 (1st Dep't 2006). The inquiry here is not whether the plaintiff suffered an injury or was otherwise harmed by the defendant's alleged conduct or inaction--that gets into a plaintiff's "standing," which is a separate question (see below)--but rather whether the law recognizes the plaintiff as the proper bearer of the lawsuit.

Some situations where the capacity question may rear its head: where the plaintiff is an artificial entity (such as a corporation or an unincorporated association), *Community Board 7 of Borough of Manhattan v. Schaffer, supra*; where the plaintiff is a governmental entity created by a legislative enactment, *id.*; *see Excess Line Ass'n of New York (ELANY) v. Waldorf & Associates*, 130 A.D.3d 563, 13 N.Y.S.3d 464 (2d Dep't 2015); where the plaintiff is a municipality seeking to contest a State decision that affects the municipality in its governmental capacity or as a representative of its inhabitants, *Matter of Town of Verona v. Cuomo*, 136 A.D.3d 36, 22 N.Y.S.3d 241 (3d Dep't 2015); where the plaintiff filed for bankruptcy but failed to list its cause of action as an asset, *Whelan v. Longo*, 23 A.D.3d 459, 808 N.Y.S.2d 95 (2d Dep't 2005); *George Strokes Elec. and Plumbing Inc. v. Dye*, 240 A.D.2d 919, 659 N.Y.S.2d 129 (3d Dep't 1997); *see Collins v. Suraci*, 110 A.D.3d 1214, 973 N.Y.S.2d 828 (3d Dep't 2013); and where the plaintiff is an infant purporting to sue on his or her own behalf. Siegel, New York Practice § 261 (Connors 5th ed.).

Plaintiff's lack of capacity may be raised in a pre-answer motion or asserted in an answer; if neither step is taken, the defense is waived. CPLR 3211(e).

Capacity to sue--the right to come into court--and possession of a cause of action--the right to relief--are distinct concepts. *Rainbow Hospitality Management, Inc. v. Mesch Engineering, P.C.*, 270 A.D.2d 906, 907, 705 N.Y.S.2d 765, 766 (4th Dep't 2000); *see Edwards v. Siegel, Kelleher & Khan*, 26 A.D.3d 789, 811 N.Y.S.2d 828 (4th Dep't 2006). But the line between the two can sometimes be blurry. *See Community Board 7* or *Borough of Manhattan v. Schaffer*, 84 N.Y.2d at 155, 615 N.Y.S.2d at 647, 639 N.E.2d at 4 (1994); Siegel, New York Practice § 261. In *Rainbow Hospitality Management*, plaintiff sued defendants for damages. Defendants moved, during trial (*see* CPLR 4401), to dismiss the complaint, arguing that plaintiff had no right to relief because plaintiff did not exist when the conduct giving rise to the action occurred and sustained no injury as a result of that conduct. The Fourth Department rejected plaintiff's assertion that defendants' argument was premised on lack of capacity and therefore waived because defendants did not raise that ground in a pre-answer motion or in their answers, concluding instead that defendants' argument touched on the legal sufficiency of the complaint. *Rainbow Hospitality Management, Inc. v. Mesch Engineering, P.C.*, 270 A.D.2d at 907, 705 N.Y.S.2d at 766.

Why is the distinction between the two grounds so important? Because, as *Rainbow Hospitality Management* illustrates, an objection under CPLR 3211(a)(7) (failure to state a cause of action) can be raised any time in the litigation, while an objection under CPLR 3211(a)(3) (lack of capacity) must be raised in a pre-answer motion or in an answer otherwise it is waived. CPLR 3211(e). Fortunately, the practitioner faced with one of these close calls need not spend much time analyzing which paragraph actually applies; both grounds can be raised in the pre-answer motion or the answer.

Note that paragraph 3 deals only with the lack of capacity of the plaintiff. If the defendant's capacity is called into question because the defendant is an infant or operating under a disability, paragraph 5 is the ground for the motion. *See* Commentary C3211:18.

C3211:13. Lack of "Standing" as Going to "Capacity."

As discussed above, CPLR 3211(a)(3) provides that a defendant can seek dismissal of the complaint on the ground that the plaintiff lacks the "capacity," i.e., the power, to appear before the court. That provision does not expressly allow for dismissal based on a plaintiff's lack of "standing." A plaintiff lacks standing if it does not have a sufficiently cognizable stake in the outcome of the litigation. *Community Board 7 of the Borough of Manhattan v. Schaffer*, 84 N.Y.2d 148, 615 N.Y.S.2d 644, 639 N.E.2d 1 (1996). While capacity and standing are conceptually different, *Silver v. Pataki*, 96 N.Y.2d 532, 730 N.Y.S.2d 482, 755 N.E.2d 842 (2001), they are treated as synonyms for the purposes of applying paragraph 3. *Wells Fargo Bank Minnesota, N.A. v. Mastropaolo*, 42 A.D.3d 239, 837 N.Y.S.2d 247 (2d Dep't 2007). Therefore, a defendant can challenge a plaintiff's standing by moving to dismiss pre-answer or raising lack of standing in the answer. *Id.* Dismissal under CPLR 3211(a)(2) for want of subject matter jurisdiction does not lie for lack of standing. *See id.*; Commentary 3211:11.

The practice in federal court is different. There, standing relates to a court's subject matter jurisdiction. *See* Siegel, New York Practice § 611 (Connors 5th ed.).

If a plaintiff has standing at the time the action was commenced but transfers its interest in the subject matter of the suit to another while the action is pending, the plaintiff does not necessarily lose standing. CPLR 1018 provides that, "[u]pon the transfer of an interest, the action may be continued by or against the original parties unless the court directs the persons [or entities] to whom the interest is transferred to be substituted or joined in the action." *See Wells Fargo Bank, N.A. v. Hudson*, 98 A.D.3d 576, 949 N.Y.S.2d 703 (2d Dep't 2012).

Historically, standing has not been a source of significant litigation in New York State courts. But the proliferation of contested residential mortgage foreclosure actions has created a wellspring of appellate case law addressing standing. Why is standing such a hot topic in this area? The volume of transfers of notes and mortgages, the complexity of many mortgage-related transactions, and the sheer number of foreclosure actions, among other factors, have created an environment conducive to questions on standing. Some clarity on the standing issue in the mortgage foreclosure realm was provided by the Court of Appeals in *Aurora Loan Services, LLC v. Taylor*, 25 N.Y.3d 355, 12 N.Y.S.3d 612, 34 N.E.3d 363 (2015) (holding that the note, not the mortgage, is the instrument that conveys standing to a plaintiff).

Paragraph 4

C3211:14. "Other Action Pending," Generally.

CPLR 3211(a)(4) authorizes dismissal of an action on the ground that there is another one pending involving the same subject matter. Paragraph 4's purpose is to prevent the consequences of duplicative litigation (e.g., conflicting judgments, the parties bearing the expense of litigating multiple, similar lawsuits). Note that paragraph 4 authorizes but does not require dismissal of an action that is similar to another; the provision cautions that a "court need not dismiss upon th[e] ground [that a similar action is pending] but may make such order as justice requires." Thus, a court confronted with a motion to dismiss the action before it in favor of another pending action has discretion to fashion relief appropriate under the circumstances. *See* Commentary 3211:17.

Paragraph 4 is available where "there is another action pending between the same parties for the same cause of action in a court of any state or the United States." If the other action is pending in a foreign country, the defendant's remedy would be to seek a stay of the New York action under CPLR 2201, *see* Commentary 2201:10, or move to dismiss the New York action under the doctrine of forum non conveniens. *See* CPLR 327.

A summons and complaint (or an equivalent initiatory paper, such as a petition) must have been served in the other action, otherwise it is not "another action" within the meaning of CPLR 3211(a)(4). *Wharton v. Wharton*, 244 A.D.2d 404, 664 N.Y.S.2d 73 (2d Dep't 1997); *see John J. Campagna, Inc. v. Dune Alpin Farm Assoc.*, 81 A.D.2d 633, 438 N.Y.S.2d 132 (2d Dep't 1981). Where, for example, the prior action was commenced using a summons with notice, CPLR 305(b), and the complaint has not been served, a paragraph 4 motion does not lie. *Wharton v. Wharton, supra*. And dismissal under paragraph 4 generally is not appropriate unless the complaint has been served in the present action. Siegel, New York Practice § 262 (Connors 5th ed.). Why is service of pleadings in both actions so important? Because it is the pleadings that allow the court to gauge whether the actions involve the same parties and the same cause of action. *Id.*

If there is "another action" pending in a New York, federal or sister state court, the next question becomes whether that action and the present action (i.e. the New York action in which the paragraph 4 motion was made) involve the same parties and the same cause of action. *See* Commentary 3211:15. If the other action and the present action do involve the same parties and the same cause of action, an important issue is which action was commenced first. *See* Commentary 3211:16. There is a solid, but rebuttable, presumption that the action that was commenced first will be the one that will be allowed to proceed. Assuming the other action and the present action are sufficiently similar, the court has a range of options. *See* Commentary 3211:17.

CPLR 3211(a)(4) must be raised in a pre-answer motion or asserted in the answer. CPLR 3211(e). The court should not dismiss an action sua sponte under paragraph 4. *Frederick v. Meighan*, 75 A.D.3d 528, 905 N.Y.S.2d 635 (2d Dep't 2010).

There is no federal statutory analog to CPLR 3211(a)(4). Where dismissal is sought in federal court of a federal action in deference to an action pending in state court, guidance must be sought from the case law. *See Bank of America v. Sharim, Inc.*, 2010 WL 5072118 (S.D.N.Y. 2010); *see* also C. Wright, A. Miller & E. Cooper, et al., 17A Fed. Prac. & Proc. Juris. § 4247 (3d ed.).

3211:15. Same Parties, Same Cause of Action.

As mentioned above, paragraph 4 seeks to prevent unnecessary duplicative litigation. If the other action and the present one are not sufficiently similar, there is no need to interfere with either one. Therefore, the court must determine whether the other action and the present one involve the same parties for the same cause of action.

Initially, it is important to stress that the other action and the present one need not be identical; substantial similarity will do. The inquiry is whether the following elements of the actions are substantially similar: (1) the

parties; (2) the causes of action; and (3) the relief.

With respect to the parties, there must be substantial identity. *Scottsdale Ins. Co. v. Indemnity Ins. Corp. RRG*, 110 A.D.3d 783, 974 N.Y.S.2d 476 (2d Dep't 2013); *White Light Productions, Inc. v. On the Scenes Productions, Inc.*, 231 A.D.2d 90, 660 N.Y.S.2d 568 (1st Dep't 1997); *see Credit-Based Asset Servicing and Securitization, LLC v. Grimmer*, 299 A.D.2d 887, 750 N.Y.S.2d 673 (4th Dep't 2002); *K.S. Finance Corp. v. Grand Palace Hotel at the Park*, 272 A.D.2d 204, 709 N.Y.S.2d 512 (1st Dep't 2000). The presence of additional parties in one of the actions does not preclude a finding that the other action and the present one are substantially similar. *White Lights Productions, Inc. v. On the Scene Productions, Inc., supra*.

Despite the absence of one common defendant in the actions, there still may be substantial identity of the parties. If, for instance, the plaintiff, in separate actions, seeks the same damages for the same alleged injuries relating to the same wrongs from close corporate affiliates. *Syncora Guarantee Inc. v. J.P. Morgan Securities, LLC*, 110 A.D.3d 87, 970 N.Y.S.2d 526 (1st Dep't 2013).

The causes of action in the other action and the causes of action in the present one are substantially similar if they arise out of the same wrong or series of wrongs. *Rinzler v. Rinzler*, 97 A.D.3d 215, 947 N.Y.S.2d 844 (3d Dep't 2012); *White Light Productions, Inc., v. On the Scene Productions, Inc., supra*. This is the critical element. *Syncora Guarantee Inc. v. J.P. Morgan Securities, LLC, supra; Scottsdale Insurance Co. v. Indemnity Insurance Corp. RRG, supra*. When reviewing the causes of action in a case, it is important to account for any counterclaims, cross claims, etc., that may have been interposed, as they count for the purpose of determining whether the causes of action in the two actions are substantially similar. *See Packes v. Cendent Mortgage Corp.*, 19 A.D.3d 386, 796 N.Y.S.2d 135 (2d Dep't 2005).

The relief sought in the other action and the present one must be the same or substantially the same. *White Light Productions, Inc. v. On the Scene Productions, Inc., supra*. That is not the case if the relief sought in one action is antagonistic or inconsistent with that sought in the other, or the purposes of the actions are entirely different. *Id.*, *see Marcus Dairy, Inc. v. Jacene Realty Corp.*, 193 A.D.2d 653, 597 N.Y.S.2d 465 (2d Dep't 1993).

If the parties, the causes of action, and the relief sought in the other action are substantially similar to those elements of the present action, it is on to consider which action was commenced first.

C3211:16. First-In-Time Rule.

Where there are two pending actions involving the same parties and the same causes of action, the court in which the first action was commenced is the one that ought to adjudicate the dispute. *City Trade & Industries, Ltd. v. New Central Jute Mills Co.*, 25 N.Y.2d 49, 302 N.Y.S.2d 557, 250 N.E.2d 52 (1969). This is the "first-in-time" rule.

In most jurisdictions, an action is commenced when the initiatory papers are filed with the appropriate clerk. Most courts in New York have such a commencement-by-filing protocol, *see* Commentary C304:1, and the federal courts look to the filing dates in determining which action came first. *See White Light Productions, Inc. v. On the Scene Productions, Inc.*, 231 A.D.2d 90, 96, 660 N.Y.S.2d 568 (1st Dep't 1997). The filing dates of the respective actions are therefore usually the information that will be used to establish priority between the actions. In the event the other action is pending in a sister state's court, check the law of that state to confirm that it too is a commencement-by-filing jurisdiction.

That an action was commenced first does not mean that it must be the one that is allowed to proceed. The presence

of special circumstances permits a court to depart from the first-in-time rule. The following factors have been identified in the case law that may inform the court's discretionary determination of whether special circumstances exist.

One, whether the prior action was filed preemptively after the plaintiff in that action learned that the opposing party intended to commence a case. *L-3 Communications Corp v. SafeNet, Inc.*, 45 A.D.3d 1, 841 N.Y.S.2d 82 (1st Dep't 2007). The law seeks to discourage a race to the courthouse, as such an exercise creates "disincentives to responsible litigation by discouraging settlements due to fear of a preemptive strike and by providing a tactical advantage to defendants seeking a more favorable forum for litigation." *Id.*, 45 A.D.3d at 8, 841 N.Y.S.2d at 88. That the prior action was brought in the form of a declaratory judgment action may serve as a strong signal that it was commenced preemptively. *Id.*, 45 A.D.3d at 8-9, 841 N.Y.S.2d at 88-89; *see White Lights Productions, Inc. v. On the Scene Productions, Inc., supra*. That the first action was filed preemptively weighs heavily against application of the first-in-time rule and strongly in favor of finding special circumstances. *L-3 Communications Corp. v. Safenet, Inc.*, 45 A.D.3d at 9, 841 N.Y.S.2d at 89.

Two, whether the competing actions were commenced reasonably close in time. *Flintkote Co. v. American Mutual Liability Ins. Co.*, 103 A.D.2d 501, 505, 480 N.Y.S.2d 742, 745 (2d Dep't 1984), *aff'd for reasons stated* 67 N.Y.2d 857, 501 N.Y.S.2d 662, 492 N.E.2d 790 (1986); *L-3 Communications Corp., v. Safenet, Inc.*, 45 A.D.3d at 9, 841 N.Y.S.2d at 89. The closer in time the actions were commenced, the greater the likelihood the first-in-time rule will not be honored if other factors militate in favor of deferring to the subsequently-commenced action.

Three, whether New York has a significant nexus to the dispute. *L-3 Communications Corp. v. Safenet, Inc.*, 45 A.D.3d at 9, 841 N.Y.S.2d at 89; *see Fox Television Stations, Inc. v. Rainbow Broadcasting Limited Partnership*, 45 A.D.3d 399, 846 N.Y.S.2d 40 (1st Dep't 2007). The inquiry on this factor "is similar to that undertaken in applying the doctrine of forum non conveniens--whether the litigation and the parties have sufficient contact with [New York] to justify the burdens imposed on our judicial system." *Flintkote Co. v. American Mutual Liability Ins., Co.*, 103 A.D.2d at 506, 480 N.Y.2d at 745-746, *aff'd for reasons stated, supra*. A New York-centric dispute suggests the New York court should keep the case; a case with tenuous New York connections should probably be dealt with by the other court. *AIG Financial Products Corp. v. Penncara Energy, LLC*, 83 A.D.3d 495, 922 N.Y.S.2d 288 (1st Dep't 2011).

Four, whether one action is further along compared to the other, and, relatedly, whether one party has been more diligent in prosecuting the action it commenced.

Five, whether one action is more comprehensive than the other. *AIG Financial Products Corp. v. Penncara Energy, LLC, supra*.

After considering these factors and any other material facts in the case, the court can ascertain whether the action that was filed first should keep its priority or whether the later-filed action should take top billing.

Where the other pending action involves the same parties and the same causes of action, and has priority over the present action, the court must decided whether to dismiss the present action or afford some other form of relief.

C3211:17. Remedies.

A court has broad discretion in considering whether to dismiss an action under CPLR 3211(a)(4). *Whitney v. Whitney*, 57 N.Y.2d 731, 454 N.Y.S.2d 977, 440 N.E.2d 1324 (1982). While dismissal of the present action is a

potential disposition, the court is invited to make "such order as justice requires." The remedies available in a given case depend on whether the other action is in the same or a different court.

Other Action in Other Court

When the other action and the present action are pending in the same court, e.g., New York State Supreme Court, the court hearing the present action can direct a disposition of (or otherwise directly affect) the other action. Where, however, the other action is pending in a federal or sister state court, the court in the present action must tread carefully; directly affecting the other action is rarely appropriate. As the court in *Matter of NYSE Euronext Shareholders/ICE Litigation*, put it: "No judge in one jurisdiction, having found it appropriate to retain a case, has the ability to direct a judge in another jurisdiction, who has found it appropriate to do the same, to dismiss or stay his or her case." 39 Misc.3d 619, 626, 965 N.Y.S.2d 278, 283 (Sup. Ct., New York County 2013).

Several remedies have been recognized in the situation where the other action is pending in a federal or sister state court.

• Stay of the present action (the New York action). This is a common disposition, largely because it is the safest course of action. The court in the New York action stays the action; the other action proceeds. The stay remedy has been used where the other action would resolve issues critical in the New York action, ultimately streamlining the New York litigation, *342 West 30th Street Corp., v. Bradbury*, 30 Misc.3d 132(A), 958 N.Y.S.2d 649 (table), 2011 WL 135257 (App Term, 1st Dep't 2011); *see AIG Financial Products Corp. v. Penncara Energy, LLC*, 83 A.D.3d 495, 922 N.Y.S.2d 288 (1st Dep't 2011); the court in the New York action was concerned that the parties could not be afforded full relief in the other action, *Wells Fargo Bank, N.A. v. Pena*, 51 Misc.3d 541, 24 N.Y.S.3d 865 (Sup. Ct., Kings County 2016); *see SafeCard Services, Inc. v. American Express Travel Related Services Co., Inc.*, 203 A.D.2d 65, 65-66, 610 N.Y.S.2d 23, 23 (1st Dep't 1994) ("[o]ne alternative [measure] available to a court faced with a [paragraph 4] motion ... where it appears that the other action may be resolved in a manner which would not bar further proceedings in New York is to stay the New York action pending resolution of the other action"); and the court in the New York action found that the New York action should serve as a back-up to the other action. Allowing a stayed New York action to serve as a back-up is appropriate, among other situations, where the defendant, who seeks dismissal of the New York action on the ground that another action is pending, has signaled that it will seek dismissal of the other action for some reasons unrelated to the merits of the dispute, e.g., that the other action is time-barred, that the court in the other action lacks personal jurisdiction over the defendant. *See Safeguard Services, Inc. v. American Express Travel Related Services, Co., supra*; Siegel, New York Practice § 262 (Connors 5th ed.). The stayed back-up action results in the New York court retaining jurisdiction and lending aid to the parties "if some unforeseen difficulty should arise in connection with the other action." *Flintkote Co. v. American Mutual Liability, Inc. Co.*, 103 A.D.2d 501, 507-508, 480 N.Y.S.2d 742, 746 (2d Dep't 1984), *aff'd for reasons stated* 67 N.Y.2d 857, 501 N.Y.S.2d 662, 492 N.E.2d 790 (1986).

• Coordination of litigation in different jurisdictions. If the court in the New York action determines that the action should proceed and the court in the other action determines that its action too should go forward, all is not lost. The two courts can coordinate the litigations, which "streamlines disclosure, minimizes conflicting rulings, and avoids burdensome and repetitive deposition appearances." Robert L. Haig, Commercial Litigation in New York State Court § 16:2 (4th ed.). A thoughtful discussion of this option can be found in *Matter of NYSE Euronext Shareholders/ICE Litigation, supra*. *See also* Commercial Litigation in New York State Courts §§ 16:1-16:2, 16:10-16:21.

• Dismissal of New York action.

• Enjoining a party from maintaining the other action. This is the nuclear option; it is rarely done as it directly interferences with the workings of another jurisdiction's courts. Examples are few. *Jay Franco and Sons Inc. v. G Studios, LLC*, 34 A.D.3d 297, 825 N.Y.S.2d 20 (1st Dep't 2006), is one. *Certain Underwriters at Lloyds, London v. Millennium Holdings, LLC*, 52 A.D.3d 295, 861 N.Y.S.2d 3 (1st Dep't 2008), is another. Only exceptional circumstances should lead a New York court to use this remedy. *See* 180 Siegel's Practice Review 3 (Dec. 2006), *Court Grants P Injunction to Stop D from Prosecuting Action in Sister State* (reviewing unusual facts underlying *Jay Franco* decision).

Other Action Pending in New York State Court

Where the other action is pending in a New York State court, the present court's options increase. If the actions are pending in the same court, say Supreme Court (our common example), and the actions involve identical parties, the court in the present action can directly affect the other action.

A common resolution (and a particularly effective one) is to order the two actions consolidated, which results in the merger of the separate actions into one. That action will have a single caption, will result in one verdict or decision, and will conclude in one judgment. Commentary C602:2. Consolidation is generally appropriate where two actions share common material questions of law or fact and no party would be prejudiced by the union of the actions. *See* CPLR 602(a). Having already concluded that the other action and the present action have the same parties and involve the same cause of action, *see* Commentary C3211:15, that general standard will likely be satisfied. *See Gutman v. Klein*, 26 A.D.3d 464, 811 N.Y.S.2d 413 (2d Dep't 2006).

Consolidation under the main consolidation statute, CPLR 602, ordinarily requires a motion by a party. Because of the phraseology of paragraph 4, the court has the power to order a consolidation on a CPLR 3211(a)(4) motion even if no party has asked for it. *See John J. Campagna, Inc. v. Dune Alpin Farm Assoc.*, 81 A.D.2d 633, 438 N.Y.S.2d 132 (2d Dep't 1981).

When consolidation is to be the result in an instance when one action is pending in Supreme Court and the other action is pending in a different New York court, it would have to be coupled with a removal under CPLR 602(b). The removal could be made only from a lower court to a higher one--only the Supreme and County Courts have removal powers under CPLR 602(b)--and it would have to be shown that all of the parties to both actions have been notified. *See* Commentary C602:4.

An issue of the venue of the motion might be raised, although venue should not be a problem if all of the parties to both actions are the same. Assume that X is a party to the other action but not to the instant one. X can reasonably contend that even if she is notified, she may not be compelled to respond to a motion in a court to whose action she is not a party. And if she is a party to a Supreme Court action in county A but the motion is made in the action in the Supreme Court of county B, X can urge that CPLR 2212(a) protects her from the motion. The Court of Appeals has indicated that as long as notice of the consolidation application is given to all parties to all actions, consolidation can be made. *See Kent Development Co. Inc. v. Liccione*, 37 N.Y.2d 899, 340 N.E.2d 740, 378 N.Y.S.2d 377 (1975). The unfairness of directing a consolidation of actions without notifying all of the parties to all of them and giving them a chance to be heard is what has to be guarded against, indicates the Court in *Kent Development Co.* If some of the parties to the other action are not also parties to the present one, the court can direct one of the parties before it to give notice--to the as yet unnotified parties to the other action--that the court here is considering a consolidation, and that it is holding off decision until X date to afford all a hearing. That would give them a chance to address the matter, and the notice requirement should be satisfied with that. On that notice, every party can be heard on all of the issues that arise on a consolidation motion.

If the motion is granted, the questions arise of which county shall be the venue of the consolidated action and what the sequence shall be of the parties' rights to open and close to the jury. On those matters, *see* Siegel, New York Practice § 128 (Connors 5th ed.); Commentary C602:3.

When removal from a lower court to a higher one under CPLR 602(b) is directed, it is apparently sufficient that the motion in the higher court includes notice to all of the parties to the lower court suit even though one or more of the parties may not be parties to the higher court action. This must be so, or a removal under CPLR 602(b) would be defeated in every instance in which one of the parties in the lower court is not also a party in the higher one, a result inconsistent with the purpose of CPLR 602(b) and practice under it.

It would also be possible, of course, for the court in county X to condition consolidation on the approval of the court in the other county, county Y. And again, the party among the several parties to the X action who is also a party in Y (and who seeks the consolidation) could be directed to make a motion in Y for the conditioned approval, and on that motion all those parties in Y who are not also parties in X can be given due notice and should have no objections to motion venue under CPLR 2212(a).

The word "consolidation" used throughout this discussion should be deemed to embrace "joint trial" as an alternative. Both are authorized under CPLR 602(a) and should therefore be alternatives for the court to use under CPLR 3211(a)(4). For the technical differences between consolidation and joint trial, *see* Siegel, New York Practice § 127. And if the power to consolidate or jointly try, otherwise conferred by CPLR 602(a), is within the court's arsenal under CPLR 3211(a)(4), then so must be the removal power authorized by CPLR 602(b).

When related, unconsolidated actions are pending in the New York State courts in more than one judicial district, "coordination" of the litigation in those actions may be appropriate. *See* 22 NYCRR 202.69.

Paragraph 5

C3211:18. Affirmative Defenses Available on Subdivision (a) Motion.

Paragraph 5 contains a grab bag of objections all of which are classified as "affirmative defenses" by CPLR 3018(b). Most of the affirmative defenses listed in CPLR 3018(b) can support a CPLR 3211(a)(5) motion, but not all. *See* Commentary C3211:19.

The affirmative defenses available under paragraph 5 are as follows:

- arbitration and award;
- collateral estoppel;
- discharge in bankruptcy;
- infancy or other disability of the moving party;

- payment;
- release;
- res judicata;
- statute of limitations; and,
- statute of frauds.

A defendant who wishes to assert one or more of these affirmative defenses must raise the desired defenses in a pre-answer motion or the answer. CPLR 3211(e); *see Wan Li Situ v. MTA Bus Co.*, 130 A.D.3d 807, 14 N.Y.S.3d 89 (2d Dep't 2015). The failure to take either of those steps can lead to a waiver, but, as we discuss in a later section, the defendant can avoid the waiver by moving to amend the answer. *See* C3211:58.

Generally speaking, in order to establish that dismissal under a given paragraph 5 affirmative defense is warranted, the defendant must show that, as a matter of law, the defense on which it is relying bars the plaintiff's action (or the challenged portion of it). What specifically a defendant must show to discharge that burden will depend on the particular affirmative defense invoked.

The party opposing the motion (usually a plaintiff) is aided by the rules of decision applicable to a motion to dismiss under CPLR 3211(a)(5). Those rules require a court to "accept the facts as alleged in the complaint as true, accord plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." *Faison v. Lewis*, 25 N.Y.3d 220, 224, 10 N.Y.S.3d 185, 187, 32 N.E.3d 400, 402 (2015). These same rules apply to most other subdivision (a) grounds, most notably paragraphs 1 and 7. *See* Commentaries C3211:10, C3211:21. *Faison* highlights how important those rules are in practice.

In *Faison*, A and B inherited real property as tenants in common. By a quit claim deed, B conveyed her interest to C. C subsequently recorded a purported corrective deed, dated December 11, 2000, that included both A and B as grantors, thus conveying the entire fee to C. C then borrowed money from a bank, providing the bank with a mortgage encumbering the property. In August 2010, plaintiff, the administrator of A's estate, brought an action against, among other defendants, B, C and the bank to declare the "corrected" deed and the mortgage null and void. Plaintiff's theory: A's signature on the "corrected" deed was forged, making that deed and the mortgage void. For their part, B and C asserted that the "corrected" deed was valid. The bank moved to dismiss the complaint as against it under CPLR 3211(a)(5), arguing that the action was barred by the statute of limitations applicable to fraud actions. *See* CPLR 213(8).

The trial court granted the motion, and, as is relevant to our discussion, the Second Department affirmed.

The Court of Appeals reversed. It stated that a forged deed is void ab initio--a legal nullity at its inception--as is any encumbrance on the property based on the forged instrument. Because a forged deed and any encumbrance based on it are legal nullities, the Court concluded that "a claim against a forged deed is not subject to a statute of limitations defense." *Faison v. Lewis*, 25 N.Y.3d at 226, 10 N.Y.S.3d at 189, 32 N.E.3d at 404. Thus, plaintiff's

suit survived the bank's CPLR 3211(a)(5) motion to dismiss. The Court indulged the assumption that the deed was forged because it applied those pro-pleader rules listed above (i.e., accept the plaintiff's version of the facts as true, accord the plaintiff the benefit of favorable inferences). That B and C asserted that the "corrected" deed was valid was of no moment at this procedural juncture.

Whether a particular defense has been established is dependent on the facts of the case and the law underlying the defense. Those are matters beyond these Commentaries but certain procedural points relevant to individual grounds should be highlighted.

The defense of arbitration and award is available only where a dispute has proceeded to arbitration and an award determining the dispute has been made. *See Langemyr v. Campbell*, 23 A.D.2d 371, 261 N.Y.S.2d 500 (2d Dep't 1965). Not just any old award will do; "an arbitration award may not serve as the foundation of the defense ... unless that award is subject to confirmation pursuant to CPLR article 75." *Marracino v. Alexander*, 73 A.D.3d 22, 23, 897 N.Y.S.2d 555, 556 (4th Dep't 2010). The requirement is not that the award actually be confirmed, a process permitted by CPLR 7510, but rather that the award be "subject to confirmation." Whether an award is capable or incapable of confirmation is a question for the statutes in CPLR article 75 and the case law interpreting them. *See* Commentaries to CPLR 7510 and 7511.

If a defendant is sued in court on a claim it believes is arbitrable and wants the matter sent to arbitration, defendant's remedy is a motion to compel arbitration under CPLR 7503. Siegel, New York Practice § 263 (Connors 5th ed.).

The doctrines of res judicata and collateral estoppel can apply to arbitration awards. *See* Siegel New York Practice § 456. Thus, where an arbitration award is at issue, there may be some overlap between the arbitration and award ground in paragraph 5, and the res judicata and collateral estoppel grounds. Any concern on counsel's part regarding the identity of the proper ground can be allayed by raising them all.

Collateral estoppel--issue preclusion--is a popular paragraph 5 ground. The doctrine is based on the notion that its not fair to permit a party to relitigate an issue decided against the party, and its purpose is to reduce litigation and conserve scarce court resources. *Kaufman v. Eli Lilly and Co.*, 65 N.Y.2d 449, 455, 492 N.Y.S.2d 584, 588, 482 N.E.2d 63, 67 (1985). On a CPLR 3211(a)(5) motion grounded on collateral estoppel, the movant must establish that the identical issue was necessarily decided in the prior action and that the previously decided issue is determinative in the present action. *Mahler v. Campagna*, 60 A.D.3d 1009, 876 N.Y.S.2d 143 (2d Dep't 2009). If the movant satisfies that burden, the plaintiff must demonstrate the absence of a full and fair opportunity to contest the prior determination. *Id.* Any doubts regarding the preclusive effect of a prior ruling or determination should be resolved in favor of the party against whom the estoppel would operate, *Wal-Mart Stores, Inc. v. United States Fidelity and Guaranty Co.*, 11 A.D.3d 300, 784 N.Y.S.2d 25 (1st Dep't 2004).

The "infancy or other disability" ground relates to the defendant's disability. It is a lack-of-capacity type defense; the defendant does not have the capacity, i.e., the power, to be a party to the lawsuit. Where the claim is that the plaintiff lacks the capacity to bring suit because of infancy or some other disability, the proper dismissal ground is paragraph 3. *See* Commentary 3211:12.

With respect to the release ground, a release is a species of contract and therefore governed by the principles of law applicable to contracts. *Aetna Casualty and Surety Co. v. Jackowe*, 96 A.D.2d 37, 468 N.Y.S.2d 153 (2d Dep't 1983). Critical questions regarding the formation, construction and enforceability of a release can be answered only by reference to those principles. For a thorough overview of contract law, generally, and the law related to releases, specifically, *see* 2B N.Y. P.J.I.2d 4:1 (2017).

Res judicata--claim preclusion--dictates that "once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy." *O'Brien v. City of Syracuse*, 54 N.Y.2d 353, 357, 445 N.Y.S.2d 687, 688, 429 N.E.2d 1158, 1159 (1981). The doctrine of res judicata is designed to ensure finality, reduce litigation and promote judicial economy. *Xiao Yang Chen v. Fischer*, 6 N.Y.3d 94, 810 N.Y.S.2d 96, 843 N.E.2d 723 (2005). A party seeking dismissal on the res judicata ground must demonstrate the existence of a prior judgment on the merits. *Miller Manufacturing Co. v. Zeiler*, 45 N.Y.2d 956, 411 N.Y.S.2d 558, 383 N.E.2d 1152 (1978).

Where the defendant moves to dismiss on the ground that the action is time-barred, the defendant must make a *prima facie* showing that the period within which to commence a timely lawsuit has expired. If the defendant makes that showing, the burden shifts to the plaintiff to raise a question of fact as to whether the action was actually commenced within the applicable statute of limitations, the statute of limitations has been tolled, or an exception to the limitations period is applicable. *Quinn v. McCabe, Collins, McGeough & Fowler, LLP*, 138 A.D.3d 1085, 30 N.Y.S.3d 288 (2d Dep't 2016); *see Hoosac Valley Farmers Exchange v. AG Assets, Inc.*, 168 A.D.2d 822, 563 N.Y.S.2d 954 (3d Dep't 1990).

The last ground listed in paragraph 5 is the statute of frauds. The statute requires that certain agreements be reduced to a writing that reflects the particulars of the transaction, e.g., identifies the parties, states the essential terms of the agreement, and is signed by the party to be charged. *Durso v. Baisch*, 34 A.D.3d 646, 830 N.Y.S.2d 327 (2d Dep't 2007). The Pattern Jury Instructions, civil, contains a lengthy review of the statute of frauds. 2B N.Y. P.J.I.2d 4:1(VI)(D) (2017).

C3211:19. Comparison of Affirmative Defenses of CPLR 3018(b) with Dismissal Grounds of CPLR 3211(a)(5).

CPLR 3018(b) defines "affirmative defense" and lists the main defenses. All of the listed defenses are contained in paragraph 5 except for three: the culpable conduct of the plaintiff under CPLR article 14-A, facts showing illegality, and fraud. The affirmative defenses listed in paragraph 5 can be raised by pre-answer motion or in the answer; the three omitted defenses lack the pre-answer motion option. Or do they?

CPLR 3211(a)(7), which allows for dismissal based on the plaintiff's failure to state a cause of action, can be employed to direct the defense of illegality at the complaint, at least where the illegality appears on the face of the complaint. *National Recovery Systems v. Mazzei*, 123 Misc.2d 780, 475 N.Y.S.2d 208 (Sup. Ct., Suffolk County 1984); *see McCall v. Frampton*, 99 Misc.2d 159, 415 N.Y.S.2d 752 (Sup. Ct., Westchester County 1979). Given the manner in which CPLR 3211(a)(7) has been interpreted by many courts, a defendant wishing to challenge a cause of action on the ground of illegality may be able to submit evidence in support of its paragraph 7 motion and obtain dismissal even where the face of the complaint is unblemished by illegality. *See* Commentaries C3211:23. CPLR 3211(a)(7) is available too as a means for a defendant to seek dismissal of a cause of action on the affirmative defense of fraud, provided the fraud can be summarily established on the pre-answer motion. *See* Commentary C3018:20; *see also* Siegel, New York Practice § 263 (Connors 5th ed.). Given the elements of fraud and the heightened burden of the proof on a claim of it, *see* 2A N.Y. P.J.I.2d 3:20 (2017), resolution of an affirmative defense of fraud at the pre-answer stage of an action should be a rare event.

That leaves the defense of the plaintiff's culpable conduct. Can that defense be packaged as a CPLR 3211(a)(7) motion? Probably not.

That affirmative defense is based on the "culpable conduct [of the plaintiff] claimed in diminution of damages as set forth in [CPLR article 14-A]." CPLR 3018(b). CPLR article 14-A is our comparative fault law; it abrogated the

common law doctrine of contributory fault that barred a plaintiff from recovering damages if she was responsible to any degree for her injuries. Commentary C1411:1. Under CPLR 1411, the statute providing the comparative fault principle, "the culpable conduct attributable to the [plaintiff], including contributory negligence or assumption of risk, shall not bar recovery, but the amount of damages otherwise recoverable shall be diminished in the proportion which the culpable conduct attributable to the [plaintiff] bears to the culpable conduct which caused the damages." When triggered, the statute calls for an apportionment of fault between the plaintiff and the defendant. *See* 1A N.Y. P.J.I.3d 2:36; 1B N.Y. P.J.I.3d 2:275. Dismissal based on a plaintiff's comparative fault is therefore not authorized under CPLR 3211(a)(7) or any other procedural device (e.g., summary judgment).

CPLR article 14-A notwithstanding, there are situations in which a plaintiff's conduct may bar her recovery. The lists is short: where a tort plaintiff's conduct is the sole proximate cause of her injuries; where a plaintiff's injuries are the direct result of the commission of serious criminal or illegal conduct; where a tort plaintiff is precluded from recovering by virtue of the doctrine of primary assumption of risk; and where a plaintiff expressly assumed the risk of the injuries for which she is suing. Commentaries C1411:3. The first three situations are not good candidates for CPLR 3211(a) treatment. Application of the legal principles barring recovery in those situations is dependent upon the facts of the particular case and the fact-sensitive question of foreseeability. The last situation, however, may provide occasion for a CPLR 3211(a) dismissal. Where the defendant wants to seek dismissal based on the plaintiff's express assumption of risk, the defendant could invoke paragraph 1 (if the assumption of risk was acknowledged in a document), 5 (on the basis of the affirmative defense of release), and 7 (failure to state a cause of action). Notice we did not choose one ground, but all that reasonably may apply.

Paragraph 6

C3211:20. Non-Interposable Counterclaim.

CPLR 3019(a) provides that "[a] counterclaim may be any cause of action in favor of one or more defendants or a person whom a defendant represents against one or more plaintiffs, a person whom a plaintiff represents or a plaintiff and other persons alleged to be liable." The law therefore allows a defendant to assert any cause of action it has against the plaintiff; the counterclaim need not bear any relation to the plaintiff's cause of action.

As an affirmative claim, a counterclaim can be challenged by a plaintiff on any relevant ground listed in subdivision (a). *See* Commentary C3211:4. Paragraph 6 provides one more dismissal tool to a plaintiff who is subject to a counterclaim. Under paragraph 6, the plaintiff may seek dismissal of the counterclaim on the basis that it may not be interposed in the action. A motion under this paragraph must be raised in a pre-answer motion or taken by answer, otherwise it is waived.

What is the meaning of this counterclaim-may-not-properly-be-interposed ground? Didn't we say above that a defendant may assert as a counterclaim any cause of action it has against a plaintiff? The defendant can do so, provided the counterclaim is against the plaintiff in the capacity in which she sued the defendant. That is to say, "[w]hen a plaintiff sues in a particular capacity, that is generally the only capacity in which the plaintiff can be counterclaimed by the defendant." Commentary C3019:3, at 393 (main volume). This is the pre-CPLR "capacity" rule and, CPLR 3019(a)'s broad language notwithstanding, it lives today and is given force by CPLR 3211(a)(6). *See* Commentary C3019:3; Siegel, New York Practice § 264 (Connors 5th ed.); *see also Ehrlich v. American Moninger Greenhouse Manufacturing Corp.*, 26 N.Y.2d 255, 309 N.Y.S.2d 341, 257 N.E.2d 890 (1970).

Under the "capacity" rule, a paragraph 6 dismissal would seem to be appropriate in the following scenarios:

- The plaintiff is the executor of a decedent's estate and brought suit in that capacity, and the defendant asserted

a counterclaim against the plaintiff in her personal capacity.

• The plaintiff is a trustee and brought suit in that capacity, and the defendant asserted a counterclaim against the plaintiff in her personal capacity.

• The plaintiff, who happens to be the guardian of another's person and property, sued the defendant in plaintiff's personal capacity, and the defendant asserted a counterclaim against the plaintiff as guardian.

CPLR 3211(a)(6) has also been employed where a defendant interposed a counterclaim in violation of a provision of a contract between the parties that barred counterclaims. *New York Merchants Protective Co. v. Raia*, 5 Misc.3d 1011(A), 798 N.Y.S.2d 711 (table), 2004 WL 2532294 (Dist. Ct., Nassau County 2004).

Dismissal in *New York Merchants Protective Co.* may have been appropriate too under CPLR 3211(a)(1) and (7). If the plaintiff has any doubt regarding which ground to use to challenge a counterclaim, she should raise paragraph 6 and any other plausible grounds.

Note that "there is no authority under the CPLR to dismiss an otherwise valid counterclaim merely because it is not convenient to have it present in the case. Such authority did exist under prior law, but the worst that can befall such a counterclaim under the CPLR is a severance, sending it off as a separate action." Siegel, New York Practice § 264 (internal footnote omitted).

Paragraph 7

C3211:21. Failure to State a Cause of Action, Generally.

Paragraph 7 is one of the most commonly used dismissal grounds under CPLR 3211(a) and one of the most important procedural statutes in litigation. CPLR 3211(a)(7) provides that a defendant may seek judgment dismissing the complaint on the ground that it fails to state a cause of action. The defendant is free to attack the entire complaint or target one or more of the specific causes of action. The motion for failure to state a cause of action is no stranger in New York practice; it is an incarnation of the common law demurrer with a modern name and, as discussed below, a bit more potency. *See* Commentary C3211:23.

There are certain fundamental rules of decision associated with the CPLR 3211(a)(7) motion. These rules (applicable to most CPLR 3211 motions) should be reviewed--if not already committed to memory--before a motion to dismiss for failure to state a cause of action is made or opposed. Here they are: the pleadings must be given a liberal construction, the allegations accepted as true, and the plaintiff accorded every possible favorable inference. *Chanko v. Am. Broad. Companies Inc.*, 27 N.Y.3d 46, 52, 29 N.Y.S.3d 879, 883, 49 N.E.3d 1171, 1175 (2016).

The party opposing a CPLR 3211(a)(7) motion may want to request an opportunity to gather evidence before the court determines the motion, *see* Commentary C3211:46, a chance to replead, *see* Commentary C3211:60, or both.

For the edification of federal practitioners, CPLR 3211(a)(7) is analogous to the dismissal ground contained in Rule 12(b)(6) of the Federal Rules of Civil Procedure. The federal terminology is "failure to state a claim upon which relief can be granted." The most apparent difference is the federal use of the word "claim" vis-a-vis the New York

phrase "cause of action." Although it is sometimes asserted that there is a difference between the two phrases, *see, e.g., Garcia v. Hilton Hotels Intern.*, 97 F.Supp. 5 (D.C. Puerto Rico 1951), it is difficult at best to devise an explanation of what the difference is. For practical purposes, federal practitioners will run into few pitfalls if they apply their understanding of the federal "claim" to the New York phraseology of "cause of action". And vice versa. (Note, however, that in the wake of *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007), a federal pleading is subject to greater scrutiny on a rule 12(b)(6) motion than a New York State court pleading encounters on a CPLR 3211(a)(7) motion. *See* Robert L. Haig, Commercial Litigation in New York State Courts, § 12.28 [4th ed.]).

CPLR 3211(a)(7) poses a number of questions. These will be treated seriatim.

Allegations Sufficient for Pleading in Supreme Court May Not Suffice for Court of Claims Pleading

In a major decision on pleadings in the Court of Claims, *Lepkowski v. State*, 1 N.Y.3d 201, 770 N.Y.S.2d 696, 802 N.E.2d 1094 (2003), the Court of Appeals gave a strict construction to the pleading requirements of § 11(b) of the Court of Claims Act.

It does not take much to satisfy as a pleading in the Supreme Court. In a deliberate endeavor to escape the rigidities of common law pleadings, the CPLR long ago relaxed things. *See* CPLR 3013 and 3014.

Sections 8, 10, and 11 of the Court of Claims Act are a different world, made much more demanding because of the State's sovereign immunity and the need for the State to waive that immunity before suit may be brought against it. The State has long since waived the immunity, in § 8 of the act, but, stressed the Court of Appeals in *Lepkowski*, with the proviso that "the claimant complies with the limitations" imposed by, among other things, §§ 10 and 11 of the act. *See* the general discussion of the requirements for pleadings in the Commentaries following CPLR 3013 and 3014, and the more specific discussion of Court of Claims pleadings in Commentary C3013:15A; *see also Kolnacki v. State*, 8 N.Y.3d 277, 832 N.Y.S.2d 481, 864 N.E.2d 611 (2007).

C3211:22. Does Paragraph 7 Replace Common Law Demurrer?

Under the common law demurrer, the defendant conceded the truth of every factual allegation made by the plaintiff but contended that, even so, the complaint stated no cause of action cognizable under the law. The defendant could not submit evidence to contest the plaintiff's factual allegations. (A remedy in some instances was to answer and then move for summary judgment under the predecessor of CPLR 3212, an alternative still available under the CPLR.) Thus, the function of the demurrer was narrow: test the facial sufficiency of a pleading.

Like the common law demurrer, a CPLR 3211(a)(7) motion can be used to test the facial sufficiency of a pleading. Thus, the paragraph 7 motion is useful in disposing of actions in which the plaintiff has not stated a claim cognizable at law, and actions in which the plaintiff has identified a cognizable cause of action but failed to assert a material allegation necessary to support the cause of action. *See Basis Yield Alpha Fund (Master) v. Goldman Sachs Group, Inc.*, 115 A.D.3d 128, 980 N.Y.S.2d 21 (1st Dep't 2014).

A plaintiff confronted with a motion addressed to the adequacy of her pleading has the option to submit an affidavit or other evidence in opposition to the motion to augment the allegations in the pleading or otherwise rehabilitate it. *Rovello v. Orofino Realty Co.*, 40 N.Y.2d 633, 389 N.Y.S.2d 314, 357 N.E.2d 970 (1976). The plaintiff should avail herself of that opportunity, especially if she perceives any weaknesses within the four corners of her pleading.

Where a defendant has challenged the facial sufficiency of a complaint, the court's inquiry is limited to determining whether, applying the familiar rules of decision applicable to CPLR 3211(a) motions (*see* Commentary C3211:21), the allegations and any evidence submitted by the plaintiff have stated a claim cognizable at law. "In the context of CPLR 3211(a)(7), the word 'stated' means pleaded: Do the allegations, liberally construed and viewed in the light most favorable to the plaintiff, plead a cognizable claim?" Higgitt, *CPLR 3211(a)(1) and (a)(7) Dismissal Motions--Pitfalls and Pointers*, 83 New York State Bar Journal 32, 33 (Nov./Dec. 2011) (internal footnote omitted). Whenever the plaintiff's allegations and evidence, taken as true, do state a cause of action, it is plain that a paragraph 7 motion unsupported by affidavits or other extrinsic proof will fail.

When the CPLR 3211(a)(7) movant omits affidavits and other proof and limits her challenge to the facial allegations of the pleading, she must be aware of the great liberalization that pleadings have undergone under the CPLR. Technicality has been largely removed. If from the four corners of the pleading, regardless of its form and draftsmanship, factual allegations can be discerned which, taken together, manifest any claim cognizable under the law, the pleading does state a cause of action and the motion will fail. These conclusions derive from a study of the Advisory Committee's intentions, which were implemented by the courts. *See Foley v. D'Agostino*, 21 A.D.2d 60, 248 N.Y.S.2d 121 (1st Dep't 1964). The practitioner would do well to note this before attempting to defeat a cause of action under paragraph 7 on the basis that it is deficient on its face. Even if the theory it purports to be based on is wrong, the existence of any other theory that would qualify the allegations as a "cause of action" will suffice to defeat the motion.

C3211:23. Attacking a Claim Valid on Its Face.

As discussed above, one function of CPLR 3211(a)(7) is to permit a defendant to seek dismissal of a complaint on the ground that it does not state--that is, plead--a cause of action. But is that its only function? Can a defendant use evidence on a CPLR 3211(a)(7) motion to attack a well-pleaded cause of action and obtain dismissal based on that evidence?

After many decades on the civil procedure scene, one would think that the role of this critical litigation device would be well-defined. But it is not. Here is the relevant history, as traced in a prior treatment of the subject. *See* Higgitt, *High Court Signals a Potential Change in Practice With CPLR 3211(a)(7)*, Aug. 5, 2013 N.Y.L.J. at 4.

CPLR 3211(a)(7) was part of the original CPLR, which became effective on September 1, 1963. Paragraph 7's language has remained the same over the years: "A party may move for judgment dismissing one or more causes of action asserted against him [or her] on the ground that: … the pleading fails to state a cause of action".

The Court of Appeals' first major decision on CPLR 3211(a)(7) came in *Rovello v. Orofino Realty Co.*, 40 N.Y.2d 633, 389 N.Y.S.2d 314, 357 N.E.2d 970 (1976). While stressing that the principal function of an (a)(7) motion is to ascertain whether a complaint states, i.e., pleads, a cognizable cause of action, the Court observed that "affidavits submitted by the defendant [on a (a)(7) motion] will seldom if ever warrant [dismissal] *unless ... the affidavits establish conclusively that plaintiff has no cause of action*" (*id.* at 636 [emphasis added]). Although the *Rovello* Court noted that "defendants' affidavits present[ed] a seemingly strong defense," it concluded that the subject complaint did state a cause of action and directed that the motion to dismiss be denied. *Rovello*, though, opened the door--albeit only in narrow circumstances--for dismissals under CPLR 3211(a)(7) based on evidence.

The Court's next pronouncement on the subject came approximately one year later in *Guggenheimer v. Ginzberg* (43 N.Y.2d 268, 401 N.Y.S.2d 182, 372 N.E.2d 17 [1977]). The *Guggenheimer* Court stated that:

[w]hen evidentiary material is considered, the criterion is whether the proponent of the pleading has a cause of action, not

whether he [or she] has stated one, and, unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it ... dismissal should not eventuate (*id.* at 275, 401 N.Y.S.2d at 185, 372 N.E.2d at 20-21).

The Court found that the essential facts in the complaint before it were not "negated beyond substantial question by the affidavits submitted ... so that it might be ruled that the pleader does not have the causes of action" (*id.*). The "establish[es] conclusively" test articulated in *Rovello* just 14 months prior was not mentioned. *Guggenheimer's* "no significant dispute/negate beyond substantial question" test appears broader than *Rovello's* "establish[es] conclusively" test, permitting a defendant to obtain dismissal with convincing--but not conclusive--evidence. *See also Godfrey v. Spano*, 13 N.Y.3d 358, 892 N.Y.S.2d 272, 920 N.E.2d 328 (2009) and *Lawrence v. Graubard Miller*, 11 N.Y.3d 588, 873 N.Y.S.2d 517, 901 N.E.2d 1268 (2008), both of which appear to endorse the *Rovello* standard.

In light of the mixed signals sent by *Rovello* and *Guggenheimer*, the Appellate Division has grappled with the appropriate standard to apply on a CPLR 3211(a)(7) motion that is supported by evidence. Some courts have said the only question on a motion to dismiss for failure to state a cause of action is whether the complaint pleads a cause of action. *See*, *e.g., Henbest & Morrisey Inc. v. W.H. Ins. Agency Inc.*, 259 A.D.2d 829, 686 N.Y.S.2d 207 (3d Dep't 1999). Other courts have said that a CPLR 3211(a)(7) motion serves a broader function: to challenge a complaint that states a cause of action with evidence undercutting the plaintiff's allegations. Phrased differently, dismissal under CPLR 3211(a)(7) may be appropriate when, on the facts adduced by the defendant, the plaintiff does not have a cause of action. But courts of this view are divided into two camps: one asks whether the defendant's evidence conclusively establishes that the plaintiff does not, in fact, have a cause of action (the *Rovello* standard), the other asks whether the defendant's evidence negates beyond substantial question an essential fact on which the plaintiff's action rests (the *Guggenheimer* standard).

In 2013, the Court of Appeals decided *Miglino v. Bally Total Fitness of Greater New York, Inc.*, 20 N.Y.3d 342, 961 N.Y.S.2d 364, 985 N.E.2d 128 (2013), an opinion that had the potential to end this long-running debate. In relevant part, the Court considered whether a health club was entitled to dismissal under CPLR 3211(a)(7) of a common law negligence cause of action asserted by the estate of a club patron who died after experiencing cardiac arrest on the club's premises. The gist of that cause of action was that the health club breached its duty of care to persons struck down by cardiac arrest while on the club's premises by failing to employ or properly employ life-saving measures to the decedent. The health club moved to dismiss that cause of action under CPLR 3211(a)(7). In support of that motion, the health club submitted the affidavit of an employee who rendered aid to the decedent. The employee described his training and the actions he and other club personnel took to assist the decedent. The motion was denied by the trial court and the Second Department affirmed.

The Court of Appeals affirmed the Appellate Division's order, writing, in pertinent part, that:

"Bally has moved to dismiss under CPLR 3211(a)(7), which limits us to an examination of the pleadings to determine whether they state a cause of action. Further, we must accept facts alleged as true and interpret them in the light most favorable to plaintiff; and, as Supreme Court observed, plaintiff may not be penalized for failure to make an evidentiary showing in support of a complaint that states a claim on its face....

"Here, the complaint asserts that Bally did not 'employ or properly employ life-saving measures regarding [the decedent]' after he collapsed. Bally's motion is supported by affidavits that contradict this claim, by purporting to show that the minimal steps adequate to fulfill a health club's limited duty to a patron apparently suffering a coronary incident--i.e., calling 911, administering CPR and/or relying on medical professionals who are voluntarily furnishing emergency care--were, in fact, undertaken. But, as noted before, this matter comes to us on a motion to dismiss, not a motion for summary judgment. As a result, the case is not currently in a posture to be resolved as a matter of law on the basis of the

parties' affidavits, and [the plaintiff] has at least pleaded a viable cause of action at common law." 20 N.Y.3d at 351, 961 N.Y.S.2d at 370, 985 N.E.2d at 134 (internal citation omitted).

One view is that *Miglino* did not change the law under CPLR 3211(a)(7), and a defendant is still free to submit evidence in support of a motion to dismiss in an effort to establish that, on the facts, the plaintiff does not have a cause of action. Another view of *Miglino* is that the Court of Appeals no longer permits a defendant to obtain dismissal under CPLR 3211(a)(7) based on evidence the defendant submits in support of the motion. The reasoning for the second view is as follows: the defendant in *Miglino* sought dismissal under CPLR 3211(a)(7) and relied on evidence; the Court of Appeals acknowledged that the defendant submitted evidence, but stressed that the only inquiry at the CPLR 3211 stage was whether the complaint states a cause of action; the Court affirmed the denial of the motion to dismiss because the plaintiff "at least pleaded a viable cause of action"; therefore, the Court must have concluded that dismissal under CPLR 3211(a)(7) based on a defendant's evidence is not permitted. *See* Higgitt, *High Court Signals a Potential Change in Practice With CPLR 3211(a)(7)*, *supra*; *see also* Connors, *Courts Reconsider Rule Permitting Use of Affidavits on CPLR 3211(a)(7) Motion*, N.Y.L.J., Jan. 20, 2015 at 3 (reviewing CPLR 3211[a][7], *Rovello*, and *Miglino*, and concluding that "the courts should not permit consideration of defendant's factual affidavits on a CPLR 3211[a][7] preanswer motion to dismiss unless the court elects to treat the motion as one for summary judgment under CPLR 3211[c].").

A construction of paragraph 7 that limits its role to a pleading motion is consistent with the legislative history of the CPLR (Higgitt, *CPLR 3211[a][7]: Demurrer or Merits-Testing Device?*, 73 Alb.L.Rev. 99 at 102), and the plain language of that paragraph ("the pleading fails to state a cause of action"). That construction also prevents paragraph 7 from becoming a "super" ground for dismissal that crowds-out the others. (The "documentary evidence" ground in CPLR 3211[a][1] has little to no role to play if the movant can rely on evidence to support her motion to dismiss for failure to state a cause of action. Higgitt, *CPLR 3211(a)(1) and (a)(7) Dismissal Motions--Pitfalls and Pointers*, 83 New York State Bar Journal 32 at 34, n.30.) We note too that while CPLR 3211(a)(7) authorizes dismissal of a cause of action for failure to state a cause of action, subdivision (b) allows for dismissal of a defense if it is not stated *or has no merit*. The Legislature seemed to make a deliberate determination to allow for a merits-based dismissal in one situation (subdivision [b]) but not in the other ([a][7]). And, absent conversion of a CPLR 3211(a) motion into one for summary judgment (*see* subdivision [c]), shouldn't the parties be allowed to assume that the focus of the court's inquiry is on the sufficiency of the pleading and not on the merits? *See Four Seasons Hotels v. Vinnik*, 127 A.D.2d 310, 515 N.Y.S.2d 1 (1st Dep't 1987).

But we digress, for all four Departments have concluded that *Miglino* did not change the law, with the Fourth Department expressly considering--and rejecting--the contention "that *Miglino* fundamentally changed the parameters of CPLR 3211(a)(7) and effectively barred the consideration of any evidentiary submissions outside of the four corners of the complaint." *Liberty Affordable Housing, Inc. v. Maple Court Apartments*, 125 A.D.3d 85, 88, 998 N.Y.S.2d 543, 545 (2015); *see*, *e.g.*, *Clarke v. Laidlaw Transit, Inc.*, 125 A.D.3d 920, 5 N.Y.S.3d 138 (2d Dep't 2015); *Marston v. General Electric Co.*, 121 A.D.3d 1457, 995 N.Y.S.2d 646 (3d Dep't 2014); *Basis Yield Alpha Fund (Master) v. Goldman Sachs Group, Inc.*, 115 A.D.3d 128, 980 N.Y.S.2d 21 (1st Dep't 2014). The *Liberty Affordable Housing* Court reasoned that "*Miglino* is properly understood as a straightforward application of *Rovello's* long-standing framework"; the cause of action for common law negligence in *Miglino* was not in a posture to be resolved by the health club's evidence because that evidence was insufficiently conclusive, not because it was categorically inadmissible. 125 A.D.3d at 91, 998 N.Y.S.2d at 547.

C3211:24. Result in Multi-Claim Case.

When the complaint states several causes of action, the movant must address a CPLR 3211(a) motion to the specific cause of action objected to. This is as true of paragraph 7 as it is of any other ground. If all of the alleged causes of action are defective, and the movant can show as much, the motion can of course succeed against them all. If less than all are defective, however, the movant should single out the defective ones and address the motion to them.

Note that "a motion to dismiss for failure to state a cause of action will be denied in its entirety where the complaint asserts several causes of action, at least one of which is legally sufficient and where the motion is aimed at the pleading as a whole without particularizing the specific causes of action sought to be dismissed." *Long Island Diagnostic Imaging, P.C. v. Stony Brook Diagnostic Associates*, 215 A.D.2d 450, 452, 626 N.Y.S.2d 828, 829 (2d Dep't 1995); *see Great Northern Associates, Inc. v. Continental Casualty Co.*, 192 A.D.2d 976, 596 N.Y.S.2d 938, 940 (3d Dep't 1993). But when "a motion to dismiss for failure to state a cause of action particularizes each of the claims in the complaint, even though it is nominally addressed to the complaint as a whole, the court should treat that motion as applying to each individual cause of action alleged." *Gamiel v. Curtis & Riess-Curtis, P.C.*, 16 A.D.3d 140, 141, 791 N.Y.S.2d 78, 79 (1st Dep't 2005). This allows the court to sustain the good causes of action and dismiss the bad ones, narrowing the issues in the case and streamlining the litigation.

When only a single cause of action is stated, the opening language of CPLR 3211(a) might suggest that the motion is available only as against the entire claim and not merely to a part of it. The motion is available as to any severable part of a single claim, however, whether it relates only to the relief clause or to some part of the theory or theories sued on.

C3211:25. Demanding Wrong Relief Inconsequential.

As long as the allegations taken from the complaint as a whole manifest that the plaintiff has a cause of action on which some kind of relief may be granted, it is of no moment on a paragraph 7 motion that the wrong relief was asked for. *See O'Reilly v. Cahill*, 50 Misc.2d 629, 271 N.Y.S.2d 29 (Sup. Ct., New York County 1966), *rev'd on other grounds* 28 A.D.2d 527, 280 N.Y.S.2d 338 (1st Dep't 1967). The remedy of the plaintiff who has a claim but has asked for relief unresponsive to it is to move under CPLR 3025(b) for leave to amend the relief clause. If the time for amending as of course, i.e., without leave of court, is still open under CPLR 3025(a), the plaintiff may amend without the need of a motion.

C3211:26. Time to Make Paragraph 7 Motion.

Paragraph 7 is one of the three CPLR 3211(a) paragraphs (the other two being paragraphs 2 and 10) that will support a CPLR 3211 dismissal motion made at any time. (*See* Commentary C3211:49.) For that reason, and because a movant is allowed to submit evidence in support of her motion, there are four different classes of CPLR (a)(7) motions: (1) a pre-answer motion unsupported by evidence, (2) a pre-answer motion supported by evidence, (3) a post-answer motion unsupported by evidence, and (4) a post-answer motion supported by evidence. The courts have applied the same rules of decision to an (a)(7) motion regardless of whether it was made pre-or post-answer. *See Hendrickson v. Philbor Motors, Inc.*, 102 A.D.3d 251, 955 N.Y.S.2d 384 (2d Dep't 2012); *see also Chenago Contracting, Inc. v. Hughes Associates*, *Landscape Architects PLLC*, 128 A.D.3d 1150, 8 N.Y.S.3d 724 (3d Dep't 2015).

As a matter of practice, of course, it is advisable for the movant who depends on paragraph 7 to make the motion before answering for the simple reason that if it prevails there will be no need to answer. If the answer has already been served when the motion is made, however, the answer is among the papers that the court can consider on the motion. *See Hamilton Printing Co. v. Ernest Payne Corp.*, 26 A.D.2d 876, 273 N.Y.S.2d 929 (3d Dep't 1966).

When the motion is made after answer and is based not on the face of the pleading but on extrinsic proof, the movant would often do better to move for summary judgment under CPLR 3212. A disposition under that provision will ordinarily carry the full effect of res judicata, while a CPLR 3211(a)(7) disposition may or may not. (*See* Commentary C3211:63.)

The practitioner who without good reason postpones a paragraph 7 motion may be courting unnecessary trouble. Technically, the movant can make the motion even as late as when the trial opens, but the suspicions of the trial judge are bound to be aroused. Why has a motion that could have put an early end to the litigation been delayed until the trial, with all parties put to the burden of pretrial preparation in the interim? Although the motion still lies at that time and would have to be entertained, the delay may, perhaps only unconsciously, influence the trial judge's disposition of it. The movant should have ready--whether called upon to use them or not--good reasons for the delay, such as that the proof needed for the motion became available only recently.

C3211:27. Paragraph 7 as Catch-All Ground.

In the comparison made between what CPLR 3018(b) labels as affirmative defenses on the one hand and what CPLR 3211(a) affords as grounds for a motion to dismiss on the other, it is pointed out that paragraph 7 can sometimes be used to make available as a motion ground an affirmative defense not explicitly contained in the CPLR 3211(a) list. *See* Commentary C3211:19. "Illegality" is a prime example. The movant who can show the defect to be something that affects the merits of the cause of action, as illegality would, can make the defect a basis for a motion to dismiss under paragraph 7.

It has also been shown that paragraph 7 may overlap (supersede may, in some instances, be a better word) other paragraphs of CPLR 3211(a), in which case the objection can be based on both the other paragraph and paragraph 7 together. *See*, *e.g.*, Commentaries C3211:12 and 18. Paragraph 7 would not be superfluous in such an instance, for the reason that a motion under paragraph 7 may be made at any time, CPLR 3211(e), while the grounds in most of the other paragraphs must be exploited by a motion before the answer is served. Additionally, all types of evidence are permitted on a motion to dismiss for failure to state a cause of action. These benefits may prove helpful in a given case-at least in the eyes of the movant.

As to the interplay between CPLR 3211(a)(7) and (a)(1) (dismissal based on "documentary evidence"), *see* Higgitt, *CPLR 3211(a)(1) and (a)(7) Dismissal Motions--Pitfalls and Pointers*, 83 New York State Bar Journal 32, 34-35 (Nov./Dec. 2011).

Paragraph 8

C3211:28. Lack of Personal Jurisdiction.

Subject matter jurisdiction, covered above (*see* Commentary C3211:11), asks whether a particular court has the authority to hear and resolve a particular type of action. Personal jurisdiction asks whether the court, under the particular facts of the case, has the power to render a judgment binding on the defendant herself. Personal jurisdiction is one of three forms of jurisdiction over persons, property and status, the other two being in rem and quasi in rem (more on these two forms of jurisdiction below). *See* Commentary C301:1. Personal (or in personam) jurisdiction over a defendant allows the court to adjudicate the defendant's liability or obligation to the plaintiff, and adjudge that the defendant is personally liable or responsible for the relief awarded in the action. *Id.*

Personal jurisdiction has three elements: (1) a basis for the exercise of jurisdiction over the defendant (i.e., general jurisdiction over the defendant or specific [a/k/a long arm] jurisdiction over her); (2) notice to the defendant of the action; and (3) proper commencement of the action. *See* Siegel, New York Practice §§ 58, 63 (Connors 5th ed.). All must be present for a court to obtain personal jurisdiction over a defendant. (Although a defendant may waive an objection to a defect relating to personal jurisdiction.).

CPLR 3211(a)(8) is the device that allows a defendant to seek dismissal of an action on the ground that the court lacks personal jurisdiction over her. She can use paragraph 8 to raise any defect relating to personal jurisdiction. The defendant may claim that no basis exists to call her before a New York court--that is to say, the defendant is not subject to the jurisdiction of the New York courts, generally, and is not subject to their jurisdiction for the purposes of the particular action in which she was named a defendant. *See* Commentaries C301:2-10; C302:1-15; Siegel, New York Practice §§ 66, 80-89. The defendant may assert that she was not served with the initiatory papers, that they were served defectively, or that they were served in an unauthorized manner. The defendant may complain that the action was not properly commenced.

Because of the waiver provisions of subdivision (e), a defendant must carefully consider when and how to raise defenses related to lack of personal jurisdiction. *See* Commentary C3211:55.

Paragraph 8 should not be confused with paragraph 9, which addresses those two other forms of jurisdiction over persons, property and status: in rem and quasi in rem. Any uncertainty on the part of the defendant regarding the category of jurisdiction on which the plaintiff is relying should be resolved by invoking both paragraphs and leaving it to the court to determine which category ultimately applies. *See* Commentary C3211:31.

Under paragraph 8, where the defendant duly raises a lack of personal jurisdiction defense, the plaintiff bears the burden of proof on the issue of whether such jurisdiction exists. *Shore Pharmaceutical Providers, Inc. v. Oakwood Care Center, Inc.*, 65 A.D.3d 623, 885 N.Y.S.2d 88 (2d Dep't 2009).

The plaintiff may need discovery on jurisdiction-related issues, particularly regarding whether a basis exists for the New York court to impose its jurisdiction on the defendant. Questions on this front sometimes arise when a plaintiff claims that a defendant is amenable to suit in New York under our longarm jurisdiction statute (CPLR 302). The plaintiff can request that the court afford her an opportunity to conduct jurisdictional discovery before determining the motion to dismiss. *See* Commentary C3211:46.

C3211:29. Jurisdictional Basis Depending on Complaint.

Certain unique problems can arise in a case when the summons was served without an accompanying complaint, which is permissible under CPLR 305(b) and 3012, and the defendant moves to dismiss under paragraph 8 before the complaint is served. If service was purportedly made within New York and the defect relates to the mechanics of service, the motion should lie immediately and can be disposed of promptly. (In that instance the motion would be to dismiss "the action," since one cannot move to dismiss a non-existent complaint.) But when the summons is served outside the State and the defendant contends not that the method of service was defective, but rather that the court lacks a basis for extraterritorial jurisdiction, it may be impossible for the court to determine the question until the complaint is served.

If the extraterritorial jurisdictional basis relied on is the fact that the defendant is a New York domiciliary, *see* CPLR 313, affidavits should be adequate to determine the domiciliary status and the paragraph 8 motion should lie before service of the complaint. But if the basis is longarm jurisdiction under CPLR 302, the issue of whether the basis exists depends on geographical factors connected with the cause of action, and the cause of action cannot be seen until the complaint is served. For this reason, the motion to dismiss for lack of personal jurisdiction in such a case should await service of the complaint. *Fraley v. Desilu Productions, Inc.*, 23 A.D.2d 79, 258 N.Y.S.2d 294 (1st Dep't 1965) (denying motion to dismiss made before service of complaint, without prejudice to renewal after service).

The moral is that a defendant served outside New York with a summons but not the complaint ought to limit her next step to demanding a copy of the complaint. Nothing is lost by so doing: a defendant who demands a complaint after being served with the summons has 20 days after the complaint is finally served in which to answer or move against it. *See* CPLR 3012(b).

Paragraph 9

C3211:30. Lack of Rem Jurisdiction.

In rem and quasi in rem jurisdiction are predicated on the presence of property (or some other res) in the State. The plaintiff in an action founded on in rem jurisdiction is asserting an interest in a particular thing. *Majique Fashions, Ltd. v. Warwick & Co., Ltd.*, 67 A.D.2d 321, 326, 414 N.Y.S.2d 916, 919 (1st Dep't 1979) ("In rem jurisdiction ... involves an action in which a plaintiff is after a particular thing, rather than seeking a general money judgment, that is, [s]he wants possession of the particular item of property, or to establish h[er] ownership or other interest in it, or to exclude the defendant from an interest in it."). The plaintiff in a quasi in rem action wants a money judgment but cannot get personal jurisdiction over the defendant. So, the plaintiff looks to the defendant's in-State property. By employing the provisional remedy of attachment, the plaintiff can pursue her cause of action against the defendant and, if the plaintiff prevails in the action, the attached property will be applied toward the judgment. Commentary C314:4. The utility of quasi in rem jurisdiction is not what it once was, but that form of rem jurisdiction is still available under the right set of circumstances. *See Banco Ambrosiano, S.P.A. v. Artoc Bank & Trust Limited*, 62 N.Y.2d 65, 476 N.Y.S.2d 64, 464 N.E.2d 432 (1984).

Paragraph 9 affords a ground for dismissal when service has been made under CPLR 314 or 315, the provisions governing in rem and quasi in rem actions. Whenever it is clear that the plaintiff is not claiming personal jurisdiction, but is bringing the action solely on a rem foundation, and the defendant can show that even rem jurisdiction does not exist--whether for lack of service or the fact that the res is not in New York or for any other reason that divests rem jurisdiction--the defendant's weapon is the motion to dismiss under CPLR 3211(a)(9).

Reliance on paragraph 9 exclusively is usually possible only when the plaintiff is not even making an argument that there is personal jurisdiction--when personal jurisdiction, in other words, is not in the picture at all--and when the defendant believes she can also show that not even the claimed rem jurisdiction exists. In any other situation it may be inappropriate for the defendant to rely solely on paragraph 9. If the defendant has any doubt whatever about the category of jurisdiction plaintiff claims to exist and defendant can show the absence of either category of jurisdiction, or of both, she had best caption the motion under both paragraphs 8 and 9 and let the court decide whether any jurisdiction exists and, if so, which kind it is. *See* Commentary C3211:31.

C3211:31. Confusion as to Kind of Jurisdiction Asserted.

When the defendant knows precisely what category of jurisdiction the plaintiff claims, and the defendant contends that the claimed basis does not exist, the defendant can caption the motion under either paragraph 8 or paragraph 9, whichever is applicable. The defendant can do this, in any event, when it is clear that the basis the plaintiff claims is the only possible one and that the existence of the unclaimed one is not even remotely possible. In any other instance, the defendant may face a dilemma. If the defendant has any doubt whatever about the kind of jurisdiction the plaintiff is asserting, the defendant should caption the motion to dismiss under both paragraphs 8 and 9 and ask the court to determine clearly which, if any, jurisdictional ground exists.

If the defendant claims neither basis exists, she would clearly invoke both grounds and move to dismiss the case entirely. *See Kalman v. Neuman*, 80 A.D.2d 116, 438 N.Y.S.2d 109 (2d Dep't 1981). If the defendant admits that one exists but contends that the other does not, she would move to dismiss on the ground describing the latter.

If the jurisdiction is only in rem, the defendant may be able to withdraw from the litigation without personam consequences. If it is only quasi in rem, the defendant may be able to stay on and defend without personam consequences. (For the distinctions between these categories of rem jurisdiction, *see* Siegel, New York Practice § 101 [Connors 5th ed.]) All these conclusions derive from CPLR 320(c). *See* Commentary C3211:39. What they manifest for our present purpose is that the defendant must be certain that the order disposing of the jurisdictional motion states specifically what kind of jurisdiction exists, if any does. *See* Siegel, New York Practice § 267. The defendant will have to depend on that determination to govern her future participation in the case.

Paragraph 10

C3211:32. Absence of a Person Who Should be A Party.

Paragraph 10 allows for dismissal of an action when the court determines that it "should not proceed in the absence of a person who should be a party." The statute does not talk about the absence of an "indispensable party"; that was the phrase used prior to the CPLR. The old "indispensable party" doctrine could be harsh. Under it, if an unjoined and unjoinable person was "indispensable," the action would be dismissed. *See generally Carruthers v. Jack Waite Mining Co.*, 306 N.Y. 136, 116 N.E.2d 286 (1953); Siegel, New York Practices § 131 (Connors 5th ed.). Paragraph 10 distances itself from the old law, abandoning both the words "indispensable party" and the principle that the absence of a person important in the scheme of the action must result in dismissal. *See Red Hook/Gowanus Chamber of Commerce v. New York City Board of Standards and Appeals*, 5 N.Y.3d 452, 805 N.Y.S.2d 525, 839 N.E.2d 878 (2005). Indeed, under the CPLR, dismissal for failure to join a necessary party is the last resort. Siegel, New York Practice § 133.

CPLR 3211(a)(10) can only be understood and applied if read in conjunction with CPLR article 10. Of particular significance is CPLR 1001. Subdivision (a) of that statute instructs that "[p]ersons who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action shall be made plaintiffs or defendants." (To avoid the now taboo concept of the "indispensable party," we'll call the important non-party the "necessary party"). Subdivision (b) tells us what is to happen if a necessary party has not been included in the caption. The easy part: if the necessary party is subject to the court's jurisdiction, the court must direct that the necessary party be joined as a party. *Dime Savings Bank of N.Y. v. Johneas*, 172 A.D.2d 1082, 569 N.Y.S2d 260 (4th Dep't 1991). If the necessary party cannot be joined and will not voluntarily appear in the action, the court must engage in a balancing of numerous factors to ascertain whether justice requires that the action proceed without her.

These are the CPLR 1001(b) factors:

"1. Whether the plaintiff has another effective remedy in case the action is dismissed on account of the nonjoinder;

"2. The prejudice which may accrue from the nonjoinder to the defendant or to the person not joined;

"3. Whether and by whom prejudice might have been avoided or may in the future be avoided;

"4. The feasibility of a protective provision by order of the court or in the judgment; and

"5. Whether an effective judgment may be rendered in the absence of the person who is not joined."

No one factor is determinative and each of them must be considered by the court. *Swezey v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 19 N.Y.3d 543, 950 N.Y.S.2d 293, 973 N.E.2d 703 (2012); *Red Hook/Gowaus Chamber of Commerce v. New York City Board of Standards and Appeals, supra*. Also, the court can consider that dismissal is the last resort, and that the purposes of the dismissal remedy are to prevent multiple, inconsistent judgments relating to the same controversy, and to protect the non-party from embarrassment from a judgment purporting to bind her rights or interests. *See Saratoga County Chamber of Commerce v. Pataki*, 100 N.Y.2d 801, 766 N.Y.S.2d 654, 798 N.E.2d 1047 (2003).

The framework of the analysis of a motion to dismiss under CPLR 3211(a)(10) is as follows:

Initially, inquiry must be made into whether the non-party is a necessary one under CPLR 1001(a). If she isn't, the motion can be denied; if she is, the court must consider whether the non-party is subject to the court's jurisdiction. If she is, the court can order her joinder; if not, the court must consider and weigh the five factors listed in CPLR 1001(b) to ascertain whether justice requires that the action proceed without the non-party.

The path to dismissal is difficult, just the way the drafters of the CPLR intended it. *See* Siegel, New York Practice § 133.

A fine example of the consideration and balancing of the factors can be viewed in *L-3 Communications Corp. v. Safenet, Inc.*, 45 A.D.3d 1, 841 N.Y.S.2d 82 (1st Dep't 2007).

What if it is not clear to the court whether the necessary party is subject to the court's jurisdiction? The court can deny the paragraph 10 motion without prejudice and grant the plaintiff leave to join the necessary party within a certain period of time. *Williams v. Somers*, 91 A.D.2d 545, 457 N.Y.S.2d 19 (1st Dep't 1982). If the plaintiff is unable to do so, she should move to be excused from joining the necessary party under CPLR 1001(b), and that motion should be supported by an affidavit demonstrating why the necessary party isn't subject to the court's jurisdiction. *Id.* The without-prejudice dismissal of the CPLR 3211(a)(10) motion would permit the defendant to make another motion to dismiss under that ground if the plaintiff fails to comply with the prior order.

As to the timing of a paragraph 10 motion, it is a member of that exclusive club of subdivision (a) grounds (along with paragraphs 2 and 7) that can be made at any time. CPLR 3211(e); *City of New York v. Long Island Airports Limousine Service Corp.*, 48 N.Y.2d 469, 475, 423 N.Y.S.2d 651, 654, 399 N.E.2d 538, 541 (1979) ("[a] court may always consider whether there has been a failure to join a necessary party"). Does that mean that a defendant's delay in making a CPLR 3211(a)(10) motion must go without consequence? Maybe the delay, if sufficiently lengthy, will be considered by the court in the course of its review and balancing of the CPLR 1001(b) factors, particularly with respect to factor number three. Commentary C1001:2. But delay, no matter its length, will not result in a waiver of the defendant's right to make the paragraph 10 motion. *D.M.I. Painting, Inc. v. Eastern Long Island Hospital*, 74 A.D.2d 838, 839, 425 N.Y.S.2d 633, 635 (2d Dep't 1980) ("failure of the [defendant] to move until the eve of trial is deplorable but does not constitute a waiver").

CPLR 3211(a)(10) does not expressly allow for conditions to be imposed in connection with a dismissal for failure to join a necessary party. But CPLR 1001(b)'s factor four makes plain that reasonable conditions are authorized. *See* Siegel, New York Practice § 268. For some examples of appropriate conditions, *see id.* at § 133.

Paragraph 11

C3211:33. Dismissal in Favor of Uncompensated Official of Not-for-Profit Organization.

CPLR 3211(a)(11) provides a narrow class of individuals with a very special, very specific dismissal device. That ground applies to directors, officers and trustees who serve without compensation in not-for-profit entities. Under Not-For-Profit Corporation Law (N-PCL) § 720-a, an uncompensated director, officer or trustee enjoys qualified immunity from most lawsuits; the immunity is stripped only if the conduct of the individual constituted gross negligence or was intended to cause harm. Paragraph 11's aim is to reduce protracted litigation against certain persons engaged in non-paid charitable activities. *Rabushka v. Marks*, 229 A.D.2d 899, 646 N.Y.S.2d 392 (3d Dep't 1996). How does it do that? By providing an expedited procedure, a mini-summary judgment of sorts, for the testing of the defendant's claim of immunity under N-PCL § 720-a. *Krackeler Scientific, Inc. v. Ordway Research Institute, Inc.*, 97 A.D.3d 1083, 949 N.Y.S.2d 286 (3d Dep't 2012). Here's how CPLR 3211(a)(11) works.

First, the court must ascertain whether the defendant moving for relief under paragraph 11 is entitled to the qualified immunity provided by N-PCL § 720-a. *Kamchi v. Weissman*, 125 A.D.3d 142, 1 N.Y.S.3d 169 (2d Dep't 2014). That statute is explicit: the uncompensated director, officer or trustee must serve an entity described in § 501(c)(3) of the United States Internal Revenue Code (26 U.S.C. 501[c][3]). *See Bernbach v. Bonnie Briar Country Club*, 144 A.D.2d 610, 534 N.Y.S.2d 695 (2d Dep't 1988). CPLR 3211(a)(11) facilitates the defendant's proof by accepting as presumptive evidence of the entity's 26 U.S.C. 501(c)(3) status certain Internal Revenue Service letters and publications. The affidavit of the chief financial officer of the entity attesting to the defendant's status as an uncompensated director, officer or trustee of the entity is presumptive evidence of such status. CPLR 3211(a)(11). Those presumptions can be rebutted by the plaintiff.

If the defendant's evidence on the motion establishes, *prima facie*, both that the entity with which the defendant is affiliated is a not-for-profit organization under 26 U.S.C. 501(c)(3), and that the defendant is an uncompensated director, officer or trustee thereof, the court must next consider whether there is a "reasonable probability" that the defendant's alleged conduct constituted gross negligence or intentional harm. If there is no such "reasonable probability" the action must be dismissed.

The burden of proof on the "reasonable probability" element would appear to rest on the plaintiff. *Rabushka v. Marks, supra*; *see Brown v. Albany Citizens Council on Alcoholism, Inc.*, 199 A.D.2d 904, 605 N.Y.S.2d 577 (3d Dep't 1993). Thus, once the defendant makes a prima facie showing of entitlement to the qualified immunity of N-PCL § 720-a, the ball moves to the plaintiff's court to "come forward with evidentiary proof showing a fair likelihood that ... she will be able to prove that the defendant was grossly negligent or intended to cause the resulting harm." *Rabushka*, 229 A.D.2d at 900, 646 N.Y.S.2d at 395. A plaintiff in that position cannot rely on the favorable rules of decision applicable to most other CPLR 3211(a) grounds, and the plaintiff is compelled to lay bare her proof that the defendant's conduct was grossly negligent or intended to cause harm. *Kamchi v. Weissman*, 125 A.D.3d at 161, 1 N.Y.S.3d at 184; *Krackeler Scientific, Inc. v. Ordway Research Institute, Inc.*, 97 A.D.3d at 1084, 949 N.Y.S.2d at 287.

A plaintiff must submit evidence in admissible form showing a fair likelihood that she will be able to prove that defendant was grossly negligent or intended to cause harm. A detailed affidavit by one with personal knowledge of the relevant facts may do the trick. *Rabushka v. Marks, supra*; *Brown v. Albany Citizens Council on Alcoholism, Inc., supra*. A detailed pleading verified by one with familiarly with the facts may also suffice. *Cf. Krackeler Scientific, Inc v. Ordway Research Institute, Inc., supra*. The key is detailed factual averments by a knowledgeable witness or equivalent evidence. *See Kamchi v. Weissman*, 125 A.D.3d at 161-162, 1 N.Y.S.3d at 184 ("given the nature of the specific allegations as well as certain undisputed circumstances ... we conclude that there is a reasonable probability that the plaintiffs can establish that the defendants' actions constituted gross negligence or

were intended to cause the resulting harm.").

In light of the unique purpose of CPLR 3211(a)(11) and the treatment it has received from the courts, it would appear that CPLR 3211(d), which allows a party opposing a CPLR 3211(a) or (b) motion to seek to forestall a decision on the motion for the purpose of gathering evidence, has limited, if any application on a paragraph 11 motion.

CPLR 3211(a)(11) sets up a summary judgment-like procedure relating to the immunity issue. Therefore, the court need not convert the paragraph 11 motion into one for summary judgment (*see* CPLR 3211[c]), provided the court confines its summary judgment-type review to the question of the defendant's immunity.

Interestingly, neither CPLR 3211(a)(11) nor CPLR 3211(e) indicate whether a motion under paragraph 11 must be made before service of an answer. Does that mean that it can be made at any time (like a motion under paragraph 2, 7 or 10)? The Third Department has considered the question and concluded that a CPLR 3211(a)(11) motion must be made before service of the answer. *Woodford v. Benedict Community Health Center*, 176 A.D.2d 1115, 575 N.Y.S.2d 415 (3d Dep't 1991). The court observed, however, that a defendant who fails to make a pre-answer motion to dismiss under paragraph 11 can move for summary judgment on that ground, provided it was raised in the answer. *Id.*

The unique dismissal ground provided by paragraph 11 is available to individuals entitled to qualified immunity under N-PCL § 720-a, as well as individuals entitled to qualified immunity under Arts and Cultural Affairs Law § 20.09.

Subdivision (b)

C3211:34. Motion to Dismiss Defense, Generally.

Subdivision (a) addresses a motion to dismiss an affirmative claim--a cause of action, a counterclaim, a cross claim, etc. Subdivision (b) provides a device to the pleader of an affirmative claim to seek dismissal of a defense interposed against the claim.

The mission of subdivision (b) is captured in one simple sentence: "A party may move for judgment dismissing one or more defenses, on the ground that a defense is not stated or has no merit." Any matter in a pleading that manifests a "defense" can be the target of a subdivision (b) motion. While a defendant seeking to dismiss a cause of action must find a specific subdivision (a) ground on which to rest the motion, *see* Commentary C3211:5, a plaintiff using subdivision (b) can raise any cognizable ground against a defense. Thus, the plaintiff can rely on any basis in law or fact that warrants dismissal of a defense. Another important feature of a subdivision (b) motion: it can be made at any time. *See* Commentary C3211:48.

CPLR 3211(e) allows the defense of failure to state a cause of action to be made the subject of a pre-answer motion, asserted in an answer or raised at some later time. If a defendant avails itself of option number two and interposes the CPLR 3211(a)(7) defense in its answer, can the plaintiff move to dismiss that defense under subdivision (b)? No, because such a motion would amount to an attempt by the plaintiff to test the sufficiency of her own claim. *Butler v. Catinella*, 58 A.D.3d 145, 150, 868 N.Y.S.2d 101, 105 (2d Dep't 2008). The CPLR 3211(a)(7) defense is therefore impervious to a CPLR 3211(b) challenge. *Id.*; *see Riland v. Frederick S. Todman & Co.*, 56 A.D.2d 350, 393 N.Y.S.2d 4 (1st Dep't 1977).

C3211:35. Standards on a CPLR 3211(b) Motion.

A plaintiff seeking dismissal of a defense has the burden of demonstrating that the defense is without merit as a matter of law. When faced with a CPLR 3211(b) motion, a court must liberally construe the pleadings in favor of the defendant and afford the defendant the benefit of every reasonable inference. *Bank of New York v. Penalver*, 125 A.D.3d 796, 1 N.Y.S.3d 825 (2d Dep't 2015); *see 534 E. 11th Street Housing Development Fund Corp. v. Hendrick*, 90 A.D.3d 541, 935 N.Y.S.2d 23 (1st Dep't 2011). Any doubt as to the availability of the defense or as to whether it should be dismissed should be resolved in favor of the defendant. *See Nahrebeski v. Molnar*, 286 A.D.2d 891, 730 N.Y.S.2d 646 (4th Dep't 2001); *see 534 E. 11th Street Housing Development Corp. v. Hendrick*, 90 A.D.3d at 542, 935 N.Y.S.2d at 24 ("A defense should not be stricken where there are questions of fact requiring trial."). The standards applicable to a CPLR 3211(b) motion to dismiss a defense are therefore akin to the rules of decision applicable to motions to dismiss a cause of action under CPLR 3211(a)(1), (5) and (7). *See* Commentaries C3211:10, 18, and 21.

C3211:36. Motion Not Limited to Defense Defective on its Face.

Subdivision (b) may be used to seek dismissal of a defense that is defective on its face. Such a legal-sufficiency-of-the-pleading challenge would not require the plaintiff to submit evidence in support of the motion. CPLR 3211(b) is also available to lodge a merits-based attack against a defense. The plaintiff is free to submit evidence of any kind (as long as it is in admissible form), *see* Commentary C3211:40, to undercut any facts on which the defense is founded. If the plaintiff's evidence demonstrates that the defense is without merit as a matter of law, *see* Commentary C3211:35, and the defendant does not submit any evidence rehabilitating the defense, dismissal is appropriate. *See Leonard v. Leonard*, 31 A.D.2d 620, 296 N.Y.S.2d 375 (1st Dep't 1968). (The defendant may avoid dismissal if she needs time to gather evidence, *see* Commentary C3211:46).

CPLR 3211(b) and 3211(a)(7) are analogous, each allowing for both a facial sufficiency and a merits-based challenge to a pleading. *See* Commentary C3211:23. CPLR 3211(b) explicitly authorizes dismissal of a defense on either basis ("A party may move for judgment dismissing one or more defenses, on the ground that a defense is not stated or has no merit."). CPLR 3211(a)(7), on the other hand, appears at first blush to support only a facial sufficiency dismissal. Judicial construction of (a)(7), however, has expanded the role of that dismissal ground. *See* Commentary C3211:23.

C3211:37. Motion to Dismiss Defense May Lead to "Searching the Record."

"Searching the record" is a process whereby the court, called on by a moving party to grant that party relief on a cause of action, looks at the motion record to ascertain whether some other party is entitled to judgment on that claim. It is a familiar concept in summary judgment practice, where searching the record is expressly authorized. *See* CPLR 3212(b) ("[i]f it shall appear that any party other than the moving party is entitled to a summary judgment, the court may grant such judgment without the necessity of a cross-motion."). The power to search the record is not conferred directly by CPLR 3211(b), but is available by implication. CPLR 3211(c) permits a court, on notice to the parties, to convert a CPLR 3211 motion into one for summary judgment. *See* Commentary C3211:42. Upon a CPLR 3211 motion's conversion to one for summary judgment, the option to search the record provided by CPLR 3212(b) becomes available to the court. (We say "option" because the determination of whether to search the record is a discretionary one. *See Raine v. Gleason*, 194 A.D.2d 395, 598 N.Y.S.2d 504 [1st Dep't 1993]).

A plaintiff considering whether to move under subdivision (b) must therefore think long and hard before doing so. The CPLR 3211(b) motion, made with the expectation that it will lead to a paring down of the answer and the elimination of a defense to the plaintiff's action, allows the court, in its discretion, to consider whether the defense being challenged by the plaintiff actually warrants dismissal of the complaint.

Note that a court's power to search the record is confined to those claims, defenses and issues that are the subject of the underlying motion. *Dunham v. Hilco Construction Co., Inc.*, 89 N.Y.2d 425, 429-430, 654 N.Y.S.2d 335, 337, 676 N.E.2d 1178, 1180 (1996); Commentary C3212:23; *see Mann v. Rusk*, 14 A.D.3d 909, 788 N.Y.S.2d 686 (3d Dep't 2005). For that reason, a motion to dismiss a counterclaim under CPLR 3211(a) does not search the record and allow a court to dismiss a defense. *Key Bank of Northern New York, N.A. v. Lake Placid Co.*, 103 A.D.2d 19, 28, 479 N.Y.S.2d 862, 869 (3d Dep't 1984); *see Croce v. Alicakos*, 45 A.D.2d 970, 359 N.Y.S.2d 581 (2d Dep't 1974).

C3211:38. Move to Dismiss Jurisdictional Defense Promptly.

As is more fully developed in the discussion of subdivision (e), *see* Commentary C3211:52, a subdivision (a) dismissal ground need not be taken by motion. The defendant can instead use the ground as a defense in the answer. As to most of the subdivision (a) grounds, the defendant's use of the ground as a defense rather than on a motion to dismiss will not contain any special dangers for the plaintiff. If the ground, for example, is that the cause of action is barred by res judicata or release, etc., the impact of the defendant's tactic is only to postpone a determination of the issue to the trial or, perhaps, to a later motion for summary judgment. In these instances, where the determination will effectively bar the plaintiff from beginning the action again, at least in a New York court, it is of relatively less moment to the plaintiff that the determination is made later rather than sooner.

In some instances, however, a postponement of an adjudication of the defense's validity can have serious consequences for the plaintiff. This is the case when the defendant's objection is that the court lacks in personam (CPLR 3211[a][8]) or rem (CPLR 3211[a][9]) jurisdiction. *See* Commentaries C3211:28 and 30. It concerns the statute of limitations.

CPLR 205(a) permits a plaintiff whose cause of action has been dismissed on some threshold ground--without reaching the merits--to begin a new action on the same claim within six months after the dismissal, notwithstanding that the original period of limitations applicable to the claim has already expired. There are some important exceptions in CPLR 205(a), however, one of which is a dismissal for lack of personal jurisdiction over the defendant. *See* Siegel, New York Practice § 52 (Connors 5th ed.). This means that if a dismissal for lack of personal jurisdiction is postponed until after the original statute of limitations has expired, the dismissed plaintiff will find herself barred by the statute of limitations and without the six months that CPLR 205(a) might otherwise offer for a new action.

When the defendant takes the jurisdictional objection by way of defense in the answer rather than by motion, time is running and with it the date on which the statute of limitations will expire draws near. One remedy of the plaintiff is to move promptly to dismiss the jurisdictional defense under CPLR 3211(b), which will bring it to early adjudication. The plaintiff must also recognize, however, that the court on such a motion has the power to deny it without passing on its merits (*see* Commentary C3211:47), thus deferring the issue until the main trial. The plaintiff should spare no reasonable effort in pointing out to the court the limitations consequences that may attend such a postponement, urging the court to decide the motion on its merits rather than exercise its discretion to defer it.

A plaintiff may also take the precautionary step--and often prefers to if the jurisdictional defense has any chance whatever of succeeding--of commencing the same action all over again, this time being more careful to assure that jurisdictional requirements have been satisfied. If the alleged jurisdictional defect relates to service of the process or the manner in which the action was commenced, *see* Commentary C3211:28, the plaintiff can initiate the new action in the same court, taking care this time to ensure that all i's are dotted and t's crossed. Should the jurisdictional issue arise because there is a question as to whether there is a Constitutionally sufficient basis upon which to subject the defendant to the New York court's jurisdiction, *see, id.*, the plaintiff should consider bringing a back-up action in a forum that has basis jurisdiction over the defendant.

If an issue of fact exists and prevents the summary determination of a motion to dismiss the jurisdictional defense, the moving plaintiff should remind the court of its power to order immediate trial of the issue. *See* Commentary C3211:44.

C3211:39. Peculiarities in "Rem" Cases Caused by Operation of CPLR 320(c)(2).

When the plaintiff sues only on an in rem (as opposed to a quasi in rem) foundation, the consequences of the defendant's appearance in the action are governed by the difficult provisions of CPLR 320(c)(2). The plaintiff may have to follow a convoluted course to preserve her rights under CPLR 3211(b).

CPLR 320(c)(2) provides that where the in rem defendant "proceeds with the defense after asserting the [in rem jurisdictional] objection," she forfeits all further objection and submits to the in personam jurisdiction of the court. There should be no difficulty when the defendant moves to dismiss on the in rem jurisdictional ground, i.e., under CPLR 3211(a)(9). If she prevails on the motion, the case is dismissed. If she does not prevail on it, she has a clear opportunity to withdraw from the litigation, leaving behind only an "in rem default," which assures that no resulting judgment can operate against her in personam. This is an advantage that CPLR 320(c)(2) gives her.

The difficulty arises when the defendant does not use the in rem jurisdictional objection under CPLR 3211(a)(9) on a motion to dismiss, but rather incorporates it as a defense in the answer, which the defendant may do under CPLR 3211(e). In that instance both sides are going to have difficulty in determining what constitutes "proceeding with the defense" sufficient to submit the defendant to personal jurisdiction under the language of CPLR 320(c)(2). Take an example:

There is no in personam jurisdiction in the case. There is only in rem jurisdiction. Assume that the defendant answers with defenses under both categories of jurisdiction. The plaintiff can move under 3211(b) to strike out the objection to in rem jurisdiction, which motion--because in rem jurisdiction does exist (and so the court finds)--would be granted. The plaintiff would not succeed, however, in getting the defense to in personam jurisdiction stricken, because there was no in personam jurisdiction to start with, meaning that the defense is a good one. And by merely including a defense of lack of personal jurisdiction in the answer--in this situation in which there was in rem jurisdiction at the outset--the defendant does not, under CPLR 320(c)(2), thereby submit to personal jurisdiction. Under CPLR 320(c)(2), the defendant does not waive the objection to personal jurisdiction unless she proceeds with the defense of the action "after asserting the objection to jurisdiction."

If, therefore, the plaintiff promptly moves to strike out the defendant's defense of lack of personal jurisdiction just as soon as the defendant serves the answer containing it, the court will have to deny the motion.

But suppose that the defendant, after the sustaining of the rem jurisdiction, goes forward and defends the action on the merits. Under the terms of CPLR 320(c)(2), the defendant thereby submits to the personam jurisdiction of the court. Continuing to defend on the merits after the sustaining of rem jurisdiction constitutes a submission to personam jurisdiction even though there was none to begin with. Hence the plaintiff can now move to strike out the in personam jurisdictional defense, a defense that was sustained earlier. Whenever a defense of lack of personal jurisdiction is contained in the original answer in an in rem case, thus presenting the possibility that the defendant will go forward on the merits (after answering) and thereby submit to personal jurisdiction, the plaintiff can move to strike out the defense whenever--at that post-answer time--the defendant does go forward.

In regard to what constitutes proceeding "with the defense" after asserting a jurisdictional objection, especially

where the defense is asserted in the answer rather than used on a motion to dismiss, the courts have maintained a rather consistent silence. Since the very service of an answer containing the defense is an "assertion" of it, one can argue that anything the defendant does in the action after serving the answer submits her to personal jurisdiction. That would be an unfair result, but if the defendant experiences any difficulty with it she can blame herself for not using the motion procedure of CPLR 3211(a), which would have afforded her an early adjudication of the defense and enabled her to decide intelligently under CPLR 320(c)(2) whether or not to proceed in the action. The courts obviously do not like this aspect of CPLR 320, whose dictates become confused when the alternative of pleading the defense in the answer is used, as allowed by CPLR 3211(e)

It has been held that a demand for a bill of particulars served along with the answer is not a going forward under CPLR 320(c)(2) such as will forfeit an objection to personal jurisdiction. *Solarino v. Noble*, 55 Misc.2d 429, 286 N.Y.S.2d 71 (Sup. Ct., New York County 1967). The best advice to the defendant, to whom the potential consequences of these confusing requirements are greater than they are to the plaintiff, is to use the 3211(a) (8 and 9) motion rather than the answer to make the jurisdictional objections.

The occasions for the kind of problem noted above were reduced by a 1969 amendment of CPLR 320(c). In the quasi in rem case in which jurisdiction is based solely on an attachment of the defendant's property, the amendment allows the defendant to defend in full without in personam consequences. *See* CPLR 320(c)(1). Thus, the problems under discussion should arise today only when the jurisdiction is in rem rather than quasi in rem, i.e., where CPLR 320(c)(2) governs. In rem examples would be foreclosure of a mortgage on local real property, replevin of a local chattel, or a matrimonial action, etc., in which there is initially no personal jurisdiction of the defendant.

Purely "in rem" jurisdiction is a casualty of the CPLR's 1963 adoption. The expansion of the bases for extraterritorial personal jurisdiction adopted under the longarm statute, CPLR 302, supplies personal jurisdiction in most of the situations that would previously have had only rem jurisdiction to rely on. Hence the infrequent need to attend to these in rem complications today.

Subdivision (c)

C3211:40. Evidence Permitted on CPLR 3211 Motion.

The first sentence of CPLR 3211(c) provides that, "[u]pon the hearing of a motion made under subdivision (a) or (b), either party may submit any evidence that could properly be considered on a motion for summary judgment." Therefore, any evidence in admissible form may be submitted in support of or opposition to a CPLR 3211(a) or (b) motion. *See* Commentary C3212:15. That means the affidavit is available. So too are deposition transcripts, all types and forms of records, and admissions. You name it, if it is in admissible form, it is welcome on the CPLR 3211 motion.

There is, however, one situation in which the type of evidence available to the CPLR 3211(a) movant is limited (and drastically at that). That is where the defendant moves to dismiss a cause of action under the "documentary evidence" ground. CPLR 3211(a)(1). As discussed above, *see* Commentary C3211:10, a defendant relying on that ground must tender a paper with certain characteristics; the document must be unambiguous and of undeniable authenticity, and its contents must be essentially undeniable. Most evidence cannot satisfy those criteria. That is why it is recommended that the CPLR 3211(a) movant invoke the documentary evidence ground along with one or more other potentially relevant grounds (such as failure to state cause of action [CPLR 3211(a)(7)]).

A CPLR 3211(a)(7) movant can rely on any evidence in support of her motion to dismiss for failure to state a cause of action. That principle finds significant case law support. But there is some authority to the contrary that would

prevent a defendant from obtaining dismissal of a well-pleaded complaint under paragraph 7 based on evidence. *See* Commentary C3211:23.

Regardless of whether the evidence submitted in support of a CPLR 3211 motion can or does support dismissal, the evidence can serve a very valuable function: it can help the court to ascertain whether to convert the CPLR 3211 motion into one for summary judgment. *See* Commentary C3211:42.

C3211:41. Evidence required on CPLR 3211 Motion--Pleadings.

CPLR 3212(b) requires the summary judgment movant to submit with her motion a complete set of the pleadings in the action. *See* Commentary C3212:15. There is no similar requirement in CPLR 3211 for motions to dismiss. But, by virtue of the application of CPLR 2214(c), which requires the moving party to furnish to the court all papers necessary for the court's consideration of a motion, the CPLR 3211 movant must submit a copy of the pleading that is being attacked. *See Alizio v. Perpignano*, 225 A.D.2d 723, 640 N.Y.S.2d 191 (2d Dep't 1996); Siegel, New York Practice §§ 246, 257 (Connors 5th ed.). To be safe, the movant should submit all of the pleadings interposed in the action (assuming there is more than one pleading at the time the motion is made, which will be the case, among other situations, with any post-answer subdivision [a] motion and any subdivision [b] motion). A court may, in its discretion, overlook the movant's failure to submit a pleading--where, for instance, the court obtains it from another source (*Asinoff v. Asinoff*, 39 Misc.3d 1207[A], 2013 WL 1406215 [Sup. Ct., Kings County 2013])--or permit the movant to submit it belatedly. *See* CPLR 2001 ("At any stage of an action ... the court may permit a mistake, omission, defect or irregularity ... to be corrected ..., or, if a substantial right of a party is not prejudiced, the mistake, omission, defect or irregularity shall be disregarded."). But why test a court's tolerance for sloppy practice? Submit the pleading (or pleadings if there's more than one) and keep the court's attention on the merits of the motion.

We tip our cap to Professor Connors, who has brought to the fore this potential trap for the unwary CPLR 3211 movant. *See* Siegel, New York Practice §§ 246, 257.

C3211:42. Converting CPLR 3211 Motion into One for Summary Judgment.

Normally, summary judgment is not available until after issue has been joined. *See* CPLR 3212(a). The second sentence of CPLR 3211(c), however, provides that, "[w]hether or not issue has been joined, the court, after adequate notice to the parties, may treat the [subdivision (a) or (b)] motion as a motion for summary judgment." This conversion from a motion to dismiss to a motion for summary judgment will entitle any order granting accelerated-judgment to res judicata treatment. *See* Commentary C3211:64. Also, it enables the court to "search the record," CPLR 3212(b), and grant relief to a non-moving party. *See* Commentary C3211:37.

Any subdivision (a) or (b) motion has the potential to trigger a subdivision (c) conversion; the court's power to treat a motion to dismiss as one for summary judgment does not depend on the CPLR 3211 ground on which the motion was made. The usual suspect, though, responsible for triggering a conversion is CPLR 3211(a)(7). Paragraph 5 of subdivision (a), which provides for dismissal based on certain enumerated affirmative defenses, *see* Commentary C3211:18, and subdivision (b), the dismissal-of-defenses provision, *see* Commentary C3211:34, are in on the action too.

Why do these types of CPLR 3211 motions generate a disproportionate number of subdivision (c) conversions? Because they are the ones most likely to produce a factual record that resembles the one developed on an outright, post-joinder of issue motion for summary judgment. It is a developed factual record that suggests to the court that there are no material issues of fact in the matter, which, in turn, may lead to the court to convert the motion. *See Born to Build LLC v. Saleh*, 36 Misc.3d 590, 950 N.Y.S.2d 236 (Sup. Ct., Nassau County 2012). After all, if the

record is complete (or could be made so upon the conversion), the action can be put to rest expeditiously, sparing the parties needless expense, providing finality to them sooner rather than later, and allowing the court to concentrate its efforts on other matters.

Conversion does not lie to "resurrect" an untimely motion to dismiss under CPLR 3211(a) or to otherwise "cover" for an attorney's mistake that led to the waiver of a defendant's right to invoke a subdivision (a) ground. *Born to Build LLC v. Saleh*, 36 Misc.3d at 593, 950 N.Y.S.2d at 238. (New members of the Bar, as well as experienced practitioners who have developed bad habits in motion practice, should read the *Born to Build* decision; it serves as a stark reminder of the importance of minding good procedure). A CPLR 3211(a) movant must therefore identify the grounds in that subdivision that may apply to the action and, if they are subject to waiver, duly raise them in either a pre-answer motion to dismiss or the answer.

C3211:43. Notice of the Conversion.

The court determines whether conversion is to occur, although the parties are free to ask or encourage the court to convert the motion. The court must provide the parties with adequate notice of its intention to invoke subdivision (c). The point of this requirement is to provide the parties with an opportunity to make an appropriate record before the court decides the motion. *Mihlovan v. Grozavu*, 72 N.Y.2d 506, 534 N.Y.S.2d 656, 531 N.E.2d 288 (1988). The notice of conversion must clearly and unambiguously alert the parties that the court intends to treat the motion as one for summary judgment. *See 20 Pine Street Homeowners Assoc. v. 20 Pine Street LLC*, 109 A.D.3d 733, 971 N.Y.S.2d 289 (1st Dep't 2013). This is important. The parties cannot be made to guess whether they are facing a merits-based summary judgment determination.

Notice of the conversion must come from the court when the action is in the pre-joinder-of-issue phase. But what if a post-answer CPLR 3211(a) motion invokes a ground that, under CPLR 3211(e), should have been raised by pre-answer motion or in the answer? Such a motion would be, in effect, one for summary judgment because no post-answer CPLR 3211(a) motion lies on a ground that may be waived. The list of grounds that may be waived is long--paragraphs 1, 3, 4, 5, 6, 8, 9, and 11. Must the court give notice of its intention to "convert" the motion in that instance or can it disregard the mislabeling of the motion and just treat it as a summary judgment motion? The Court of Appeals' decision in *Rich v. Lefkovits*, 56 N.Y.2d 276, 452 N.Y.S.2d 1, 437 N.E.2d 260 (1982), suggests that the court should give the notice.

In *Rich*, the CPLR 3211(a) motion was based on paragraph 8, lack of personal jurisdiction (a ground subject to waiver), and the motion was made long after the joinder of issue. The trial court considered the motion under CPLR 3211 and granted it. The First Department affirmed. The Court of Appeals reversed the order of the Appellate Division and remanded the matter to the trial court to provide the parties with notice of a CPLR 3211(c) conversion. The Court found that the trial court erred in not converting the motion into one for summary judgment because that was the only procedural device available under the circumstances, the defendant having waived the right to make a CPLR 3211(a) motion by not moving pre-answer. *See* Commentary C3211:55. The Court stated that "[r]equiring that a motion addressed to lack of personal jurisdiction made after answer pleading that lack as an affirmative defense be made by motion specifying that it is made under CPLR 3212 or, if made under 3211, that the parties be given notice that the court will consider it as a 3212 motion[,] reduces the possibility of gamesmanship, while at the same time permitting the court to deal with the issue in the most efficient manner ..." 56 N.Y.2d at 282, 452 N.Y.S.2d at 4-5, 437 N.E.2d at 263-264. The Court observed that, based on the record before it, it could not be said that the plaintiff was not prejudiced by the failure of the trial court to convert the motion. The motion should have been one for summary judgment, conversion was therefore required, and had conversion occurred the plaintiff would have been provided with notice and the opportunity to lay bare his proof on the jurisdictional issue raised on the motion.

In light of *Rich*, if a party mislabels what ought to be a CPLR 3212 motion as one pursuant to CPLR 3211(a), the

court should notify the parties that the motion will be converted, invite submissions and convert the motion. *See JP Morgan Chase Bank v. Johnson*, 129 A.D.3d 914, 10 N.Y.S.3d 446 (2d Dep't 2015). Where, however, the mislabeling has not caused prejudice to the non-moving party (maybe because the motion papers made it clear that what the defendant was really seeking was summary judgment), courts have overlooked the mistake and treated the motion as one for summary judgment without giving the non-moving parties any additional notice. *See Schultz v. Estate of Sloan*, 20 A.D.3d 520, 799 N.Y.S.2d 246 (2d Dep't 2005); *Hertz Corp. v. Luken*, 126 A.D.2d 446, 510 N.Y.S.2d 590 (1st Dep't 1987); *see also Guzov v. Manor Lodge Holding Corp.*, 13 A.D.3d 482, 787 N.Y.S.2d 84 (2d Dep't 2004).

There are three exceptions to the requirement that the court give notice to the parties of its intention to convert a CPLR 3211(a) or (b) motion into one for summary judgment. If one of the exceptions is applicable, the court can simply treat the CPLR 3211 motion as one for summary judgment and the absence of notice of a subdivision (c) conversion will be overlooked. The exceptions are as follows: (1) where subdivision (c) treatment is requested by all of the parties; (2) where the motion raises a pure question of law addressed by all of the parties; and (3) where the parties, by laying bare their respective proofs, deliberately chart a summary judgment course. *Hendrickson v. Philbor Motors, Inc.*, 102 A.D.3d 251, 955 N.Y.S.2d 1 (2d Dep't 2012); *see Mihlovan v. Grozavu*, 72 N.Y.2d 506, 534 N.Y.S.2d 656, 531 N.E.2d 288 (1988); *see also Richard A. Hellander, M.D., P.C. v. Metlife Auto & Home Ins. Co.*, 48 Misc. 3d 59, 15 N.Y.S.3d 537 (App. Term, 2d Dep't 2015) (charting summary judgment course). If the procedural posture of the case is equivocal and a party does not appreciate the need to submit all of her evidence and arguments in connection with the motion, the third exception will not apply. *See generally Nonnon v. City of New York*, 9 N.Y.3d 825, 842 N.Y.S.2d 756, 874 N.E.2d 720 (2007).

In the event that the trial court treats the CPLR 3211 motion as one for summary judgment without giving the parties clear notice of its intention to do so (and none of the exceptions to the notice requirement applies), an appellate court will apply the standards applicable to a motion to dismiss. *Jones v. Rochdale Village, Inc.*, 96 A.D.3d 1014, 948 N.Y.S.2d 80 (2d Dep't 2012); *Sta-Brite Services, Inc. v. Sutton*, 17 A.D.3d 570, 794 N.Y.S.2d 70 (2d Dep't 2005).

One last note on conversion. A motion to dismiss for failure to state a cause of action (CPLR 3211[a][7]) can be made at any time. *See* Commentary 3211:49. The movant employing a paragraph 7 motion can seek dismissal of a complaint on the basis that it is facially deficient or on the basis that the cause of action stated is resolved conclusively by evidence. *See* Commentary C3211:23. Evidence submitted on the CPLR 3211(a)(7) motion might suggest to the court that summary judgment treatment is appropriate. *See* Commentary C3211:42.

A CPLR 3211(a)(7) motion made long after the joinder of issue and supported by evidence is a particularly attractive candidate for conversion to summary judgment.

When a CPLR 3211(c) conversion takes place, the motion to dismiss becomes one for summary judgment. A summary judgment motion (unlike a CPLR 3211[a][7] motion) must be made within a certain period of time. (CPLR 3212[a] provides, in relevant part, that "the court may set a date after which no [summary judgment] motion may be made, such date being no earlier than thirty days after the filing of the note of issue. If no such date is set by the court, such motion shall be made no later than one hundred twenty days after the filing of the note of issue, except with leave of court on good cause shown.")

The Court of Appeals has made plain that summary judgment motion deadlines must be taken seriously: if a summary judgment motion is untimely, the motion must be denied unless the movant provides a satisfactory explanation for the untimeliness. *Brill v. City of New York*, 2 N.Y.3d 648, 652, 781 N.Y.S.2d 261, 264, 814 N.E. 2d 431, 434 (2004). Neither the merits of the motion nor the absence of prejudice to the non-moving party is relevant in ascertaining whether good cause exists to consider a late motion. *Id.*; *see* Commentary C3212:12.

Thus, when a conversion is effected on a CPLR 3211(a)(7) motion that was made after the deadline for summary judgment motions, the movant must demonstrate "good cause"--a satisfactory explanation for the untimely summary judgment motion--otherwise the motion should be denied. *See Neil v. New York City Housing Auth.*, 15 Misc.3d 1115(A), 2007 WL 1005525, at *6 (Sup. Ct., Kings County 2007); Connors, *CPLR 3212(a)'s Timing Requirement for Summary Judgment Motions*, 71 Brook. L. Rev. 1529, 1577--1578 (Summer 2006). If the timeliness provision of CPLR 3212(a) did not apply to a CPLR 3211(a)(7) motion converted to one for summary judgment under CPLR 3211(c), parties would be encouraged to turn to paragraph 7 where the deadline for making a summary judgment motion has passed and the *Brill* holding would be undermined significantly. *See Neil v. New York City Housing Auth.*, 15 Misc.3d 1115(A), 2007 WL 1005525, at *6, Connors, *CPLR 3212(a)'s Timing Requirement for Summary Judgment Motions*, *supra*, at 1577-1578.

C3211:44. Immediate Trial of Issue of Fact.

The last sentence of subdivision (c) states that "[t]he court may, when appropriate for the expeditious disposition of the controversy, order immediate trial of the issues raised on the motion." "The motion" is one made under subdivision (a) or (b). The power to direct a hearing in connection with a CPLR 3211 motion would exist if the last sentence was omitted: CPLR 2218 allows a court to direct a hearing to resolve a fact issue on a motion.

With one notable exception treated below, immediate trials in aid of the determination of CPLR 3211 motions are not common. They are reserved for situations in which the resolution of a disputed issue of fact can resolve the entire case or a significant part of it. That is the effect of the "when appropriate for the expeditious disposition of the controversy" clause. If an action or most of it can be resolved early in the life of the case after an immediate trial, the parties may be spared significant expenses and burdens associated with prolonged litigation.

The immediate trial has particular utility on a motion to dismiss for want of personal jurisdiction under CPLR 3211(a)(8) because that dismissal ground must be raised on a pre-answer motion to dismiss or in an answer, *see* Commentary C3211:55, and it has the potential to resolve the action. Furthermore, the plaintiff may have a strong incentive to get an early determination of the personal jurisdiction question. If the statute of limitations is still alive on the plaintiff's claim, a new action can be commenced and the alleged defect depriving the court of personal jurisdiction may be cured. The plaintiff will want to know if she must avail herself of that option. (We suggest that the new action be brought anyway as backup. *See* Commentary C3211:38). The synergy of the plaintiff's need (and, sometimes, strong desire) to raise the personal jurisdiction issue in the infancy of the action and the ability of a personal jurisdiction defect to bring an action to an end, makes issues of fact on motions to dismiss for want of personal jurisdiction great candidates for subdivision (c) immediate trial treatment.

Personal jurisdiction comprises three elements: a basis for the exercise of jurisdiction over the defendant, notice to the defendant of the action, and proper commencement of the action. *See* Commentary C3211:28. An immediate trial can be used to consider factual questions related to any one of those elements. *See*, *e.g.*, *Vandermark v. Jotomo Corp.*, 42 A.D.3d 931, 839 N.Y.S.2d 670 (4th Dep't 2007) (immediate trial directed on issue of whether defendant's creation and maintenance of web site constituted transaction of business under CPLR 302[a][1] sufficient to confer longarm jurisdiction over that defendant). It is the notice element, though, that generates the most immediate trials. The issue on the notice score is whether the defendant was served properly with the initiatory papers. So common are "trials" on the issue of proper service that they have developed their own name in civil procedure idiom: the traverse hearing.

The subdivision (c) immediate trial has also proven itself useful in addressing fact questions related to whether an action was time-barred, *see Bronx-Lebanon Hospital Center v. Daines*, 101 A.D.3d 1431, 956 N.Y.S.2d 660 (3d Dep't 2012); *Ryan v. Borg*, 88 A.D.2d 637, 450 N.Y.S.2d 767 (2d Dep't 1982); *Back O'Beyond, Inc. v. Telephonic*

Enterprises, Inc., 76 A.D.2d 897, 429 N.Y.S.2d 250 (2d Dep't 1980); whether an action-barring release was procured through fraud or duress, *see Anger v. Ford Motor Co., Dealer Dev.*, 80 A.D.2d 736, 437 N.Y.S.2d 165 (4th Dep't 1981); *Purta v. Cisz*, 42 A.D.2d 594, 344 N.Y.S.2d 737 (2d Dep't 1973); and whether a tort plaintiff was an employee of the defendant at the time of the accident giving rise to the action (a finding that would trigger the exclusivity provisions of the Workers' Compensation Law). *See Duboff v. Board of Higher Ed. of City of New York*, 34 A.D.2d 824, 312 N.Y.S.2d 726 (2d Dep't 1970).

What is meant by an "immediate" trial? The word "immediate" indicates that the subdivision (c) trial should be given a preference. *See* Siegel, New York Practice § 271 (Connors 5th ed.). Just how potent the preference proves to be is a matter for the judge taking into account the other matters on her calendar. *Id.*

Who should decide the issue presented on a subdivision (c) immediate trial, the judge or a jury? That subject is addressed below in Commentary C3211:45.

C3211:45. Jury Trial of Motion Issue?

In allowing the immediate trial of an issue of fact arising on a CPLR 3211 motion, CPLR 3211(c) does not say whether the trial must be by jury. Here CPLR 2218 might be turned to for guidance, but it, too, has little to offer: it directs trial by jury if the issue is "triable of right" by jury, thus begging the question.

This issue turns on three things:

(1) whether the case is one in which the merits would be triable of right by jury;

(2) whether a jury has been demanded; and

(3) the nature of the ground on which the motion is based.

If no part of the action itself--such as where it is one in equity for an injunction--would be triable by jury, no issue of fact being tried on a CPLR 3211 motion in the case need be tried by jury.

If the case is triable by jury--such as an ordinary money action--and trial by jury has been duly demanded or the time in which to demand it is still open (*see* CPLR 4102), item (2) on the above list is satisfied, leaving only item (3) to be negotiated.

If the ground of the motion is such that resolution of the fact issue in favor of the movant will dismiss the case and preclude suit from being brought upon the cause again in New York, a jury trial will be required if either side insists on it. *See* CPLR 2218. Grounds that fall under this category would be release, res judicata, payment, statute of limitations, etc. If the grant of the motion dismissing the case would not prevent suit from being brought again, jury trial of the issue of fact would not be required. Examples of these grounds would be lack of jurisdiction (personal, rem, or subject matter), temporary disability of a party, other action pending (CPLR 3211[a][4]), failure to join a party, etc.

Even on these latter grounds, however, a situation can arise in which a trial by jury should be granted. If it appears

that a dismissal for lack of personal jurisdiction, for example, will take place at a time that would prevent the plaintiff from suing anew because of the statute of limitations, *see* Commentary C3211:38 above, the impact of the dismissal would be permanently to oust the plaintiff from the New York courts and the issue of fact on the jurisdictional motion should therefore be tried by jury.

In *Cerrato v. Thurcon Constr. Corp.*, 92 A.D.2d 89, 459 N.Y.S.2d 765 (1983), the First Department so held, but not without dissent. The court divided 3-2 on the issue, the dissent writing that the mode of trial should not depend on the stage at which an issue is raised, but rather on the nature of the issue itself. In essence the dissent says that whether there is a right to reach the merits is an issue for the court rather than a jury to determine.

The Second Department appeared to be of a different view on an analogous issue in *Yannon v. RCA Corp.*, 131 A.D.2d 843, 517 N.Y.S.2d 205 (1987). The issue in *Yannon* was whether the action was timely. It was if the plaintiff was insane, because the insanity would have meant that the statute of limitations was tolled under CPLR 208; but the case would have been dead if the plaintiff was sane. The immediate issue, then, was the sanity. Even though the whole case depended on it, the court held that the issue is triable by the court, not by a jury. (It then went on to hold that the plaintiff did suffer from the disability, that there was a toll under CPLR 208, and that the action was therefore timely.)

Subdivision (d)

C3211:46. Resisting Party's Need of More Evidence.

When a motion is made under CPLR 3211, it is generally assumed that the moving party has already amassed all of the evidence needed to support the motion. But it may be that the opposing party has not yet done so, or has tried but been unable to. Subdivision (d) covers that situation.

CPLR 3211(d) provides that "[s]hould it appear from affidavits submitted in opposition to a motion made under subdivision (a) or (b) that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion, allowing the moving party to assert the objection in his [or her] responsive pleading, if any, or may order a continuance to permit further affidavits to be obtained or disclosure to be had and may make such other order as may be just." Thus, the burden on the opposing party is to convince the court in the opposing affidavits that facts "may exist" that would defeat the motion; mere hope that discovery will yield helpful information will not forestall a determination of the CPLR 3211 motion. *See Cracolici v. Shah*, 127 A.D.3d 413, 4 N.Y.S.3d 506 (1st Dep't 2015). The opposing party need not convince the court that facts essential to oppose the motion actually exist because that obviously cannot be known until further investigation is had. The party seeking the benefit of subdivision (d) should specify the facts that need to be developed and explain why those facts are material to the opposition. *See Warshaw Burnstein Cohen Schlesinger & Kuh, LLP v. Longmire*, 106 A.D.3d 536, 965 N.Y.S.2d 458 (1st Dep't 2013). The court should also be shown the sources through which the opposing party believes the needed evidence can be secured. While not expressly required by the statute, the opposing party should, of course, make a specific request for subdivision (d) relief. *See SNS Bank, N.V. v. Citibank, N.A.*, 7 A.D.3d 352, 777 N.Y.S.2d 62 (1st Dep't 2004).

If the evidence can be secured simply by getting additional affidavits, the opposing party should explain why those affidavits were not gotten in time to resist the motion. If that is reasonably explained and it is just a matter of giving the opposing party more time in which to get them, the motion can be adjourned for the requisite time.

It may also happen, of course, that the affidavit will not be available because the witness who knows the facts will not volunteer them or because the needed facts are in the knowledge of an adverse party. Here the deposition

procedure may suffice, and the court has explicit power under subdivision (d) to adjourn or continue the motion so as to afford the opposing party an opportunity to seek a deposition or use any other disclosure device against the person or party who holds a possible key to the facts.

Another alternative for the court in such a situation is merely to deny the motion and allow the moving party to put the objection into its pleading, thereby in effect deferring the issue until the trial or, perhaps, the making of a motion for summary judgment under CPLR 3212 (which would be made after the opposing party has had a sufficient time to amass other evidence). This is the subject of Commentary C3211:47.

Another situation is where the movant herself holds the key to the facts. *See Cantor v. Levine*, 115 A.D.2d 453, 495 N.Y.S.2d 690 (2d Dep't 1985). It may be unfair to grant the CPLR 3211 motion in a situation in which the opposing party must depend entirely on the moving party's testimony to support her own position. If that's the case, the opposing party should advise the court that the nature of the case requires her to depend on cross-examination of the movant at the trial. An illustration of this would be the situation in which the plaintiff is a personal representative suing for the wrongful death of a decedent and where the death resulted from an accident which only the defendant (the movant) survived. If the defendant is the only one who can testify to what occurred at the scene, the plaintiff should have a chance to cross-examine the movant in front of the fact-trier. An early dismissal motion by the defendant in those circumstances, such as under CPLR 3211(a)(7), would not ordinarily be granted.

Plaintiff's Need of Jurisdictional Evidence in "Longarm" Case

A conceptual difficulty frequently arises when the plaintiff relies on the "longarm" statute (CPLR 302) for extraterritorial jurisdiction against the defendant, who moves to dismiss for lack of personal jurisdiction contending that CPLR 302 is not applicable. Whether the statute applies depends on whether the New York contacts required by CPLR 302 are present in the particular case. Since the court's jurisdiction over the defendant turns on that issue, a potential cart-before-the-horse argument arises. Its most sensitive appearance is when the longarm defendant moves to dismiss under CPLR 3211(a)(8) and the plaintiff in responding papers claims the need of disclosure under CPLR 3211(d).

The defendant's position at that moment is that the plaintiff must at least establish a prima facie basis for jurisdiction under CPLR 302 before the court can put the defendant to the burden of making disclosure, even if the disclosure is sought only as to the jurisdictional facts. That is, the defendant argues that the court does not even have the jurisdiction to order the disclosure unless and until the plaintiff factually, through affidavits or otherwise, establishes at least a prima facie set of facts invoking the longarm statute.

In *Peterson v. Spartan Industries*, 33 N.Y.2d 463, 354 N.Y.S.2d 905, 310 N.E.2d 513 (1974), the Court of Appeals held that the plaintiff in that situation does not have to make a prima facie showing of jurisdiction. The plaintiff "need only demonstrate that facts 'may exist' whereby to defeat the [dismissal] motion. It need not be demonstrated that they do exist. This obviously must await discovery." 33 N.Y.2d at 466, 354 N.Y.S.2d at 908, 310 N.E.2d at 515.

The Court said that to impose on the plaintiff the burden of establishing prima facie jurisdiction "may impose undue obstacles ... particularly ... under the 'long arm' statute." 33 N.Y.2d at 467, 354 N.Y.S.2d at 908, 310 N.E.2d at 515. The plaintiff in the *Peterson* case did show some local contacts on the part of the defendant. The Court found that with these "the plaintiffs have made a sufficient start, and shown their position not to be frivolous" on the question of jurisdiction.

With the "sufficient start" inquiry, the Court appeared to be pronouncing a kind of good faith test. Unless the court can be convinced, from what facts have been shown, that the plaintiff is guilty of bad faith in arguing that longarm jurisdiction exists, the plaintiff will get the benefit of the doubt and the defendant will be required to furnish further information that may reflect on jurisdiction. *See West Mountain Corp. v. Seasons of Leisure International, Inc.*, 82 A.D.2d 931, 440 N.Y.S.2d 729 (3d Dep't 1981).

Where the court determines that jurisdictional discovery will be permitted, it should deny the motion to dismiss without prejudice to renewal of the motion upon the completion of the jurisdictional discovery. *Goel v. Ramachandran*, 111 A.D.3d 783, 975 N.Y.S.2d 428 (2d Dep't 2013). Alternatively, the court could order a continuance of the motion, providing an opportunity for the discovery, then decide the motion. *See Jacobson v. Princess Hotels International, Inc.*, 101 A.D.2d 757, 475 N.Y.S.2d 846 (1st Dep't 1984).

C3211:47. Denying Motion with Leave to Plead the Objection.

An alternative course for the court to follow in a situation in which the opposing party does not yet have the evidence needed to resist a CPLR 3211 motion is to deny it with leave to the movant to plead it in the responsive pleading, if any. Where the defendant has moved to dismiss a cause of action under CPLR 3211(a), the denial would be without prejudice to the defendant to plead the objection as a defense in the answer. If the plaintiff has moved to dismiss a defense under CPLR 3211(b), and the defense is contained in an answer that requires no responsive pleading (*see* CPLR 3011), the denial would merely have to specify that it is not on the merits of the motion or that it is without prejudice to the movant to litigate the issue at the trial, or by subsequent motion under CPLR 3212 (summary judgment), etc.

If the issue raised on a CPLR 3211 motion, whether made under subdivision (a) or (b), can be resolved on the paper proof submitted on the motion, it of course should be. If its resolution depends on a fact of which the opposing party must still secure evidence and the evidence can be secured by pretrial methods, as discussed in Commentary C3211:46, the remedy is an adjournment or continuance to enable the opposing party to get affidavits or to use the disclosure devices.

If an issue of fact connected with the motion cannot be resolved by paper proof already appearing in the motion papers or available for addition to them by an adjournment or continuance, a hearing may be necessary. The court may order that it take place promptly. *See* Commentary C3211:44.

With all of these alternatives available to the court, it would seem that a denial of the motion without passing on its merits, thereby leaving the matter for resolution by later summary judgment motion under CPLR 3212 or at the trial, should be used only where the nature of the particular case makes it especially appropriate. If the ground of the CPLR 3211 motion is such that an early resolution of the fact issue can result in a dismissal of the case or a final judgment in favor of either side, the issue is one that should not ordinarily be deferred until the trial.

If the issue arising on the motion is inextricably intertwined with the basic merits of the case itself, on the other hand, a strong argument appears for deferring its resolution to the trial proper. In such an instance an early trial of the issue under the court's power to direct immediate trial pursuant to subdivision (c) of CPLR 3211 can in effect become an early trial of the entire case, i.e., a back-door preference. That was not the purpose of subdivision (c), which may be said to contemplate an instance in which the fact issue arising on the motion is relatively sharp, can be isolated from the action's main issues, and can on a narrow point dispose of the whole case. *See* Commentary C3211:44.

Even where the issue is intertwined with the merits of the entire claim, strong countervailing reasons can appear to justify an immediate trial of the motion's fact issue. An example of this is where the plaintiff bases jurisdiction on the longarm statute (CPLR 302), the defendant pleads as a defense lack of jurisdiction, and the plaintiff moves to dismiss the defense under CPLR 3211(b). Even if resolution of the issue will not itself dispose of the case on the merits, as in the example where it relates only to jurisdiction, but the deferment of it until the trial can itself result in a disposition which will prevent the merits from ever being reached, the issue should not be deferred. An example would be where the statute of limitations expires in the interim so that a later dismissal for lack of jurisdiction will disable the plaintiff from suing anew. The issue in that situation should be ordered to immediate trial under CPLR 3211(c). *See* Commentaries C3211:38 and C3211:44.

Subdivision (e)

C3211:48. Time for Making CPLR 3211 Motion.

CPLR 3211(e) requires that a motion to dismiss a cause of action under CPLR 3211(a) be made before service of the responsive pleading "is required." The responsive pleading includes not just the answer to the complaint, but also an answer to a cross-claim, a reply to a counterclaim, an answer to a third-party claim, etc., depending on what pleading contains the cause of action being attacked. But for purposes of discussion we will assume the common situation in which the attacked cause of action is in the complaint and the motion to dismiss it is made by the defendant.

When the defendant must respond to a cause of action contained in the complaint that accompanied a summons, the responding time is 20 or 30 days, depending on the place and method of service. If the defendant is responding to a cause of action contained in a subsequent pleading, the responding time is a straight 20 days. These are the rules spelled out by the interplay of CPLR 320 and 3012. (The subsequent complaint can be an amended or supplemental one, or even the original one if the plaintiff has started the action with a CPLR 305[b] notice instead of a complaint and the complaint is served only after the defendant has served a demand for it.)

These periods, which dictate how long the defendant has to respond, therefore dictate as well how long she has to move to dismiss under CPLR 3211 in lieu of pleading.

It is generally contemplated, and it is surely the better practice, that the movant make the CPLR 3211 motion before pleading. If disposed to move pre-answer, the defendant should therefore move to dismiss before serving an answer. *See Wahrhaftig v. Space Design Group, Inc.*, 29 A.D.2d 699, 700, 286 N.Y.S.2d 442, 443 (3d Dep't 1968) (as a result of defendants' "failure to proceed by motion before service of the responsive pleading they must be deemed to have elected to proceed solely by means of the affirmative defense pleaded in the amended answer.") (internal quotation marks omitted); *see also Incorporated Village of Laurel Hollow v. Laverne, Inc.*, 43 Misc.2d 248, 250 N.Y.S.2d 951 (Sup. Ct., Nassau County 1964), *mod'd* 24 A.D.2d 615, 262 N.Y.S.2d 622 (2d Dep't 1965).

A defendant who has carelessly interposed an answer containing as a defense a ground on which she now wants to move to dismiss under CPLR 3211 can of course move under CPLR 3212 instead, and perhaps should do that. A ground that would have supported a CPLR 3211 motion before the service of the answer will ordinarily support a summary judgment motion after the service of the answer. *See* Commentary C3212:20.

If a motion is based on CPLR 3211 but is made after the service of the answer, the court can treat the motion as one for summary judgment, a power expressly conferred on it by CPLR 3211(c). *See* Commentary C3211:42. That would avoid the barrier otherwise presented by subdivision (e), and allow the court to get to the issues raised on the motion.

The time limit under discussion does not apply to all CPLR 3211 motions. There are three exceptions, as discussed in Commentary C3211:49.

C3211:49. Time Limitation Inapplicable to Certain Grounds.

If the motion is to dismiss a defense under subdivision (b), there is no time limit on it. The time limitations of CPLR 3211(e) operate only on the motion to dismiss a cause of action under subdivision (a). And there are three grounds even under CPLR 3211(a) that are excepted from the time requirement. A motion predicated on paragraph 2, 7, or 10 of subdivision (a) may be made at any time--the objections of lack of subject matter jurisdiction, failure to state a cause of action, and failure to join a necessary party--and may be made notwithstanding the service of an answer and even though the objection was not even included in the answer as a defense. *See* Commentary C3211:54.

C3211:50. Effect of Extensions of Responding Time.

Since the time in which to make a motion under CPLR 3211(a) is keyed by CPLR 3211(e) to the responding time, it will generally be true that anything that extends the responding time will also extend the time in which to move under CPLR 3211(a). A motion by the defendant to correct the complaint under CPLR 3024 will constitute such an extension, for example. *See* CPLR 3024(c). The CPLR 3211 motion itself has this effect under CPLR 3211(f). *See* Commentary C3211:67.

If the plaintiff amends the complaint, whether as of course under CPLR 3025(a) or by leave of court under CPLR 3025(b), the answering time and hence the responding time will run anew as to the amended complaint. *See* CPLR 3025(d). The same is true of a supplemental complaint under those provisions, and the same conclusions reached as to the complaint will of course govern as to a cause of action contained in other pleadings, such as a cross-claim or counterclaim in an amended answer.

If a stipulation is made extending the time to respond, a frequent occurrence in practice, it should automatically extend the time in which to move under CPLR 3211(a). *See Bob v. Cohen*, 105 A.D.3d 530, 967 N.Y.S.2d 690 (1st Dep't 2013); *see also Rich v. Lefkovits*, 56 N.Y.2d 276, 280-281, 452 N.Y.S.2d 1, 3, 437 N.E.2d 260, 262 (1982). The stipulation can be more restrictive, however: it can provide that the extension is given only with respect to pleading and that it does not extend the time to move under CPLR 3211. A stipulation negating an extension of time to move should ordinarily be upheld. The would-be movant who has a CPLR 3211(a) objection, which could otherwise have been taken on a CPLR 3211 motion to dismiss, is not undone by this: she can serve a responsive pleading including the objection as a defense and then use a summary judgment motion under CPLR 3212 based on it.

The court clearly has power to extend the time to answer. *See* CPLR 3012(d). But the courts are perhaps not as free with an extension of time for a motion. In *Smith v. Pach*, 30 A.D.2d 707, 292 N.Y.S.2d 333 (2d Dep't 1968), the court extended the time to answer but specifically refused to permit a motion within the extended time, holding that "[g]ood cause for an extension of time to move was not shown." Perhaps the reason for this is that a refusal to extend the pleading time will result in a default judgment against the would-be pleader, while a refusal to allow more time to make a CPLR 3211 motion will not (as long as the defendant does serve a timely answer, of course).

Nothing discussed here should be confused with CPLR 3211(f), which automatically extends the time to serve a responsive pleading when the would-be responder moves to dismiss under CPLR 3211 as a first step in lieu of serving an answer, and the motion is denied. *See* Commentary C3211:67.

Defendant's Waiver of Defense as Quid Pro Quo for Extension of Time to Answer

It is always a wise thing for the plaintiff, when asked for an extension of the answering time by the defendant, to inquire into whether the defendant is planning to interpose a jurisdictional objection. Indeed, it may be tactically indispensable to do so if the case was brought with only a short time left on the statute of limitations, for the reason that if the case should be dismissed for lack of jurisdiction after the statute has expired, CPLR 205(a) will not offer the case its six months for a new action and the case will be dead. When the plaintiff discerns that the defendant has such an objection, and its resolution may occur too late for the plaintiff to start over, the plaintiff should try to get from the defendant, as a quid pro quo for the time extension, a waiver of jurisdictional objections. See on this subject the three-part series in the New York State Law Digest on the various ingredients that go into this tactical occasion (New York State Law Digest Nos. 274-6, entitled "The Urgency of Timing the Adjudication of Jurisdictional Objections").

A defendant who has agreed to the stipulation should check it out very carefully when it is reduced to writing to make sure that only jurisdictional objections are waived. A defendant who stipulated to waive "all affirmative defenses" found that she even waived the defense of the statute of limitations. *See Stefaniw v. Cerrone*, 130 A.D.2d 483, 515 N.Y.S.2d 66 (2d Dep't 1987).

The *Stefaniw* situation was more unusual still, because it was the defendant who drafted the stipulation, honoring the plaintiff's request that the defendant waive all affirmative defenses. The defendant apparently overlooked what a big bag that is. It would not be amiss, of course, for the plaintiff to insist also on a waiver of a statute of limitations defense, too. But the defendant's offer of such a waiver, if there is any possible merit at all to the limitations defense (which might put a permanent end to the plaintiff's case), and for the quid pro quo of nothing more than a little more time to answer, is a quid that goes far beyond the quo. (Or is it a quo that goes far beyond the quid?) An all-around bad contract, anyway. Waiving "all" affirmative defenses is worse still, when one considers just what that takes in.

The major affirmative defenses are listed in CPLR 3018(b). A simple scanning of that provision reveals how many substantive rights a defendant may give up with a waiver of "all" defenses. Does the defendant intend to waive, for example, defenses such as res judicata or fraud, or, indeed, the fact that the defendant has already paid the obligation? (Payment and release are also on the list.) And in a personal injury case even comparative fault on the plaintiff's part is officially an affirmative defense. *Stefaniw* wasn't a personal injury case, but if it was, would it have been the defendant's intention to waive so casually the defense of the plaintiff's comparative fault?

A defendant who stipulates to waive "all affirmative defenses" might just as generously offer the plaintiff summary judgment instead. A defendant who offers the plaintiff summary judgment will be surprised by how generous the plaintiff will be with an extension of the defendant's time to answer.

C3211:51. Single-Motion Rule.

There shall be but one motion to dismiss under subdivision (a). (There is no limitation stated on the number of motions that can be made to dismiss defenses under CPLR 3211[b]). And if there are several causes of action stated, this provision means that the movant must gather together all of her subdivision (a) objections, or such of them as she wants to take by motion, for use on that single CPLR 3211 opportunity. This requirement has both procedural and administrative missions. It is designed to protect the pleader from being harassed by repeated CPLR 3211(a) motions and to spare the court's motion calendars the burden of a CPLR 3211 motion more than once in the same case.

It would appear that a second CPLR 3211 motion would be allowable if based on the want of subject matter jurisdiction under paragraph 2 of CPLR 3211(a), for the simple reason that this objection is an unwaivable one and can be raised at any time. And for CPLR 3211 purposes, the objections of paragraphs 7 (failure to state a cause of action) and 10 (failure to join a party) are in the same category as paragraph 2. *See* subdivision (e) of CPLR 3211. Subdivision (e) specifies that a motion on a ground specified in paragraph 2, 7, or 10 of subdivision (a) may be made at any time. Because of this common treatment of the three paragraphs, it might be thought that a second motion under CPLR 3211 could also be made if based on paragraph 7 or 10 of CPLR 3211(a). It was at one time so held, *e.g., Higby Enterprises, Inc. v. City of Utica*, 54 Misc.2d 405, 282 N.Y.S.2d 583 (Sup. Ct., Oneida County 1967), *aff'd* 30 A.D.2d 1052, 295 N.Y.S.2d 428 (4th Dep't 1968), but the Court of Appeals held otherwise in *McLearn v. Cowen & Co.*, 60 N.Y.2d 686, 468 N.Y.S.2d 461, 455 N.E.2d 1256 (1983).

It should be stressed, however, that omitting the paragraph 7 ground (failure to state a cause of action) from the initial CPLR 3211 motion will not waive it; subdivision (e) allows the paragraph 7 motion to be made at any time. It is just a matter of determining what mechanical device to use for the paragraph 7 objection when the CPLR 3211 motion has been used up. The device should be the summary judgment motion of CPLR 3212. The best counsel to the defendant, of course, is to join, in any CPLR 3211 motion made on any ground, a paragraph 7 objection as well, if the defendant has one.

When the CPLR 3211 motion is made prematurely and is denied for that reason--as where it is made to dismiss for lack of jurisdiction under CPLR 3211(a)(8) after the service of a summons without a complaint and the court cannot determine the motion until the complaint is served--the motion can be denied without prejudice to its renewal. *See Fraley v. Desilu Productions, Inc.*, 23 A.D.2d 79, 258 N.Y.S.2d 294 (1st Dep't 1965). Because the court seemed unsure in *Fraley* about whether the CPLR 3211 motion in that situation could be duplicated, it took the precaution of suggesting that what the defendant might do in the alternative is wait for the complaint, serve an answer, and then move for summary judgment under CPLR 3212, using the same objection (lack of jurisdiction) to ground it. Of course the objection would have had to be preserved by being included as a defense in the answer.

If the first CPLR 3211 motion made by a defendant is addressed to the complaint, a second one afterwards made against a cross-claim in a co-defendant's answer is permissible. The indication is that it will not be barred by the single-motion rule, whose purpose, which is to protect the pleader from repeated motions, is not undermined when the pleadings are those of different parties. *Nassau Roofing & Sheet Metal Co. Inc., v. Celotex Corp.*, 74 A.D.2d 679, 424 N.Y.S.2d 786 (3d Dep't 1980).

May a defendant, who made a CPLR 3211(a) motion against the initial complaint, move against an amended complaint on a CPLR 3211(a) ground, or did the prior motion against the earlier complaint "use up" the single motion? A second motion should lie, provided the claims that the defendant wishes to challenge were not set forth in the prior complaint. *See Kocourek v. Booz Allen Hamilton, Inc.*, 114 A.D.3d 567, 981 N.Y.S.2d 392 (1st Dep't 2014); *cf. Swift v. New York Medical College*, 48 A.D.3d 671, 850 N.Y.S.2d 906 (2d Dep't 2008) (service of amended complaint containing no new causes of action, but merely restating and renumbering certain causes of action, did not provide defendant with basis for circumventing single motion rule). The test is whether the defendant, on the prior CPLR 3211(a) motion, had the opportunity to address the claims she wishes to attack on the subsequent motion. *Barbarito v. Zahavi*, 107 A.D.3d 416, 968 N.Y.S.2d 422 (1st Dep't 2013). If she did, the new motion should be barred by the single motion rule; if she didn't the new motion is permitted.

When the omitted objection is to personal or rem jurisdiction, based on paragraph 8 or 9 of subdivision (a), different considerations may arise, discussed in Commentary C3211:55.

The general rule that only one CPLR 3211(a) motion may be allowed to a defendant does not bar a later made

motion to dismiss on the ground of forum non conveniens under CPLR 327. *Harp v. Malyn*, 166 A.D.2d 848, 563 N.Y.S.2d 181 (3d Dep't 1990); *see F G II, Inc. v. Saks Inc.*, 46 A.D.3d 305, 847 N.Y.S.2d 185 (1st Dep't 2007).

If the defendant makes a CPLR 3211 motion, and the plaintiff alleges new facts in her answering papers, the defendant may, without violating the single-motion rule, include in reply papers additional dismissal grounds not covered in the defendant's initial motion. In that context it is all deemed part of a single motion. *Held v. Kaufman*, 91 N.Y.2d 425, 694 N.E.2d 430, 671 N.Y.S.2d 429 (1998).

C3211:52. Pleading Objection Instead of Moving on It.

As to all of the grounds listed in subdivision (a), CPLR 3211(e) gives the responding party an option. She can either move to dismiss on the stated ground or grounds, or instead plead them as defenses in her answer. This is true of all of the subdivision (a) grounds, without exception, and as long as the party uses all of her available grounds in the one form or the other, i.e., either uses them all to ground a CPLR 3211 motion or uses them all as defenses in the answer, she will not be held to waive any of them. It is where she divides them up and elects to take some of the objections by motion while saving others to use in the answer (if the motion is denied) that the risk of a waiver arises.

The treatment of waiver should be separately addressed to three distinct groups of objections contained on the subdivision (a) list: those contained in

a. paragraphs 1, 3, 4, 5, and 6;

b. paragraphs 2, 7, and 10; and

c. paragraphs 8 and 9.

The ensuing Commentaries treat these three categories separately. But an admonition to the practitioner at this point is warranted: the real trouble centers about the jurisdictional objections contained in paragraphs 8 and 9 of CPLR 3211(a). It is in regard to those objections that a "dividing-up" of objections for use partly by motion and partly by answer contains the waiver prospect.

While the defendant most commonly directs her jurisdictional objections against the plaintiff, the defendant must also pay some attention to the specific modes of preserving a jurisdictional objection against co-defendants who have cross-claimed. In *Bides v. Abraham & Strauss Division of Federated Dept. Stores, Inc.*, 33 A.D.2d 569, 305 N.Y.S.2d 336 (2d Dep't 1969), the danger to a co-defendant who has been cross-claimed against, in failing to make an independent objection (regarding the cross-claim) to the court's jurisdiction, resulted in a forfeiture of the objection although, ironically, the objection was successful against the plaintiff's main claim. The whole problem arose because the defendant who objected to jurisdiction took the objection as a defense in the answer rather than moving to dismiss based on it.

The plaintiff sued A and B. A pleaded lack of jurisdiction in the answer and, the matter thereby being deferred to the trial, A prevailed on it at the trial and plaintiff's claim against A was thereupon dismissed. But defendant B had cross-claimed A, and in A's answer to the cross-claim A did not assert or repeat the jurisdictional objection. As against B, therefore, A was held to have waived the jurisdictional objection.

A bizarre result. Since the jurisdiction the plaintiff originally secures against defendants is also generally assumed to constitute the jurisdictional foundation on which a cross-claim also rests, A's doing in the *Bides* case does not seem unreasonable. The court apparently chose to regard A's appearance, without repeating the jurisdictional objection against B, as superseding the original jurisdiction--the jurisdiction acquired by the plaintiff against A initially.

It was not unreasonable for A to do what was done in *Bides*. Since CPLR 3211(e) permits any defendant to take a jurisdictional objection by way of motion or answer, and a motion to dismiss successfully made against the plaintiff would presumably dismiss B's cross-claim as well, A should have been able to assume that the later disposition of a jurisdictional objection taken by way of answer would have the same effect.

Reasonable assumption or not, A is yet another litigant whose case has sounded a warning note for others. The warning is that any objection to personal jurisdiction that a given defendant, X, may have had is best be asserted independently as against each person in the litigation who has made a claim against X. On facts like those of *Bides*, A should, in the answer to the cross-claim, allege as a defense that the lack of jurisdiction A claims as against the plaintiff is claimed also against B. That should preserve the objection if taken by way of answer instead of by way of motion.

Note that only a properly pleaded defense will preserve a defendant's right to seek relief on it at some later point in the litigation, i.e., on summary judgment or at trial. If the purported defense is not pleaded with sufficient particularity, a court may conclude that it has been waived.

In *Scholastic Inc. v. Pace Plumbing Corp.*, 129 A.D.3d 75, 8 N.Y.S.3d 143 (1st Dep't 2015), the defendant attempted to raise the statute of limitations defense in its answer. Overly embracing the maxim that brevity is a virtue, the defendant pleaded that defense, along with 15 others, in "a boilerplate, catchall paragraph"; in that same paragraph the defendant reserved the right to plead any other potential affirmative defense. After some disclosure, the defendant moved for summary judgment on several grounds, including that the action was time-barred. In opposition to the statute of limitations ground, the plaintiff argued that the defense was waived because it had not been adequately pleaded. The trial court agreed.

The First Department also agreed, finding that the "[d]efendant failed to properly plead the statute of limitations, because its inclusion of the defense within a laundry list of predominantly inapplicable defenses did not provide [the] plaintiff with the requisite notice." *Id.* at 79; 8 N.Y.S.3d at 146. The Court concluded that the plaintiff was prejudiced by the defendant's failure to properly plead the statute of limitations defense: the plaintiff was induced by the contents of the answer to forego disclosure relevant to the statute of limitations issue, disclosure that may have yielded evidence to use to oppose the motion.

What was the consequence of the defendant's failure to properly plead the defense? Although the Court could have treated the defense as waived, *see* CPLR 3211(e); Commentary C3211:53, it declined to so because, under the circumstances, that punishment would not fit the defendant's offense. "Instead, the prejudice c[ould] be cured by allowing [the] defendant to amend its pleading and then allowing [the] plaintiff to conduct disc[losure] on the statute of limitations issue." 129 A.D.3d at 81, 8 N.Y.S.3d at 148 (internal citation omitted).

For a thorough treatment of *Scholastic*, including useful tips for a defendant regarding the pleading of affirmative defenses, *see* Connors, *Back to Basics: Careful Pleading Under CPLR Article 30*, N.Y.L.J., May 18, 2015.

C3211:53. Waiving Objection Contained in Paragraphs 1, 3, 4, 5, or 6 of 3211(a).

The only time a defendant, will waive an objection under paragraphs 1, 3, 4, 5, or 6 of CPLR 3211(a) is where the defendant raises it neither by motion to dismiss under CPLR 3211 nor as a defense in the answer. If the defendant raises it in the one form or the other, it is preserved. *See*, *e.g., Wan Li Situ v. MTA Bus Company*, 103 A.D.3d 807, 14 N.Y.S.3d 89 (2d Dep't 2015). And the defendant can divide these objections up, taking some by motion and saving others for use as pleaded defenses if the motion fails. *See*, *e.g., Kinberg v. Schwartzapfel, Novick, Truhowsky, Marcus, PC*, 136 A.D.3d 431, 24 N.Y.S.3d 614 (1st Dep't 2016); *Hertz Corp. v. Luken*, 126 A.D.2d 446, 510 N.Y.S.2d 590 (1st Dep't 1987).

If the defendant omits to take any of these objections in either form, the defendant waives it, although the defendant may seek to assert it in an amended pleading, a subject discussed in Commentary C3211:58.

C3211:54. Waiving Objection Contained in Paragraphs 2, 7, or 10 of 3211(a).

The objections contained in paragraphs 2, 7, and 10 of CPLR 3211(a) are the least likely to be waived by careless pretrial procedure. Any or all of the three objections can be taken either by CPLR 3211 motion or by way of defense in the responsive pleading. And they can be divided, one or more used on a CPLR 3211 motion and the rest saved for use in the pleading if the motion fails. If taken by neither a CPLR 3211 motion nor by way of defense in the responsive pleading, they are still not necessarily waived. Paragraphs 2, 7 and 10 can be raised at any time and made the subject of a summary judgment motion or invoked at trial. *See* Commentary C3211:49.

C3211:55. Waiving Objection Contained in Paragraphs 8 or 9 of 3211(a).

This is one of the busiest of the CPLR 3211(e) categories. It covers a lot of ground. Division is made into subcaptions to facilitate treatment.

In General

The objections to lack of personal (paragraph 8) or rem (paragraph 9) jurisdiction under CPLR 3211(a) are singled out for special treatment by CPLR 3211(e).

If the defendant has available either of these objections she may take them by motion under CPLR 3211 before answering or by way of defense in the answer. It is no longer required that the defendant make the jurisdictional objection by motion in a special appearance, as was required by § 237-a of the old Civil Practice Act (superseded by the CPLR in 1963). The special appearance has been abolished and it now suffices for the defendant to object to personal or rem jurisdiction either by motion to dismiss under CPLR 3211 or in the answer.

But if the defendant does have either of these objections available, she is not to waste the court's or the plaintiff's time on any CPLR 3211 motion on any ground at all unless on that motion she joins the jurisdictional ground. *See Competello v. Giordano*, 51 N.Y.2d 904, 434 N.Y.S.2d 976, 415 N.E.2d (1980). If the defendant makes no CPLR 3211 motion on any ground, she may then safely include the jurisdictional defense in the answer without fear that she has waived it. (The objection of improper service faces a separate time limit after assertion in the answer, however, as will be noted in a separate caption below.) But if she makes any CPLR 3211 motion, regardless of ground, she must include the jurisdictional objection in the motion or she waives it. She may not, if the CPLR 3211 motion made on other grounds is denied, then turn around and serve an answer containing the jurisdictional objection. *Montcalm Publishing Corp. v. Pustorino*, 125 A.D.2d 188, 508 N.Y.S.2d 455 (1st Dep't 1986) ("A defendant may not, upon denial of the motion under CPLR 3211 which omits a jurisdictional defense, serve an

answer containing the jurisdictional defense.").

Of course, as with the objections contained in paragraphs 1, 3, 4, 5, and 6, the omission to make the paragraph 8 or 9 objection either by motion or answer will waive it. *See* Commentary C3211:53 above, and also Commentary C3211:58, regarding amendment of the answer to add the objection.

Motion Without Jurisdictional Objection Waives It Even If Motion Aborts

The making of a CPLR 3211(a) motion without including the personal jurisdiction objection will destroy the objection immediately. *Addesso v. Shemtob*, 70 N.Y.2d 689, 518 N.Y.S.2d 793, 512 N.E.2d 314 (1987); *see Competello v. Giordano, supra*; *cf. Gliklad v. Cherney*, 97 A.D.3d 401, 948 N.Y.S.2d 48 (1st Dep't 2012). In *Addesso*, the defendant moved under CPLR 3211(a)(7) to dismiss the complaint for failure to state a claim. The plaintiff amended the complaint while the motion was pending and apparently stated the claim right. The defendant then served an answer to the amended complaint and in it included the jurisdictional objection not previously raised. It was held to be too late. The Court said the objection was waived by the making of the motion against the original complaint without including the jurisdictional objection. (See the discussion of *Addesso* case in the lead note in New York State Law Digest No. 335.)

If no motion is made, and an answer is then served without including the jurisdictional objection, it was held in *Solarino v. Noble*, 55 Misc.2d 429, 286 N.Y.S.2d 71 (1967), that an amendment of the answer made as of course under CPLR 3025(a) can include the objection as a matter of right and avoid the waiver. The Court of Appeals agreed with the *Solarino* court's assessment. *Iacovangelo v. Shepherd*, 5 N.Y.3d 184, 185, 800 N.Y.S.3d 116, 116, 833 N.E.2d 259, 259 (2005) ("[A] defendant who omits from an answer a defense based on lack of personal jurisdiction has not waived the defense if the defendant corrects the omission before the time to amend the answer without leave of court has expired."). This point is pursued further in Commentary C3211:58.

Jurisdictional Defense Not Waived by Defending on Merits

CPLR 3211(e) clearly permits the defendant either of two modes in which to interpose an objection to personal jurisdiction: as a motion to dismiss under CPLR 3211(a)(8) or as a defense in the answer. If the answer method is used, the defendant must obviously be permitted to put every other defense she has into that answer, including her denials. By using the answer method, in other words, the defendant is signaling that she is willing to wait until some later point--perhaps the trial itself--for resolution of the issue, and that's the defendant's right under CPLR 3211. *See Calloway v. National Services Industries, Inc.*, 93 A.D.2d 734, 461 N.Y.S.2d 280 (1st Dep't), *aff'd* 60 N.Y.2d 906, 470 N.Y.S.2d 583, 458 N.E.2d 1260 (1983). (The right is qualified when the jurisdictional objection is addressed to improper service, as noted in a separate Commentary below.) Meanwhile, the defendant must also be allowed to prepare for the trial in respect of the merits.

Remember that the matter of when the jurisdictional objection should be determined is not lodged exclusively in the defendant's hands. If the defendant uses the answer method, the plaintiff has in CPLR 3211(b)--the motion to strike a defense--a tool for bringing the matter to an early adjudication.

Motion for Judgment May Eclipse and Thus Forfeit Jurisdictional Defense Asserted in Answer

If the case is not disposed of before trial, and reaches the trial stage, it is fair enough to conclude that the jurisdictional defense can be adjudicated at that time, having been duly preserved all the while in the answer. (An

exception is the jurisdictional defense based on improper service, which has a 60-day time restriction under CPLR 3211[e], for which see the Commentary below.) But suppose that the case goes to judgment on the merits before then; that one of the parties moves for summary judgment on the merits during the pretrial stage, for example, and that the motion is granted.

If the defendant is the successful movant, she will gladly forfeit the jurisdictional defense that she interposed. But assume that the plaintiff is the successful movant. If the defendant has not been able to defeat the summary judgment motion, and has also failed to inject the jurisdictional objection into the motion, the defendant will likely be held to have forfeited the objection despite its inclusion in the original answer. (*See* the lead note in Issue 33 of Siegel's Practice Review, also treating the differences between New York and federal practice on the issue of how long a jurisdictional objection asserted by way of defense in the answer may be allowed to survive in the action.)

Jurisdictional Defense Based on Improper Service Must Be Brought to Adjudication by Defendant Within 60 Days

Zeroing in on only one category of objection to personal jurisdiction--the objection of improper service--an amendment of CPLR 3211(e) that took effect in 1997 requires a relatively prompt adjudication of the objection even when taken by answer. Within 60 days after serving the answer containing the objection, the defendant must "move for judgment on that ground."

Since the service of an answer cuts off the defendant's right to make a CPLR 3211 motion (except on certain grounds not relevant here), the defendant's application for adjudication of the defense apparently contemplates a motion for summary judgment.

If the defendant fails to make the motion within the allotted 60 days, the objection is waived and the court's personal jurisdiction assumed. *Wiebusch v. Bethany Memorial Reform Church*, 9 A.D.3d 315, 781 N.Y.S.2d 6 (1st Dep't 2004), highlights just how seriously the 60-day rule is taken by the courts. In *Wiebusch*, the defendant made the motion to dismiss for want of proper service beyond the 60 days. The court held that it could deny the motion on its own initiative; that the plaintiff need not move to strike the defense nor even oppose the defendant's motion by citing the tardiness issue. It's still a good idea for the plaintiff to take either step. It isn't every court that's going to notice and dispose of the defect on its own motion. *See generally Misicki v. Caradonna*, 12 N.Y.3d 511, 519, 882 N.Y.S.2d 375, 381, 909 N.E.2d 1213, 1218 (2009) (courts "are not in the business of blindsiding litigants, who expect [courts] to decide their appeals on rationales advanced by the parties, not arguments their adversaries never made").

Note that only the specific ground of improper service is involved here. Other objections that go to personal jurisdiction--like want of a jurisdictional basis for extraterritorial service, defective contents of the summons, failure to include either a complaint or default notice with the summons, etc.--are defects of personal jurisdiction but are not among those that have to be made the basis for a dismissal motion within 60 days after being pleaded. They can be postponed of adjudication until much later, when the statute of limitations has expired and when a dismissal of the action can indeed be fatal because CPLR 205(a) does not offer its six months for a new action when the earlier one was dismissed for lack of personal jurisdiction. (Unless, of course, the plaintiff presses the defendant's lack of personal jurisdiction affirmative defense by way of a CPLR 3211[b] motion.)

When the defendant makes a motion to bring the improper service defense to adjudication, and the plaintiff opposes it, the plaintiff must include in the opposing papers a copy of proof of service, even if proof of service has already been filed in the case.

Generally, the tenant in a summary proceeding is not subject to this 60-day time limit. The assertion of a jurisdictional objection in an answer in the summary proceeding thus remains valid despite the expiration of the 60 days. This is the accomplishment of CPLR 3211(e)'s citation of subdivisions 1 and 2 of RPAPL 711, which cover the most numerous of the summary proceedings: those based on holding over after the expiration of the lease term and those based on the nonpayment of rent.

The 60-day waiver provision of CPLR 3211(e) does not apply in the Court of Claims because the failure to comply with the service requirements in the Court of Claims Act touches on that special court's subject matter jurisdiction over an action. *See Zoeckler v. State*, 109 A.D.3d 1133, 971 N.Y.S.2d 760 (4th Dep't 2013); *see also Diaz v. State*, 174 Misc.2d 63, 662 N.Y.S.2d 719 (Ct.Cl. 1997).

A coordinate amendment of CPLR 3214(b) was made in the same 1997 law that amended CPLR 3211(e). CPLR 3214(b) automatically stays all outstanding disclosure proceedings when the defendant makes a motion under CPLR 3211 (motion to dismiss), CPLR 3212 (motion for summary judgment), or CPLR 3213 (motion for summary judgment in lieu of complaint). Under the amendment of CPLR 3214(b), if the motion is based on the improper service ground addressed in CPLR 3211(e), the motion does not automatically suspend disclosure.

Only Showing of "Undue Hardship" Can Extend the 60 Days

The court can extend the 60 days, but only on the ground of "undue hardship." This provision has had a lot of attention, usually with bad news for the defendant. The phrase has been given a strict construction.

The lighter showing exacted under a "good cause" or "in the interests of justice" standard, applicable under diverse other procedural statutes, does not suffice under the "undue hardship" criterion of CPLR 3211(e). So concludes *Abitol v. Schiff*, 180 Misc.2d 949, 691 N.Y.S.2d 753 (Sup.Ct., Queens County, 1999, treated in Issue 84 of Siegel's Practice Review), *modified on other grounds* 276 A.D.2d 571, 714 N.Y.S.2d 880 (2d Dep't 2000). The court cites, and rejects for CPLR 3211(e) application, the more liberal measures of CPLR 306-b (extension of time to serve summons and complaint), CPLR 2004 (extension of time for taking procedural steps in general), and CPLR 3212(a) (extension of time to make motion for summary judgment). The defendant in *Abitol* did not make any showing of "undue hardship" to excuse the delay, and the jurisdictional objection was held waived.

In this light, certainly the general--and liberal--time extending power of the court under CPLR 2004 is superseded for CPLR 3211(e) purposes by the "undue hardship" provision.

A connected question arose in *Zucco v. Antin*, 257 A.D.2d 421, 682 N.Y.S.2d 354 (1st Dep't 1999): whether the 60-day period will start to run anew from an amended answer. The court said no: even if the original answer had the objection, the failure to bring it to judgment within 60 days from service of the original answer waives it; an amended answer will not offer a new 60-day period.

Does Removal to Federal Court Effect Waiver of Objection to Personal Jurisdiction?

In *Cain v. Commercial Publishing Co.*, 232 U.S. 124, 34 S.Ct. 284 (1914), the U.S. Supreme Court held that the removal of an action from state court to federal court does not waive an objection to personal jurisdiction, and many a defendant's lawyer will confirm that one of the considerations in whether to remove a case may be to have the federal rather than the state court rule even on a mere objection to personal jurisdiction that the defendant has raised in the state court. The Appellate Division has more recently held, however, that an objection of improper

service--which is of course a category of personal jurisdiction--does get waived by the defendant's removing the case to federal court. *Quinn v. Booth Memorial Hosp.*, 239 A.D.2d 266, 657 N.Y.S.2d 680 (1st Dep't 1997).

The removal in *Quinn* was held to be a general appearance, at least to the extent that when the case was afterwards remanded, the waiver was held to apply by the New York court. As noted above, however, one of the purposes of the removal may have been to have the federal court rule on the objection. Perhaps the defendant in *Quinn* was somehow remiss in preserving the jurisdictional objection before the removal. One counseling point for a defendant bent on removal is to at least assert the objection in the state court before the removal, even if in no other form than as a defense in a promptly served answer--always mindful, of course, of the 30-day time limit on removal from state to federal court under 28 U.S.C.A. 1446(b).

If the ground of the jurisdictional objection is improper service and the defendant has chosen to assert it as a defense in the answer--and the answer has already been served at the time of removal--the defendant must also attend to New York's 60-day time limit on bringing the objection to judgment. To be on the safe side, the defendant should promptly, after removal, make a motion for judgment in the federal court based on the jurisdictional objection, being certain that the motion in the federal court also falls within the 60-day period following the service of the answer in the state court. By doing that, the defendant can avoid having to rely on a federal court determination of whether the CPLR 3211(e) 60-day time limit would have to be applied by the federal judge.

And if the defendant chooses to remove the case before answering, the defendant would do well to make a prompt motion to dismiss in the federal court after the removal, under Rule 12(b) of the Federal Rules of Civil Procedure, based on the improper service objection.

By so proceeding, the defendant should be able to preserve the objection through the process of removal to federal court, and even through the process of removal and remand, should the case be sent back. It is in any event hard to think that a defendant intent on removing a case should be held, despite all procedural precautions, to forfeit an objection to the court's personal jurisdiction by the mere fact of the removal. *See Benefits by Design Corp. v. Contractor Management Services, LLC*, 75 A.D.3d 826, 905 N.Y.S.2d 340 (3d Dep't 2010).

Answer by Unserved Defendant Is Not Jurisdictional Waiver

In authorizing a defendant to object to personal jurisdiction either with a motion to dismiss under CPLR 3211(a)(8) or with a defense in the answer, the CPLR has in mind a defendant on whom service of process has at least been attempted. But suppose that there has been no service at all. Will the defendant's service of an answer in that situation--duly setting forth a jurisdictional objection--preserve it? It will, holds the Second Department in *Colbert v. International Security Bureau, Inc.*, 79 A.D.2d 448, 437 N.Y.S.2d 360 (2d Dep't 1981).

A situation like this arises, as it did in *Colbert*, when there are several named defendants in the case, of which X is only one. The rest have been served, so that there is a pending action in which, X learns, she is also a named defendant, and yet there has been no summons served on her. X may nevertheless have an objection to jurisdiction, not for want of service, obviously, but based on some other ground, such as the absence of a jurisdictional basis for extraterritorial jurisdiction.

The plaintiff contended in *Colbert* that because no service was attempted on X, X's service of an answer constituted a voluntary appearance and submission to jurisdiction; that the modes of a CPLR 3211 motion or a defense in the answer are available only to defendants upon whom service was at least attempted. The court rejected those arguments. X need not stand by idly, knowing that an action is pending in which she is a named

party and can be served at any time, the court says. As long as X is named, X may, if she contends that there is no jurisdiction over her, take the initiative of having the court so hold. She has the right to appear in the action and state the jurisdictional objection, and since one of the ways the CPLR allows for the assertion of the objection is an answer, X may serve an answer and the answer can include the jurisdictional objection as well as plead whatever else is appropriate to an answer.

If the plaintiff does not want to serve X, and does not want X serving papers and making objections, the plaintiff should approach X with the offer to stipulate to drop X from the action entirely.

Jurisdictional Objection Arising Later Is Assertable Later

It may sometimes happen that at the outset of the litigation, at the juncture at which a jurisdictional objection is most appropriate, the jurisdictional objection does not yet exist. Since CPLR 3211(e) requires that an objection to jurisdiction--we refer here to personal or rem as opposed to subject matter jurisdiction--be asserted either by a CPLR 3211 motion before answering or as a defense in the answer, what should a defendant do when the jurisdictional objection does not arise until after the time for the making of the CPLR 3211 motion has expired and the answer has already been served? In a situation like that arising in *Rich v. Rich*, 103 Misc.2d 723, 426 N.Y.S.2d 936 (Sup. Ct., New York County 1980), the court held that the defendant may make a motion for summary judgment based on the newly arising jurisdictional objection. *See* Siegel, New York Practice § 111 (Connors, 5th ed.).

The problem in the case revolved around an attachment. Under the procedures of article 62 of the CPLR, an attachment properly levied at the outset validates jurisdiction, but it is subject to the condition subsequent of a perfection of the levy by appropriate steps. In the interim, the time for making a CPLR 3211 motion, and for serving an answer, the two devices by which a jurisdictional objection may be asserted, expires. The time for perfecting a levy of the attachment may not yet have expired when the answering time does, however; perfection may yet take place, so there is not as yet any jurisdictional defect. But then suppose the time for perfection does expire, and without appropriate steps by the plaintiff. The *Rich* case holds that as soon as it becomes plain that the levy has been voided for want of perfection, thus undoing the jurisdiction that the levy had initially secured, the objection may be raised by the defendant and an appropriate expedient for the raising is a motion for summary judgment. That motion, which is governed by CPLR 3212, has no pre-answer time limit such as CPLR 3211 imposes.

Consistent with the procedural realities of the case in such a situation, the plaintiff's contention that the defendant "waived" a jurisdictional objection at a moment when she did not have one is of course rejected.

C3211:56. Counterclaim or Cross-Claim as Waiving Jurisdictional Objection.

If the plaintiff has an objection under paragraphs 8 or 9 of CPLR 3211(a)--that jurisdiction in personam or in rem is lacking--the plaintiff may assert it by a motion to dismiss under CPLR 3211(a). Or, if the plaintiff makes no motion, she may assert the objection by way of defense in the answer. The mere service of an answer containing a defense of lack of jurisdiction preserves the objection under the CPLR; it is not a waiver of it.

But assume that the defendant also includes a counterclaim in the answer. It was held early in the life of the CPLR that inclusion of a counterclaim does not waive the jurisdictional objection. *Goodman v. Solow*, 27 A.D.2d 920, 279 N.Y.S.2d 377 (1st Dep't 1967).

Since that time the rule has been refined, evolving a distinction between a counterclaim related to the plaintiff's claim, and an unrelated one. The related one (it was a related one in *Goodman*) does not waive the jurisdictional objection, but the interposition of an unrelated counterclaim does. *See* *Liebling v. Yankwitt*, 109 A.D.2d 780, 486 N.Y.S.2d 292 (2d Dep't 1985), in which the court holds that

[w]hen defendant interposed a counterclaim unrelated to the plaintiff's claim, he placed himself in the position of a plaintiff who initially invokes the jurisdiction of a court and by so doing effectively waives any jurisdictional objection he might have had against the prime action.

How does one test whether a counterclaim is "related" to the main claim? The Court of Appeals addressed the matter in *Textile Technology Exchange, Inc. v. Davis*, 81 N.Y.2d 56, 595 N.Y.S.2d 729, 611 N.E.2d 768 (1993), holding that the doctrine of issue preclusion (collateral estoppel) holds the answer. When there are issues in common between the counterclaim and the plaintiff's main claim, such that an adjudication of an issue in the course of trying the main claim would necessarily be dispositive of the same issue when it afterwards becomes relevant on the trial of the counterclaim, then the counterclaim is to be deemed a related one and, practically speaking, the defendant really has no choice but to interpose it. Interposing it, therefore, does not waive a jurisdictional defense that the defendant may also have.

The defendant who is in doubt about the relatedness of the counterclaim and who wants at least a preliminary test of the merits of the jurisdictional objection should use the motion method to contest jurisdiction, i.e., move to dismiss under CPLR 3211(a)(8). The mere making of the motion extends the answering time, CPLR 3211(f), and the defendant will shortly have at least the trial court's view of whether the jurisdictional objection is valid.

As is plain from the Appellate Division stage of the *Textile* case, the judges will sometimes disagree about whether the counterclaim is related to the main claim. The adoption of the issue preclusion doctrine to test the point will help to avoid that, but is not likely to be a talisman in its own right.

What about a cross-claim? The *Goodman* case indicates that the inclusion of a cross-claim against a co-defendant may constitute a jurisdictional waiver, but it would be best to qualify that conclusion, too, so as to apply the waiver only to a cross-claim wholly unrelated to anything else in the action.

The same rationale that enables a defendant to interpose a related counterclaim without waiver consequences should apply to a related cross-claim as well. If a defendant fails to interpose a related cross-claim, she will be risking the consequences of the issue preclusion (collateral estoppel) doctrine: issues decided in the case will be binding on the defendant if they also turn up in a later, separate suit by the defendant on what would have been the cross-claim.

The interposition of an unrelated cross-claim, on the other hand--the cross-claim that neither seeks indemnity for something interposed against the defendant by some other party nor has any issue of law or fact in common with anything else in the case--marks the defendant's intention to exploit the forum for her own purposes, a posture inconsistent with the contention that the forum lacks jurisdiction.

Impleader of Third-Party Defendant as Waiving Jurisdictional Objection

The general rule that the interposition of a related counterclaim or cross-claim by the defendant should not be deemed a waiver of a jurisdictional defense that is also contained in the answer, has also been extended to a

defendant's use of the impleader device. Thus, where the defendant included in her answer a defense of lack of jurisdiction of her person and then served a third-party summons and complaint on X, she did not forfeit the jurisdictional objection. That would be tantamount to forcing the defendant to raise the jurisdictional objection by motion, which in turn would divest her of her clear CPLR right to assert it by defense in the answer as an alternative. *Italian Colony Restaurant v. Wershals*, 45 A.D.2d 841, 358 N.Y.S.2d 448 (2d Dep't 1974).

Even under the expanded use of the impleader device of CPLR 1007, permitting it for anything related to something else in the case rather than restricting it--as a tight reading of the statute's language would indicate--only to a claim of indemnification to cover liability of some other claim, the device is limited to claims having at least some relationship to a matter already in the case. That relatedness should assure that the inclusion of a claim of want of jurisdiction will not run into any argument of waiver.

Risk of Moving for Summary Judgment on Counterclaim If Defendant Has Also Asserted Jurisdictional Objection

As noted, the mere assertion of a related counterclaim does not prevent the defendant from also including in the answer a jurisdictional objection. But other conduct may forfeit the objection, as illustrated in the bizarre goings-on in *Flaks, Zaslow & Co. v. Bank Computer Network Corp.*, 66 A.D.2d 363, 413 N.Y.S.2d 1 (1st Dep't 1979).

The defendant took the jurisdictional objection by answer instead of by motion, also including a related counterclaim in the answer. Then the defendant apparently had a change of heart and wanted the jurisdictional point disposed of early. Too late now to make a CPLR 3211(a)(8) motion, the defendant made the jurisdictional objection the subject of a summary judgment motion (or, in any event, the equivalent of a summary judgment motion), which is a permissible alternative. Moreover, the defendant won on the point: plaintiff's action was dismissed for want of jurisdiction.

The counterclaim survived, however, and now the defendant moved for summary judgment on it on the merits. Although the mere interposition of the counterclaim did not waive the jurisdictional objection, the motion for summary judgment on the counterclaim--after the jurisdictional point in respect of the plaintiff's main claim was raised and disposed of in the defendant's favor--did. The plaintiff contended, in any event, that these merits proceedings by the defendant in respect of the counterclaim evinced an intention to submit to the court's general jurisdiction, and the court accepted this contention and permitted the plaintiff, with an amendment, to re-assert the main claim (the one which had been dismissed when the defendant's jurisdictional objection was sustained). Perhaps it would be more accurate to describe the situation as one in which a defendant, against whom jurisdiction was initially lacking, submitted to jurisdiction with the equivalent of an informal appearance, that is, a voluntary participation on the merits of the case, when he no longer had to (the claim against him having been dismissed).

The defendant brought this on itself. Had the defendant wanted the action dismissed for lack of jurisdiction, the defendant should have made a prompt motion under CPLR 3211(a)(8), which would have been granted and the action dismissed. Perhaps the defendant had calculated that with an answer instead of a motion the case could have been so set up that the defendant could obtain the services of the court for its counterclaim while denying them to the plaintiff for the main claim. The scheme, if that it was, did not work. Said the court, "If 'man bites dog' in this case, it is purely the defendant's fault," and with those words the court proceeded to add insult to injury: the defendant still had at least some hope of prevailing with the summary judgment motion that the defendant had made on the counterclaim. Here, too, a disappointment was in store for the defendant. A summary judgment motion "searches the record." *See* Commentary C3212:23 on McKinney's CPLR 3212. This means that the court will look behind the pleading being attacked (in this case the plaintiff's reply to the counterclaim), and back to the pleading containing the claim on which summary judgment is being sought (in this case the counterclaim in the defendant's answer). If that claim is defective, the search-the-record doctrine authorizes the court to grant summary judgment dismissing it even though the opposing party, in this case the plaintiff, has not asked for such relief. That is what

happened in the *Flaks* case. The plaintiff, having been awarded jurisdiction (of the plaintiff's main claim) that the court did not initially have, was now also the beneficiary of a summary judgment (on the defendant's counterclaim) that the plaintiff did not ask for.

The case is one of the most vivid illustrations of the pitfalls that await a defendant who first elects to take a jurisdictional objection as a defense in her answer rather than by a clear-cut preliminary motion, and who then confounds the situation by presuming to impose on the court's jurisdiction with her own counterclaim after it has been advised that the court is willing to uphold the defendant's jurisdictional objection against the plaintiff.

C3211:57. Tools of CPLR 308(5) Designee.

On an ex-parte motion by the plaintiff pursuant to CPLR 308(5), the court can devise--literally invent--a method of summons service. One of the things the courts occasionally do under that provision is designate a person having some relationship to the defendant, directing the plaintiff to effect service on that person in the defendant's behalf. The premise is that the relationship of the designated person to the defendant is such as to make it reasonable to assume that the defendant will be notified through the designee.

It may be true, however, that no such relationship exists, despite the fact that the plaintiff claimed it did on her ex-parte motion under CPLR 308(5). How does the designated person call to the court's attention the fact that she does not bear the assumed relationship to the defendant, or that she has no knowledge of the defendant's whereabouts, or, indeed, that she is even hostile to the defendant? The possibilities are many.

If it is quite clear that the designee does bear a relationship to the defendant such as to justify the designation-for-service under CPLR 308(5), it may be reasonable to require the designee to state any objections she has to the designation through the same routes that would be open to the defendant herself. *Cf. Cosby v. Moyant*, 55 Misc.2d 393, 285 N.Y.S.2d 980 (Sup. Ct., New York County 1967). The routes open to the defendant herself are the motion to dismiss under CPLR 3211 or the answer by way of defense. Clearly, however, the designee cannot be asked to assert her objections in an answer; she is not the defendant and cannot be asked to answer anything. Nor would it be appropriate to limit such a designee to the expedient of moving to dismiss under CPLR 3211(a)(8). Since she is not a party, but a mere expedient through whom the plaintiff seeks to notify the defendant, she should not be compelled to retain her own attorney and formally move under CPLR 3211. It would also seem that CPLR 3211 is not available to her, since it is the tool of the party against whom a claim is asserted. A person's designation under CPLR 308(5) as a person to be served in the defendant's behalf does not make her the equivalent of the defendant's attorney or empower her to act in the defendant's behalf.

The court nevertheless may hear anything the designee has to say about her designation. The court must recognize that her designation was made on only the ex-parte proof of the plaintiff, which could have been false or mistaken. The designee should not be bound to any particular course of procedure in bringing to the court's attention objections to her designation. Whatever means she chooses should be accepted by the court. If she has been served with or has otherwise obtained a copy of the ex-parte order designating her, so that she knows the name of the judge who signed the order, and she contacts the court, it could take the initiative in setting up a procedure whereby the designee's objections can be heard. The designee can be invited to chambers, the plaintiff being notified to attend and the matter resolved there.

The court should recognize the difficult position of the CPLR 308(5) designee and hear her objections regardless of the procedural route through which they come to the court's attention.

C3211:58. Initially Raising Objection in Amended Pleading.

If the party does not make a motion based on a subdivision (a) objection and also fails to include the objection in a responsive pleading, the objection is waived. Apparently excepted from the operation of this rule are the objections contained in paragraphs 2, 7, and 10 of CPLR 3211(a). *See* Commentary C3211:54. We thus address discussion here to the other grounds of objection contained under subdivision (a).

Assume that the defendant neither moves to dismiss on the particular ground nor includes it as a defense in the initial answer. May the defendant include it as a defense in an amended answer? In answering this question it will help to distinguish between the amendment of right allowed by CPLR 3025(a) and the amendment that requires court leave under CPLR 3025(b).

Amendment of Course; CPLR 3025(a)

If the amendment is one made of right (without court leave) under CPLR 3025(a), the amended pleading may include the previously omitted defense for the first time. *See*, *e.g.*, *Iacovangelo v. Shepherd*, 5 N.Y.3d 184, 800 N.Y.S.3d 116, 833 N.E.2d 259 (2005); *Moezinia v. Ashkenazi*, 136 A.D.3d 990, 25 N.Y.S.3d 632 (2d Dep't 2016). The as-of-course amendment allowed by CPLR 3025(a) is designed to permit each pleader to correct her pleading at least once without leave of court, and this category of amendment must be made so close in time to the service of the original pleading that it may be said to be nothing more than a final version of the original one. The time limit on the amendment as of course under CPLR 3025(a) will itself guarantee in almost all instances that the adverse party will not be able to claim any prejudice traceable to the brief delay in asserting the objection in an as-of-course amendment.

We turn attention now more specifically to the amendment that requires court leave.

Amendment by Leave; CPLR 3025(b)

If the time to amend as of course has expired under CPLR 3025(a), and the pleader wishes to assert a CPLR 3211(a) objection for the first time in an amendment for which leave is needed under CPLR 3025(b), the pleader now faces an exercise of the court's discretion. Although CPLR 3025(b) directs that leave to amend be "freely given," the allowance of the amendment is in the last analysis for the court to determine on a case by case basis. The best rule of thumb under CPLR 3025(b), for the purpose of permitting an amendment to include a previously omitted CPLR 3211(a) objection, is that the amendment should be allowed if the adverse party cannot claim any significant prejudice due to the mere delay in asserting the objection. The court should consider too whether the proposed amendment is palpably insufficient or patently devoid of merit. *See*, *e.g.*, *Onewest, F.S.B. v. Goddard*, 131 A.D.3d 1028, 17 N.Y.S.3d 142 (2d Dep't 2015).

Here the likelihood of prejudice is greater than with the of-right amendment. If, for example, the objection is that the court lacks jurisdiction of the defendant's person and its omission from the original answer has prompted the plaintiff to go to substantial trouble or expense preparing the case on the merits, on the assumption that no jurisdictional objection has been asserted, the amendment to add the objection would properly be denied. But if the amendment is sought reasonably close in time to the service of the pleading to be amended and the plaintiff can show no prejudice because of the mere passage of time, the amendment should be allowed. It should also be allowed when a substantial period of time has passed unless the plaintiff can demonstrate that she has taken such steps in the interim as would enable the court to say that the delay in assertion of the objection by itself significantly prejudices the plaintiff.

Discourse like the foregoing should not be necessary for the careful practitioner. Once again: it is obviously the sounder practice to include the objection in the original pleading or in an amendment of right so as not to have to depend on an exercise of the court's discretion.

An additional dimension appears when the objection that a party seeks to interpose by way of amendment did not come into being until after service of the original pleading, as where a defense like res judicata (or payment, release, etc.) arises only afterwards. There the time to amend as of course under CPLR 3025(a) may have expired, necessitating leave to amend under CPLR 3025(b). This is a different scenario. Here the party is technically seeking to "supplement" the pleading rather than merely amend it, and the very fact that the objection came into being after service of the earlier pleading would appear to mandate a grant of leave to add the objection. *See Lance International, Inc. v. First National City Bank*, 86 A.D.3d 479, 927 N.Y.S.2d 56 (1st Dep't 2011); *George Strokes Electrical and Plumbing Inc. v. Dye*, 240 A.D.2d 919, 659 N.Y.S.2d 129 (3d Dep't 1997). That would be so, in any event, if the motion is made within a reasonable time after the objection comes into existence.

Leave to amend an answer to include a waived defense and summary judgment based on that defense can be sought in one motion. *Armstrong v. Peat, Marwick, Mitchell & Co.*, 150 A.D.2d 189, 540 N.Y.S.2d 799 (1st Dep't 1989).

C3211:59. Raising Objection in Answer to Amended Complaint.

Assume that the plaintiff serves a complaint and the defendant answers it without including an objection to personal jurisdiction, a CPLR 3211(a) ground of objection. Then the plaintiff, as allowed by CPLR 3025(a), amends the complaint as of right. The defendant must serve a new answer to it under CPLR 3025(d). The defendant now asserts the jurisdictional defense in her answer to the amended complaint. This was held permissible in *Blatz v. Benschine*, 53 Misc.2d 352, 278 N.Y.S.2d 533 (Sup. Ct., Queens County 1967), but later cases, such as *Boulay v. Olympic Flame, Inc.*, 165 A.D.2d 191, 565 N.Y.S.2d 905 (3d Dep't 1991), indicate no, at least in general language. *Boulay* and like cases may reach the right result on their facts, but they should not be taken as setting forth a hard and fast rule in their reading of the Court of Appeals *Addesso* case. In *Boulay*, there may have been a little chicanery on the defendant's part in getting the plaintiff to amend the complaint to assert a different date for the accident--the change of date does not appear to have been of any consequence by itself--just so that the defendant, who failed to make a jurisdictional defense to the original complaint, might now make it against the amended one. The court would not countenance that.

Whether a defendant who has interposed no jurisdictional objection against the claim in the original complaint should be permitted to interpose one against an amended complaint should depend on what the amended one contains, and on the nature of the jurisdictional defect alleged. If, for example, the defendant claims never to have been served with a summons at all, or was served in a defective manner, such an objection would have just as much bearing on the original complaint as on the amended one. The fact that it was omitted from the CPLR 3211 motion made against the original complaint, or from an answer addressed to the original complaint, should therefore mean that it is waived so that it cannot be used against an amended complaint either. But if the particular ground of jurisdictional objection depends on the contents of the complaint, a waiver should not necessarily result. It is quite possible that an objection exists legitimately against a claim appearing for the first time in an amended complaint while the defendant may have had no jurisdictional objection to claims asserted in the original complaint. A situation involving longarm jurisdiction illustrates:

The plaintiff effects service of the summons and original complaint on the defendant, a nondomiciliary, in Ohio. The defendant concedes that the claims asserted in the original complaint arise out of the defendant's New York acts and, making no jurisdictional objection, the defendant appears in the action by serving an answer on the merits. The plaintiff then amends the complaint as a matter of right, as the plaintiff may do under CPLR 3025(a), and adds yet another cause of action, claiming that this one, too, has a longarm basis in CPLR 302. (Note also, in this situation, CPLR 302[c].) The defendant does not concede longarm jurisdiction of this new claim, however, and

wants to assert a jurisdictional defense to it. The defendant should of course be permitted to. If general language in *Boulay* and like cases indicate that the defendant is barred from making the objection, the courts are likely to narrow the language so as to preserve what seems plainly to be the defendant's right in the example just put.

It is the plaintiff, when she amends the original complaint, who injects new matter into the case, and the defendant should be able, in answering the amended complaint, to address the new matter just as if the answer to the amended complaint is the only answer to appear in the case--the original answer deemed as effectively superseded by the amended answer as the original complaint is by the amended complaint.

A lesson from all of this for the plaintiff is that if the plaintiff has the remotest suspicion of the existence of a CPLR 3211(a) objection that the defendant has omitted from the initial answer, the plaintiff had best think twice before invoking CPLR 3025(a) and amending the complaint.

C3211:60. Leave to Replead on (a)(7) or (b) Motion.

The motion to dismiss a cause of action under CPLR 3211(a)(7) or to dismiss a defense under CPLR 3211(b) may be made to attack the cause of action or defense as defective on its face, or, conceding that it is good on its face, to attack it for lack of underlying merit.

If the basis of the defendant's attack on the plaintiff's claim is a defect in its pleading and the plaintiff now wishes to remedy the defect by amendment, the plaintiff may ask in the opposing papers for leave to replead. If the plaintiff is in doubt about whether the objection goes to the face of the pleading, the plaintiff should include the repleading request as a precaution. Perhaps the best rule of thumb here is that the plaintiff should make the request in the opposing papers, at least as an alternative, in any instance in which the plaintiff is confronted with a motion under subdivision (a)(7). The same is true for the defendant when it is defendant's defense that is attacked for facial invalidity.

The party who has at hand evidence to establish the validity of a claim or defense may of course submit it in or with his opposing papers. Affidavits used to support leave to replead should be made by those with knowledge of the facts. The courts constantly remind the bar that the affidavit of one lacking knowledge will not suffice and that leave to replead will be denied, although perhaps with leave to reapply on adequate papers. *See, e.g., Young v. Nelson*, 23 A.D.2d 531, 256 N.Y.S.2d 649 (4th Dep't 1965). The party who does not, merely needing time to secure supportive affidavits or to conduct disclosure proceedings to get the requisite evidence, *see* CPLR 3211(d), should so state in opposing papers.

If the party seeking leave to replead includes no extrinsic proof and relies solely on the face of the attacked pleading, all of that pleading's allegations are assumed to be true. And if the pleading is defective only as a matter of draftsmanship, as where it omits an essential allegation that can be shown to exist in fact, the court will be more disposed to grant leave to replead. Even in the situation in which the movant uses no extrinsic proof, however, the opposing party might still do well to submit extrinsic proof of the validity of the claim and the existence in fact of all of the elements on which it depends. The party who does that goes as far as possible to encourage the court to grant leave to replead if a defect is found to exist.

CPLR 3211(e) used to require a party desiring leave to replead to expressly request that relief in the opposing papers and demonstrate that she had "good ground" to support the claims she wished to replead. And the court was authorized to insist that the party produce evidence demonstrating the merit of those claims. These requirements were deleted as a result of a 2005 amendment of CPLR 3211(e). L.2005, ch. 616.

In the first significant appellate treatment of the post-amendment CPLR 3211(e), the Second Department in *Janssen v. Inc'd Village of Rockville Ctr.*, 59 A.D.3d 15, 869 N.Y.S.2d 572 (2d Dep't 2008), made several important points about the leave-to-replead device. First, in amending the law to eliminate the requirements previously associated with seeking leave to replead, the Legislature did not eliminate repleader. Second, the standard to be employed by a court in considering whether to grant a request or motion for leave to replead is the same as the standard employed on a motion for leave to amend a pleading (i.e., relief should be freely granted absent significant prejudice unless new claim is devoid of merit or palpably insufficient). *See*, *e.g.*, *Rabos v. R&R Bagels & Bakery, Inc.*, 100 A.D.3d 849, 955 N.Y.S.2d 109 (2d Dep't 2012). Third, there is no time limitation on a motion for leave to replead.

With respect to the third point, the plaintiff pleaded several claims (including for harassment and retaliatory action) against several defendants (we'll call them collectively the defendant), along with their village employer. The court on the defendant's motion dismissed several of these. The plaintiff did not request leave to replead in the papers answering the motion. Months after that, with the action still pending, the plaintiff moved for leave to replead--couched also in the form of a motion to amend (which is in effect the same thing)--and the defendant argued that the motion was too late; that it was, by analogy if nothing else, limited to the time for appealing under CPLR 5513 or the time for moving to reargue under CPLR 2221(d)(3). The court rejected both analogies and held plaintiff's motion, made half a year after the original dismissal, timely enough. Neither the amendment itself nor any statement in its legislative bill jacket prescribes any time limit on a motion for leave to replead, the court pointed out.

A party desiring leave to replead should not take *Janssen* as an invitation to make a repleader motion at some remote point in the action. The motion will be judged under the standards applicable to a CPLR 3025(b) motion, and the principal consideration on the motion to amend is whether the non-moving party would be significantly prejudiced by the proposed amendment. The greater the delay in moving to amend, the greater the likelihood that such prejudice can be demonstrated. *See* Siegel, New York Practice § 275 (Connors 5th ed.).

Courts occasionally insist that the party seeking leave to replead submit with her motion a proposed amended pleading. *Parker Waichman LLP v. Squier, Knapp & Dunn Communications, Inc.*, 138 A.D.3d 570, 28 N.Y.S.3d 603 (1st Dep't 2016); *Fletcher v. Boies, Schiller & Flexner, LLP*, 75 A.D.3d 469, 906 N.Y.S.2d 212 (1st Dep't 2010); *see JJM Sunrise Automotive, LLC v. Volkswagen Group of America, Inc.*, 49 Misc.3d 1208(A), 26 N.Y.S.3d 724 (table), 2015 WL 5971752 (Sup. Ct., Nassau County 2015). This requirement flows naturally from the *Janssen* court's conclusion that a motion for leave to replead is to be viewed in the same light as a motion for leave to amend. *See* CPLR 3025(b) ("Any motion to amend or supplement pleadings shall be accompanied by the proposed amended or supplemental pleading clearly showing the changes or additions to be made to the pleading.").

If repleading is allowed, the disposition of the motion should be a grant with leave to replead. The action itself would not be dismissed.

C3211:61. Amendment of Objectionable Pleading as Abating Motion.

It may happen that while defendant's CPLR 3211(a) motion against plaintiff's complaint is pending, the plaintiff amends the complaint as of right (without leave of court) under CPLR 3025(a). Upon such an amendment, the amended complaint supersedes the original pleading and becomes the only complaint in the action. *D'Amico v. Correctional Medical Care, Inc.*, 120 A.D.3d 956, 991 N.Y.S.2d 687 (4th Dep't 2014). Should such an amendment be deemed to abate the motion?

No amendment as of right of the pleading that asserts the cause of action should be deemed to abate a motion to dismiss under CPLR 3211(a). That rule has particular force where the amendment did not substantively alter the causes of action being challenged on the motion. *See Sim v. Farley Equipment Company LLC*, 138 A.D.3d 1228, 30 N.Y.S.3d 736 (3d Dep't 2016); *EDP Hospital Computer Systems, Inc. v. Bronx-Lebanon Hospital Ctr.*, 212 A.D.2d 570, 622 N.Y.S.2d 557 (2d Dep't 1995).

A motion that seeks merely to compel an amendment of the pleading, on the other hand, should be deemed abated upon amendment of the pleading moved against. A motion to require a separate statement and numbering of allegations under CPLR 3024 would be an example. *See* the Commentaries on 3024 and 3025. Since CPLR 3211(e) requires the court on a CPLR 3211(a)(7) motion to consider not merely whether the plaintiff has properly pleaded the cause of action but whether the plaintiff in fact has a cause of action, an amendment of the objectionable pleading while a motion is being brought on under CPLR 3211(a)(7) should not, under the CPLR, be deemed automatically to abate the motion. If the pleader has no cause of action, no quantity of amendments is going to give her one, for which reason the CPLR 3211(a)(7) motion does not necessarily lose its vigor because of the amendment. And whether or not it does is also a matter likely to engender disagreement between the parties, which only the court can resolve.

The court in *Sholom & Zuckerbrot Realty Corp. v. Coldwell Banker Commercial Group, Inc.*, 138 Misc.2d 799, 525 N.Y.S.2d 541 (Sup. Ct., Queens County 1988), held that plaintiff's amendment of the complaint after the defendant has made a motion under CPLR 3211 to dismiss it does not automatically abate the motion. It says that the "better rule" gives the movant "the option of withdrawing its motion or pressing it with regard to the amended pleading," observing that a rule that would have the amendment abate the motion automatically would only invite "additional motion practice." It is a good idea for the parties to be in touch to discuss the matter. Perhaps the defendant can be convinced that the amendment meets her objection and makes the motion academic, prompting its withdrawal.

Reviewing this subject in *Sage Realty Corp. v. Proskauer Rose LLP*, 251 A.D.2d 35, 675 N.Y.S.2d 14 (1998), the First Department held that the moving party "has the option to decide whether its motion should be applied to the new pleadings." In *Sage*, the defendant asked the court to treat the original motion as being addressed to the amended complaint as well. This was permissible, held the court. And because plaintiff did not object to the treatment, plaintiff could claim no prejudice. *See Sobel v. Ansanelli*, 98 A.D.3d 1020, 951 N.Y.S.2d 533 (2d Dep't 2012); *Toikach v. Basmanov*, 31 Misc.3d 615, 918 N.Y.S.2d 844 (Sup. Ct., Kings County 2011).

By making such a request, the defendant must of course be satisfied that the amended complaint does not add anything new, or at least does not add any new matter to which the original motion has not addressed itself. But that's up to the defendant. If there is anything at all in the amended complaint that was not present in the original one, the defendant may well wish to respond to it.

It would seem that the defendant could do so, if so disposed, by asking the court to retain the original motion papers and consider them as a response to the amended complaint, while perhaps offering the court additional affidavits responsive to just the new matter contained in the amended complaint. If the nature of the pleadings makes that feasible, it could save the effort that the total redoing of the answering papers might entail.

While *Sage* indicates that the matter should be left to the defendant in first instance, if the defendant chooses a course that encumbers the court's consideration of the motion after the plaintiff has amended the complaint, the court can direct the parties to do whatever's necessary to remove the encumbrance.

Most of the grounds stated in CPLR 3211(a) appear to be of the kind that cannot be cured by mere amendment of

the pleading.

It has been held that where the plaintiff serves an amended complaint pursuant to a court order (as opposed to an amendment as of course) disposing of a CPLR 3211(a) motion, the service of such an amended pleading does make the original issues academic on an appeal from the order. *See Langer v. Garay*, 30 A.D.2d 942, 293 N.Y.S.2d 783 (1st Dep't 1968). This is a kind of abatement coming about because of an amended pleading--but only for appeal purposes. If there is some dispute about whether the amended complaint satisfies the order that permitted it, the dispute should be resolved by the judge who made the order before an appellate court is imposed on to determine the point.

C3211:62. Res Judicata Treatment of Granted CPLR 3211 Motion.

If a motion under CPLR 3211 is granted, the order or judgment in which it culminates is entitled to res judicata treatment. But it will of course be res judicata only of the point it decides.

If the motion was based on a ground in absolute bar of the action, such as release or payment, it will have the effect of a final judgment on the merits and will be entitled to future res judicata treatment as such. If it was based only on a ground in abatement, it will have narrower effect. Thus, where the action is dismissed on a CPLR 3211(a)(8) motion for lack of jurisdiction of the defendant's person, the plaintiff may of course sue anew if she can afterwards get jurisdiction; the only point decided is that the court lacked jurisdiction in the first action.

Most of the grounds listed in CPLR 3211(a)(5) are the so-called objections "in bar," and their application will ordinarily result in complete res judicata treatment precluding future suit on the same cause of action. Among these grounds are arbitration and award, collateral estoppel, discharge in bankruptcy, payment, release, and res judicata. The objection of infancy or disability, however, is only an objection "in abatement" and will not preclude future suit when the disability is removed or rectified.

The statute of limitations and statute of frauds objections cannot be as easily categorized. A limitations dismissal will bar future suit on the same claim in New York, at least to this extent: when the plaintiff sues anew in New York she can be met by the objection that the fact of untimeliness is res judicata, thereby necessitating dismissal of the second suit without relitigation of the timeliness issue. *See Spindell v. Brooklyn Jewish Hospital*, 35 A.D.2d 962, 317 N.Y.S.2d 963 (2d Dep't 1970), *aff'd* 29 N.Y.2d 888, 328 N.Y.S.2d 678 (1972). But if the first adjudication purported only to apply the New York period of limitation in a case with foreign elements, without any investigation or application of any foreign period of limitations, it may be possible for the plaintiff to sue anew in the foreign forum whose statute of limitations is applicable and under which the claim is still timely. If, however, the New York court in making the adjudication applied a foreign period of limitations under the so-called "borrowing statute," CPLR 202, the adjudication should preclude suit anew both in New York and in the foreign forum whose statute was applied. The objection to the second suit in either instance would be that the fact of untimeliness is res judicata, and it would be entitled to full faith and credit in the foreign forum.

The statute of frauds dismissal will bar future suit on the alleged agreement, but it may or may not bar a second suit based on a quantum meruit (depending on whether the particular statute of frauds applicable in the first action is construed to intend a complete bar to all recovery emanating from the transaction or merely to bar a claim based on the alleged agreement itself). Here, too, the impact of the New York dismissal may have differing results if the second suit is brought elsewhere. Much remains to be determined in this difficult conflict of laws realm, which is further discussed in Commentary C3211:65.

Many of the CPLR 3211(a) grounds are objections in mere abatement. A dismissal based on one of these grounds

will not necessarily preclude future suit. Thus, a dismissal under paragraph 2 will not preclude suit in a court of adequate jurisdiction; one under paragraph 3 will not preclude future suit when the capacity to sue is achieved; one under paragraph 4 will not preclude future suit if the earlier action whose pendency wrought the dismissal is itself later dismissed for lack of jurisdiction; one under paragraph 10 will not preclude future suit in which the necessary party is brought under the court's jurisdiction.

A nice illustration of an objection in mere abatement at work is provided by *Landau, P.C. v. LaRossa, Mitchell & Ross*, 11 N.Y.3d 8, 862 N.Y.S.2d 316, 892 N.E.2d 380 (2008). *Landau, P.C.*, involved a disbarred lawyer unable to keep his firm name (Eisen, P.C.) after the disbarment. So he dissolved the Eisen, P.C. firm and filed a certificate renaming it Landau, P.C., after his daughter, Debbi (also a lawyer). The gist of the dispute was a legal malpractice action by Landau, P.C. against the law firm (the defendant) that represented Eisen in an earlier action brought by New York City against Eisen for fraud and various other activities. Eisen claimed the firm didn't properly resist the city's summary judgment motion in that case.

The legal malpractice action was dismissed for lack of both "standing" and "capacity." Eisen couldn't sue for Eisen, P.C., because, since he was no longer a lawyer, he lacked "standing." And Eisen, P.C., could not be a plaintiff and initiate the action for itself because, as a dissolved corporation, it had no "capacity". The action by both attempted plaintiffs was therefore dismissed on those grounds, the judgment of dismissal reciting that it was "without prejudice."

Now, with Landau, P.C., as plaintiff, the legal malpractice action was brought with "a virtually identical summons and complaint." The defendant moved to dismiss this one on several grounds, but we address here only the res judicata ground. The Court of Appeals held that the earlier action was not res judicata.

The case occasioned a review of which of the various dismissal grounds listed in CPLR 3211(a) count as merits dispositions in actuality or in effect so as to bar a subsequent action under the res judicata doctrine. The grounds of the earlier dismissal here--lack of capacity and lack of standing--do not count as such grounds, the Court held, thus leaving the merits to be adjudicated when the "capacity" or "standing" defect was cured with a proper substitution of Landau, P.C., as plaintiff. *See Brown v. Lutheran Medical Ctr.*, 107 A.D.3d 837, 968 N.Y.S.2d 526 (2d Dep't 2013) (lack of capacity dismissal did not bar subsequent action).

Paragraph 7 dismissals merit separate treatment. *See* Commentary C3211:63.

C3211:63. Impact of Dismissal under CPLR 3211(a)(7).

The objection of failure to state a cause of action under CPLR 3211(a)(7) today tests not just the face of the pleading, but its basic merits as well. *See* Commentary C3211:23.

If the paragraph 7 dismissal is based solely on the facial insufficiency of the pleading of the cause of action, the plaintiff may sue anew with a complaint that corrects the deficiency, *see*, *e.g., Addeo v. Dairymen's League Co-op. Ass'n*, 47 Misc.2d 426, 262 N.Y.S.2d 771 (Sup. Ct., New York County 1965); the prior dismissal, which was not on the merits, will not be given res judicata effect. *Hock v. Cohen*, 125 A.D.3d 722, 4 N.Y.S.3d 70 (2d Dep't 2015). But if the complaint in the second suit is "virtually identical" to the one dismissed for insufficiency in the first, res judicata will be a basis for the second's dismissal. *Flynn v. Sinclair Oil Corp.*, 20 A.D.2d 636, 246 N.Y.S.2d 360 (1st Dep't 1964) *aff'd* 14 N.Y.2d 853, 251 N.Y.S.2d 967, 200 N.E.2d 633 (1964); *Grinstein v. Official Laura Branigan Fan Club*, 174 A.D.2d 545, 571 N.Y.S.2d 725 (1st Dep't 1991).

What about the situation where the granted CPLR 3211(a)(7) motion was supported by evidence? Is that dismissal entitled to res judicata effect, barring a subsequent similar action? The answer appears to be no. *See Amsterdam Savings Bank v. Marine Midland Bank, N.A.*, 140 A.D.2d 781, 528 N.Y.S.2d 184 (3d Dep't 1988); *Plattsburgh Quarries, Inc. v. Palcon Industries, Inc.*, 129 A.D.2d 844, 513 N.Y.S.2d 861 (3d Dep't 1987).

Of course, if the paragraph 7 motion in the first action was converted to one for summary judgment under CPLR 3211(c) and the converted motion is granted, the judgment or order from the first action should be entitled to res judicata effect. *See* Commentary C3211:64.

C3211:64. Impact of CPLR 3211 Motion "Treated" as Summary Judgment.

As previously discussed in Commentary C3211:42, the court is empowered to treat any CPLR 3211 motion as one for summary judgment. If it elects to do so, regardless of the ground on which the CPLR 3211 motion is made, it is in effect saying that the claim or defense lacks merit--a holding equivalent to a final judgment after trial--and it should as a rule be accorded full res judicata (claim preclusion) treatment in any future suit on the same cause. It should also be given full collateral estoppel (issue preclusion) treatment in a future suit on a different cause of action regardless of what the dismissed party may do in the interim.

But here we must hedge. The res judicata realm is one of the most subtle in the law. Even a dismissal made upon an outright motion for summary judgment under CPLR 3212 may carry less than res judicata consequences, as where judgment was granted summarily based on a mere objection "in abatement," such as lack of jurisdiction. This point is more fully developed in Commentary C3212:21 on CPLR 3212.

Ironically, the "treatment" of a CPLR 3211 motion as one for summary judgment may be more apparently a disposition on the merits than a dismissal made on a direct summary judgment motion under CPLR 3212. The court's election to "treat" the CPLR 3211 motion as one for summary judgment is its shorthand term to indicate that it has a complete body of evidence before it on the motion, that it has examined the evidence carefully, that it finds the claim or defense to lack merit, and that it therefore wants the judgment to be on the whole merits rather than limited to the particular CPLR 3211 ground on which the motion was made. But since a summary judgment motion under CPLR 3212 can be predicated on a ground that would have been a basis for a dismissal motion under CPLR 3211--as long as the objection has been preserved by being included as a defense in the answer--a situation may arise in which such a narrowly based summary judgment under CPLR 3212 can occur without the judgment or order specifying the limited ground of it. The fact that a CPLR 3211 motion has been treated as one for summary judgment, on the other hand, should always appear in the judgment or order itself. *See* Commentary C3211:42.

The practitioner should see to it that the order or judgment resulting from either a CPLR 3211 or CPLR 3212 motion fully clarifies its scope. Its future availability (or unavailability) for preclusion use will depend largely on that. If the matter is omitted and the judge who decided the case wrote no opinion, it may become difficult and sometimes impossible to know the precise ground of the disposition, thereby necessitating a rehearing that might otherwise have been avoided.

C3211:65. Res Judicata in Later Suit in Foreign Forum.

The problems that res judicata and its family can present in the most usual of situations--when sought to be applied to a final judgment rendered only after a full trial--are ample enough and are not a topic of discussion here. When it is sought to append res judicata to a pretrial dismissal such as one resulting under CPLR 3211(a), the problems multiply, and that's the current subject. If one essays to determine how a foreign forum will treat a New York CPLR 3211 disposition, the problems can become more complicated still and will often involve the full faith and credit clause of the federal constitution.

Stating only a few essentials, we may take as the general rule that a New York disposition made with jurisdiction will be just as binding in the foreign forum as it would be in New York. But the scope that New York intended the disposition to have will be a prime source of contention in many cases. Here is one example.

New York dismisses the case on motion under CPLR 3211(a)(5) because the claim is on an oral contract and is barred by the statute of frauds. If the statute of frauds of State X would allow such suit, will the New York disposition be res judicata in State X? This will depend on a number of factors. Did the New York disposition presume to declare only that the case was barred in New York and intend to leave open the possibility of suit later in a forum that allows it? Did the court in New York look at the statutes of all of the related jurisdictions and then decide that the New York statute of frauds was the proper one to apply based on the contacts that the case had with New York? Did the New York court treat the matter as purely a "procedural" question? (If it did, then the adjudication may carry no effect at all in a foreign forum.) To resolve issues like these would require more space than we have here.

We raise the issues only to call to the practitioner's attention the fact that unique factors may be involved if foreign states also have contacts with the case and if jurisdiction of the defendant can be secured in a foreign forum and a suit is commenced anew there. Both sides would do well in such a case to anticipate the possible res judicata questions that can arise after a grant of a CPLR 3211 motion, researching foreign law in advance of the motion. A revelation concerning foreign law and its possible application later can dictate a step to be taken now in connection with the CPLR 3211 motion.

Assume, for example, that State X will apply its own longer statute of limitations to the case if it is shown that the New York court, in dismissing for untimeliness, looked only to the New York statute of limitations and gave no treatment to the foreign one. (*See* CPLR 202.) If the plaintiff can discern this to be the State X approach, and suit would be timely in State X after the New York dismissal, the plaintiff should see to it that either the order or judgment concluding the CPLR 3211 motion, or an opinion of the court written in connection with it, clarifies that only the New York statute of limitations was considered and applied.

The old adage about letting sleeping dogs lie might be invoked here to dictate that these matters not even be discussed within the framework of a general CPLR 3211 Commentary. The difficulty is that this sleeping dog may wake up later on, and wake up hungry, when a second suit is brought elsewhere. Research into foreign law in advance of making or answering a CPLR 3211 motion--whenever there is a prospect of a later foreign suit on the same or a connected claim--can suggest procedures that will be of great moment in the later suit but which would not have occurred to the party in the present action in New York without that little bit of foresight and research.

C3211:66. Denial of CPLR 3211 Motion as "Law of the Case."

The "Law of the Case" doctrine is a kind of intra-action res judicata. Within the framework of a single action it prevents relitigation of a point already adjudicated in it. The denial of a motion under CPLR 3211 will generally invoke this doctrine and prevent the adjudicated point from again being litigated within the action. *See* Siegel, New York Practice § 448 (Connors 5th ed.).

Thus, the denial of a motion to dismiss for (e.g.) lack of jurisdiction of the defendant's person is a determination that the court has such jurisdiction and precludes relitigation of the point. While the defendant may appeal the order denying the motion, *see* CPLR 5701(a)(2), and may do so immediately or as part of an appeal from a later final judgment on the merits, *see* CPLR 5501(a)(1), she may not, after a denial of the motion, plead the objection as a defense in her answer and expect that the trial judge will hear the matter a second time.

The law of the case doctrine is invoked only when the court has actually adjudicated the point urged on the motion. If it has denied the motion without prejudice to its assertion by way of defense in a responsive pleading or otherwise indicated that it is not passing on its merits but rather deferring it to the trial or some later pretrial juncture--which the court has express power to do under CPLR 3211(d)--the matter is in no sense disposed of and may of course be determined at that future time.

If the point was adjudicated, however, the loser cannot raise the point at trial level again. Of course, she may move to reargue the motion; or, if she has additional and recently uncovered proof justifying a different result, she may move to renew the motion, but that is a different matter entirely. (On the reargument and renewal of motions, *see* Siegel, New York Practice § 254 and the Commentaries on CPLR 2221.)

Subdivision (f)

C3211:67. Motion Automatically Extends Responding Time.

The defendant or other person who must respond to a pleading (such as the plaintiff to a counterclaim) need not fear being in default by making a CPLR 3211 motion instead of pleading. The mere making of the motion during the time in which to respond automatically extends the responding time until 10 days after the movant is served with notice of entry of the order that disposes of the motion. CPLR 3211(f). A party gets the benefit of subdivision (f) only if the pre-answer motion was made within the time the party had to respond to the pleading. *See Wenz v. Smith*, 100 A.D.2d 585, 473 N.Y.S.2d 527 (2d Dep't 1984). As any practitioner can attest, that 10-day period, measured as it is by service of notice of entry of the order resolving the CPLR 3211 motion, can be a long time and can sometimes cover many months. *See* CPLR 2219(a). Note that if notice of entry of the order denying the motion isn't served, the CPLR 3211 movant's time to serve a responsive pleading will not begin to run. *De Falco v. JRS Confectionary, Inc.*, 118 A.D.2d 752, 500 N.Y.S.2d 143 (2d Dep't 1986); *Moore v. Latovitzki*, 25 Misc.3d 130(A), 901 N.Y.S.2d 908 (table), 2009 WL 3378381 (App. Term, 2d Dep't 2009).

Although subdivision (f) speaks only of service of "notice of entry" of the order, which is usually entered on the initiative of the prevailing party, it is customary to include with it a copy of the order itself.

If the dismissal motion is granted, resulting in a dismissal of the attacked pleading, there is of course nothing to answer. If several causes of action were pleaded, however, and the motion was aimed, successfully, at only one of them, only that one would be dismissed and the rest would now have to be responded to in a pleading.

If the motion is one by the plaintiff under CPLR 3211(b) to dismiss a defense contained in an answer that has no counterclaim, the answer requires no responsive pleading (*see* CPLR 3011) and the plaintiff therefore need not be concerned about the time element. If the answer does contain a counterclaim, however, it will require a reply, in which event the same time rules that govern the defendant's answer will govern the plaintiff's reply.

Since the making of a motion under CPLR 3211 extends the movant's responding time, it will ipso facto extend the time within which the opposing party can amend the attacked pleading as of right. CPLR 3025(a). Thus, where the defendant moves to dismiss the complaint and thereby extends her own time to answer until 10 days after notice of entry of the resulting order, the plaintiff can, within that extended period, amend the complaint as of right.

The question of whether an amendment of the attacked pleading abates the motion being made against it is

discussed in Commentary C3211:61.

Where a party's CPLR 3211 motion is denied and she does not serve a responsive pleading within CPLR 3211(f)'s 10-day window period, that party is in default. To be relieved from that default, the party must make a motion for an extension of time to serve the responsive pleading (*see* CPLR 3012[d]) or to vacate the default under CPLR 5015(a)(1). If no default judgment or order has been entered, the former mechanism can be used; if a default judgment or order has been entered, the latter should be invoked. *See Munroe v. Burgher*, 43 A.D.3d 891, 841 N.Y.S.2d 636 (2d Dep't 2007); *Rockland County Patrolmen's Benevolent Assoc., Inc.*, 288 A.D.2d 456, 733 N.Y.S.2d 874 (2d Dep't 2001).

C3211:68. Time to Respond Where Only Part of Pleading Attacked.

Assume that the plaintiff has pleaded multiple causes of action in the complaint. The defendant moves to dismiss the first one only. Must the defendant serve an answer to the others within the original responding time? No, because a CPLR 3211 motion made against any part of a pleading extends the time to serve a responsive pleading to all of it. Siegel, New York Practice § 277, n.3 (Connors 5th ed.), citing *United Equity Services, Inc. v. First Amer. Title Ins. Co. of N.Y.*, 75 Misc.2d 254, 347 N.Y.S.2d 377 (Sup. Ct., Nassau County 1973); *see Chagnon v. Tyson*, 11 A.D.3d 325, 783 N.Y.S.2d 29 (1st Dep't 2004). Thus, where the defendant moves to dismiss claim #1, she should be able to rely on subdivision (f) and its extension of time to serve her answer to the other claims (which answer would of course respond to the first claim, too, if the CPLR 3211 motion to dismiss it is denied).

Even if the construction were otherwise, the court's general power to extend time (CPLR 2004) is so broad--and its propensity to forgive defaults when reasonable ground is offered so widespread--that a plaintiff who seeks a default judgment on claim #2 simply because the defendant has deferred answering until after the disposition of a CPLR 3211 motion made against claim one will often be doing nothing more than wasting time.

The multiple-claim situation can get stickier when an appeal is also involved. Look at the situation in *Rotondo v. Reeves*, 192 A.D.2d 1086, 596 N.Y.S.2d 272 (4th Dep't 1993). The defendant was a county, which, under CPLR 5519(a)(1), gets an automatic stay of enforcement of an order when it takes an appeal. The defendant moved to dismiss two claims. The court granted the dismissal of claim one but not two. The defendant appealed the order--aggrieved that claim two was not also dismissed--but served no answer to claim two in the interim on the assumption that the need to answer was suspended. The court holds that it wasn't; that only proceedings to "enforce" the order are stayed, and that the obligation to answer was not a proceeding to "enforce" the order. The plaintiff was therefore granted a default judgment against the defendant. The Second and Third Departments would probably agree with that outcome; the First Department may well have gone the other way. *See* Robert L. Haig, Commercial Litigation in New York State Courts, § 8:74 (4th ed.).

Subdivision (g)

C3211:69. Easier Standard for Dismissing "SLAPP" Suit.

Subdivision (g) was added to CPLR 3211 in 1992, designed to deter what is sometimes referred to as a "SLAPP" suit, an acronym standing for "strategic lawsuit against public participation." A little background will make clear what a SLAPP suit is.

Developers, property owners, and a variety of others who must secure public approval of a project from some public agency, such as in the form of a permit, license, certificate, or like authorization, are often opposed before the agency by members of the public for an assortment of reasons, some publicly minded and some privately

motivated.

Whatever the source of the opposition, these "opposers," to use a handy reference word, don't make the applicants very happy, and it has become increasingly common, in an effort to discourage such opposition, for the applicant, during or after the agency proceedings, to bring an action against the opposer for damages, perhaps for defamation, perhaps on other grounds. *See 600 W. 115th Street Corp. v. Von Gutfeld*, 80 N.Y.2d 130, 589 N.Y.S.2d 825, 603 N.E.2d 930 (1992). Legislation adopted in Chapter 767 of the Laws of 1992 is designed to deter such "SLAPP" suits--which the Legislature describes as an "action involving public petition and participation"--by tightening up the legal requirements for them and by making it easier for the opposer (the defendant in the damages action) to get them dismissed.

Two of the several amendments with that purpose affect the CPLR: subdivision (g), added to CPLR 3211, and subdivision (h), added to CPLR 3212. These are best negotiated a little further on, after the more substantive parts of the package are briefly analyzed.

The more substantive parts of the package are in the Civil Rights Law, in §§ 70-a and 76-a. Subdivision (1)(a) of the latter contains the "public petition and participation" definition quoted above. *See National Fuel Gas Distribution Corp. v. PUSH Buffalo*, 104 A.D.3d 1307, 962 N.Y.S.2d 559 (4th Dep't 2013); *OSJ, Inc. v. Work*, 180 Misc.2d 804, 691 N.Y.S.2d 302 (Sup. Ct., Madison County 1999). The crux of the legislation is in subdivision 2 of § 76-a, which permits the recovery of damages in such an action only if the plaintiff (the applicant before the agency) establishes by "clear and convincing evidence" that the statement made before the agency by the defendant (the opposer before the agency) was made "with knowledge of its falsity or with reckless disregard of whether it was false," at least when falsity is at issue.

Section 70-a goes even further by enabling the opposer, either in the same suit by way of counterclaim or with a separate action against the applicant, to recover damages from the applicant, including attorneys' fees, if it can be shown that the applicant brought the action "without a substantial basis in fact and law." The "substantial" basis is supposed to be more stringent than the standard that would otherwise apply--"reasonable" rather than "substantial"--but, as the first Governor Cuomo noted in his approval message, the difference may be more theoretical than real.

If it is found that the applicant was motivated by harassment or intimidation in bringing the suit--and such a finding won't be hard if the action is determined to lack "substantial basis"--punitive damages can be assessed against the plaintiff/applicant, in addition to such compensatory damages as may be called for. The function of the two CPLR provisions in this whole design is to facilitate the early dismissal of the "SLAPP" suit if the proper showing can be made.

Subdivision (g) of CPLR 3211 provides that if the defendant/opposer moves to dismiss the action under subdivision (a)(7) of CPLR 3211 and demonstrates that the action is a SLAPP suit, the burden is thrust onto the plaintiff/applicant to establish that the claim has the requisite "substantial basis." *See Matter of Related Properties, Inc. v. Town Board of Town/Village of Harrison*, 22 A.D.3d 587, 802 N.Y.S.2d 221 (2d Dep't 2005). Subdivision (g) also requires that the "hearing of such motion" be granted a preference. That may be helpful if the court's or the individual judge's motion calendar is clogged. The preference instruction is a legislative statement that it wants this motion to go up front. What it probably really means to grant a preference to, however, is not just the "hearing" of the motion, but the trial of an issue of fact if such an issue should arise on the motion and hold up its disposition. *See* subdivision (c) of CPLR 3211.

The matter may come up on a summary judgment motion under CPLR 3212 made after the service of the answer

instead of on a pre-answer CPLR 3211 motion. The same burden alights upon the plaintiff/applicant in the summary judgment context. That's what subdivision (h), added to CPLR 3212, prescribes. It also calls for a preference, but in this instance that may be a more substantial gift than it is under the counterpart CPLR 3211(g). If subdivision (h) of CPLR 3212 is construed to require not just a prompt entertainment of the motion, but the ordering of a prompt trial of any issue of fact arising on the motion, it will be by-passing the rule that subdivision (c) of CPLR 3212 applies on summary judgment motions generally.

Under that subdivision, the only time an immediate fact trial can be ordered in the summary judgment context is when it concerns only damages (as opposed to liability), or when the motion is based on one of the grounds enumerated in subdivision (a) or (b) of CPLR 3211. That authorization contained in CPLR 3212(c) was probably not intended to authorize the immediate trial of an issue of fact arising on a motion under CPLR 3211(a)(7), however--where the ground is that the complaint fails to state a cause of action--because that would open the door to the immediate trial of any issue of fact at all. *See* Commentary C3212:22. But given the general background and history of the "SLAPP" suit, the "preference" instruction of subdivision (h) of CPLR 3212 can reasonably be construed to permit just such an immediate trial--even of an issue going to liability under the new "SLAPP" suit standards.

As to whether CPLR 3211(g) applies in federal court actions, *see Egiazaryan v. Zalmayev*, 2014 WL 1244790, *2 (S.D.N.Y. 2014); *Douglas v. New York State Adirondack Park Agency*, 895 F.Supp.2d 321, 384-385 (S.D.N.Y. 2012); *Yeshiva Chofetz Chaim Radin, Inc. v. Village of New Hempstead by its Board of Trustees of the Village of New Hempstead*, 98 F.Supp.2d 347, 358-360 (S.D.N.Y. 2000).

Subdivision (h)

C3211:70. Greater Scrutiny of Complaint Where Defendant is Design Professional.

Subdivision (h) provides a special dismissal tool to certain design professionals who are named as defendants in tort actions. If a licensed architect, engineer, land surveyor or landscape architect is a defendant in an action that is subject to CPLR 214-d ("Limitations on certain actions against licensed engineers and architects") and moves to dismiss the action under CPLR 3211(a)(7), the plaintiff must, to defeat the motion, "demonstrate[ ] that a substantial basis in law exists to believe that the performance, conduct or omission complained of such [design professional] ... was negligent and that such performance, conduct or omission was a proximate cause of [the plaintiff's damages]." CPLR 3211(h).

CPLR 214-d and 3211(h) (as well as CPLR 3212[i]) were added by the Legislature in 1996 to ameliorate the effects of New York's tort law, which, at the time, "tended to facilitate marginal claims against design professionals based on defects arising long after their work was completed and the improvements for which they were initially responsible had been in the owner's possession and subject to the owner's use and maintenance." *Castle Village Owners Corp. v. Greater New York Mutual Ins. Co.*, 58 A.D.3d 178, 183, 868 N.Y.S.2d 189, 192 (1st Dep't 2008).

As a result of subdivision (h)'s "substantial basis" element, a court reviewing a CPLR 3211(a)(7) motion in a qualifying action (*see* CPLR 214-d) must ask whether the plaintiff's claim is "supported by 'such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact.' " *Castle Village Owners, Corp.*, 58 A.D.3d at 183, 868 N.Y.S.2d at 192, quoting Senate Memorandum in Support, L.1996, ch. 682, 1996 McKinney's Session Laws of N.Y., at 2614. While the plaintiff need not adduce evidence demonstrating that the claim is supported by a preponderance of the evidence--that's the burden that the plaintiff must meet at trial (*see* 1A N.Y. P.J.I.3d 1:23 [2016])--the bar at the motion-to-dismiss stage is set higher for the plaintiff. *See* Practice Commentaries for CPLR 214-d.

In the typical case, the CPLR 3211(a)(7) motion will be denied if the complaint states, i.e., pleads, a cognizable cause of action. When the motion to dismiss for failure to state a cause of action is augmented by subdivision (h), the plaintiff must adduce allegations and evidence that demonstrate the existence of triable issues of fact regarding the design professional's negligence and proximate cause. *See Castle Village Owners Corp.*, 58 A.D.3d at 183, 868 N.Y.S.2d at 192. Detailed allegations of negligence and the affidavit of an expert can go a long way in helping the plaintiff to defeat a CPLR 3211(a)(7) motion by a design professional. *See Schmitt v. Spector*, 129 A.D.3d 1052, 11 N.Y.S.3d 680 (2d Dep't 2015); *Castle Village Owners Corp. v. Greater New York Mutual Ins. Co., supra*.

A motion subject to subdivision (h) is to be afforded a "preference," just like one subject to CPLR 3211(g). *See* Commentary C3211:69.

LEGISLATIVE STUDIES AND REPORTS

The First Report of the Revisers to the Legislature notes that this rule, taken from §§ 30 and 237(a)(1) of the civil practice act and rules 106, 107, 109 and 110 of the rules of civil practice, allows a motion at any time before a responsive pleading is required, with or without supporting proof, asserting specified objections which, if sustained, will dispose of the action.

In the original draft of subd. (a) of this rule, the Revisers eliminated the motion to dismiss for failure to state a cause of action which was authorized by rule 106(4) of the rules of civil practice. They comment that lawyers, judges and commentators have long been concerned about the ineffectiveness and dilatory nature of the motion to dismiss for legal insufficiency on the face of a pleading. Requiring a determination on the basis of allegations rather than facts, it does not perform well its traditional function of terminating groundless suits. With free amendment permitted, it more often serves only to secure a new and more technically acceptable pleading in place of one omitting an essential allegation or stating a claim in conclusory or other uninformative terms. The round of demurrers and amendments continues while the facts underlying the controversy remain hidden behind a wall of unsupported allegation. See, e.g., Dulberg v. Mock, 286 A.D. 1008, 145 N.Y.S.2d 533 (1st Dep't 1955), reversed, 1 N.Y.2d 54, 133 N.E.2d 695 (1956).

It is further stated that legal sufficiency should be tested on the basis of facts, rather than the allegations, to the extent that they may be ascertained prior to trial. To that end, the jurisdictions following the Federal rules allow proof outside the pleading to be submitted, both on a motion to dismiss and a motion for judgment on the pleadings, converting the motion into one for summary judgment. See rule 12(b), (c) of the Federal Rules of Civil Procedure, 28 U.S.C.A. This rule goes a step further, dispensing with the motion prior to answer and requiring that a preliminary challenge to legal sufficiency be made by motion for summary judgment after answer. Since such an attack, particularly when it goes beyond the pleadings, usually requires some preparation by counsel on the whole case, there is no extra burden in requiring an answer. At the same time, certain benefits ensue: since answer will not be stayed, the motion is less attractive as a delaying tactic. Moreover, the submission of the responsive pleading permits disclosure to proceed, it defines the issues, and it enables the court to grant judgment against the moving party where such a disposition is indicated.

Nor should the de-emphasis of the statement of the claim condone or encourage poor pleading. For the same reasons that dictate omission of rule 106(4) of the rules of civil practice, this rule abolishes the other motions directed to the legal sufficiency of a pleading on its face under rules 109(5), 109(6), 111 and 112 of the rules of civil practice.

Nevertheless, in the final draft of this subdivision, the Revisers inserted par. 7, which is derived from rule 106(4), and states that it reflects a middle view between the original proposal that the motion to dismiss for legal insufficiency should be abolished, and the feeling of some bar association committees that, despite abuses, such motions often perform a valuable function in permitting a party to have a defective pleading dismissed before being required to frame a responsive pleading and perhaps submit to disclosure proceedings unjustifiably extended by the scope of the defective pleading. The words "facts

sufficient to constitute" were not carried forward into par. 7 to conform with the pleading rule which does not use this phrase.

It is further explained in the First Report that there is good reason to continue the provisions for a preliminary motion under rules 107 and 110 of the rules of civil practice and, indeed, to expand them. As separable and easily demonstrable bars to an action, they may often save a lawyer considerable time and effort preparing an answer in a complicated case. There is little danger that they will delay the litigation since, by their nature, they are difficult to fabricate and raise issues that are relatively easily resolved. The commentators have highly praised the New York provisions. See, e.g., Millar, Civil Procedure of the Trial Court in Historical Perspective 250-52 (1952); Atkinson, Pleading the Statute of Limitations, 36 Yale L.J. 914, 930-32 (1927). Similar provisions exist in Illinois and Michigan. Ill.Ann.Stat. c. 110, § 48 (Smith-Hurd Supp.1955); 6A Mich.Comp.Laws Annotations, app. 4, Court Rule 18 (1948).

A new par. 1, relating to defense founded upon documentary evidence, was added by the Revisers, and they also included the defenses of estoppel, arbitration and award and discharge in bankruptcy in par. 5. The latter were chosen because they represent affirmative defenses that are usually easily established. Discharge in bankruptcy is an enumerated objection in the analogous Illinois provision, but this rule has not adopted the phrase "other affirmative matter" used in Illinois. Although par. 5 includes the most common defenses founded upon documentary evidence, par. 1 is added to cover all others that may arise, as for example, a written modification or any defense based on the terms of the written contract.

The words "in a court of any state or the United States" have been added in par. 4, in order to do away with the anomalous doctrine that an action in another state is not "another action pending" within the meaning of the rule. See Squier v. Houghton, 131 Misc. 129, 226 N.Y.S. 162 (Supp.Ct.1927). In the final draft of par. 4, the Revisers inserted provisions to give the court discretion to make an order other than dismissal, and they comment that in some cases, for example, stay of one of the actions or consolidation might be a more desirable solution.

Pars. 8 and 9 of subd. (a) of this rule were inserted to cover jurisdiction over the person and in rem or quasi in rem jurisdiction.

The objection of nonjoinder is covered by par. 10, and it is said that the rule that this objection is nonwaivable has been placed in subd. (e) of this rule.

Subd. (b) of this rule is derived from rule 109(6) of the rules of civil practice. As noted above in the discussion of subd. (a) of this rule, the Revisers originally planned to eliminate this provision. However, since they included the motion to dismiss for legal insufficiency, they carried forward rule 109(6) in this subdivision. The words "facts sufficient to constitute" a defense were omitted since this language in not used in the pleading rule.

Subd. (c) of this rule authorizes submission of evidence upon the hearing of a motion. The Revisers state in the First Report to the Legislature that rules 107 and 110 of the rules of civil practice, as to the evidence permitted, mention only affidavits, but "it is clear that the motion is in essence one for summary judgment."

Rule 108 of the rules of civil practice, permitting the court to direct an immediate trial of the issues raised, is continued in the second sentence of subd. (c). It is said that as to the specified defenses, it makes possible an accelerated judgment even though a genuine issue of fact exists which would defeat a motion for summary judgment. The Illinois and Michigan provisions analogous to rules 107 and 110 allow such a preliminary trial except where a jury trial is required. See note, 33 Chi.-Kent Law Rev. 191 (1955). The procedure seems worthy of retention, although courts are sometimes reluctant to use it because of the fear of two separate trials if the determination is against the moving party. See, e.g., Rizzuto v. U.S., Shipping Board Emergency Fleet Corp., 213 A.D. 326, 210 N.Y.S. 482 (2d Dep't 1925); Gordon v. Prishkoff, 67 N.Y.S.2d 373 (Sup.Ct.1946), aff'd 272 A.D. 872, 72 N.Y.S.2d 402 (1st Dep't 1947). A trial on any of the enumerated objections will

usually be short; if it is before the court, it will require little more time than the motion itself. As often as not, it will result in a speedy disposition without calendar delay or the necessity of trying the whole case.

Rule 56(f) of the Federal Rules of Civil Procedure, 28 U.S.C.A., is the source of subd. (d) of this rule. The discussion accompanying this subdivision in the First Report to the Legislature states that rule 108 of the rules of civil practice permits the court, in its discretion, to deny the motion and "allow the same facts to be alleged in the answer as a defense." Although the rule offers no criteria for exercise of this discretion, it would undoubtedly cover the situation where the facts are then unavailable to the opposing party This subdivision goes beyond this, allowing the court to retain the motion while permitting disclosure. Further, under the power to make "such other order as is just," it is contemplated that the court could require service of an answer during the continuance for disclosure and thereafter treat the motion as one for summary judgment.

Subd. (e) of this rule is based on § 279 of the civil practice act. As originally drafted this subdivision provided: "A party may combine in a single motion two or more of the enumerated objections, and no more than one motion shall be permitted under this rule. Any objection or defense enumerated in this rule except jurisdiction over the subject matter is waived unless it is raised by motion or in the responsive pleading." The Revisers explained in the First Report to the Legislature that this subdivision is designed to prevent the delay before answer that could result from a series of motions under this rule. With only a relatively short period ordinarily required for disposition of this motion, there is no serious need for allowing subsequent motions based on newly discovered evidence. In any event the party will lose no rights by failing to move or to include all available grounds in his motion, for he still may assert in his answer or reply any defense or objection not raised by motion.

The Revisers also stated that the waiver provision in the original draft does not change existing law. Affirmative defenses may not be proved unless pleaded. The generally non-waivable objections of nonjoinder and failure to state a cause of action or defense (cf. C.P.A. § 279; Rule 12(h) of the Federal Rules of Civil Procedure, 28 U.S.C.A.) are not affected because the provision applies only to objections or defenses enumerated in this rule. The rules concerning amendments and summary judgments, however, de-emphasize the objection of failure to state a cause of action and focus instead upon whether a cause of action actually exists.

Section 278 of the civil practice act provides for waiver of certain of the enumerated objections if they are not taken by motion; the purpose of that section, however, is merely to preserve the common law doctrine that dilatory pleas and pleas in abatement are waived unless claimed before trial. Thus, the doctrine is satisfied by the provision that they are waived unless claimed by motion or answer.

The final draft of subd. (e) of this rule inserted provisions relating to time, the rule of non-waiver of objection of legal insufficiency or of non-joinder, and the last sentence.

The rules of non-waiver of objections of legal insufficiency or of non-joinder were originally omitted from this subdivision becase of the proposal of the Revisers to omit the defense of legal insufficiency from subd. (a) of this rule. However, since the defense was included within subd. (a), the rules of non-waiver were required to be incorporated in subd. (e).

The last sentence was also added as part of the compromise approach toward the motion to dismiss for legal insufficiency. It is designed to remove the major objection to such objections--i.e., the liberality with which leave is granted to plead over without any showing that a legally sufficient claim exists. The combined operation of par. 7 of subd. (a) of this rule and this provision is to allow the motion at any time but also to put the burden on the opposing party to show that he has a good claim or defense even if he has not stated it; otherwise leave to plead over will not be granted.

The Sixth Report notes that subd. (e) of this rule, in its final form, is very flexible. If the judge hearing the motion wishes, he

may insist that the party seeking leave to amend furnish him and the opponent with a proposed new pleading which can be considered in the light of the argument on the motion to dismiss and the information, if any, set forth in the opposing papers.

Subd. (f) of this rule follows the law under § 283 of the civil practice act. It will not operate to relieve a party's default if his time to plead expired before a motion was made, absent a stipulation or court order extending his time.

Official Reports to Legislature for this rule:

1st Report Leg.Doc. (1957) No. 6(b), p. 83.

2nd Report Leg.Doc. (1958) No. 13, p. 152.

5th Report Leg.Doc. (1961) No. 15, p. 482.

6th Report Leg.Doc. (1962) No. S, p. 329.

Notes of Decisions (4997)

McKinney's CPLR Rule 3211, NY CPLR Rule 3211
Current through L.2024, chapters 1 to 545. Some statute sections may be more current, see credits for details.

McKinney's Consolidated Laws of New York Annotated
Election Law (Refs & Annos)
Chapter Seventeen. Of the Consolidated Laws (Refs & Annos)
Article 17. Protecting the Elective Franchise (Refs & Annos)
Title 2. John R. Lewis Voting Rights Act of New York (Refs & Annos)
McKinney's Election Law § 17-200

§ 17-200. Legislative purpose and statement of public policy

Effective: July 1, 2023

Currentness

In recognition of the protections for the right to vote provided by the constitution of the state of New York, which substantially exceed the protections for the right to vote provided by the constitution of the United States, and in conjunction with the constitutional guarantees of equal protection, freedom of expression, and freedom of association under the law and against the denial or abridgement of the voting rights of members of a race, color, or language-minority group, it is the public policy of the state of New York to:

1. Encourage participation in the elective franchise by all eligible voters to the maximum extent; and

2. Ensure that eligible voters who are members of racial, color, and language-minority groups shall have an equal opportunity to participate in the political processes of the state of New York, and especially to exercise the elective franchise.

Credits

(Added L.2022, c. 226, § 4, eff. July 1, 2023.)

McKinney's Election Law § 17-200, NY ELEC § 17-200
Current through L.2024, chapters 1 to 545. Some statute sections may be more current, see credits for details.

End of Document

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Title 2. John R. Lewis Voting Rights Act of New York (Refs & Annos)
McKinney's Election Law § 17-204

§ 17-204. Definitions

Effective: August 6, 2024

Currentness

For the purposes of this title:

1. "At-large" method of election means a method of electing members to the governing body of a political subdivision: (a) in which all of the voters of the entire political subdivision elect each of the members to the governing body; (b) in which the candidates are required to reside within given areas of the political subdivision and all of the voters of the entire political subdivision elect each of the members to the governing body; or (c) that combines at-large elections with district-based elections, unless the only member of the governing body of a political subdivision elected at-large holds exclusively executive responsibilities. For the purposes of this title, at-large method of election does not include ranked-choice voting, cumulative voting, and limited voting.

2. "District-based" method of election means a method of electing members to the governing body of a political subdivision using a districting or redistricting plan in which each member of the governing body resides within a district or ward that is a divisible part of the political subdivision and is elected only by voters residing within that district or ward, except for a member of the governing body that holds exclusively executive responsibilities.

3. "Alternative" method of election means a method of electing members to the governing body of a political subdivision using a method other than at-large or district-based, including, but not limited to, ranked-choice voting, cumulative voting, and limited voting.

4. "Political subdivision" means a geographic area of representation created for the provision of government services, including, but not limited to, a county, city, town, village, school district, or any other district organized pursuant to state or local law.

5. "Protected class" means a class of individuals who are members of a race, color, or language-minority group, including individuals who are members of a minimum reporting category that has ever been officially recognized by the United States census bureau.

5-a. “Language minorities” or “language-minority group” means persons who are American Indian, Asian American, Alaskan Natives or of Spanish heritage.

6. “Racially polarized voting” means voting in which there is a divergence in the candidate, political preferences, or electoral choice of members in a protected class from the candidates, or electoral choice of the rest of the electorate.

7. “Federal voting rights act” means the federal Voting Rights Act of 1965, 52 U.S.C. § 10301 et seq., as amended.

8. The “civil rights bureau” means the civil rights bureau of the office of the attorney general.

9. “Government enforcement action” means a denial of administrative or judicial preclearance by the state or federal government, pending litigation filed by a federal or state entity, a final judgment or adjudication, a consent decree, or similar formal action.

10. Repealed by L.2024, c. 216, § 2, eff. Aug. 6, 2024.

Credits

(Added L.2022, c. 226, § 4, eff. July 1, 2023. Amended L.2024, c. 216, §§ 1, 2, eff. Aug. 6, 2024.)

McKinney’s Election Law § 17-204, NY ELEC § 17-204
Current through L.2024, chapters 1 to 545. Some statute sections may be more current, see credits for details.

McKinney's Consolidated Laws of New York Annotated
Election Law (Refs & Annos)
Chapter Seventeen. Of the Consolidated Laws (Refs & Annos)
Article 17. Protecting the Elective Franchise (Refs & Annos)
Title 2. John R. Lewis Voting Rights Act of New York (Refs & Annos)
McKinney's Election Law § 17-206

§ 17-206. Prohibitions on voter disenfranchisement

Effective: August 6, 2024

Currentness

1. Prohibition against voter suppression. (a) No voting qualification, prerequisite to voting, law, ordinance, standard, practice, procedure, regulation, or policy shall be enacted or implemented by any board of elections or political subdivision in a manner that results in a denial or abridgement of the right of members of a protected class to vote.

(b) A violation of paragraph (a) of this subdivision shall be established upon a showing that, based on the totality of the circumstances, members of a protected class have less opportunity than the rest of the electorate to elect candidates of their choice or influence the outcome of elections.

2. Prohibition against vote dilution. (a) No board of elections or political subdivision shall use any method of election, having the effect of impairing the ability of members of a protected class to elect candidates of their choice or influence the outcome of elections, as a result of vote dilution.

(b) A violation of paragraph (a) of this subdivision shall be established upon a showing that a political subdivision:

(i) used an at-large method of election and either: (A) voting patterns of members of the protected class within the political subdivision are racially polarized; or (B) under the totality of the circumstances, the ability of members of the protected class to elect candidates of their choice or influence the outcome of elections is impaired; or

(ii) used a district-based or alternative method of election and that candidates or electoral choices preferred by members of the protected class would usually be defeated, and either: (A) voting patterns of members of the protected class within the political subdivision are racially polarized; or (B) under the totality of the circumstances, the ability of members of the protected class to elect candidates of their choice or influence the outcome of elections is impaired.

(c) For the purposes of demonstrating that a violation of paragraph (a) of this subdivision has occurred, evidence shall be weighed and considered as follows: (i) elections conducted prior to the filing of an action pursuant to this subdivision are more probative than elections conducted after the filing of the action; (ii) evidence concerning elections for members of the governing body of the political subdivision are more probative than evidence concerning other elections; (iii) statistical evidence is more probative than non-statistical evidence; (iv) where there is evidence that more than one protected class of eligible voters are politically cohesive in the political subdivision, members of each of those protected classes may be combined; (v) evidence concerning the intent on the part of the voters, elected officials, or the political subdivision to discriminate against a protected class is not required; (vi) evidence that voting patterns and election outcomes could be explained by factors other than racially polarized voting, including but not limited to partisanship, shall not be considered; (vii) evidence that sub-groups within a protected class have different voting patterns shall not be considered; (viii) evidence concerning whether members of a protected class are geographically compact or concentrated shall not be considered, but may be a factor in determining an appropriate remedy; and (ix) evidence concerning projected changes in population or demographics shall not be considered, but may be a factor, in determining an appropriate remedy.

3. In determining whether, under the totality of the circumstances, a violation of subdivision one or two of this section has occurred, factors that may be considered shall include, but not be limited to: (a) the history of discrimination in or affecting the political subdivision; (b) the extent to which members of the protected class have been elected to office in the political subdivision; (c) the use of any voting qualification, prerequisite to voting, law, ordinance, standard, practice, procedure, regulation, or policy that may enhance the dilutive effects of the election scheme; (d) denying eligible voters or candidates who are members of the protected class to processes determining which groups of candidates receive access to the ballot, financial support, or other support in a given election; (e) the extent to which members of the protected class contribute to political campaigns at lower rates; (f) the extent to which members of a protected class in the state or political subdivision vote at lower rates than other members of the electorate; (g) the extent to which members of the protected class are disadvantaged in areas including but not limited to education, employment, health, criminal justice, housing, land use, or environmental protection; (h) the extent to which members of the protected class are disadvantaged in other areas which may hinder their ability to participate effectively in the political process; (i) the use of overt or subtle racial appeals in political campaigns; (j) a significant lack of responsiveness on the part of elected officials to the particularized needs of members of the protected class; and (k) whether the political subdivision has a compelling policy justification that is substantiated and supported by evidence for adopting or maintaining the method of election or the voting qualification, prerequisite to voting, law, ordinance, standard, practice, procedure, regulation, or policy. Nothing in this subdivision shall preclude any additional factors from being considered, nor shall any specified number of factors be required in establishing that such a violation has occurred.

4. Standing. Any aggrieved person, organization whose membership includes aggrieved persons or members of a protected class, organization whose mission, in whole or in part, is to ensure voting access and such mission would be hindered by a violation of this section, or the attorney general may file an action against a political subdivision pursuant to this section in the supreme court of the county in which the political subdivision is located.

5. Remedies. (a) Upon a finding of a violation of any provision of this section, the court shall implement appropriate remedies to ensure that voters of race, color, and language-minority groups have equitable access to fully participate in the electoral process, which may include, but shall not be limited to:

(i) a district-based method of election;

(ii) an alternative method of election;

(iii) new or revised districting or redistricting plans;

(iv) elimination of staggered elections so that all members of the governing body are elected on the same date;

(v) reasonably increasing the size of the governing body;

(vi) moving the dates of regular elections to be concurrent with the primary or general election dates for state, county, or city office as established in section eight of article three or section eight of article thirteen of the constitution, unless the budget in such political subdivision is subject to direct voter approval pursuant to part two of article five or article forty-one of the education law;

(vii) transferring authority for conducting the political subdivision's elections to the board of elections for the county in which the political subdivision is located;

(viii) additional voting hours or days;

(ix) additional polling locations;

(x) additional means of voting such as voting by mail;

(xi) ordering of special elections;

(xii) requiring expanded opportunities for voter registration;

(xiii) requiring additional voter education;

(xiv) modifying the election calendar;

(xv) the restoration or addition of persons to registration lists; or

(xvi) retaining jurisdiction for such period of time on a given matter as the court may deem appropriate, during which no redistricting plan shall be enforced unless and until the court finds that such plan does not have the purpose of diluting the right to vote on the basis of protected class membership, or in contravention of the voting guarantees set forth in this title, except that the court's finding shall not bar a subsequent action to enjoin enforcement of such redistricting plan.

(b) The court shall consider proposed remedies by any parties and interested non-parties, but shall not provide deference or priority to a proposed remedy offered by the political subdivision. The court shall have the power to require a political subdivision to implement remedies that are inconsistent with any other provision of law where such inconsistent provision of law would preclude the court from ordering an otherwise appropriate remedy in such matter.

6. Procedures for implementing new or revised districting or redistricting plans. The governing body of a political subdivision with the authority under this title and all applicable state and local laws to enact and implement a new method of election that would replace the political subdivision's at-large method of election with a district-based or alternative method of election, or enact and implement a new districting or redistricting plan, shall undertake each of the steps enumerated in this subdivision, if proposed subsequent to receipt of a NYVRA notification letter, as defined in subdivision seven of this section, or the filing of a claim pursuant to this title or the federal voting rights act.

(a) Before drawing a draft districting or redistricting plan or plans of the proposed boundaries of the districts, the political subdivision shall hold at least two public hearings over a period of no more than thirty days, at which the public is invited to provide input regarding the composition of the districts. Before these hearings, the political subdivision may conduct outreach to the public, including to non-English-speaking communities, to explain the districting or redistricting process and to encourage public participation.

(b) After all draft districting or redistricting plans are drawn, the political subdivision shall publish and make available for release at least one draft districting or redistricting plan and, if members of the governing body of the political subdivision would be elected in their districts at different times to provide for staggered terms of office, the potential sequence of such elections. The political subdivision shall also hold at least two additional hearings over a period of no more than forty-five days, at which the public shall be invited to provide input regarding the content of the draft districting or redistricting plan or plans and the proposed sequence of elections, if applicable. The draft districting or redistricting plan or plans shall be published at least seven days before consideration at a hearing. If the draft districting or redistricting plan or plans are revised at or following a hearing, the revised versions shall be published and made available to the public for at least seven days before being adopted.

(c) In determining the final sequence of the district elections conducted in a political subdivision in which members of the governing body will be elected at different times to provide for staggered terms of office, the governing body shall give special consideration to the purposes of this title, and it shall take into account the preferences expressed by members of the districts.

7. Notification requirement and safe harbor for judicial actions. Before commencing a judicial action against a political

subdivision under this section, a prospective plaintiff shall send by certified mail a written notice to the clerk of the political subdivision, or, if the political subdivision does not have a clerk, the governing body of the political subdivision, against which the action would be brought, asserting that the political subdivision may be in violation of this title. This written notice shall be referred to as a "NYVRA notification letter" in this title. The NYVRA notification letter shall specify the potential violation or violations alleged and shall contain a statement of facts to support such allegation; provided, however, that failure to so specify shall not be a basis for dismissal of such judicial action, but may affect the calculation of reimbursement pursuant to paragraph (e) of this subdivision. The prospective plaintiff shall also send by first class mail or email a copy of the NYVRA notification letter to the civil rights bureau. For actions against a school district or any other political subdivision that holds elections governed by the education law, the prospective plaintiff shall also send by certified mail a copy of the NYVRA notification letter to the commissioner of education.

(a) A prospective plaintiff shall not commence a judicial action against a political subdivision under this section within fifty days of sending to the political subdivision a NYVRA notification letter.

(b) Before receiving a NYVRA notification letter, or within fifty days of mailing of a NYVRA notification letter, the governing body of a political subdivision may pass a resolution affirming: (i) the political subdivision's intention to enact and implement a remedy for a potential violation of this title; (ii) specific steps the political subdivision will undertake to facilitate approval and implementation of such a remedy; and (iii) a schedule for enacting and implementing such a remedy. Such a resolution shall be referred to as a "NYVRA resolution" in this title. If a political subdivision passes a NYVRA resolution, such political subdivision shall have ninety days after such passage to enact and implement such remedy, during which a prospective plaintiff shall not commence an action to enforce this section against the political subdivision. For actions against a school district, the commissioner of education may order the enactment of a NYVRA resolution pursuant to the commissioner's authority under section three hundred five of the education law. Within seven days of passing a NYVRA resolution, the political subdivision shall send by first class mail or email a copy of the resolution to the civil rights bureau.

(c) If the governing body of a political subdivision lacks the authority under this title or applicable state law or local laws to enact or implement a remedy identified in a NYVRA resolution, or fails to enact or implement a remedy identified in a NYVRA resolution, within ninety days after the passage of the NYVRA resolution, or if the political subdivision is a covered entity as defined under section 17-210 of this title, the governing body of the political subdivision shall undertake the steps enumerated in the following provisions:

(i) The governing body of the political subdivision may approve a proposed remedy that complies with this title and submit such a proposed remedy to the civil rights bureau no later than one hundred twenty days after the passage of the NYVRA resolution. Such a submission shall be referred to as a "NYVRA proposal" in this title.

(ii) Prior to passing a NYVRA proposal, the political subdivision shall hold at least one public hearing, at which the public shall be invited to provide input regarding the NYVRA proposal. Before this hearing, the political subdivision may conduct outreach to the public, including to non-English-speaking communities, to encourage public participation.

(iii) Within sixty days of receipt of a NYVRA proposal, the civil rights bureau shall grant or deny approval of the NYVRA proposal. The civil rights bureau may invoke an extension of up to twenty days to review the proposal.

(iv) The civil rights bureau shall only grant approval to the NYVRA proposal if it concludes that: (A) the political subdivision may be in violation of this title; (B) the NYVRA proposal would remedy any potential violation of this title cited in the NYVRA notification letter and would not give rise to any other violation of this title; (C) the NYVRA proposal is unlikely to violate the constitution or any relevant federal law; and (D) implementation of the NYVRA proposal is feasible.

(v) If the civil rights bureau grants approval, the NYVRA proposal shall be enacted and implemented immediately, notwithstanding any other provision of law, including any other state or local law.

(vi) If the political subdivision is a covered entity as defined under section 17-210 of this title, the political subdivision shall not be required to obtain preclearance for the NYVRA proposal pursuant to such section upon approval of the NYVRA proposal by the civil rights bureau.

(vii) If the civil rights bureau denies approval, the NYVRA proposal shall not be enacted or implemented. The civil rights bureau shall explain the basis for such denial and may, in its discretion, make recommendations for an alternative remedy for which it would grant approval.

(viii) If the civil rights bureau does not respond, the NYVRA proposal shall not be enacted or implemented.

(d) A political subdivision that has passed a NYVRA resolution may enter into an agreement with the prospective plaintiff providing that such prospective plaintiff shall not commence an action pursuant to this section against the political subdivision for an additional ninety days. Such agreement shall include a requirement that either the political subdivision shall enact and implement a remedy that complies with this title or the political subdivision shall pass a NYVRA proposal and submit it to the civil rights bureau.

(e) If, pursuant to a process commenced by a NYVRA notification letter, a political subdivision enacts or implements a remedy or the civil rights bureau grants approval to a NYVRA proposal, a prospective plaintiff who sent the NYVRA notification letter may, within thirty days of the enactment or implementation of the remedy or approval of the NYVRA proposal, demand reimbursement for the cost of the work product generated to support the NYVRA notification letter. A prospective plaintiff shall make the demand in writing and shall substantiate the demand with financial documentation, such as a detailed invoice for demography services or for the analysis of voting patterns in the political subdivision. A political subdivision may request additional documentation if the provided documentation is insufficient to corroborate the claimed costs. A political subdivision shall reimburse a prospective plaintiff for reasonable costs claimed, or in an amount to which the parties mutually agree. The cumulative amount of reimbursements to all prospective plaintiffs, except for actions brought by the attorney general, shall not exceed forty-three thousand dollars, as adjusted annually to the consumer price index for all urban consumers, United States city average, as published by the United States department of labor. To the extent a prospective plaintiff who sent the NYVRA notification letter and a political subdivision are unable to come to a mutual agreement, either party may file a declaratory judgment action to obtain a clarification of rights.

(f) Notwithstanding the provisions of this subdivision, in the event that the first day for designating petitions for a political subdivision’s next regular election to select members of its governing board has begun or is scheduled to begin within thirty days, or in the event that a political subdivision is scheduled to conduct any election within one hundred twenty days, a

plaintiff alleging any violation of this title may commence a judicial action against a political subdivision under this section, provided that the relief sought by such a plaintiff includes preliminary relief for that election. Prior to or concurrent with commencing such a judicial action, any such plaintiff shall also submit a NYVRA notification letter to the political subdivision. In the event that a judicial action commenced under this provision is withdrawn or dismissed for mootness because the political subdivision has enacted or implemented a remedy or the civil rights bureau has granted approval of a NYVRA proposal pursuant to a process commenced by a NYVRA notification letter, any such plaintiff may only demand reimbursement pursuant to this subdivision.

8. Coalition claims permitted. Members of different protected classes may file an action jointly pursuant to this title in the event that they demonstrate that the combined voting preferences of the multiple protected classes are polarized against the rest of the electorate.

Credits

(Added L.2022, c. 226, § 4, eff. July 1, 2023. Amended L.2024, c. 216, §§ 3 to 8, eff. Aug. 6, 2024.)

McKinney's Election Law § 17-206, NY ELEC § 17-206
Current through L.2024, chapters 1 to 545. Some statute sections may be more current, see credits for details.

McKinney's Consolidated Laws of New York Annotated
Election Law (Refs & Annos)
Chapter Seventeen. Of the Consolidated Laws (Refs & Annos)
Article 17. Protecting the Elective Franchise (Refs & Annos)
Title 2. John R. Lewis Voting Rights Act of New York (Refs & Annos)
McKinney's Election Law § 17-208

§ 17-208. Assistance for language-minority groups

Effective: June 20, 2025

Currentness

<[Eff. June 20, 2025.]>

1. Political subdivisions required to provide language assistance. A board of elections or a political subdivision that administers elections shall provide language-related assistance in voting and elections to a language-minority group in a political subdivision if, based on data from the American community survey, or data of comparable quality collected by a public office, that:

(a) more than two percent, but in no instance fewer than three hundred individuals, of the citizens of voting age of a political subdivision are members of a single language-minority group and are limited English proficient.

(b) more than four thousand of the citizens of voting age of such political subdivision are members of a single language-minority group and are limited English proficient.

(c) in the case of a political subdivision that contains all or any part of a Native American reservation, more than two percent of the Native American citizens of voting age within the Native American reservation are members of a single language-minority group and are limited English proficient. For the purposes of this paragraph, "Native American" is defined to include any persons recognized by the United States census bureau or New York as "American Indian" or "Alaska Native".

2. Language assistance to be provided. A board of elections or political subdivision required to provide language assistance to a particular language-minority group pursuant to this section shall provide voting materials in the covered language of an equal quality of the corresponding English language materials, including registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots. Any registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots, in a covered political subdivision, shall be provided in the language of the applicable language-minority group as well as in the English language, provided that where the language of the applicable language-minority group is historically oral or unwritten, the board of elections or political subdivision shall only be required to furnish oral instructions, assistance, or other

information relating to registration and voting.

3. Action for declaratory judgment for English-only voting materials. A board of elections or political subdivision subject to the requirements of this section which seeks to provide English-only materials may file an action against the state for a declaratory judgment permitting such provision. The court shall grant the requested relief if it finds that the determination was unreasonable or an abuse of discretion.

4. Standing. Any aggrieved persons, organization whose membership includes aggrieved persons or members of a protected class, organization whose mission, in whole or in part, is to ensure voting access and such mission would be hindered by a violation of this section, or the attorney general may file an action pursuant to this section in the supreme court of the county in which the alleged violation of this section occurred.

5. This section shall not apply to special districts as defined by section one hundred two of the real property tax law.

Credits

(Added L.2022, c. 226, § 4, eff. June 20, 2025.)

McKinney's Election Law § 17-208, NY ELEC § 17-208
Current through L.2024, chapters 1 to 545. Some statute sections may be more current, see credits for details.

End of Document

McKinney's Consolidated Laws of New York Annotated
Election Law (Refs & Annos)
Chapter Seventeen. Of the Consolidated Laws (Refs & Annos)
Article 17. Protecting the Elective Franchise (Refs & Annos)
Title 2. John R. Lewis Voting Rights Act of New York (Refs & Annos)
McKinney's Election Law § 17-212

§ 17-212. Prohibition against voter intimidation, deception or obstruction

Effective: August 6, 2024

Currentness

1. (a) No person, whether acting under color of law or otherwise, may engage in acts of intimidation, deception, or obstruction that affects the right of voters to access the elective franchise.

(b) A violation of paragraph (a) of this subdivision shall be established if:

(i) a person uses or threatens to use any force, violence, restraint, abduction or duress, or inflicts or threatens to inflict any injury, damage, harm or loss, or in any other manner practices intimidation that causes or will reasonably have the effect of causing any person to vote or refrain from voting in general or for or against any particular person or for or against any proposition submitted to voters at such election; to place or refrain from placing their name upon a registry of voters; or to request or refrain from requesting an early mail or absentee ballot; or

(ii) a person knowingly uses any deceptive or fraudulent device, contrivance or communication that (A) pertains to: (1) the time, place, or manner of any election; (2) the qualifications or restrictions on voter eligibility for such election; (3) any voter's eligibility to vote in any election; (4) the consequences for voting or failing to vote in any election; or (5) a statement of endorsement by any specifically named person, political party, or organization; and (B) impedes, prevents or otherwise interferes with the free exercise of the elective franchise by any person, or causes or will reasonably have the effect of causing any person to vote or refrain from voting in general or for or against any particular person or for or against any proposition submitted to voters at such election; to place or refrain from placing their name upon a registry of voters; or to request or refrain from requesting an early mail or absentee ballot; or

(iii) a person obstructs, impedes, or otherwise interferes with access to any polling place or elections office, or obstructs, impedes, or otherwise interferes with any voter in any manner that causes or will reasonably have the effect of causing any delay in voting or the voting process, including the canvassing and tabulation of ballots.

2. Standing. Any aggrieved persons, organization whose membership includes aggrieved persons or members of a protected

class, organization whose mission, in whole or in part, is to ensure voting access and such mission would be hindered by a violation of this section, or the attorney general may file an action pursuant to this section in the supreme court of the county in which the alleged violation of this section occurred.

3. Remedies. Upon a finding of a violation of any provision of this section, the court shall implement appropriate remedies that are tailored to remedy the violation, including but not limited to providing for additional time to cast a ballot that may be counted in the election at issue. Any party who shall violate any of the provisions of the foregoing section or who shall aid the violation of any of said provisions shall be liable to any prevailing plaintiff party for damages, including nominal damages for any violation, and compensatory or punitive damages for any intentional violation.

Credits

(Added L.2022, c. 226, § 4, eff. July 1, 2023. Amended L.2023, c. 481, § 33, eff. Jan. 1, 2024; L.2024, c. 216, § 12, eff. Aug. 6, 2024.)

Notes of Decisions (1)

McKinney's Election Law § 17-212, NY ELEC § 17-212
Current through L.2024, chapters 1 to 545. Some statute sections may be more current, see credits for details.

End of Document

McKinney's Consolidated Laws of New York Annotated
Election Law (Refs & Annos)
Chapter Seventeen. Of the Consolidated Laws (Refs & Annos)
Article 17. Protecting the Elective Franchise (Refs & Annos)
Title 2. John R. Lewis Voting Rights Act of New York (Refs & Annos)
McKinney's Election Law § 17-218

§ 17-218. Attorneys' fees

Effective: July 1, 2023

Currentness

In any action to enforce any provision of this title, the court shall allow the prevailing plaintiff party, other than the state or political subdivision thereof, a reasonable attorneys' fee, litigation expenses including, but not limited to, expert witness fees and expenses as part of the costs. A plaintiff will be deemed to have prevailed when, as a result of litigation, the defendant party yields much or all of the relief sought in the suit. Prevailing defendant parties shall not recover any costs, unless the court finds the action to be frivolous, unreasonable, or without foundation.

Credits

(Added L.2022, c. 226, § 4, eff. July 1, 2023.)

McKinney's Election Law § 17-218, NY ELEC § 17-218
Current through L.2024, chapters 1 to 545. Some statute sections may be more current, see credits for details.

End of Document

McKinney's Consolidated Laws of New York Annotated
Town Law (Refs & Annos)
Chapter 62. Of the Consolidated Laws (Refs & Annos)
Article 4. Town Boards

McKinney's Town Law § 60

§ 60. Town board constituted

Effective: August 17, 2022

Currentness

1. In every town the supervisor and the town council members shall constitute the town board and shall be vested with all the powers of such a town and shall possess and exercise all the powers and be subject to all the duties now or hereafter imposed by law upon town boards and town boards of health within such towns; but it is not intended to extend the power of said boards or officers within the limits of any incorporated village or city, or in any manner to abridge or interfere with the power and authority of the officers of any such village or city within its corporate limits, except as otherwise provided by law.

2. In any town in which a town justice serves as a member of the town board, such town justice shall continue to serve as a member of the town board until the expiration of their term. Thereafter any town justice shall not be a member of the town board and a town council member shall be elected as a member of such town board in place of such town justice except as otherwise provided by the town board by resolution adopted pursuant to the provisions of section sixty-a of this article.

Credits

(Added L.1976, c. 739, § 2. Amended L.1981, c. 123, § 3; L.2022, c. 513, § 18, eff. Aug. 17, 2022.)

Notes of Decisions (9)

McKinney's Town Law § 60, NY TOWN § 60
Current through L.2024, chapters 1 to 545. Some statute sections may be more current, see credits for details.

End of Document

West's Revised Code of Washington Annotated
Title 29a. Elections (Refs & Annos)
Chapter 29A.92. Voting Rights Act

West's RCWA 29A.92.010

29A.92.010. Definitions

Effective: January 1, 2024

Currentness

The definitions in this section apply throughout this chapter unless the context clearly requires otherwise. In applying these definitions and other terms in this chapter, courts may rely on relevant federal case law for guidance.

(1) "At large election" means any of the following methods of electing members of the governing body of a political subdivision:

(a) One in which the voters of the entire jurisdiction elect the members to the governing body;

(b) One in which the candidates are required to reside within given areas of the jurisdiction and the voters of the entire jurisdiction elect the members to the governing body; or

(c) One that combines the criteria in (a) and (b) of this subsection or one that combines at large with district-based elections.

(2) "Cohesive" means that members of a group tend to prefer the same candidates or other electoral choices.

(3) "District-based elections" means a method of electing members to the governing body of a political subdivision in which the candidate must reside within an election district that is a divisible part of the political subdivision and is elected only by voters residing within that election district.

(4) "Polarized voting" means voting in which there is a difference in the choice of candidates or other electoral choices that are preferred by voters in a protected class or a coalition of protected classes, and in the choice of candidates and electoral choices that are preferred by voters in the rest of the electorate.

(5) “Political subdivision” means any county, city, town, school district, fire protection district, port district, or public utility district, but does not include the state.

(6) “Protected class” means a class of voters who are members of a race, color, or language minority group in the state of Washington, as this class is referenced and defined in the federal voting rights act, 52 U.S.C. 10301 et seq.

Credits

[2023 c 56 § 2, eff. Jan. 1, 2024; 2018 c 113 § 103, eff. June 7, 2018.]

OFFICIAL NOTES

Effective date--2023 c 56: See note following RCW 29A.92.720.

Notes of Decisions (3)

West’s RCWA 29A.92.010, WA ST 29A.92.010
Current with all legislation from the 2024 Regular Session of the Washington Legislature. Some sections may be more current, see credits for details.

End of Document

NEW YORK STATE OF OPPORTUNITY.

Division of Local Government Services

Local Government Handbook

Kathy Hochul, Governor
Robert J. Rodriguez, Secretary of State

A Division of the New York State Department of State

COLLABORATORS			
	TITLE : Local Government Handbook		
ACTION	*NAME*	*DATE*	*SIGNATURE*
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Foreword

Since 1975, the Local Government Handbook has provided a brief history and a comprehensive and authoritative overview of our local, state, and federal governments. Now in its seventh edition, this publication is an invaluable tool for citizens, municipal officials, teachers, students, and anyone who seeks to understand the complexity of state and local government.

New York State has a tradition of home rule authority and providing citizens with a strong voice in their local governments. In order to exercise that voice effectively, it is important to understand how our government and officials function at every level. The New York State Department of State Division of Local Government Services assists local citizens and local officials in providing effective and efficient services.

The Local Government Handbook was made possible through the efforts and contributions of experts working at all levels of state agencies. Their work on this important document is greatly appreciated.

Acknowledgments

The Department of State received generous assistance and information from many state entities in the preparation of this 7th Edition of the Local Government Handbook, including:

- Empire State Development
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- New York State Department of Environmental Conservation
- New York State Department Education
- New York State Department of Transportation
- New York State Thruway Authority and Canal Corporation
- New York State Senate Research Service
- Office of the Speaker of the New York State Assembly
- Office of the State Comptroller
- Office of Real Property Services
- Office of Court Administration

Chapter 1

The Origins of Local Government and the Federal System

Local government in New York has evolved over centuries. The governmental forms created by the people reflect functional concerns and a sustained dedication to basic ideas of representative government.

Although we often speak of three "levels" of government, the United States Constitution mentions only two: the federal government and the state governments. The federal system, however, implicitly includes the idea that the states, in the exercise of powers reserved to them by the United States Constitution, would provide for local governments in ways that would take into account local diversities and needs. To the extent that the states have made such provisions in the form of state constitutional grants of home-rule power to the local units, such as in New York, local governments have become, in fact as well as theory, a third level of the federal system.

The experiences of the millions of people who have lived in this state have provided the raw materials for the creation of present-day social and governmental institutions. This chapter reviews some basic considerations that are relevant to the following questions:

- Why did New Yorkers of long ago create local governments?
- What types of governments did they establish?
- What did they believe about governmental power and its uses?
- How did the land, its climate and its diversities contribute to the shaping of governmental patterns?
- How did New Yorkers mesh their governmental patterns with those of the emerging nation?

1.1 The Heritage of History

A historian of county government will find that the familiar office of sheriff existed in England over one thousand years ago — as did the reeve (tax collector) of the shire or "shire-reeve." [1]

Long before early European settlers began to plan their particular forms of governmental organization in New York State, the Iroquois Confederacy existed as a sophisticated system of government. The Iroquois Confederacy

[1] Readers interested in the history of local government in New York will find informative the "Early History of Town Government" in McKinney's Town law, prepared in 1933 by Frank C. Moore. Moore later became Comptroller and Lieutenant Governor of New York, and his essay appeared in all subsequent editions of Mckinney's Town Law. Also of interest is the "History of the County Law," prepared by James S. Drake as an Introduction for the 1950 edition of McKinney's County Law.

included extensive intergovernmental cooperation and operated effectively from the mouth of the Mohawk River to the Genesee River. The Iroquois had found it advantageous to substitute intertribal warfare and strife for a cooperative arrangement in which each of the six tribes carried out assigned functions and duties on behalf of all. The federal arrangement in the United States Constitution was patterned after the Iroquois Confederacy. The familiar patterns of local government in New York today, however, stem largely from the colonial period.

1.1.1 Colonial Government in New York

Established by the Dutch, the first local governments in New York began as little more than adjuncts to a fur-trading enterprise. Under a charter from the government of the Netherlands, the Dutch West India Company ruled the colony of New Netherland from 1609 until the British seized it in 1664.

At first the Dutch concentrated almost wholly on commerce and trade, particularly the fur trade. As early as 1614 and 1615, they established trading posts at Fort Nassau, near the present Albany, and on Manhattan Island. Serious efforts to colonize began in 1624, when New Netherland became a province of the Dutch Republic. Beginning in 1629, the Dutch established feudal manors called "patroonships" to expedite the effort of permanent settlement. This system bestowed vast land grants upon individual "patroons," who were expected to populate their holdings with settlers who would then cultivate the lands on their behalf.

The Dutch rulers of New Netherland initially did not draw a sharp line between their overall colonial or provincial government and that of their major settlement, which was called New Amsterdam. It was not until 1646 that the Dutch West India Company granted what appears to have been certain municipal privileges to the "Village of Breuckelen" — lineal ancestor of the present-day Brooklyn — located across the East River from New Amsterdam. Fort Orange, which later became the City of Albany, obtained similar municipal privileges in 1662. In 1653 the "Merchants and Elders of the Community of New Amsterdam" won the right to establish what was called "a city government." This was the birth of the municipality which would later become New York City.

The Dutch colonial period lasted for more than 50 years. In 1664, during hostilities leading up to the second Anglo-Dutch War, Peter Stuyvesant, the last Dutch governor, surrendered New Netherland to James II of England, who came to be known as James, Duke of York. The British easily adapted the governments previously established by the Dutch to their own patterns and then further modified them to meet the needs of colonial New Yorkers.

Pressed to name a single source for the present pattern of local government in New York, a historian may cite a number of dates and places and argue that each has validity. However, the most prominent single event in the development of contemporary forms of local government in colonial New York was the "Convention" of delegates, which took place in 1665 at Hempstead, in what is now Nassau County. The purpose of the event was to propose laws for the colony which only the year before had passed from Dutch to British rule. The laws proposed by these delegates were adopted for the most part and came to be called the Duke of York's laws. They recognized the existence of 17 towns and created one county, called Yorkshire. Thus, the beginnings of town and county government in New York reflected colonial policies of the English government, certain Dutch patterns, and British colonial experience.

At a historic "General Assembly of Freeholders" convened in 1683 by Governor Thomas Dongan, participants passed a charter outlining the principles by which the colony ought to be governed. Known as the Charter of Liberties and Privileges, its principles were drawn from the Magna Carta and closely resembled our modern constitutions. Among other important actions, the Assembly divided the province of New York into 12 counties. The county became the basis of representation in the Colonial Assembly and also the unit of administration for the system of courts that was established at the same time. The charter was signed by the Duke of York and then vetoed by him five months later when he ascended to the throne as King James II. He abandoned the throne in 1688 and, in 1691, a new assembly elected under Governor Henry Sloughter passed new statutes reasserting the principles contained in the original charter.

The office of town supervisor also originated at this time in a directive to each town to elect a freeholder, to be called the "town treasurer," "to supervise and examine the publique and necessary charge of each respective

county." It is of interest to note that the original function of this office, called the "town supervisor" after 1703, was to allocate county expenses among the towns. County boards of supervisors and county legislatures developed from the meetings of the colonial town supervisors for the purpose of apportioning county expenses.

In 1686, the British Crown issued charters known as the "Dongan Charters" to the cities of New York and Albany. A century would pass before another city was chartered in New York. The City of Hudson received its charter in 1785 by an act of the State Legislature and thus became the first city to be chartered in the new United States.

It is apparent that many of the basic patterns, forms, and some of the practices of local government in the Empire State already existed at the time of the Revolution. The first State Constitution, which became effective in 1777, recognized counties, towns and cities as the only units of local government.

The village emerged as a fourth unit of local government in the 1790s through a series of legislative enactments granting recognition and powers to certain hamlets (see Chapter 8 [81]). This trend culminated in 1798, when the Legislature incorporated the villages of Troy and Lansingburgh. Neither now exists as a village; Lansingburgh was long ago absorbed into what has become the City of Troy.

1.2 Some Basic Beliefs

Local governments in the Empire State are more than merely products of four centuries of history; they also reflect basic beliefs and perceptions that are deeply held by past and present residents of the State.

There is a fundamental perception, widely shared among Americans, that although governmental power can be used to benefit the people, it can also be used to harm them. This awareness has fostered a firm conviction in New Yorkers that the people must not only promote the desirable uses of governmental power, they must also carefully protect themselves from the abuse of such power.

For this reason, many protective mechanisms have been put in place to hedge the constitutional and statutory provisions that authorize the use of power for specific purposes. These mechanisms are designed to assure that power will only be used for generally acceptable purposes and in ways which will not infringe unduly upon either the dignity or the established rights of the individuals, on whose behalf the power is presumed to be exercised.

Later chapters will identify and describe such protective measures as the judicial system, due process of law, certain constitutional protections, instruments of direct democracy (such as referenda, citizen boards and commissions), and other mechanisms of representative self government — all of which reflect a basic belief that we must subject governmental power to tight controls if we want to protect the people against tyranny, whether it is the tyranny of a king, a dictator or a political majority.

The people's strong attachment to representative government has greatly influenced the organization and operation of local government. The Charter of Liberties and Privileges (also known as "Dongan's Laws") declared in 1683 that the supreme legislative authority, in what was then the colony, "under his Majesty and Royal Highness should forever be and reside in a Governor, Council, and the people met in General Assembly." The Council and the Assembly, thus endowed with supreme legislative authority, constituted a bicameral (two-chambered) legislature in which at least the Assembly reflected a belief in representative government. In this particular case, representation was by counties. From the very earliest days, the forms of local government in New York have demonstrated the people's firm belief in representative government.

In addition, New Yorkers have always regarded government in a very practical way. Conceiving of governments as instruments to carry out duties and functions to meet specific needs, they created local governments to carry out particular activities. The Constitution, the statutes, and the charters of the cities, a few villages and some counties spell out these duties and functions.

Since New Yorkers have typically created local governments to meet generally recognized needs, it follows that they would see the forms, powers and operational arrangements of local governments as devices to accomplish

specific ends. Constitutional amendments, changes in state laws, and local legislative and administrative action have all facilitated the adjustment of form to function. Such measures have kept local governments responsive to the practical needs of the people they serve. Of course, it is not always easy to make such adjustments and later chapters will identify and describe tensions which develop when adjustments lag behind perceived needs.

1.2.1 The Land and the People

The functions of local governments reflect not only the history and beliefs of the people, but also their interests, how they go about the business of conducting their lives and the characteristics of their physical environment.

New York State encompasses an enormous variety of natural environments. While many local governments on Long Island are concerned with beach erosion and mass transit, those of the North Country often focus on such issues as winter recreation development and snow control.

New York State's location and geography has influenced the shaping of local government in several fundamental ways. Occupying a prominent position among the 13 original colonies, New York firmly held its position as the nation expanded over the centuries that followed. More than one-third of the battles of the American Revolution were fought in New York, including two decisive battles in the Town of Stillwater and the resulting British surrender at Saratoga, which collectively became the turning point of the war. In New York City, the Federal Union came into being in 1789.

From the start, New York has been the nation's most important roadway to its interior and its primary gateway from and to the rest of the world. The harbor of New York City and the waterways, railroads and highways of the state have provided the arteries over and through which a large portion of the nation's commerce has flowed. Airline route maps for the United States and the world illustrate the convergence of transportation in New York State and New York City. New York's natural resources and its people have maintained New York's standing as one of the nation's largest manufacturing states, and as the undisputed financial center of the nation.

If there is a single attribute that characterizes New York, it is diversity. Montauk Point at the eastern tip of Long Island, Rouses Point at the state's northeastern corner, and Bemus Point near the southwestern corner share little beyond their designation as "Points," and all abut bodies of water which are themselves diverse — the Atlantic Ocean, Lake Champlain and Chautauqua Lake, respectively.

1.2.2 The Land

New York has an area of 53,989 square miles, of which 6,765 square miles are water. Two masses of mountains — the Adirondacks and the Catskills — stand out in New York's topography, while Long Island, a 1,401-square-mile glacial terminal moraine, juts 118 miles into the Atlantic Ocean from the mouth of the Hudson River at the tip of Manhattan Island. New York is additionally unique in that its 75 miles of shoreline on Lake Erie, more than 200 miles on Lake Ontario and approximately 165 miles on the Atlantic shore make New York the only state that is both a Great Lakes state as well as an Eastern Seaboard state.

The waters of New York drain literally in all directions: southward to the Hudson, Delaware and Susquehanna Rivers; westward to Lake Erie; and northward to Lake Ontario and the St. Lawrence River. Also, a small part of the state's southwest corner lies in the Mississippi River watershed. Those New York waters drain eastward into the Allegheny River and onward into the Ohio River. The Ohio River empties into the Mississippi River, and ultimately, New York waters discharge into the Gulf of Mexico.

The rivers and waterways of New York greatly influenced the development of local government in the state. Settlement followed the waterways and hence river valleys saw the earliest local governments. Most prominent among the rivers, the Hudson is navigable by ocean-going vessels for nearly 150 miles inland to Albany. Also near Albany, the Mohawk River and the Erie Barge Canal extend westward from the Hudson River to form a water transportation route from eastern to western New York. In the southern tier region of the state the Susquehanna River, and

to some extent the Delaware River, provided waterways along which commerce, trade and settlement moved. In the northern and northwestern parts of the state, Lakes Erie, Ontario, and Champlain, as well as the St. Lawrence River provided additional avenues for development.

1.2.3 The Climate

Meteorologists describe the climate of New York State as "broadly representative of the humid continental type which prevails in the northeastern United States, but its diversity is not usually encountered within an area of comparable size." [2] This means that New York enjoys a climate of extremes — hot in the summer and cold in the winter.

Immediately east of Lake Erie, in the Great Lakes plain of western New York, and in those areas influenced by the Atlantic Ocean, such as Long Island, winter temperatures are often substantially more moderate. Long Island and New York City, for example, record below-zero temperatures in only two or three winters out of ten.

To understand the significance of this climatic diversity one need only glance at the average length of the frost-free season, which varies from 100 to 120 days in the Adirondacks, Catskills and higher elevations of the western plateau, to 180 to 200 days on Long Island. With its obvious implications for the agricultural and other economic interests of New Yorkers, the climate directly affects local government. In parts of the state that are referred to as "snowbelt" regions, the average yearly snowfalls exceed 90 inches. In these areas, local government must devote a major portion of its time and municipal budget to snow control on the highways and related challenges of highway maintenance.

1.2.4 The People

Nowhere is the essential diversity of New York more clearly demonstrated than in the ethnic and national origins of its people. From the earliest days of colonial settlement, the multiplicity of people coming to the great harbor at the mouth of the Hudson River nurtured the growth of the nation's largest city. Immigrants from all over the world flowed through the vast funnel of New York City. While many went on to populate the nation, others remained residents of the city or the state. The languages of the world continue to echo on the streets of Manhattan.

For 16 decades prior to 1970, more residents of the United States lived in New York than in any other state. After 1980, New York was supplanted by California as the most populous state Based on 2010 Census data, the New York population of 19,378,102 now ranks third to the California population of 37,253,956 and the Texas population of 25,145,561.[3]

The downstate counties — Nassau, Suffolk, Westchester and the five boroughs of New York City — account for over 61.7 percent of the state's population.

Table 1.1 [6] reveals the diverse sizes of New York's towns and villages. The largest number of towns and villages fall in the 500 to 2,499 population grouping. However, some New York villages have more than 25,000 people and some towns have populations over 50,000.

[2] Climate of New York, U.S. Department of Commerce, NOAA, "Climatography of the United States," No. 60, p.2.

[3] With a 2000 Census population of 18,976,457, New York now ranks third to California and Texas, which have 2000 Census populations of 33,871,648 and 20,851,820, respectively.

Table 1.1: Distribution of New York Towns and Villages by Population Category.[5]

Population	Towns Number	Towns Percent	Villages Number	Villages Percent
Up to 500	31	3.3	73	13.2
500 - 2,499	381	40.9	270	48.6
2,500 - 4,999	213	22.8	103	18.6
5,000 - 9,999	151	16.2	74	13.3
10,000 - 14,999	53	5.7	14	2.5
15,000 - 19,999	24	2.6	10	1.8
20,000 - 24,999	15	1.6	3	0.5
25,000 - 49,999	43	4.6	7	1.3
More than 50,000	21	2.3	1	0.2
Total	933	100	555*	100

Source: 2010 Census of the Population, courtesy of the Empire State Development.

- As of December 31, 2017 the number of villages were 536

These population statistics and those of Figure 1.1 [7] and Table 1.2 [7] reveal a great deal about local government activity. In some areas of the state, the local governments habitually deal with issues of expansion and growth. They must provide basic public services and amenities under conditions of rapid expansion, and somehow finance these activities. In other areas, local governments oversee static communities where little or no growth is taking place. A few areas face issues associated with contraction, where, for instance, excess school facilities are visible in communities with declining populations of school-age children.

[5] Source: 2010 Census of the Population, courtesy of the Empire State Development.

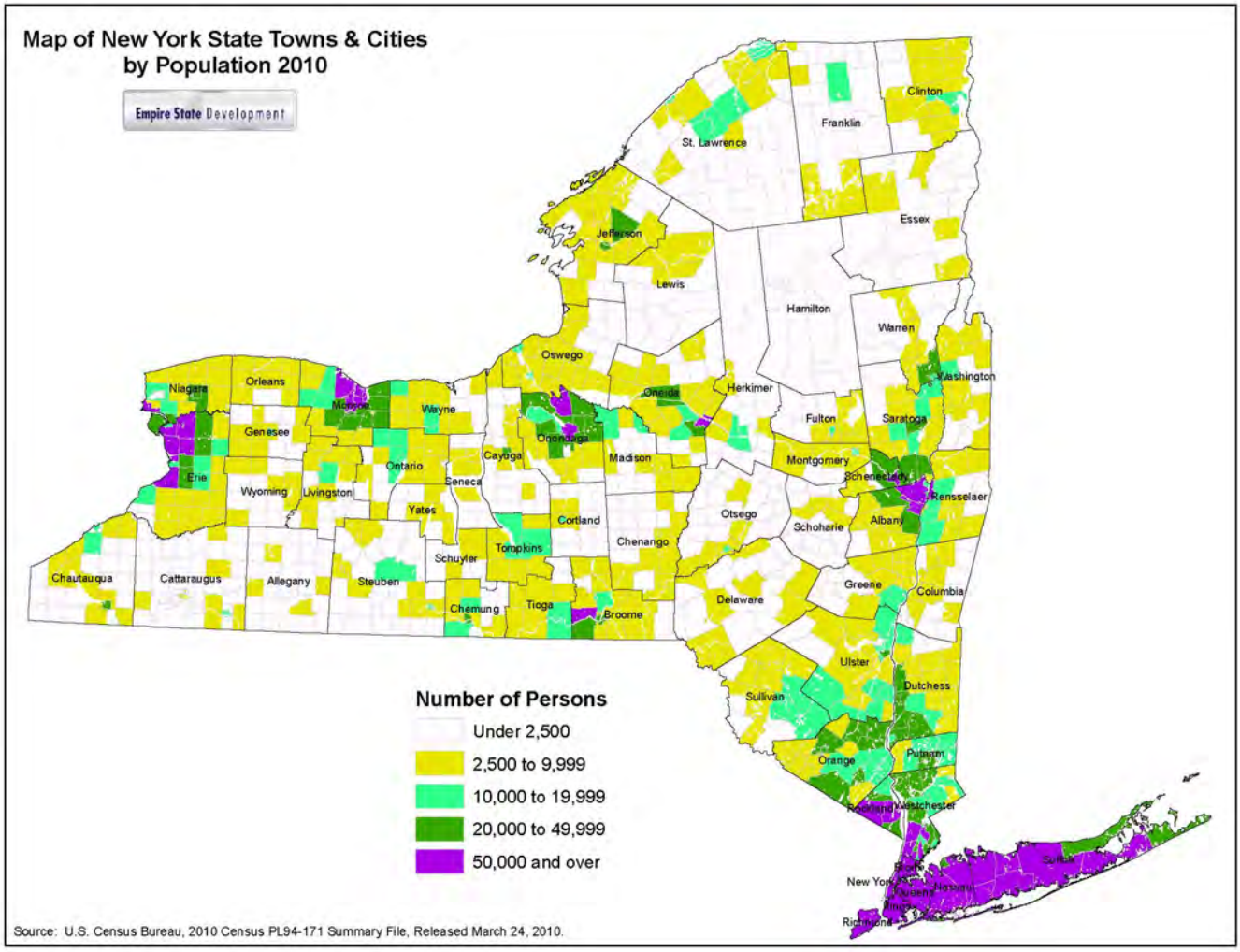

Figure 1.1: New York Counties with Population

Table 1.2: Population Change by Type of Municipality, 2000 - 2010. [7]

	2000	2010	Percent Change	Percent of Total Population
Towns [8]	8,692,132	8,958,225	3.1	46.2
Villages	1,871,947	1,905,581	1.8	9.83
Towns Outside of Villages	6,820,185	7,052,644	3.4	36.39
Cities other than NYC	2,265,897	2,235,187	-1.4	11.53
New York City [9]	8,008,686	8,175,133	2.1	42.19
American Indian Reservations	7,213	9,557	32.5	0.05
Total	18,976,811	19,378,102	2.1	100.0

1.2.5 The People's Interests

If government does indeed exist to serve the practical needs of the people, it follows that local governments should reflect the desires of the people and devote efforts to their concerns.

New Yorkers, like most people, are vitally concerned with issues related to making a living. Government at all levels has a role in maintaining an environment that is conducive to such pursuit. Accordingly, some basic economic statistics concerning New Yorkers are in order.

More than one-sixth of those employed in New York State work for federal, state or local government. Whether or not employees of local school districts are included, local governments employ far more people in New York State than the state and federal governments combined.

The total non-agricultural labor force of the state in October of 2011 was estimated at 8,727,000; a 176,400 job increase over October of 2001. Service industries, including wholesale and retail trade, financial, transportation and other services, lead the way with over 89 percent of the non-agricultural employment in New York State.

New York State agriculture is surprisingly diverse and vibrant. Agriculture is not only a vitally important element of New York's total economic life, it is often times the socio-economic backbone of New York's rural communities. The positive impact that New York State agriculture has on the local economic multiplier estimates far exceeds the local economic multipliers of many other employment sectors.[10] Agriculture also provides many valuable quality-of-life benefits such as open space, habitat protection, agri-tourism and recreational opportunities in the form of hunting, fishing and snowmobiling. In 2007, there were 36,350 farms in New York State, comprising 7.2 million acres of land or about 25 percent of the state's land area. The total value of agricultural products sold in 2007 was $4.4 billion dollars, which represents an increase of 51 percent over 1997 numbers, more than half of which was derived from dairy cattle and milk production.[11]

[7] SOURCE: 2010 Census of the Population, cited in the 2005 Annual Report, Office of the State Comptroller

[8] Includes villages.

[9] Includes the five boroughs of New York City.

[10] Policy Issues in Rural Land Use, Vol. 9, No. 2 December, 1996. Department of Agriculture, Resource and Managerial Economics-Cornell Cooperative Extension.

[11] New York State Agricultural Statistics 2005-2006 Annual Bulletin, printed and distributed by NYS Department of Agriculture and Markets.

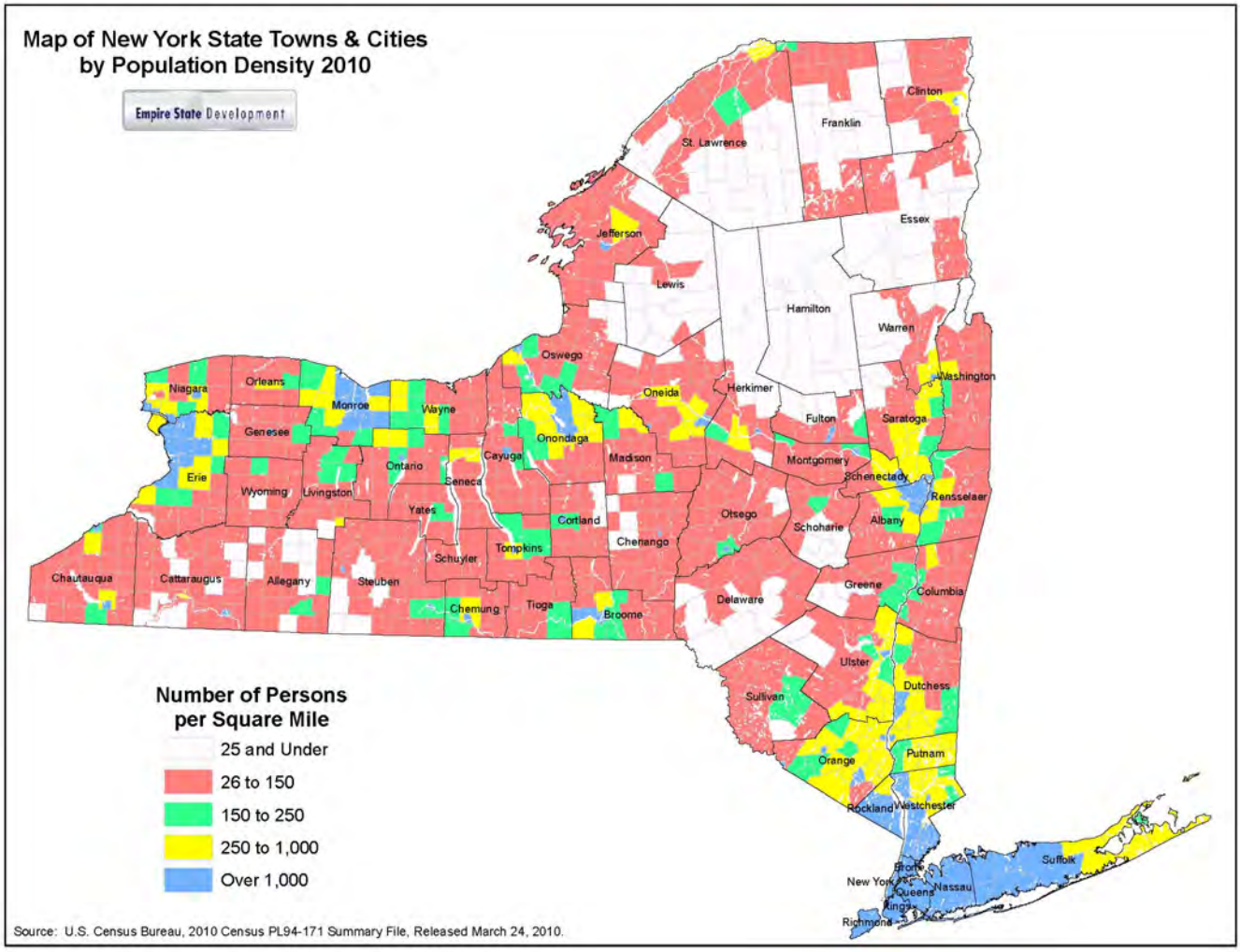

Figure 1.2: Map of New York Towns and Cities by Population Density

1.3 The Federal System

Among the factors that have influenced the nature and development of local government in New York, one of the most important has been the state's role as a member – a charter member – of the federal union called the United States. The state and its local governments are an integral element of the federal system.

At the time the people of the United States were creating the Federal Union in 1787-1789, they deeply feared great concentrations of governmental power. Accordingly, the United States Constitution established more than one principal center of sovereign power.

Although the United States Constitution does not mention local governments, the constitutional fathers were well aware of its existence and importance; it is clear that they saw it as a vital and continuing element of American life. The First Congress made the intention of the framers explicit in 1789 when it proposed the Tenth Amendment – all powers which were not delegated to the national government would rest with the states.

Among other reserved powers, the states were free to subdivide not only their territory, but also their powers, authority, and functional responsibilities, as they believed appropriate to their unique needs and requirements.

Accordingly, every state in its own way has provided for local governments and has endowed them with relatively independent authority to deal with issues that are regarded as local in nature. This has been done within limitations and according to applicable procedures set forth in the United States Constitution. The reapportionment of county legislative bodies to conform with the Equal Protection clause of the 14th Amendment (described in Chapter 5 [45]) provides a clear example.

When, as in New York, the people of a state have endowed their local governments with extensive home-rule authority through State Constitutional provisions, it is possible to regard the local government as a third level of the federal system. By delegation from the people of the state, the local government constitutes a third center of sovereign power, energy and creativity.

1.3.1 The Federal Idea

Local government in New York is more than a mechanical device or a set of legal formulas that channel political power toward specific objectives. It includes beliefs and values that reflect basic ideas and it embodies centuries of practical experience.

In 1789, the people of the several states were aware of and asserted their differences and diversities. If they were to accept a central government, it would have to recognize that the states would retain and exercise powers and decision-making authority in affairs of immediate and direct importance to the people in the places where they lived and worked. The American people still hold firmly to the idea of federalism. It operates both between the national government and the 50 state governments on the one hand, and between the individual states and their local governments on the other.

The federal system should not be viewed exclusively, however, as a means for limiting the concentration of power. It also permits the people to use power most effectively to deal with problems that are special and unique to different regions of such a highly diverse land.

By leaving the states free to organize and empower local government in response to the demands and needs of local areas, the constitutional framers gave a vast nation the capacity to achieve necessary unity without sacrificing useful diversity. Fostering the unity necessary to have a nation and giving free play to diversity at the same time is the essence of the federal system. Over two hundred years of American history demonstrate the suitability of local government for the nation as a whole, and for New York State in particular.

1.3.2 The National Government

A thorough description of the national government would comprise several lengthy books. Here are some fundamental facts:

First, the national government is a government of “restricted” powers. Over the years, presidential, congressional and judicial interpretations have found constitutional authority for adjusting and broadening the specific powers granted to the national government into functional areas that the framers could never have foreseen. Nonetheless, the Tenth Amendment of the United States Constitution, which reserves powers to the states, is still applicable.

Article 1, section 8 of the Constitution grants Congress the power “to regulate Commerce with foreign nations, and among the several states. . . .” Without formal amendment, this has sufficed to accomplish such diverse national purposes as the assurance of orderly air travel, electronic communication by radio, television and (potentially) the internet, and the maintenance of orderly labor-management relations in the nation’s industries.

Because the national powers alone cannot direct many areas of governmental activity efficiently or effectively, there has been a clarification — perhaps even a strengthening in some cases — of the roles of states and local governments in the federal system. We can see this, for instance, in some aspects of governmental action regarding environmental pollution. The national government has not been urged to assume the task of picking up solid

waste matter from the curbs in front of homes throughout the country. Nor is this an appropriate matter for the states. The duty to collect solid waste is, by general agreement, a function of local government.

What, then, should the national and state governments do in the area of solid waste management? The national government sets standards, conducts and finances research to develop new technologies for waste disposal, and provides financial assistance to utilize the new technologies to meet the standards. State governments match the research findings to their particular needs, develop specific regulations and operational procedures to meet the standards, devise optional organizational arrangements, and provide technical and financial assistance to local governments with issues related to solid waste management.

Collaborative governmental action can also best handle many other areas of public service.

1.3.3 The Role of the States and Local Government

The states have “residual” powers. In the words of the Tenth Amendment of the Constitution, the states have “the powers not delegated to the United States by the Constitution, nor prohibited by it....”

Some people assert that the states have “lost” power to the national government, as the latter has moved more and more into areas once regarded as the exclusive province of the states.

To some extent this may be true, but it is also true that state activity has grown. The situation is not so much one of relative gains or losses of power as it is of expanding governmental roles at all levels.

Recent experience shows that even as societal issues become nationwide in scope, they often retain state and local dimensions that make it desirable for the states and local governments to act in concert with the national government.

More and more, contemporary federalism has become a cooperative arrangement whereby national, state and local governments direct their energies toward common objectives. Consider the great highway network that now spans the nation. National, state and local governments all help to finance, build and maintain roads.

Any recent state or municipal budget includes a range of joint national-state-local actions that extends into familiar areas of modern life - public, health, social services, education, environmental pollution, and land-use planning. Local government officials increasingly find themselves cooperating in enterprises where they must coordinate their individual roles with officials who are similarly engaged at other levels of government.

1.3.4 The Contemporary Federal System

For more than a century and a half, people sought to clearly distinguish what the national government could do from what the states could do. The United States Supreme Court filled many shelves with learned discourses and decisions related to this purpose.

In recent decades, relationships within the federal system raise less questions of relative powers, and more questions regarding the portion of an overall governmental objective that each level of government can achieve. Since contemporary social problems have many facets and dimensions that cross governmental lines, it is no longer productive to view the federal system as an arena where antagonists contend for power. It is far more useful to consider which government can perform a given function, activity or duty and produce the best results.

The contemporary questions of federalism ask: how best to spread the costs of certain types of government programs among the tax-payers of the whole nation, how best to channel the dwindling natural resources of the nation to purposes of greatest benefit to all, how best to ensure that the powers of government are not used unfairly for the benefit of one segment of the society at the expense of others, and how best to ensure that citizens have a meaningful role in making decisions that are important to them.

In some ways the contemporary federal system operates in the way the framers envisaged. But we look at the system somewhat differently now than we did in the past. The root question of the national-state relationship has always been the extent to which the system would be centralized or decentralized. Today we often answer this question in terms of how much centralization or decentralization is necessary or desirable to meet agreed upon general objectives.

For local officials, one of the most significant attributes of the contemporary federal system is the array of federal financial grant programs that have been authorized by Congress, especially since World War II. The Catalog of Federal Domestic Assistance, https://www.cfda.gov/, available from the Superintendent of Documents, contains more than 1,000 separate federal aid programs. Many, though not all, are available to local governments. The fact that a program appears in the Catalog does not necessarily mean that funds are readily available. Making a federal grant program operational involves three necessary steps. Congress must enact legislation that "authorizes" a relatively large amount of money for the program. Congress must then appropriate all or part of the authorized amount — usually a considerably smaller figure than the full authorization. Finally, the President must release the appropriated funds through the federal budgetary control mechanisms for administration by the designated federal agency.

In recent years, many federal categorical assistance programs have been consolidated into block grants in response to demands for a simpler aid system and greater flexibility in state and local use of federal funds. Despite the continued consolidation of domestic assistance funding into block grants, the dollar amounts allocated to various programs have been continually reduced.

1.3.5 The Future of the Federal System

The resolution of public problems often requires a multi-pronged approach that the federal system not only makes possible, but facilitates. Many of our challenges can only be overcome by focusing the efforts of people at all levels. This belief has renewed the interest in various forms of decentralization, both of authority and of capacity to deal with specific problems. At the same time, it is realized that popular participation in community decision making should always be encouraged in an increasingly pluralistic society.

Proper functioning of the federal system requires citizen participation, continual patience and compromise, and toleration of diverse views and approaches. The federal system of government is far from perfect. However, its inclusion of checks and balances, diffusion of authority over several levels, and paramount respect for overarching constitutional principles, makes it the strongest bulwark against tyranny that has ever been seen in the world.

Chapter 2

The State Government

Government in New York State is essentially a partnership between the State and the local units of government — cities, towns and villages. All of the elements of the State government — the Legislature, the office of the Governor, the courts and the vast administrative structure — are engaged in activities for which the local governments also share responsibility. To understand local government fully, it is necessary to gain a basic understanding of the State government and its far-reaching activities.

Our federal system of government divides responsibilities between the national and state governments. The states, in turn, delegate much power to local governments. The entire system calls for fiscal and political accountability at each government level — from the White House to the village hall.

The interdependence and interrelationships among the Office of the Governor, the State Legislature, state agencies and the local governments are important to know. We must understand the grants of authority, the scope of jurisdiction, the organization and the operative processes of the executive, legislative, judicial and administrative elements of state government in relation to the other elements and to the local government function. The Governor makes policy and provides administrative leadership and direction; the Legislature also makes policy and implements it by enacting legislation and appropriating funds. State agencies carry out the actual programs of state government, and they act as intermediaries and close working partners with local governments. By providing a check and balance on the system, the courts also play an integral part in the operation of state and local government. We will discuss the courts in the following chapter.

2.1 The Legislature and the Legislative Process

The Constitution of the State of New York vests the lawmaking power of the state in the Legislature. It is a bicameral, or two-house, legislative body consisting of the Senate and the Assembly. Bicameralism in the United States today has two major roots: the English Parliament and the “Great Compromise,” which was advanced by the State of Connecticut at the Constitutional Convention of 1787. This compromise resulted in a Congress in which all states have equal representation in the Senate and representation roughly proportional to population in the House of Representatives.

2.1.1 Composition

Article III, section 2 of the State Constitution prescribes the number and terms of senators and assembly members. The number of senators varies, but there must be a minimum of 50. At present the Senate membership numbers

63.[1] Elected for two-year terms, its members are chosen from senatorial districts established by the Legislature.[2] The presiding officer is the Lieutenant Governor, who may not participate in debates and may vote only in the case of a tie. This tie-breaking vote applies only to organizational and procedural matters and may not be exercised on legislation since constitutionally no bill can become law "…except by the assent of a majority of the members elected to each branch of the legislature." [3] The Lieutenant Governor is not regarded as a member of the Senate. In the absence of the Lieutenant Governor, the presiding officer is the President pro tem, whom the Senate chooses from its own membership, or the President pro tem may designate another member to serve as presiding officer. When the presiding officer is a duly elected member of the body, he or she retains the right to vote on all matters.

The State Constitution specifies that the Assembly shall consist of 150 members chosen from single-member districts. Assembly members are elected simultaneously with senators for a term of two years. The presiding officer of the Assembly is the Speaker, who is elected by members of the Assembly.

2.1.2 Eligibility

Article III, section 7 of the State Constitution requires that legislators be citizens of the United States, state residents for at least five years, and residents of the district they represent for at least one year prior to their election. The Constitution does not specify a minimum age requirement for members of the Legislature, but the statutes provide that "No person shall be capable of holding a civil office who shall not, at the time he shall be chosen thereto, have attained the age of eighteen years." [4]

2.1.3 Compensation

Article III, section 6 of the State Constitution allows the Legislature itself, by statutory enactment, to establish rates of legislative compensation. Salary is paid on an annual basis and provision is made for reimbursement of expenses. Neither salary nor any other allowance can be altered during the legislative term in which it is enacted.

2.1.4 Dual Office Holding

The State Constitution bars legislators from accepting, during the term for which they are elected, a civil appointment from the Governor, the Governor and the Senate, the Legislature, or from any city government if the office is created or if its compensation is increased during the term for which the member has been elected.[5]

The Constitution also provides that a legislator elected to a congressional seat or accepting any paid civil or military office of the United States, New York State (except as a member of the National Guard, Naval Militia or Reserve Forces), or any city government shall vacate his legislative seat.

2.1.5 Internal Procedures

The State Constitution contains provisions regarding the general organization of the Legislature. Each house: determines its own rules; judges the elections, returns and qualifications of its members; chooses its own officers;

[1] State Law § 123.

[2] Please note that a concurrent resolution proposing an amendment to the State Constitution on legislative redistricting is now being considered. Article III, § 5-b is a proposed Constitutional Amendment that would authorize an Independent Redistricting Commission composed of 10 appointed members who would determine the district lines for congressional and state legislative offices. The proposal has been passed by the Legislature in 2012 by bill A.9526 and in 2013 by bill A.2086 and will become law if approved by vote of the people in November 2014.

[3] N.Y.S. Constitution, Article III, §14; see also Public Officers Law, §3.

[4] See N.Y.S. Constitution, Article VII; Public Officers Law, §3.

[5] N.Y.S. Constitution, Article III, § 7.

keeps and publishes a journal of its proceedings; and keeps its doors open except when the public welfare may require otherwise.

2.1.6 The Legislative Process

The Legislature convenes annually in regular session on the first Wednesday after the first Monday in January. The Legislature, or the Senate alone, may also be convened in special session at the call of the Governor or upon presentation to the Temporary President of the Senate and the Speaker of the Assembly of a petition signed by two-thirds of the members of each house of the Legislature.

2.1.6.1 Introduction of Bills

The introduction of a bill starts the formal legislative process. In general, members of the Legislature may introduce bills, which often appear simultaneously in both the Senate and the Assembly, beginning on the date the Legislature convenes. However, under Article VII of the State Constitution the Governor can introduce his Executive Budget bills without legislative sponsors. Bills may be presented for "prefiling" in the fall of an even numbered year for formal introduction when the Legislature convenes the following January, which will mark the start of a new two-year legislative term. Budget and appropriation bills that the Governor has submitted pursuant to section 3 of Article VII of the Constitution are delivered on or before the first day of February in each gubernatorial election year, and on or before the second Tuesday following the first day of the annual meeting of the legislature in all other years. The Temporary President designates the final day for unlimited introduction of bills in the Senate in each session. In the Assembly, the final day for the unlimited introduction of bills is the first Monday four weeks before the scheduled end of the Legislative session in the annual legislative calendar in the second year of the term of the Assembly. After that, a bill can only be introduced by the Committee on Rules, by message from the Senate or, with the consent of the Speaker, by members elected at a special election who take office on or after the first Tuesday in May. Otherwise, bills may be introduced at any time by unanimous consent of the House.

2.1.6.2 Committees

The rules of each house provide for the establishment of standing committees to consider and make recommendations concerning bills assigned to the committees according to the subject matter, area affected or specific function to which the bills relate. A bill introduced in the Senate or Assembly is first referred to a standing committee unless, by unanimous consent, it advances without committee reference. A bill begins its course through the Legislature when a majority of the committee membership votes it out of committee.

2.1.6.3 Amendment

Bills may be amended an unlimited number of times. In either house the sponsor may amend and recommit a bill in committee, or the committee may report the bill with amendments. Either house may amend a bill even after it has passed in the other house.

The originating house must concur on amendments added by the second house and repass the bill as amended before it may be transmitted to the Governor. Each time a sponsor amends a bill, it adds a letter of the alphabet, beginning with "A," to the bill number. Either house may substitute, on a motion from the floor, an identical bill from the other house.

2.1.6.4 Action by the Governor

Ordinarily the Governor must sign a bill which has passed both houses of the Legislature before it becomes a law. While the Legislature is in session, the Governor has 10 days, excluding Sundays, to approve or veto a bill. If the Governor signs the bill, or does not take action within the 10 days, the bill becomes a law. If the Governor vetoes the bill, it dies unless it is repassed with the approval of two-thirds of the members of each house in which case it becomes a law notwithstanding the veto.

All bills passed or returned to the Governor during the last 10 days before the Legislature finally adjourns are treated as "30-day" bills. On such bills, the Governor has 30 calendar days, including Sundays, after the Legislature adjourns, within which to act. If the Governor does not act on a bill during the 30-day period, it does not becomes a law, but is deemed vetoed. Such bills are said to have been "pocket vetoed", since the Governor is not required to act upon them and does not have to give reasons for his or her failure to act.

2.1.7 Constitutional Amendments

A concurrent resolution proposing an amendment to the State Constitution is considered by the Legislature in the same manner as a bill. The Legislature must, however, transmit the proposed amendment to the Attorney General for an opinion as to its possible effect upon other provisions of the Constitution. The Attorney General must return the proposal within 20 days. Failure of the Attorney General to render an opinion does not affect the proposal or action thereon. If adopted by both houses, it is sent to the Secretary of State for filing and publication prior to the election of a new Legislature. No action by the Governor is required. The proposal must again be submitted to the next succeeding Legislature. If adopted a second time, it is submitted to the people for consideration and vote. If approved, it becomes part of the Constitution as of the following January first.

A concurrent resolution ratifying a proposed amendment to the United States Constitution is treated in the same manner as a bill. If adopted by the Legislature, the resolution is delivered to the New York State Secretary of State, who forwards it to the United States General Services Administration.

2.1.8 Sources of Legislation

A characteristic of our relatively open society in the United States is that an idea for legislation, and indeed a bill itself, may originate from almost any source. Sources of legislative proposals include the Governor's annual legislative program, the legislative programs of the various state departments, individual legislators, special interest groups, municipal associations, local governments, individual citizens and various committees of the Legislature.

2.1.9 Legislation — Local Government Role

The legislative process provides local officials and the public with the opportunity to express their views on pending legislation to the Legislature and the Governor. Individuals can have an impact on legislation; it does not take an accomplished lobbyist to point out to legislators and legislative leaders the advantages or deficiencies of a particular bill. Officials and citizens alike should not be dissuaded from making their views known merely because they are unfamiliar with the legislative process. Local officials can turn to their municipal associations for guidance on legislative matters, and citizens have the opportunity to work with an array of public and special interest groups.

In many cases, the task of making one's views known may begin before specific legislation has been introduced. Legislative commissions and committees frequently hold public hearings on particular problems at which the views of public officials and citizens are sought. Also, individual legislators often actively seek out the views of their constituents as to needed legislation.

The time to make one's views known about a particular bill is while it is under consideration by the Legislature, particularly while the bill is in committee. Written comments given to the committee's chairperson, with sufficient copies for committee members and staff, will help accomplish this purpose.

After a bill is reported out of committee, getting an opinion across may be increasingly difficult, because, if for no other reason, a vast number of bills come before each house. At this point it is best to direct comments to the leaders of each house. Anyone wishing to express views on a bill should remember that even after a bill has passed one house prior to becoming law, the other house must consider it, first in committee and then on the floor. After a bill has passed both houses, comments should be directed to the Governor or his or her Counsel. Here, again, time is of the essence. If passed early in the session, the Governor has 10 days from the time the bill is delivered to him or her in which to sign or veto it.

In the Assembly, the news media and the public are provided access to all standing committee meetings. The committee chairpersons have the option to close meetings or hold executive sessions in accordance with the Open Meetings Law, but roll call votes must be available to the press and to the public as soon as practicable. The public may also check committee attendance records. The Assembly public information office provides the public with a variety of materials relating to standing committees (schedules of meetings, hearings, etc.), sponsor's memoranda on bills, transcripts of debates, daily calendars and other relevant information. The Assembly also maintains a website.

The Senate rules require a great deal of transparency about actions taken by the Senate, its members and its committees. These rules provide that all committee meetings must be open to the news media and the public. Additionally the committee meetings are webcast and archived (available after the meeting is over) on the Senate Standing Committee website (although committee chairpersons may call special closed meetings in accordance with the Open Meetings Law). The rules also provide that agendas for committee meetings must be made available to the news media and to the public, the Thursday prior to the meeting and provide that standing committees must serve all year. The Senate Journal Clerk's office provides, or helps the public to obtain, materials similar to those available from the Assembly Public Information Office. The Senate also maintains a website, which has public information about bills introduced, committee actions, and provides access to all hearings, roundtables, committee meetings and reports and information of interest to the public. Both houses provide a telephone "hotline" service during sessions, from which anyone can obtain information on the current status of any bill.

2.2 The Governor

The Governor is the central figure in the State's public affairs. The Governor initiates programs and executes them; guides the Legislature; appoints and removes key officials; and represents the state and its people. The Governor has a very strong role in the State of New York, since the office includes policy development, legislative leadership, executive control and sovereign responsibilities.

2.2.1 Policy Development

The policymaking role derives from the Governor's responsibilities and position as chief executive officer of the state. The role of chief policymaker is therefore more implied than explicitly stated in either the State Constitution or other state laws. As the state's activities have grown, the Governor's concerns have become broader. Today they include economic and community development, transportation, education, environmental conservation, health, criminal justice, drug abuse, housing and other matters affecting daily life. The people look to the Governor for leadership and direction in these areas, but the Constitution does not explicitly vest the office with such powers. The Constitution mandates that the Governor annually present a "State of the State" message and an executive budget to the Legislature.[6]

[6] N.Y.S. Constitution, Article IV, § 3.

2.2.2 Legislative Leadership

Legislative authority is often required to implement executive policy proposals. To achieve implementation, the Governor has substantial constitutional, statutory and other less-formal resources. The Governor not only has influence with legislators and with the public, but he or she also has constitutional authority to convene and specify the agenda of special legislative sessions. Via messages of necessity, the Governor also has the power to clear bills for consideration. With those powers, the Governor has a key role in establishing the agenda for decision making and in shaping those decisions. The Governor serves as a public leader as well as the chief administrator of the State of New York.

2.2.3 Executive Control

The State Constitution provides that "the executive power shall be vested in the Governor," who "shall take care that the laws are faithfully executed." [7] The Constitution also empowers the Governor to appoint and remove the heads of most state agencies and to propose the budget. These provisions form the basis for gubernatorial direction of state activities.

The executive budget is perhaps the strongest managerial tool that the Constitution provides the Governor. Since 1927, Article VII of the New York Constitution has conferred on the Governor initial responsibility for proposing to the Legislature a coherent statewide plan for government spending. Under this system, the State's budget originated with the Governor, and he or she must submit to the Legislature proposed legislation, including "appropriation bills," to put his or her proposed budget into effect. The Legislature may not alter an appropriation bill the Governor has submitted, except to strike out or reduce items. The Legislature may, however, add items of appropriation, provided that each such item is stated separately and distinctly from the original items and that each refer to a single object or purpose. "Such an appropriation bill shall when passed by both houses be a law immediately without further action by the governor, except that separate items added to the governor's bills by the legislature shall be subject to [the governor's line-item veto]." Gubernatorial direction over administrative agencies centers in the Division of the Budget, which both recommends to the Governor how much state agencies should be allowed in appropriations, and exercises considerable authority over how agencies spend the funds appropriated by the Legislature. The Governor's specific constitutional powers for administrative control, however, are not extensive and do not include complete administrative and managerial powers. Constitutionally, the Governor does not control the entire executive branch. Both the State Comptroller and the Attorney General are popularly elected, and the Legislature chooses the Regents of the University of the State of New York, who supervise the Education Department. The Governor primarily concentrates on policy, and focuses gubernatorial administrative attention on overall direction.

2.2.4 Sovereign Responsibilities

The Governor has power to grant reprieves, commutations and pardons after conviction for all offenses except treason or in cases of impeachment. The Governor also may remove certain local officials, particularly those concerned with law enforcement, and may appoint certain judges and local officials to complete terms in some cases and to fill vacancies pending election in others. Finally, the Governor is commander-in-chief of the state's military and naval forces.

2.2.5 Eligibility

The Governor must be a citizen of the United States, not less than 30 years old, and must have resided in the state for at least five years at the time of election.

[7] N.Y.S. Constitution, Article III, §2; see also Public Officers Law, §3.

2.2.6 Succession

If the Governor dies, resigns or is removed from office, the Lieutenant Governor becomes Governor and, upon succession to the office, the Governor may fill the vacancy created in the office of Lieutenant Governor by appointment.[8] If the Governor is absent from the state, under impeachment, or is otherwise unable to discharge the duties of the office, the Lieutenant Governor acts as Governor until the inability ceases. The Temporary President of the Senate and the Speaker of the Assembly are next in the line of succession, respectively.

2.3 Lieutenant Governor

The Constitution assigns the Lieutenant Governor only the role of serving as President of the Senate. The Governor and the Legislature may, however, make other assignments, and traditionally Governors have turned to the Lieutenant Governor for various kinds of help, ceremonial and otherwise.

2.4 State Comptroller

The State Comptroller is the state's chief fiscal officer. The Office of the State Comptroller: maintains accounts and makes payments on behalf of the State; audits the finances and management of state agencies, New York City and public authorities; examines the fiscal affairs of local governments; provides fiscal legal advice to both state agencies and local governments; trains local officials in fiscal matters; and administers the State's retirement systems. The State Comptroller's Office publishes a wide range of materials on fiscal matters, including annual reports on state and local government finances, as well as an annual volume of legal opinions on local government operations.

2.5 Attorney General

The Attorney General is the state's chief legal officer. The Office of the Attorney General prosecutes and defends actions and proceedings for and against the state, and defends the constitutionality of state law. Local government legal officers may obtain informal, written Opinions from the Attorney General. These Opinions, while not binding on the local government, are nonetheless extremely useful, and are given great weight by the courts. The Attorney General's responsibilities also include supervising the Organized Crime Task Force; protecting consumers against fraud; safeguarding civil rights and the rights of workers; the condemning property; and collecting debts. Specialized bureaus handle: criminal prosecutions, antitrust cases, investor protection, environmental protection, consumer fraud and protection, civil rights, worker protection, regulation of cooperative and condominium housing, charities, and trusts and estate matters.

2.6 State Agencies

The State Constitution provides that there shall be no more than 20 civil departments in the state government. These departments previously were specified by name, but the Constitution was amended in 1961 to eliminate the specification of departments and to set the maximum number of departments at 20.

The Legislature is authorized by law to assign new powers and functions to departments, offices, boards, commissions or executive offices of the Governor, and to increase, modify or diminish such powers and functions. The

[8] See Skelos v. Paterson, 13 N.Y.3d 141 (N.Y. 2009).

Legislature is further authorized to create temporary commissions for special purposes or executive "offices" in the Executive Department. Numerous state agencies fall into the latter two categories — that is, temporary commissions and "offices" in the Executive Department. Generally speaking, the heads of all departments, boards and commissions (except the State Comptroller, Attorney General and the members of the Board of Regents) must be appointed by the Governor with the advice and consent of the Senate, and may be removed by the Governor in a manner prescribed by law. Another exception involves the authority of the Board of Regents to appoint and remove the Commissioner of Education.

A final exception is the Commissioner of the Department of Agriculture and Markets. The Constitution provides that this department head shall be appointed as provided by law, which presently provides for the Governor to make this appointment, by and with the advice and consent of the Senate.[9] While this manner of appointment is consistent with the general manner of appointment of department heads, the Governor's appointment power is statutory rather than constitutional.

The administrative structure of New York State government currently consists of 20 state departments and a great number of other agencies, such as public authorities, temporary state commissions, and various divisions and offices in the Executive Department. Each department and agency has been established for a particular purpose, and each functions in a particular way and within a legally prescribed area of operation. Each department directly or indirectly affects local governments of the state in terms of jurisdictional or regulatory authority, advisory services, aid programs and other related functions, depending on its program responsibilities.

Some state agencies were created in response to federal mandates requiring that a particular type of statewide agency handle a particular program. Pressures from within the state for new agencies to furnish specialized services led to the establishment of other agencies. The relationships between these agencies and local governments in the provision of public services are discussed Chapter 15 [163].

[9] N.Y.S. Agriculture and Markets Law § 5.

Chapter 3

The Judicial System

The State Constitution establishes a unified court system for New York State. All courts, except those of towns and villages, are financed by the state in a single court budget. Administration of the courts is the responsibility of a single administrator, having statewide authority, who acts in accordance with policy direction supplied by the Chief Judge of the Court of Appeals.

The courts that compose the state's judicial system generally may be arranged on three functional levels: (1) appellate courts, including the Court of Appeals and the Appellate Divisions of Supreme Court; (2) trial courts of superior jurisdiction, including the Supreme Court and various county level courts; and (3) trial courts of inferior jurisdiction, including the New York City civil and criminal courts and various district, city, town and village courts upstate.

The court system in New York is one of the three separate branches of state government (Executive, Legislative and Judicial), it plays an integral role in both state and local governmental operations. The courts are charged with: interpreting provisions of the State Constitution and laws enacted by state and local governments; resolving disputes between private citizens or between a private citizen and a state agency; exercising jurisdiction over persons accused of crimes and other violations of law; and adjudicating claims of individuals against state and local governments.

In 1962, New York made its first court reorganization in more than a century by completely revising the judiciary article of the State Constitution (Article VI). This new article continued or established the various courts that now comprise the New York court system. It also prescribed the number of judges and justices for each of these courts, their method of selection, and their terms of office (see Table 3.1 [22]). The new article also created an administrative structure responsible for administering the courts and for disciplining judges.

In November 1977, the people of the state approved a series of amendments to the judiciary article that: (1) changed the manner in which Judges of the Court of Appeals are selected from statewide popular election to gubernatorial appointment; (2) established a new, centralized system of court administration; and (3) streamlined procedures for disciplining judges. These amendments took effect on April 1, 1978.

Of great importance to the operation of the court system was the 1976 enactment by the State Legislature of a unified court budget for all courts of the unified court system, except town and village courts. Whereas formerly both state and local government sources had funded the affected courts in over 120 different court budgets, effective April 1, 1977, the state funded them entirely in a single court budget.

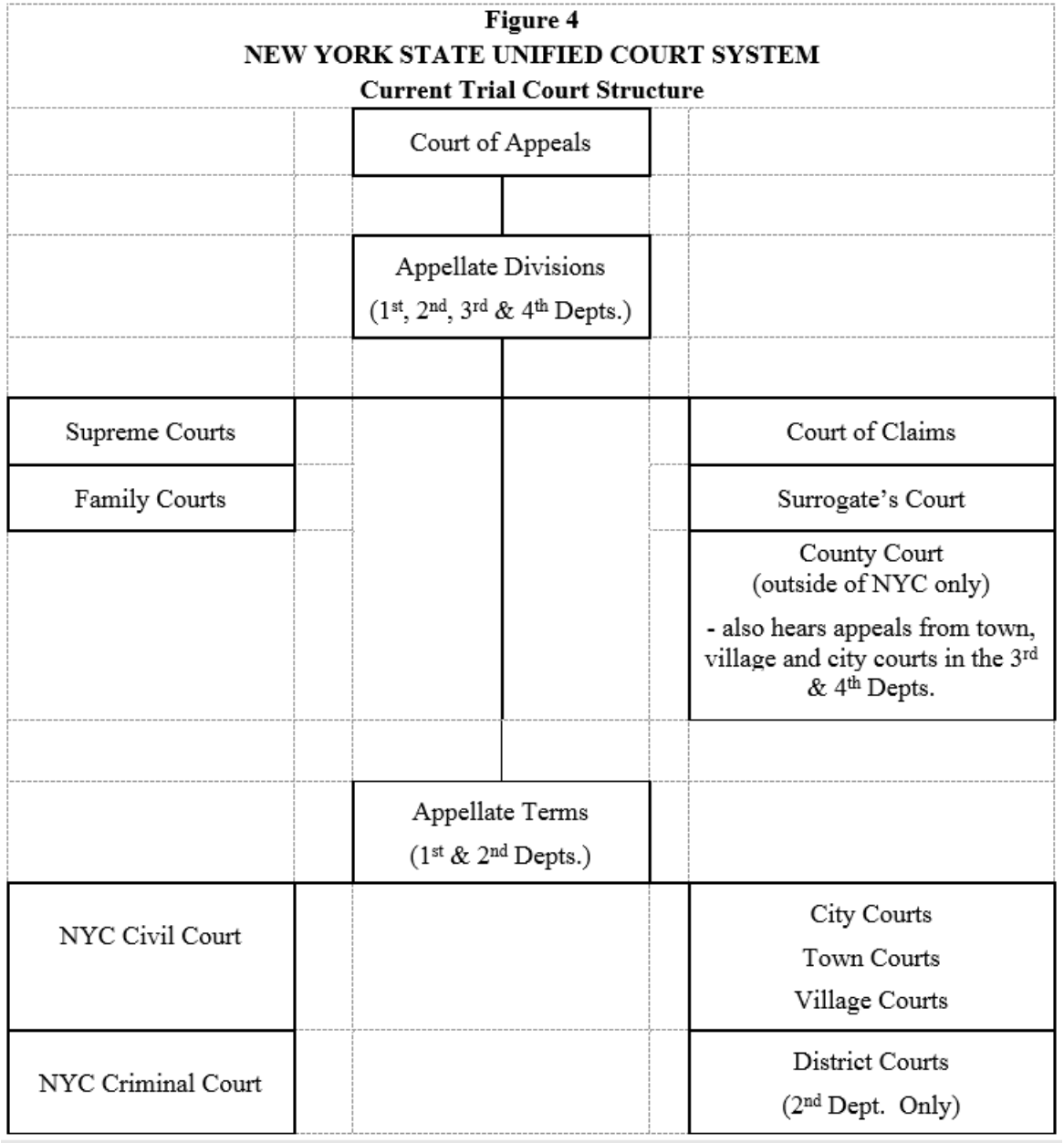

Figure 3.1: New York State Unified Court System Current Trial Court Structure

Table 3.1: New York State Court System Characteristics [1]

Court	Number of Judges	How Selected	Terms
Court of Appeals	7	Gubernatorial appointment with advice and consent of Senate upon recommendation of a commission on judicial nomination	14 years

Table 3.1: (continued)

Court	Number of Judges	How Selected	Terms
Appellate Division	24 permanent; more temporary	Gubernatorial designation from among duly elected Supreme Court justices Court justices	Presiding justice: 14 years, or balance of term as Supreme Court justice Associate justice (permanent): 5 years or balance of term as Supreme Court justice
Appellate Term	Varies	Designated by Chief Administrator of Courts, with approval of presiding justice of the Department, from among duly elected Supreme Court justices	Varies
Supreme Court	328[2]	Elected	14 years
Court of Claims	26	Gubernatorial appointment with advice and consent of Senate	9 years or, if appointed to fill a vacancy, the period remaining in that term
Surrogate's Court	31[3]	Elected	14 years in New York City 10 years outside the City
County Court	129[4]	Elected	10 years
Family Court	127	Mayoral appointment in New York City. Elected outside the City	10 years or, if appointed to fill a vacancy, the period remaining in that term
Civil Court of New York City	120	Elected	10 years
Criminal Court of New York City	107	Mayoral appointment	10 years or, if appointed to fill a vacancy, the period remaining in that term
District Court	50	Elected	6 years
City Court	162	Most elected, some appointed by Mayor of Common Council	Varies
Town Court	Approx. 2,000	Elected	4 years
Village Court	Approx. 570	Elected	Varies; most are 4 years

3.1 Court of Appeals

Established in 1846, the New York Court of Appeals has emerged as a great common law court at the apex of the state court system.

[1]Mandatory retirement at end of year in which Judge reaches age 70, with limited potential exceptions for Supreme, Appellate and Court of Appeals justices.

[2]Includes justices designated to the Appellate Division and Terms. Does not include certified justices of the Supreme Court (which number may vary significantly each year).

[3]Includes only separately elected surrogates.

[4]Includes 72 county judges and 57 multi-hatted county-level judgeships.

In civil cases, appeals may be taken as of right or by permission, depending on the finality of the determination from which an appeal is sought, the issues involved, the court in which the action or proceeding originated, and whether there was disagreement in the court below.

The Court of Appeals consists of a Chief Judge and six Associate Judges. Each judge serves a term of 14 years or until the end of the calendar year in which he or she reaches age 70, whichever occurs first. Vacancies on the court are filled by gubernatorial appointment from among individuals found to be qualified by a nonpartisan Commission on Judicial Nomination. In order to be eligible for appointment, candidates must have been admitted to the practice of law in New York for at least 10 years. All appointments must be approved by the State Senate. The Governor is empowered to designate justices of the Supreme Court to serve as additional Associate Judges on the Court of Appeals during times of heavy caseload.

Generally, all seven judges of the Court of Appeals hear each case, although the Constitution requires only a quorum of five judges. In every case the concurrence of at least four judges is necessary for a decision.

The operations of the Court of Appeals are supervised and controlled by the court itself, the Chief Judge, and the clerk of the court. The Chief Judge serves as the principal officer of the court and oversees its maintenance and operation. The Chief Judge presides at the hearing of arguments and at the conference of judges during which decisions are reached.

3.2 Appellate Division

Established in 1894, the Appellate Division of the Supreme Court serves a very important function in the administration of justice in New York State. The four courts of the Appellate Division correspond geographically to the four Judicial Departments on the map in Figure 3.2 [25]. They are constituted as courts of intermediate appellate jurisdiction. For all practical purposes, however, they serve as courts of last resort; 90 percent of the cases they hear are not subsequently reviewed by the Court of Appeals.

Under the Constitution and implementing statutes, appeals in civil matters are taken to the Appellate Divisions from each of the trial courts in the unified court system, except the New York City Civil Court, and district, town, village and city courts outside the City of New York. On an appeal, the Appellate Division reviews questions of law and questions of fact. Appeals in criminal matters are taken to the Appellate Division from County and Supreme Courts. As in civil cases, the Appellate Division reviews questions of fact and questions of law in criminal appeals. The Appellate Division also has original jurisdiction in a limited number of cases.

The State Constitution authorizes the First and Second Judicial Departments to have seven justices while the Third and Fourth Judicial Departments are each authorized to have five justices. The Governor can assign additional justices to each of the courts to assist with the case load. Justices of the Appellate Division, other than the presiding justice, are designated by the Governor from among the justices elected to the Supreme Court. The term of office of each justice is five years, but is limited also to the end of the calendar year in which the justice reaches age 70. However, Associate Justices who have been certified for continued service may be designated to remain on an Appellate Division beyond this retirement age. While the Governor is not generally limited to choosing justices who reside in the Judicial Department where a vacancy exists, the Constitution requires that a majority of the justices designated to sit in any Appellate Division shall be residents of that Department.

The presiding justice of each Appellate Division is designated by the Governor from among the Supreme Court justices in that Department. The term of office of the presiding justice equals the period of time remaining in his or her term as a Supreme Court justice. From time to time, as terms expire or vacancies occur, the Governor makes new designations. The Governor is also empowered to make additional designations during times of heavy caseload, or when a sitting justice is unable to serve for a period of time.

The Appellate Division courts generally sit in panels of five justices, although panels of four justices are authorized. In every case the concurrence of at least three justices is necessary for a decision. The operations of the Appellate Division are supervised and controlled by each court itself, its presiding justice and the clerk of the court.

3.3 Appellate Term

The Constitution authorizes the Appellate Division in each judicial Department to establish an Appellate Term for that Department or a part of that Department. The Appellate Terms are conducted by no more than three Supreme Court justices who have been specially assigned to the terms. Two justices constitute a quorum, and the concurrence of at least two is necessary for a decision. Where they have been established, Appellate Terms exercise jurisdiction over civil and criminal appeals from local courts and certain appeals from county courts. At the present time, Appellate Terms have been established only in the First and Second Departments.

Figure 3.2: Judicial Districts of New York

3.4 Supreme Court

The Supreme Court, as presently constituted, was established in 1846. Formed by the consolidation of the offices of circuit judge and chancery judge with the preexisting Supreme Court, it is now considered a single court having general original jurisdiction in law and equity.

Under this broad constitutional grant of jurisdiction, the Supreme Court may hear any criminal or civil action or

proceeding irrespective of its nature or amount, except claims against the State. In practice, however, the Supreme Court outside New York City principally hears civil matters, and the County Courts hear criminal matters. In New York City, Supreme Court sits in both civil and criminal parts.

Justices are elected for 14-year terms by electors within their judicial districts. Retirement is mandatory at the end of the calendar year in which a justice reaches age 70, but justices can be certified for up to three two-year periods after reaching 70. A justice of the Supreme Court must have been admitted to practice law in the State for at least 10 years before assuming office. The number of justices for each judicial district is prescribed by the State Legislature, subject to a constitutionally prescribed maximum number.

3.5 Court of Claims

From 1777 until 1897, New York State did not permit any claim for damages to be asserted against it in any court. During that period, the state was entirely immune from suit in its courts. Individuals suffering injury to their persons or property through the activities of public employees were not, however, wholly without remedy, as they could petition the Legislature for redress in the form of private legislation. In 1817, an administrative remedy was made available for some claims related to the Erie Canal. From this modest 1817 provision, the Court of Claims evolved through many enactments, culminating in Chapter 36 of the Laws of 1897.

Article VI, section 9, of the Constitution provides: “The Court shall have jurisdiction to hear and determine claims against the state or by the state against the claimant or between conflicting claimants as the legislature may provide.”

Implementing this grant of authority, the Legislature has provided that the Court of Claims shall have jurisdiction over claims against the State for appropriation of real or personal property, breaches of contract, and torts. The Legislature also has specifically granted the court jurisdiction to hear claims involving: wrongful acts by members of the military; military employees in the operation of any vehicle or aircraft; and claims of imprisoned convicts later pardoned as innocent by the Governor. The court serves as a forum for claims by or against the State and certain public authorities. It does not possess the power to grant claims against political subdivisions such as counties, cities, towns and villages. These claims are litigated in the Supreme Court. The Court of Claims currently consists of 26 judges, who hear claims against the State. The court holds two trial terms each year in each of its 9 districts throughout the state. Claims are usually tried and decided by one judge, unless the presiding judge appoints up to three judges to sit in a particular case. Judges of the Court of Claims are appointed by the Governor, by and with the consent of the Senate, for nine year terms (although retirement is mandatory at the end of the calendar year in which the judge reaches age 70). A judge must have been admitted to practice law in the state for at least 10 years before he or she may begin to serve on the bench.

3.6 County Court

A County Court sits in each of the 57 counties of the state outside the City of New York. Under the Constitution, they have unlimited criminal jurisdiction, but their civil jurisdiction is limited to money claims for not more than $25,000. The County Court also has limited appellate jurisdiction; in the Third and Fourth Judicial Departments, it hears appeals from civil and criminal judgments of justice courts and city courts.

The State Constitution of 1846 declared that there should be elected in each of the counties of the state, except the City and County of New York, one county judge, who should hold office for four years. The term of office has been changed to 10 years, but the office has remained elective. A candidate, to be eligible for election, must have been admitted to practice law in the state for at least five years and must be a resident of the county. Retirement is mandatory at the end of the calendar year in which a judge turns 70 years of age.

The Constitution authorizes the Legislature to provide that the same individual may hold two or all of the positions of county, surrogate and family court judge at the same time. There are many so-called “two-hat” and “three-hat” judges in upstate counties.

3.7 Surrogate’s Court

The existence of the Surrogate’s Court in New York can be traced back to colonial times, when early Dutch officials exercised jurisdiction over estate matters. This practice continued through the British colonial period. The granting of letters of administration and the probate of wills in the State of New York became the responsibility of the Governor. In discharging this responsibility, the Governor was authorized to appoint a delegate to act in his stead. One of the early delegates used the title of “surrogate.”

The Constitution (Article VI, section 12) provides that the Surrogate’s Court shall have jurisdiction over all actions and proceedings relating to:

- the affairs of decedents, probate of wills and administration of estates;
- the guardianship of the property of minors; and
- such other actions and proceedings, not within the exclusive jurisdiction of the Supreme Court, as may be provided by law.

In practice, the court’s jurisdiction, which includes such equity jurisdiction as may be provided by law, extends to, among other proceedings: the probate and construction of wills; grants of letters testamentary to executors; grants of letters of administration; proceedings for the payment of creditors’ claims; proceedings by fiduciaries and claimants to determine the ownership of property; proceedings for the payment of bequests; grants of letters of trusteeship; appointment of guardians for infants and their property; and accountings by executors, administrators, trustees and guardians.

The Constitution provides that there shall be at least one judge of the Surrogate’s Court in each county and such number of additional judges as may be provided by law. Each judge of the Surrogate’s Court, also known as a “surrogate,” must be a resident of the county in which the surrogate serves and elected by the voters of that county. The term of office is 14 years within the five counties of the City of New York and 10 years in the other 57 counties. All surrogates are subject to mandatory retirement at the close of the calendar year in which they turn 70 years of age.

There is no constitutional requirement that the surrogate be a separately elected position. The Legislature has provided that where it is not, the county court judge shall discharge the duties of the surrogate, as well as those of the County Court.

3.8 Family Court

Viewed as one of the major accomplishments of the 1962 constitutional reorganization of the judiciary, the Family Court has emerged as a major entity in dealing with difficult issues involving children and families. The court sits in every county in the state outside of New York City, and citywide in New York City.

The Family Court’s jurisdiction is divided between matters that originate as provided by law and those that are referred to it from the Supreme Court. The court’s original jurisdiction includes authority to adjudicate matters related to the:

- protection, treatment, correction, and commitment of minors;

- custody of minors;
- adoption of persons (shared concurrently with Surrogate's Court);
- support of dependents;
- establishment of paternity; and
- proceedings for conciliation of spouses and family offenses (shared concurrently with courts with criminal jurisdiction).

The Family Court, when exercising its jurisdiction over matters referred to it from the Supreme Court, has the same powers possessed by the Supreme Court.

In New York City, judges of the Family Court are appointed by the mayor for terms of 10 years. In counties outside the City of New York, judges of the Family Court are elected by the voters of the counties for terms of 10 years. All judges of the Family Court must retire at the end of the calendar year in which they turn 70 years of age.

3.9 Criminal Court of the City of New York

The Criminal Court of the City of New York was constituted in its present form in 1962. The court has its roots in colonial days and is the product of an evolutionary process that culminated in the abolition of two court systems in the City — the Magistrates Court and the Court of Special Sessions — and their replacement by the Criminal Court of the City of New York. The court now has an authorized complement of 107 judges.

The Criminal Court of the City of New York has jurisdiction to adjudicate misdemeanors and offenses less than misdemeanors, and to conduct pre-indictment felony hearings. Most of the court's business consists of traffic violations, and violations of the Administrative Code of New York City or the Multiple Dwelling Law.

Judges of the Criminal Court must be residents of New York City. They are appointed for terms of 10 years by the mayor. Where a vacancy occurs for reasons other than expiration of a 10-year term, the mayor appoints a judge to fill the position for the balance of the unexpired term. Retirement is mandatory at the end of the calendar year in which the judge turns 70 years of age.

3.10 Civil Court of the City of New York

The Civil Court of the City of New York came into existence on September 1, 1962, when it was established through a merger of the City and Municipal Courts as part of the state's plan of court reorganization. The court has jurisdiction over numerous civil actions, including contracts, actions for personal injury, real property actions, and actions in equity. The State Constitution, however, limits the civil jurisdiction in actions involving money claims to a maximum of $25,000. The Civil Court has a special housing part, instituted in 1972, to assure the effective enforcement of state and local laws for the establishment and maintenance of proper housing standards in New York City.

The Civil Court also has a small claims part. Claimants may present a small claim without being represented by an attorney. Corporations, associations and assignees may not institute actions in the small claims part, although they may be sued as defendants. They may, however, institute small claims in the Court's commercial claims part, which observes the same informal, expedited procedures as the small claims part.

The Civil Court presently consists of 120 judges, selected for terms of 10 years by voters within New York City from "districts" established by the State Legislature. Retirement is mandatory at the end of the calendar year in which a judge turns 70 years of age.

3.11 District, Town, Village and City Courts

Minor civil and criminal litigation, as well as the early stages of major criminal litigation, arising outside New York City are handled by district, city, town and village courts. These courts of "inferior jurisdiction," as they are sometimes called, include some of the oldest of the state's courts — town justices date back to the seventeenth century— and some of the newest — the Nassau and Suffolk District Courts were established in 1937 and 1964, respectfully. The population centers served by courts of inferior jurisdiction range from small cities, villages and towns, many of which have populations under a thousand, to counties having more than one million residents. These courts deal with a variety of matters, including simple traffic offenses, bill collection cases, felony hearings, and complex commercial litigation.

Town and village courts are staffed by full-time or part-time justices, who often are not lawyers. District courts and some of the city courts are staffed by full time judges who are lawyers. Court sessions are held in places ranging from the justice's living room or office, to rooms in town or village halls, to formal court houses. In some localities, court records are kept directly by the judicial officer. In others, records are kept by one or more full-time or part-time clerks.

An initiative to achieve procedural uniformity in the lower courts in New York culminated in the enactment of sections of the Uniform Court Acts, which assure that procedures followed in these courts are substantially the same throughout the state.

3.11.1 Town Courts

The town justice court is the oldest of the "inferior" courts in the state (see also Chapter 7 [69]). Under the original town structure, justices of the peace were members of the town board and thus had legislative as well as judicial functions. The Town Law, adopted in 1934, substituted town councilmen for justices on the town board in towns of the first class. In towns of the second class, justices remained members of the town boards, although the town boards had the option — by resolution subject to permissive referendum — of providing that justices should not be members of the board. In1976, the Town Law was amended again to preclude all town justices from serving on town boards during the tenure of their judicial office. All town justices of the peace formerly ran their courts independently, regardless of the number of justices in the same town. In 1962, however, the Court Reorganization Amendment integrated town justice courts into the unified court system, and the enactment of the Uniform Justice Court Act firmly established the single court concept in each municipality. All justices of a town are considered to be justices of the same court, and the proceedings of one justice are treated as acts of the whole court. The salaries of judicial and non-judicial personnel of a town justice court are funded by the town.

3.11.2 Village Justice Courts

Although villages appeared as local governmental units as long ago as 1790, village justices have not played the same central roles in village organization as justices of the peace played in town development. The constitutional history of the office of village justice, formerly known as the police justice, starts with the Constitutional Convention of 1846. Until then, village police justices apparently were not the subject of general legislation. At the convention, a proposal was made to authorize the Legislature to create inferior local courts of civil and criminal jurisdiction in cities and villages. Today's village justice court traces its roots to that point in time.

A village justice court has the same jurisdiction within the village as a town justice court has within the town. The cost of village justice court operations is funded locally.

3.11.3 City Courts

Since 1846, the Legislature has been authorized to create city courts of limited jurisdiction and to establish the tenure of city judges and the method of their selection. For many years, the resulting legislative enactments were framed as individual court acts, each affecting only one city. In 1988, however, the Legislature combined all provisions of law regulating city courts and their judgeships into a single section of law. Also, as has been done with town and village justice courts and the district courts, the Legislature has established general procedural and jurisdictional regulations in one consolidated statute of general applicability to all city courts in the state outside the City of New York — the Uniform City Court Act.

3.11.4 District Courts

The first district court was established in Nassau County in 1937, under the provisions of the Constitution and the Alternative County Government Law. The only other district court now in existence is the district court of the First Judicial District of Suffolk County, comprising the towns of Babylon, Brookhaven, Huntington, Islip and Smithtown. It was created by the Legislature with the approval of the voters of those towns in 1963.

Although there are only two district courts now in operation in the state, the State Constitution provides that a district court may be established in any area of the state where the local governing body of the affected area requests the State Legislature to establish such court and where both the Legislature and the voters of that area approve its establishment.

3.11.5 Jurisdiction

District, town, village and city courts have limited civil and limited criminal jurisdiction, as defined in the Uniform Court Acts. In general, the civil jurisdiction of these courts is limited to claims for money damages not exceeding $15,000 in the district court and city courts, and $3,000 in the town and village justice courts, and to jurisdiction over summary proceedings for the recovery of real property. Each court also has jurisdiction over small claims, as discussed below. The criminal jurisdiction of these courts is identical to that of the New York City Criminal Court.

3.11.6 Small Claims

Each town, village, city and district court has a small claims part where money claims up to a maximum of $5,000 ($3,000 in town and village courts) may be heard and determined in accordance with more informal court procedures. Special jurisdictional requirements must be met before a suit may be brought in a small claims part. If suit is brought in a town or village justice court, the defendant must reside or have an office for the transaction of business or a regular employment within the municipality in which the court is located. If brought in a city court, the defendant must reside, have an office or be regularly employed within the county in which the court is located. If brought in a district court, the defendant must reside, have an office or be regularly employed within the territory embraced by the court.

City and district courts also have commercial claims parts where money claims up to a limit of $5,000 may be brought by businesses and heard and determined as in small claims parts.

State rules provide for a simple, informal and inexpensive procedure for prompt determination of small claims and commercial claims. Such claims must receive an early hearing and determination, and the hearings must be conducted in such a way as to ensure substantial justice between the parties according to the rules of substantive law. The parties are not, however, bound by statutory provisions or rules of practice, procedure, pleading or evidence.

3.12 Court Financing

Effective April 1, 1977, New York adopted a unified court budget system. Under this system, the state took over the entire non-capital cost of the operation of all courts and court-related agencies of the unified court system, except town and village justice courts.

3.13 Disciplining of Judges

Effective April 1, 1978, new constitutionally mandated procedures for the disciplining of judges were established. A Commission on Judicial Conduct, comprising 11 persons selected from the community by the Governor, the Chief Judge of the Court of Appeals, and the leadership of the Legislature, has primary responsibility for the investigation and initial determination of complaints against judges. The Commission may admonish, censure, remove or retire judges against whom complaints are sustained. The Court of Appeals may review all determinations.

The Constitution authorizes two other methods by which judges who are found guilty of misconduct may be removed from office, both of which require action by the Legislature: removal by impeachment and removal by concurrent resolution of the Senate and Assembly. Neither method is frequently used.

3.14 Court Administration

Effective April 1, 1978, the structure of court administration in New York changed considerably. The principal features of the new system include:

- appointment of a Chief Administrator of the Courts by the Chief Judge of the Court of Appeals, with the advice and consent of an Administrative Board of the Courts;
- central administrative direction of the courts by the Chief Judge and the Chief Administrator;
- approval by the Court of Appeals of statewide standards and policies governing the operation of all courts;
- promulgation by the Chief Judge, and approval by the Court of Appeals, of a code of conduct for judges; and
- frequent consultation with the Administrative Board of the Courts in court management decisions.

The Chief Administrator has numerous duties. Among the most significant are: preparing the judiciary budget; establishing the terms and parts of court and assigning judges to them; engaging in labor negotiations with unions representing non-judicial employees of the courts; and recommending to the Legislature and Governor changes in laws and programs to improve the administration of justice and court operations. To assist in the performance of these duties, the Chief Administrator has established an Office of Court Administration, staffed by lawyers and management experts. The Chief Administrator has also delegated responsibility to a cadre of administrative judges, each serving on a regional basis.

The Office of Court Administration seeks to reduce the caseload in the state's courts through an alternative approach to resolving problems that develop between people — the Community Dispute Resolution Centers Program. Under the program, which was authorized by the Legislature in 1981 and made a permanent part of the Unified Court system in 1984, the Chief Administrator of the Courts contracts with nonprofit community agencies to provide mediation assistance to help disputants reach mutual agreement. Now operating statewide, these centers take referrals from judges, law enforcement agencies, individuals and others. They handle such matters as animal complaints, breaches of contract, domestic arguments, harassment, landlord/tenant problems, noise complaints, petty larceny, school problems, small claims and ordinance violations.

Chapter 4

Local Government Home Rule Power

The constitutional and statutory foundation for local government in New York State provides that counties, cities, towns and villages are "general purpose" units of local government. They are granted broad home rule powers to regulate the quality of life in communities and to provide direct services to the people. In doing so, local governments must operate within powers accorded them by statute and the New York and United States Constitutions.

The home rule powers available to New York local governments are among the most far-reaching in the nation. The extent of these powers makes the local government a full partner with the state in the shared responsibility for providing services to the people.

Local government in New York State comprises counties, cities, towns and villages, which are corporate entities known as municipal corporations. These units of local government provide most local government services. Special purpose governmental units also furnish some basic services, such as sewer and water services. School districts, although defined as municipal corporations, are single-purpose units concerned basically with education in the primary and secondary grades. Fire districts, also considered local governments in New York State, are single-purpose units that provide fire protection in areas of towns. Fire districts are classified as district corporations. There are other governmental entities which have attributes of local governments but which are not local governments. These miscellaneous units or entities are generally special-purpose or administrative units normally providing a single service for a specific geographic area.

In this country's federal system, consisting of the national, state and local governments, local government is the point of delivery for many governmental services and is the level of government most accessible to and familiar with residents. It is often referred to as the grass-roots level of government.

New York has many local governmental entities that possess the power to perform services in designated geographical areas. While all of these entities fall within the broad definition of "public corporation," [1] only a very small percentage of them are "general purpose" local governments - counties, cities, towns and villages - which have broad legislative powers as well as the power to tax and incur debt. In order to stem the proliferation of overlapping and independent local taxing units, the New York Constitution was amended in 1938 to prohibit the creation of any new type of municipal or other corporation possessing both the power to tax and to incur debt.[2]

While New York has long had counties, towns, villages and cities, their powers have increased greatly in the last century. Originally, each individual local government was created by a special act of the State Legislature. Each

[1] A public corporation includes municipal corporations, district corporations and public benefit corporations. Municipal corporations are cities, towns, villages, counties and school districts. District corporations are territorial divisions of the state with the power to contract indebtedness and to levy (or require the levy of) taxes, such as a local fire district. Public benefit corporations are formed for the purpose of constructing public improvements, such as a local parking authority. District and public benefit corporations are discussed in Chapter 9 [91].

[2] New York Constitution, Article VIII, § 3; see the discussion in Greater Poughkeepsie Library District v. Town of Poughkeepsie, 81 N.Y.2d 574 (1993).

act created the corporate entity, identified the geographical area that would be served by the entity and granted it powers and duties.[3] Over time, the State Legislature adopted general laws to govern the nature and extent of local governments' powers: the Town Law, Village Law, General City Law and the County Law.[4] These general laws still apply, and now are augmented by the overriding constitutional guarantee of "home rule." [5]

A local government's power is primarily exercised by its legislative body. The general composition of legislative bodies for counties, cities, towns and villages is discussed in the individual chapters addressing each particular form of government. The New York State Constitution, however, guarantees and requires that each county, city, town and village have a legislative body elected by the people of the respective governments.[6] Local legislative bodies are granted broad powers to adopt local laws in order to carry out their governmental responsibilities.[7]

Local governments serve a vital link in the relationship between the states and the federal government under the federal system. Many governmental services, whether from the national or state level, have implications for, or call for the involvement of, local government. Additionally, in exercising its broad legislative authority, a local government can profoundly impact the quality of life of its residents. This sharing of responsibility with the other levels of government emanates from the federal and state constitutions and the various statutory grants of power which the State Legislature has passed to local governments.

4.1 Constitutional and Statutory Sources of Local Authority

4.1.1 Federal Constitutional Foundation

Because in the states and, particularly in New York, local governments are integral elements of the federal system, neither state constitutional and statutory provisions nor local government legislative actions may contravene the United States Constitution. It is rare for many of the specific restrictions on state powers and authority, such as those found in Article I, section 10, of the federal Constitution, to affect the day-to-day activities of local government, since these restrictions are designed primarily to ensure the supremacy of the national government in foreign relations. Whenever any local government exercises any power accorded it by either the state constitution or by statute it must take care to consider whether its actions would compromise federal constitutional provisions that define the relationship of the state (and, by implication, any of its political subdivisions) within the federal system, or guarantee personal liberties to individuals. For example, Article 1, section 8 of the United States Constitution provides Congress with the power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." This grant of power over commerce among the States has been interpreted to limit States' power to adversely impact interstate commerce. Local regulatory measures that restrict interstate commerce have been struck down by the United States Supreme Court as unconstitutional.[8]

The federal Constitution also guarantees that certain personal liberties will not be taken away by the federal government or by any state or local government. Of great importance among these are the limitations on state power that derives from the language of the Fourteenth Amendment, which reads in part:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

[3] The 1777 New York State Constitution, Article XXXVI, confirmed land grants and municipal charters granted by the English Crown prior to October 14, 1775. Chapter 64 of the Laws of 1788 organized the state into towns and cities.

[4] A small group of villages still operate under their original special act charters. See Chapter 8 [81].

[5] See the New York Constitution, Article IX, added to the Constitution in 1963 and effective January 1, 1964.

[6] New York Constitution, Article IX, § 1(a).

[7] New York Constitution, Article IX, § 1(a).

[8] A town's solid waste flow control law which restricted interstate commerce by limiting out-of-state firms' entry to the unsorted garbage market was struck down under what is called the "dormant" Commerce Clause. C.& A. Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383 (1994).

It is not practicable here to review the many ways in which the Fourteenth Amendment limits and restricts the exercise of state and local power. Suffice it to say that in exercising the general power to make regulations for the "…health, peace, morals, education, and good order of the people…" — the power known as "police power" — the state, as well as its local governments, must be careful to do so only in ways that do not contravene the "due process of law," "equal protection of the laws," and "privileges and immunities" provisions of the Fourteenth Amendment.

4.1.2 State Constitutional Foundation

Local governments look to the State Constitution for the basic law which provides for their structure, powers and operational procedures. Two articles of the State Constitution concern key local government needs: home rule (Article IX) and finance (Article VIII). Article IX, entitled "Local Government," is commonly referred to as the "Home Rule" article of the Constitution, for it provides both an affirmative grant of power to local governments over their own property, affairs and government, and restricts the power of the State Legislature from acting in relation a local government's property, affairs, and government pursuant only special laws upon home rule request or to general laws.[9] This article includes:

- a local government bill of rights;
- local government's power to adopt local laws;
- the duty of the State Legislature to provide for the creation and organization of local governments;
- the duty of the Legislature to enact a statute of local governments;
- restrictions upon the power of the Legislature to act by special legislation in relation to the property, affairs or government of a local government;
- the power of the Legislature to confer additional powers upon local governments.

Article VIII, entitled "Local Finances," contains the constitutional powers pertaining to local taxation and the incurring of debt. Among its provisions are the following:

- prohibition on gift and loan of public money or property to any private undertakings except for the care of the needy;
- prohibition of loan or credit to any public or private individual, corporation or undertaking;
- authorization for two or more local governments to incur debt for cooperative arrangements;
- limitations on the amount of debt that counties, cities, towns, villages and school districts may contract and the purposes for which such debt may be incurred;
- limitation on the creation of a municipal or other corporation which would have both the power to levy taxes and the power to incur debt other than a county, city, town, village, school district or fire district;
- the manner of computation of the amount of debt that may be incurred, including specified exclusions from the total debt-incurring power;
- limitations on the amount of real property taxes that may be raised for local purposes; and
- the power of the State Legislature to restrict the powers of taxation and incurring of debt.

[9] New York Constitution, Article IX, § 2(b)(2).

Table 4.1 [36] indicates other articles of the State Constitution which contain references relating to local government powers and operations or which place restrictions on the State Legislature. Article IX of the State Constitution grants power in two ways: directly, where the grants are, in effect, self-executing and require no further state legislative implementation; and indirectly, where the grants require further legislation before they can be exercised.

Examples of direct grants of power are contained in section 1 of Article IX of the State Constitution, entitled "Bill of Rights for Local Governments." These rights include: (1) the right of a local government to have a legislative body elected by the people; (2) the power to elect or appoint local government officers whose election or appointment is not otherwise provided for by the Constitution; (3) the power to take private property for public use by eminent domain; and (4) the right to make a fair return on local government utility operations.

In some cases, although the Constitution sets forth direct grants of power, these grants may still be subject to state legislative implementation through enactment of procedural steps for their use. For example, Article IX of the State Constitution grants local law powers to local governments, but the exercise of the local law power must be in accordance with the procedures set forth in the Municipal Home Rule Law, which was enacted by the State Legislature to implement the constitutional grants of power.

Some grants of power require additional legislative authorization or direction in order for a local government to utilize them. These grants include: (1) the power to engage in cooperative undertakings as authorized by the Legislature; (2) the power to apportion the costs of governmental services as authorized by the Legislature; and (3) the power for counties to adopt alternative forms of county government under a special law or a general law enacted by the State Legislature.

These constitutional references indicated in the following table are intended only to acquaint the reader with the existence of a constitutional base for local governments. Determining whether a local government may exercise a particular power or function requires a greater familiarity with the complete text of the constitutional provision, the state legislative implementation, and judicial interpretations, if any.

Table 4.1: Constitutional Provisions Relating to Local Government

New York State Constitution	**Subject**
Article V, §6	Prescribes civil service merit system.
Article V, §7	Prescribes that after July 1, 1940 membership in any pension or retirement system of the state or civil division is a contractual relationship and cannot be diminished or impaired.
Article VI	Provides for the court system.
Article X, §5	Prescribes the power of the State Legislature to create public corporations.
Article XI	Provides for the educational system.
Article XIII	Contains several provisions relating to local office holders, including: filling of vacancies, compensation of constitutional officers and election of city officers.
Article XVI	Contains the general provisions relating to taxing authority.
Article XVII	Contains the basic provisions relating to public assistance and the social services system.
Article XVIII	Provides the authority for the provision of low-rent housing and nursing home accommodations for persons of low income and for urban renewal.

4.1.3 The Statutes

In many instances, the Constitutional provisions described above direct the State Legislature to adopt laws which give local governments the authority to take certain legislative actions, such as entering into inter-municipal agreements or adopting city or county charters. The State Legislature also may delegate to local governments additional authorizations as it deems appropriate or necessary to enable local governments to fulfill their obligations in the partnership of government.

The Legislature has enacted a body of law, known as the Consolidated Laws, containing the statutory provisions from which local governments derive most of their substantive and procedural power. The title of each volume of the law generally suggests the subject matter or level of government to which it has primary application. Table 4.2 [37] indicates the Consolidated Laws most relevant to local government.

Table 4.2: Consolidated Laws Relating to Local Government

Law	**Scope**
Civil Service Law	The state's merit system; powers and duties of the State Civil Service Commission; provisions for civil service administration at the local level; the Public Employees' Fair Employment Act, commonly referred to as the Taylor Law.
County Law	The structure, administrative organization, and power and duties of county government.
Education Law	The powers of the State Education Commissioner; the structure, organization, and powers and duties of school districts; and the basic programs of state aid to school districts.
Election Law	The conduct of elections.
Eminent Domain Procedure Law	Procedure for acquiring property by exercise of the power of eminent domain.
General City Law	The powers and duties of cities generally, as well as specific authorizations of taxation for the City of New York.
General Municipal Law	Powers and duties pertaining to all local governments and school districts, including provisions relating to the maintenance of reserve funds, planning activities, cooperative undertakings, establishment of municipal hospitals, public bidding requirements, municipal airports, local bingo and games of chance option, urban renewal, annexation, and conflicts of interest.
Highway Law	Construction and maintenance of state highways and arterials; powers of the State Department of Transportation; powers and duties of county and town superintendents of highways; the construction and maintenance of county and town highways, including limitations on expenditures for certain highway-related purposes, as well as state aid programs for highways.

Table 4.2: (continued)

Law	Scope
Local Finance Law	Authorizations and procedures relating to the incurring of debt by counties, cities, towns, villages, school districts, fire districts and district corporations.
Municipal Home Rule Law — Statute of Local Governments	Basic authorizations, requirements and procedures for the adoption of local laws by counties, cities, towns and villages, and the procedures for enactment and revision of county charters and city charters, as well as the Statute of Local Governments.
Public Officers Law	Provisions applicable to state and local officers, including residency requirements, official oaths and undertakings, resignations, filling of vacancies, removal from office, public access to records and open meetings.
Retirement and Social Security Law	State and local retirement systems.
Second Class Cities Law	The organization of cities which were classified as cities of the second class on December 31, 1923. This law has limited application.
Tax Law	General taxation laws of the state and authorizations for sales and use taxes by counties, cities and certain school districts.
Town Law	The structure, organization, provision of services, and powers and duties of towns and fire districts, as well as fiscal procedures and requirements.
Vehicle and Traffic Law	State operation and regulation of vehicular traffic as well as authorizations for regulation by counties, cities, towns and villages.
Village Law	The structure, organization, powers and duties of villages.
Volunteer Firefighters' Benefit Law	Disability or death benefits for firefighters or their families as a result of injuries or death arising from the performance of duties by volunteer firefighters.
Workers' Compensation Law	Workers' compensation benefits for employees of public as well as private employers. Also contains authorizations for self-insurance plans by local governments.

This listing is not a complete compilation of the laws having local government application. Many other laws that have significance either to a particular level of government or to an individual local government are scattered through the statutes. For example: the State Finance Law sets forth the provisions relating to the state's revenue-sharing programs; the Labor Law contains provisions relating to prevailing wage requirements in public works contracts; the Agriculture and Markets Law contains provisions relating to the establishment of agricultural districts, dog regulation and impoundment and sealers of weights and measures; the Correction Law contains provisions relating to supervision and administration of county jails and penitentiaries and state supervisory powers over

city jails; the Parks, Recreation and Historic Preservation Law contains authorizations for historic preservation and local snowmobile operation regulation; and the Transportation Corporations Law contains local government approval requirements for the formation of private sewer and waterworks corporations. The Social Services Law, Mental Hygiene Law, Real Property Tax Law and Public Health Law are discussed elsewhere in this book.

4.1.4 Statute of Local Governments

Article IX of the State Constitution required the State Legislature to enact a "Statute of Local Governments" in order to grant certain powers to local governments. The granted powers include the power to: adopt ordinances, resolutions, rules and regulations; acquire real and personal property; acquire, establish and maintain recreational facilities; fix, levy and collect charges and fees; and in the case of a city, town or village, to adopt zoning regulations, and conduct comprehensive planning.

The powers granted in the Statute of Local Governments are accorded quasi-constitutional protection by Article IX; a power so granted cannot be repealed, impaired or suspended, except by the action of two successive Legislatures, and with the concurrence of the Governor. Thus, for example, the repeal of village ordinance power by the State Legislature was accomplished by Chapter 975 of the Laws of 1973 and Chapter 1028 of the Laws of 1974.

The Statute of Local Governments reserves certain powers to the State Legislature, even where the exercise of these powers could or would diminish or impair a local power. These include the power to take actions relating to the defense of the state, to adopt laws upon local home rule request, to adopt laws relating to creating alternative forms of county government and to adopt laws relating to matters of overriding state or regional concern.

4.1.5 Limitations on the State Legislature

The powers of the State Legislature are derived from Article III of the State Constitution, as well as from other Constitutional provisions. Additional powers, as well as restrictions thereon, were conferred upon the Legislature by Article IX of the State Constitution, which directs the State Legislature to adopt certain laws necessary to affect the local powers granted by that article. Article IX also restricts the State Legislature from adopting special laws which affect a local government's property affairs or government. Article IX, therefore, serves both as a source of authority for local governments and as a shield against intrusion by the State upon their home rule prerogatives.

The restriction upon the State Legislature's legislative powers is predicated upon the phrases "property, affairs or government" and "general law." The Legislature is specifically prohibited from acting with respect to the property, affairs or governance of any local government except by general law, or by special law enacted on a home rule request by the legislative body of the affected local government or, except in the case of the City of New York, by a two-thirds vote of each house upon receiving a certificate of necessity from the Governor. The definitions of the terms "general law" and "special law" as set forth above also apply in the context of this provision.

4.1.6 Local Laws and Ordinances

Local legislative enactments must be considered in order to fully define the power and authority of a local government. City and county charters originally were adopted by a special act of the State Legislature when a city or county was created. These charters created the municipal corporation and, importantly, directed its organization, its responsibilities and accorded its powers. The Municipal Home Rule Law, pursuant to constitutional direction, authorizes cities to amend their charters and counties to adopt or amend charters by local law.[10] Charters of charter local governments must be consulted in order to ascertain the nature and extent of any power held by that government.[11]

[10] Municipal Home Rule Law, Article 4.

[11] This holds true for any charter village, as well.

Once a local government adopts an ordinance or local law, the government is bound by such legislative enactment until it is amended or repealed. Since local laws may direct that a local government's power be exercised in a certain manner, and, in some instances, may supersede state law (to be discussed later), the local government's local laws and ordinances must be consulted in order to fully define its powers.

4.1.7 Administrative Rulings and Regulations

Local government powers also may be expanded, restricted or qualified by the rules and regulations of state agencies. These rules and regulations are usually adopted as part of the implementation of a state program having local impact or application. Thus, it is advisable to review state regulations on the particular subject in order to ascertain the extent of local authorization in undertaking a particular activity or program.

An example is the promulgation of a local sanitary or health code. While a local government may promulgate such a code, it must first ascertain what areas of regulation have been covered by the State Sanitary Code. The State Sanitary Code and other rules and regulations appear in the Official Compilation of Codes, Rules and Regulations of the State of New York, which is published and continually updated at the direction of the Secretary of State.

4.1.8 Home Rule and Its Limitations

What "home rule" means depends upon the context in which it is used. Home rule in a broad sense describes those governmental functions and activities traditionally reserved to or performed by local governments without undue infringement by the state. In its more technical sense, home rule refers to the constitutional and statutory powers given local governments to enact local legislation in order to carry out and discharge their duties and responsibilities. This affirmative grant of power is accompanied by a restriction upon the authority of the State Legislature to enact special laws affecting a local government's property, affairs or government.

4.1.9 Interpreting Home Rule

Originally, the powers of local legislation were derived from specific delegations from the State Legislature. These delegations concerned specific subjects and were narrowly circumscribed. The courts applied strict rules of construction when called upon to interpret state statutes which delegated legislative power to local governments. However, with the evolution of the broad home rule powers, which culminated in constitutional grants to all local governments in 1964, there emerged a gradual recognition that the rules of strict construction were no longer applicable to the interpretation of such delegated powers. Rather, the same rules of liberal construction applicable to enactments of the State Legislature should be applied to the local law power.

Judicial interpretations of the Home Rule article illustrate the tension between the affirmative grant of authority to local governments and the reservation of matters outside the term "property, affairs or government" of local governments to the State Legislature. In a society where many issues transcend local boundaries, a growing number of matters are considered to be matters of state concern.[12]

The home rule powers enjoyed by local governments in this state are among the most advanced in the nation. By recognizing the extent of their powers and by continuing to exercise them, local governments can best avoid the erosion of such powers. In this fashion, local governments will not only serve the needs of the people, but will strengthen state-local relationships as well.

[12] The most recent home rule cases indicate a growing class of state concerns. City of New York v. State of New York, 76 N.Y.2d 479 (1990); Albany Area Builders Association v. Town of Guilderland, 74 N.Y.2d 372 (1989).

4.2 Local Legislative Power

4.2.1 Forms of Local Legislation

Local legislation may take the form of local laws, ordinances and resolutions.

A local law is the highest form of local legislation, since the power to enact a local law is granted to local governments by the State Constitution. In this respect, a local law has the same quality as an act of the State Legislature, since they both are exercises of legislative power accorded by the State Constitution to representative bodies elected by the people. Indicative of this is the fact that acts of the State Legislature and local laws are both filed with the Secretary of State, the traditional record keeper for State government.

An ordinance is an act of local legislation on a subject specifically delegated to local governments by the State Legislature. Counties do not ordinarily possess ordinance powers and the power of villages to adopt ordinances was eliminated in 1974.

A resolution is a means by which a governing body or other board expresses itself or takes a particular action. Unlike local laws and ordinances, which can be used to adopt regulatory measures, resolutions generally cannot be used to adopt regulatory measures. Exceptions exist to this rule, however, as authorized by the State Legislature. For example, section 153 of the County Law provides that a power vested in a county may be exercised by local law or resolution.

4.2.2 The Local Law Power

Article IX of the State Constitution was implemented in 1964 by the State Legislature through the enactment of the Municipal Home Rule Law, which reiterates and explicates the constitutional local law powers and provides procedures for adopting local laws.

Both the Constitution and the Municipal Home Rule Law provide the following categories of local law powers:

- The power to adopt or amend local laws relating to their property, affairs or government which are not inconsistent with the provisions of the Constitution or with any general law;
- The power to adopt or amend local laws, not inconsistent with the Constitution or any general law, relating to specifically enumerated subjects, whether or not these subjects relate to the property, affairs or government of the local government, and subject to the power of the Legislature to restrict the adoption of local laws in areas not relating to property, affairs or government; and
- The State Legislature is expressly empowered to confer upon local governments additional powers not relating to their property, affairs or government and to withdraw or restrict such additional powers.

The phrase “property, affairs or government” is a term of art which has been defined largely by court decisions which have determined what it is not.[13] Even where the subject matter of a local law falls instead within the meaning of “property, affairs or government,” the local law must be consistent with all general state laws and with the Constitution.

The second category of local laws set forth above includes the specifically enumerated topics found in section 10 of the Municipal Home Rule Law. For example, a county, city, town or village may, by local law, modify the powers, qualifications, number, mode of selection and removal, terms of office, compensation and hours of work of its officers and employees. It may: create and discontinue departments of its government; decide the membership and composition of its legislative body; and regulate the acquisition and management of property, the levy collection

[13] For example, the phrase “property, affairs or government” is not “matters of state concern”.

and administration of local taxes and assessments, and the fixing, levying and collecting of local rental charges and fees. It may also provide for the protection of its environment, the welfare and safety of persons and property within its boundaries, and the licensing of business and occupations.

Additional powers are conferred upon counties, cities, towns and villages in section 10 of the Municipal Home Rule Law, for example:

- Counties may assign administrative functions to the chairperson of the county legislative body, create an administrative assistant to the chairperson, and provide for the control of floods and reforestation of lands owned by the county;
- Cities may revise their charters, as well as authorize benefit assessments for local improvements;
- Towns may adopt local laws relating to the preparation, making, and confirmation of assessments of real property and the authorization of benefit assessments, consistent with state law. They may also supersede any provision of the Town Law in relation to an authorized area of local legislation, unless such supersession has been restricted by the State Legislature and except for those provisions of the Town Law relating to improvement districts, areas of taxation, referenda and town finances;
- Villages may authorize benefit assessments and may also supersede any provision of the Village Law in relation to an authorized area of local legislation, unless the State Legislature has restricted such supersession.

The courts also have recognized the extent of local law power. In a landmark case, the Court of Appeals, the state's highest court, upheld a locally enacted county charter provision that superseded a general state law.[14] Similarly, a town's authority to supersede provisions of the Town Law has been upheld.[15]

It can be readily seen that the grant of local law power to local governments in New York is quite broad.

4.2.3 Restrictions on Local Law Powers

The local law power is not without its limitations. The restrictions upon the exercise of the local law power are as follows:

- A local law cannot be inconsistent with the Constitution or with any general law. The term "general law" is defined in the Constitution as a law enacted by the State Legislature which in terms and in effect applies alike to all counties outside the City of New York, to all cities, to all towns or to all villages. Conversely, a special law is defined as one which applies to one or more, but not all, counties, cities, towns or villages;
- A number of specific restrictions or qualifications are contained in the Constitution or have been enacted by the State Legislature, such as those set forth in section 11 of the Municipal Home Rule Law. This section, for example, restricts the adoption of a local law if it would remove a restriction of law relating to the issuance of bonds;
- Local law power is restricted where the subject of the local law is one considered to be of "state concern." "Matters of state concern" is a phrase born in judicial opinions rather than in the Constitution or statutes. It is a term used by the courts to define what local governments may not accomplish by local law – in other words, what is not within their "property, affairs or government." Matters of state concern are those of sufficient importance to require State legislation. If the matter is to a substantial degree a matter of State interest, it is considered a matter of State concern, even if local concerns are intermingled with the State concerns.[16] Court cases construing the home rule grants have indicated that "state concern" includes such matters as taxation, incurring

[14] Town of Smithtown v. Howell, et al., 31 N.Y. 2d 365, 339 N.Y.S. 2d 949.
[15] Kahmi v. Town of Yorktown, 74 N.Y.2d 423 (1989).
[16] See Adler v. Deegan, 251 N.Y. 467 (1929) and Wambat Realty Corp. v. State of New York, 41 N.Y.2d 490 (1977).

of indebtedness, education, water supply, transportation and highways, health, social services, aspects of civil service and banking. As a general principle, a local government may not adopt a local law relating to a "matter of state concern" unless the Legislature has specifically granted such power by law; and

- Local law power is restricted where the subject of proposed local law action has been preempted by the state. Preemption occurs when the State Legislature specifically declares its intent to preempt the subject matter, or when the Legislature enacts sufficient legislation and regulation so as to indicate an intent to exclude regulation by any other governmental entity. The courts have termed such indication intent to "occupy the field."

4.2.4 Referenda

New York's governmental heritage is that of a representative form of government where most matters are addressed by elected officials. Certain matters of particular importance, however, are set aside to be confirmed by the voters through referenda. These matters generally include approval of Constitutional amendments and bonding authorizations. The preference for a representative form of government also carries through to the local level. Matters may be set for local referendum only when authorized by state statute. Certain local laws, which are subject to mandatory referendum, do not become effective until approved by the voters through a referendum. The referendum requirements that apply to local laws are set forth primarily in sections 23 and 24 of the Municipal Home Rule Law, and are discussed at greater length in Chapter 10 [103].

Chapter 5

County Government

While originally established to serve as instrumentalities of the state existing for state purposes, counties in New York are now full-service general purpose units of government that provide a vast array of services to their residents.

5.1 What is a County?

New York counties started as entities established by the State Legislature to carry out specified functions at the local level on behalf of the state. During the 20th century, county government in New York underwent major changes in function, form and basic nature.

The counties in New York are no longer merely subdivisions of the state that primarily exist to perform state functions. The county is now a municipal corporation with geographical jurisdiction, home rule powers and the fiscal capacity to provide a wide range of services to its residents. To some extent, counties have evolved into a form of "regional" government that performs specified functions and which encompasses, but does not necessarily supersede, the jurisdiction of the cities, towns and villages within its borders.

New York State outside New York City is divided into 57 counties. The five boroughs of the City of New York function as counties for certain purposes, although they are not organized as such nor do they operate as county governments. Unless otherwise indicated, references to counties in this chapter will apply only to those outside New York City. Counties in New York are diverse in population and demographics. The 2010 Census populations of the counties vary from Suffolk County's 1,493,350 to Hamilton County's 4,836. St. Lawrence County is the largest in geographical area, with over 2,700 square miles, and Rockland is the smallest, with an area of 175 square miles. The most densely populated county is Nassau County with more than 4,700 people per square mile, and the most sparsely populated is Hamilton County, with fewer than 3 people per square mile. The population of New York's counties is shown in Table 5.1 [46] and Table 5.2 [48].

Of the state's 57 counties outside New York City, 21 contain no cities. All counties include towns and villages, although the number of each varies widely. For example, St. Lawrence, Cattaraugus and Steuben counties each contain 32 towns, while there are only three towns in Nassau County. Hamilton and Warren counties each contain one village to the 64 villages within Nassau County.

The foregoing statistics demonstrates that not all counties in New York State are alike. The State of New York has some of the most urban and rural counties in the nation, and the interests, concerns and governmental expectations of their residents are similarly diverse.

5.2 Historical Development

The patterns of county government organization in New York were set in colonial times. The "Duke's Laws" of 1665 created "ridings," or judicial districts, which were in effect a system of embryonic counties. In 1683, an act of the first Assembly of the Colony established the first 12 counties — adding 2 to the 10 which had previously come into existence — and created the office of sheriff in each county. These original counties were Albany, Cornwall, Dukes, Duchess, Kings, New York, Orange, Queens, Richmond, Suffolk, Ulster, and Westchester. Cornwall and Dukes were deemed part of Massachusetts after 1691. County legislative bodies began at the same time, when freeholders, later known as supervisors, were elected to represent each town in the establishment of tax rates to defray the costs of county government, including the operation of a court house and a jail.

The reasons for the creation of county governments in the early colonial period appear to have been practical: to improve protection against enemies and to provide a more broadly based mechanism for maintaining law and order. The first duties of county government lay in these functional areas. The sheriffs in the first counties were appointed by the Governor and could serve only one term. The first State Constitution in 1777, which designated counties, towns and cities as the only units of local government, recognized the existence of 14 counties that had been established earlier by the colonial Assembly. Two of those counties were ceded to Vermont in 1790 in the settlement of the New Hampshire land-grant controversy. All of New York's other 50 counties were created by acts of the State Legislature. The state's newest county, Bronx, was established in 1914.

The basic composition of the counties was set in 1788 when the State Legislature divided all of the existing counties into towns. Towns, of course, were of earlier origin, but in that year they acquired a new legal status as components of the counties.

Throughout the nineteenth century, additional counties were created, usually when an area contained approximately 1,000 residents. New counties were typically formed out of existing counties, some of which originally covered vast geographical areas.

Table 5.1: New York State Counties [1]

County	Chief Administrative Official	Legislative Body	Number of Members	Population**
Albany*	Executive	Legislature	39	304,204
Allegany	Administrator	Legislature	15	48,946
Broome*	Executive	Legislature	15	200,600
Cattaraugus	Administrator	Legislature	21	80,317
Cayuga	Manager	Legislature	15	80,026
Chautauqua*	Executive	Legislature	19	134,905
Chemung*	Executive	Legislature	15	88,830
Chenango	Chair of Legislative Body	Supervisors	23	50,477
Clinton	Administrator	Legislature	10	82,128
Columbia	Chair of Legislative Body	Supervisors	23	63,096
Cortland	Administrator	Legislature	17	49,336
Delaware	Chair of Legislative Body	Supervisors	19	47,980
Dutchess*	Executive	Legislature	24	297,488
Erie*	Executive	Legislature	11	919,040
Essex	Manager	Supervisors	18	39,370
Franklin	Manager	Legislature	7	51,599

Table 5.1: (continued)

County	Chief Administrative Official	Legislative Body	Number of Members	Population**
Fulton	Administrator	Supervisors	20	55,531
Genesee	Manager	Legislature	9	60,079
Greene	Administrator	Legislature	14	49,221
Hamilton	Chair of Legislative Body	Supervisors	9	4,836
Herkimer*	Administrator	Legislature	17	64,519
Jefferson	Administrator	Legislature	15	116,229
Lewis	Manager	Legislature	10	27,087
Livingston	Administrator	Supervisors	18	65,393
Madison	Administrator	Supervisors	20	73,442
Monroe*	Executive	Legislature	29	744,344
Montgomery	Executive	Supervisors	9	50,219
Nassau*	Executive	Legislature	19	1,339,532
Niagara	Manager	Legislature	19	216,469
Oneida*	Executive	Legislature	23	234,878
Onondaga*	Executive	Legislature	17	467,026
Ontario	Administrator	Supervisors	20	107,931
Orange*	Executive	Legislature	21	372,813
Orleans	Administrator	Legislature	7	42,883
Oswego	Administrator	Legislature	25	122,109
Otsego	Chair of Legislative Body	Legislature	14	62,259
Putnam*	Executive	Legislature	9	99,710
Rensselaer*	Executive	Legislature	19	159,429
Rockland*	Executive	Legislature	17	311,687
St. Lawrence	Administrator	Legislature	15	111,944
Saratoga	Administrator	Supervisors	22	219,607
Schenectady*	Manager	Legislature	15	154,727
Schoharie	Chair of Legislative Body	Supervisors	15	32,749
Schuyler	Administrator	Legislature	9	18,343
Seneca	Manager	Supervisors	14	35,251
Steuben	Manager	Legislature	17	98,990
Suffolk*	Executive	Legislature	18	1,493,350
Sullivan*	Manager	Legislature	9	77,547
Tioga	Chair of Legislative Body	Legislature	9	51,125
Tompkins*	Administrator	Legislature	14	101,564
Ulster*	Executive	Legislature	23	182,493
Warren	Administrator	Supervisors	20	65,707
Washington	Administrator	Supervisors	17	63,216
Wayne	Administrator	Supervisors	15	93,772
Westchester*	Executive	Legislature	17	949,113
Wyoming	Chair of Legislative Body	Supervisors	16	42,155

Table 5.1: (continued)

County	Chief Administrative Official	Legislative Body	Number of Members	Population**
Yates	Administrator	Legislature	14	25,348

* Denotes a Charter County

Table 5.2: New York City Boroughs/Counties

Borough	Population [2]
Bronx	1,385,108
Kings (Brooklyn)	2,504,700
New York	1,585,873
Queens	2,230,722
Richmond (Staten Island)	468,730

5.3 The Changing Nature of County Government

The basic changes in form, powers and functions, which the counties in New York have been undergoing, have been hastened and facilitated by three major developments:

- The rapid urbanization of many areas of the state after World War II, particularly in the environs of large cities;
- The availability, by general law, of authority for the residents of a county to draft and adopt a home rule charter to provide whatever form of government they consider most appropriate to local needs, and through the charter, to assign to the county government duties and functions they want the county to undertake — within state Constitutional and statutory limitations;
- Basic alteration of the representative base for county legislative bodies resulting from federal and state court rulings requiring that such representation comply with the “one person-one vote” principle.

While county government still must perform as an administrative arm of state government for many purposes, at the same time it must be an independent unit of government exercising powers of its own to meet demands.

As the population spilled out from the central cities of the metropolitan areas, the towns and the counties occupying the periphery had to take on a wide range of new functions, services and duties. As a result, the forms and procedures of county government changed to meet the needs of the metropolitan areas. At the same time, however, the old forms of county government, which largely reflected rural needs and county functions as state administrative units, were retained in areas where they were still appropriate. Even in the latter case, however, it has proven convenient for the state to use the counties in new ways for new purposes in carrying out new state programs and objectives.

[1] County government information courtesy New York State Association of Counties
[3] Source: U.S. Bureau of the Census, courtesy of Empire State Development Corporation

At the present time, most New Yorkers live in counties that are now considered urban because of their population or proximity to a major city. Some counties are marginally urban because of their economic orientation and because people journey to work from those counties to larger metropolitan centers that may be some distance away. This very fact, however, lends an urban aura to those counties even though their primary activities may still have rural characteristics.

5.4 The County Charter Movement

One of the developments that has facilitated the changing nature of county government in New York has been the provision of general law authority for counties to draft and adopt home rule charters by local initiative and action.

Most of the counties of the state still operate, as they did in the past, under the general provisions of the New York State County Law. Even these counties have certain latitude under state law to develop their own organizational structures and to provide for the administration of their services. In fact, a majority of the counties that operate under the County Law have a county administrator or comparable position.

Any county, regardless of size, may gain a much wider scope for local initiative and action through the adoption of a county charter. Table 5.3 [49] lists the 23 charter counties in New York and the year of adoption of their current charter.

Table 5.3: Charter Counties in New York State

County	**Date Charter Adopted**
Nassau	1936
Westchester	1937
Suffolk	1958
Erie	1959
Oneida	1961
Onondaga	1961
Monroe	1965
Schenectady	1965
Broome	1966
Herkimer	1966
Dutchess	1967
Orange	1968
Tompkins	1968
Rensselaer	1972
Albany	1973
Chemung	1973
Chautauqua	1974
Putnam	1977
Rockland	1983
Sullivan	1999
Ulster	2006
Montgomery	2012
Steuben	2013

The spread of the county charter movement in New York has been a relatively recent phenomenon. In 1937, the

Legislature enacted an Optional County Government Law which broadened the scope of local choice as to organization and form. By the early 1950's only three counties — Nassau, Monroe and Westchester — had organized under optional or special charters granted by the State Legislature. Because of the counties indifferent response to this form, in 1952 the Legislature repealed the Optional County Government Law and enacted the Alternative County Government Law, which extended to the counties a choice of four optional alternative forms of government organization. However, no county utilized the provisions of this law. In 1958, Suffolk County was granted an alternative form of county government by special state legislation.

An amendment to the State Constitution in 1959 provided the necessary constitutional basis for locally developed and adopted charters. With the implementing statutes enacted by the State Legislature, the amendment enabled counties to adopt charters that could supersede the governmental structures provided in the County Law. The response was immediate; Erie County in 1959 was the first to adopt its own charter under the new law. In 1961, Oneida and Onondaga Counties followed. Enactment in 1963 of the Municipal Home Rule Law, to which the County Charter Law provisions were transferred, further facilitated the reorganization by charter of county governments. Since that change, the number of counties operating under charters has increased to 23. One of these counties — Herkimer — chose only to reapportion the county legislative body through the county charter method and left intact the organizational arrangements provided under the County Law.

5.4.1 Reform of County Legislative Bodies

A third recent development that significantly impacted county government in New York was the reapportionment of representation in county legislative bodies in response to judicial mandates.

From the earliest days of county government, the county's legislative body — and its executive and administrative elements as well — was a board of supervisors. The board of supervisors consisted primarily of the supervisors of the towns within the county, who were elected solely as town officers at town elections, but who served ex officio as county legislators. In counties containing cities a number of "city supervisors" were elected by city voters, usually by wards, to serve solely as county officials and having no other duties as city officials.

In the early 1960s, the courts found that many of the arrangements in New York for boards of supervisors violated the Equal Protection clause of the Fourteenth Amendment of the United States Constitution. The basis for this ruling was the fact that each town in a county, small or large, had one vote in the legislative body. Thus, a voter in a town with a population of a hundred wielded ten times more weight in the county legislative body than did a voter in a town of a thousand. Accordingly, the counties were ordered to bring the apportionment of their legislative bodies into compliance with the principle of one person-one vote.

The counties of New York State have used one of two basic methods to comply with the Supreme Court's mandate: weighted voting or districting. Some counties still retain the board of supervisor's arrangement, but with an appropriate weighting of the relative voting strength of each supervisor. Other counties now elect legislators from districts, which may or may not coincide with town lines.

Variations of these two basic methods have been used to accommodate local conditions. In some counties, weighted voting provides that each legislator "casts the decisive vote on legislation in the same ratio which the population of his or her constituency bears to the total population." In others, the weighting simply reflects the represented population. Districting has taken the form of single or multi-member districts or a mix of both.

In many cases the members of the county legislative bodies now occupy their positions in that capacity alone; they are clearly county legislators, elected as such. This is a major change in the basic structure of county government, since it can be argued that until the county had its own independently elected legislative body, it could not truly be regarded as a full unit of local government with its own defined powers and its own authority to utilize those powers in response to countywide needs.

5.5 County Government Organization

Four organizational elements exist in some form and in varying degrees among all counties, both charter and non-charter. These are: (1) a form of executive or administrative authority, either separate from or as a part of legislative authority; (2) a legislative body; (3) an administrative structure; and (4) certain elective or appointed officers who carry out specific optional duties and functions.

5.5.1 Executive and Administrative Authority

5.5.1.1 Non-charter Counties

The County Law, which provides the legal framework for non-charter county government, makes no provision for an independent executive or administrative authority. The executive and legislative authority remain joined in the legislative body, which may exercise that function in different ways. The legislative body may organize its committee structure around the functional areas of county government; each committee or its chair exercises a certain amount of supervisory or administrative authority on behalf of the legislative body over the operational arrangements for the provision of the specific service or activity. The legislature may also delegate to its chair a substantial amount of administrative authority to be exercised on its behalf.

As long as the functions of county government were relatively few and simple, such arrangements assured the legislature of direct information about day-to-day county operations. As county functions and programs increased in number, diversified in kind, and expanded enormously in both complexity and cost, this fragmentation of administrative authority often fell short of providing necessary overall supervision and coordinated direction. Partly to correct this inadequacy, the county charter movement spread rapidly during the 1950's and 1960's among the larger and rapidly urbanizing counties of the state.

In addition to the internal arrangements whereby a county legislative body may exercise a certain amount of executive and administrative authority, several provisions of law authorize the county legislature to establish the office of county administrator or a similar office to carry out, on behalf of the legislature, certain administrative functions.

The first of these provisions is section 10(1)(a)(1) of the Municipal Home Rule Law, which authorizes local governments to enact local laws relating to the powers, duties, qualifications, number, mode of selection and removal, and terms of office of their officers and employees. Under this provision, a county may create the office of county administrator or manager, and assign to the office certain administrative functions and duties to be performed on behalf of the county legislature.

A county legislature should keep two factors in mind when creating such an office. The first is to determine whether the powers and functions to be assigned to the office would either diminish the powers of any elected county official or transfer to such an office any powers and duties presently vested by law in other county offices. In such situations, the Municipal Home Rule Law provides for a mandatory referendum. The second is to determine how far the county legislature is empowered to go in assigning various functions and duties to the office of county administrator. At what point will the legislature, in effect, be enacting an alternative form of county government? In other words, how far can the county go in assigning powers and functions before it becomes necessary to enact a county charter?

Another option is found in the Municipal Home Rule Law, section 10(1)(b)(4), which authorizes a county to create by local law the position of administrative assistant to the chairman of the board of supervisors. While such a law may assign specified administrative functions, powers, or duties to this office the board must remain the final authority with respect to such administrative functions and duties.

Finally, Section 204 of the County Law provides that the county legislative body may establish the position of "executive assistant" by local law, resolution, or by inclusion in the county budget.

The foregoing illustrates that a county government without a charter still has a number of options through which it can provide itself with a certain amount of administrative leadership and day-to-day direction. However, the legislative body must retain the executive authority generally embodied in making policy and developing the annual budget.

5.5.1.2 Charter Counties

The principal difference between a county government operating pursuant to the County Law and one operating pursuant to a charter is that a county charter ordinarily provides for an executive or administrator, independent of the legislature, who administers the day-to-day affairs of county government. Of the 23 charter counties in the state, 18 have elected executives, while 3 have professional managers, and 2 have administrators.

Voters in the charter counties of New York, in most cases, have chosen the elected executive form of county government organization. The creation of the office of elected executive provides the county with potentially strong leadership, because the executive is elected by the voters of the entire county. Thus, the executive operates from a strong political base to speak for the county, and to exercise leadership in relation to the legislative body. This principle holds true even where the charter does not endow the executive with extensive powers.

The elected executive also provides a focus of public attention in county government that is lacking in the organization under the County Law. Like elected executives at other levels, the county executive operates under constant scrutiny.

Under most county charters, the elected county executive may secure additional professional administrative assistance, subject to appropriated funds. For example, the executive may provide, within the annual appropriation, for the creation of the office of deputy county executive for administration or for an executive assistant to carry out responsibilities that may be delegated by the executive.

One of the most influential elements of the elected executive's authority is the budgetary power, an essential tool of executive participation in policy development and in strong administration. Through the framing of an executive budget, the county executive establishes and recommends to the county legislature priorities among programs. If they are approved by the legislative body, these priorities provide a direction for the implementation of policies.

Another important element of the authority of the county executive or county manager in charter counties is the power to appoint and remove department heads. The charter may allow the executive to exercise this authority without confirmation or approval by the legislative body, and in other cases, the charter may require the confirmation or approval of the action. In either case, the executive must exercise this authority within the scope of the applicable civil service laws as described in Chapter 13 [143].

Initially, the size of a county's population has much to do with whether the county's voters believe is necessary to provide the county with executive leadership and day-to-day direction of operations by adopting a locally drafted charter. It is possible, however, that other considerations, such as fiscal concerns, are of equal importance. Without a strengthening of executive capacity, the urbanizing counties of the state found themselves severely handicapped in meeting and dealing with new and expanding service demands. Legal authority to draft and adopt a charter locally, one specifically tailored to fit local conditions and requirements, has facilitated the efforts of counties to meet their rapidly growing responsibilities as true units of local government.

5.5.2 County Legislative Bodies

Every county has power to enact laws, adopt resolutions, and take other actions having the force of law within its jurisdiction. This power, along with the related authority to make policy determinations, is vested in a legislative body.

The legislative bodies of the counties are designated by various names, including Board of Supervisors, Board of Representatives, Board of Legislators, and County Legislature. Originally, the legislative bodies of all counties were boards of supervisors, consisting of the town and city supervisors. With the adoption of various reapportionment plans and with the spread of home rule charters, however, other designations were developed according to local preference.

Table 5.1 [46] shows the basic makeup of county legislative bodies, along with their 2010 Census populations. This table illustrates that neither the size of a county's population nor the fact of having a charter have little if anything to do with the size of a county's legislative body. Legislatures range in size from seven members in Franklin and Orleans Counties to 39 in Albany County.

Generally, members of county legislative bodies are elected for either two or four year terms. In counties that have retained a Board of Supervisors, the term of office for each member is two years, except in towns that have exercised the option under the Town Law to extend the term to four years. Of the 57 county legislative bodies, 36 conduct scheduled meetings once a month and 17 meet twice a month. Other meeting patterns are practiced by three counties. One legislative body, Herkimer, conducts a scheduled meeting quarterly but holds additional meetings as needed. All of the legislative bodies convene for special meetings, a fairly frequent occurrence in many counties.

Since the role of the county as a true unit of local government continues to evolve, the legislative bodies of New York counties are continuing to change. Their committee structures, rules of procedure, and patterns of action may reflect some practices of earlier times, but it is clear that adjustments are under way. The heightened responsibility of members of county legislative bodies is indicated by the fact that the budgets they must consider and adopt each year range from tens of millions of dollars in small counties to hundreds of millions in large counties. Several counties have budgets in excess of one billion dollars, and Nassau County's budget exceeds three billion dollars.

5.5.3 Administrative Structure

The administrative structures of county governments in New York are generally similar. The basic organizational arrangements and operational procedures of county administration were set at a time when the functions and duties were few, relatively simple and largely reflective of state objectives. In some counties with smaller and homogeneous populations, the traditional arrangements still provide an adequate administrative structure.

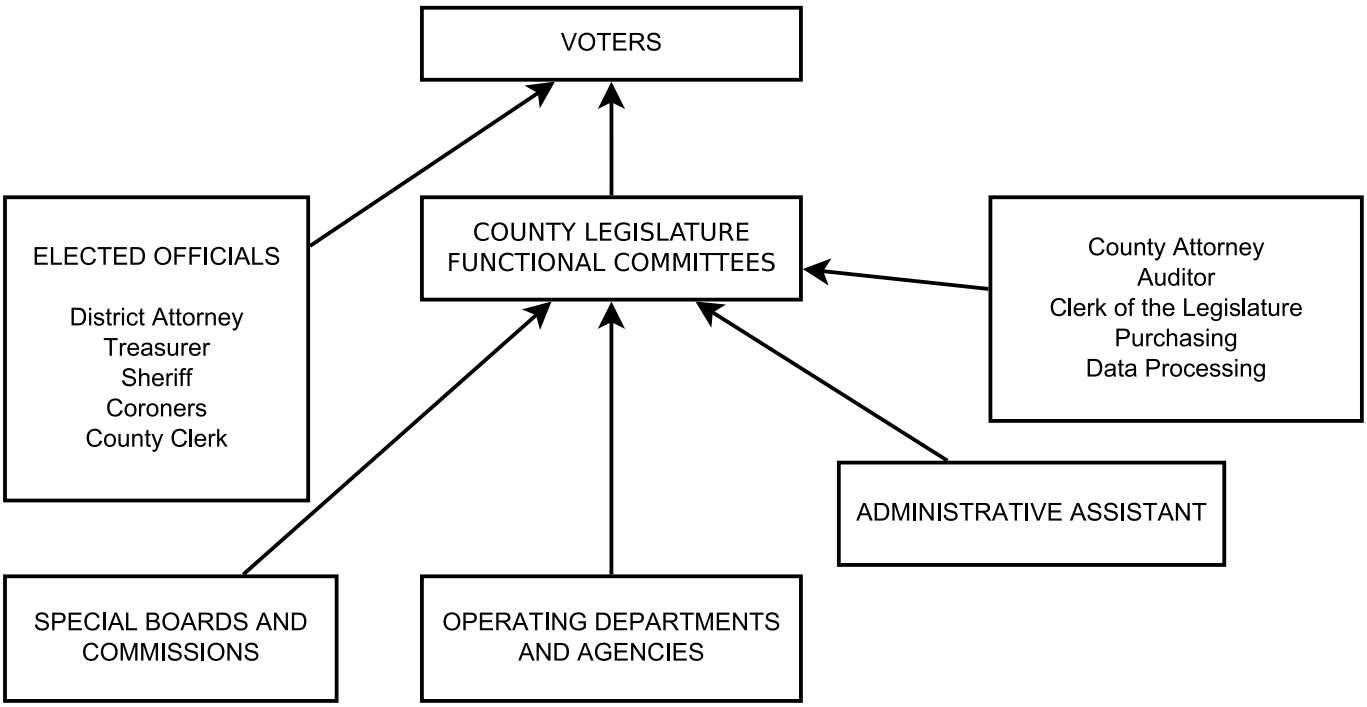

Figure 5.1: County Law Form Organization Chart

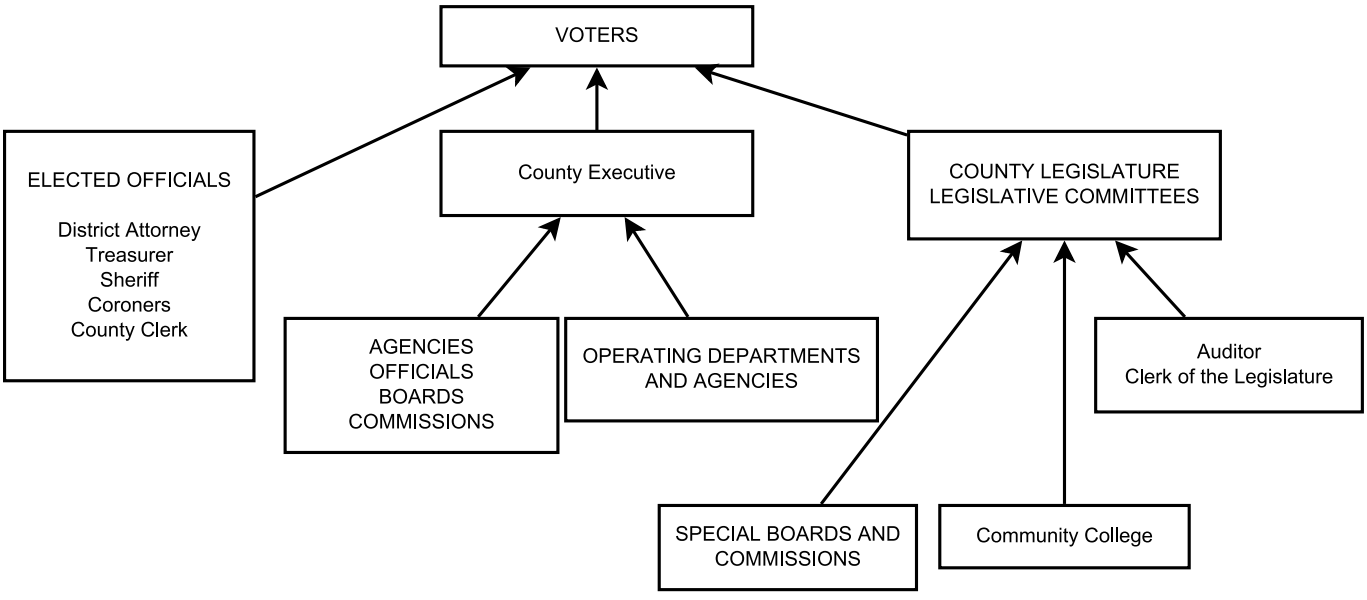

Figure 5.2: County Executive Form Organization Chart

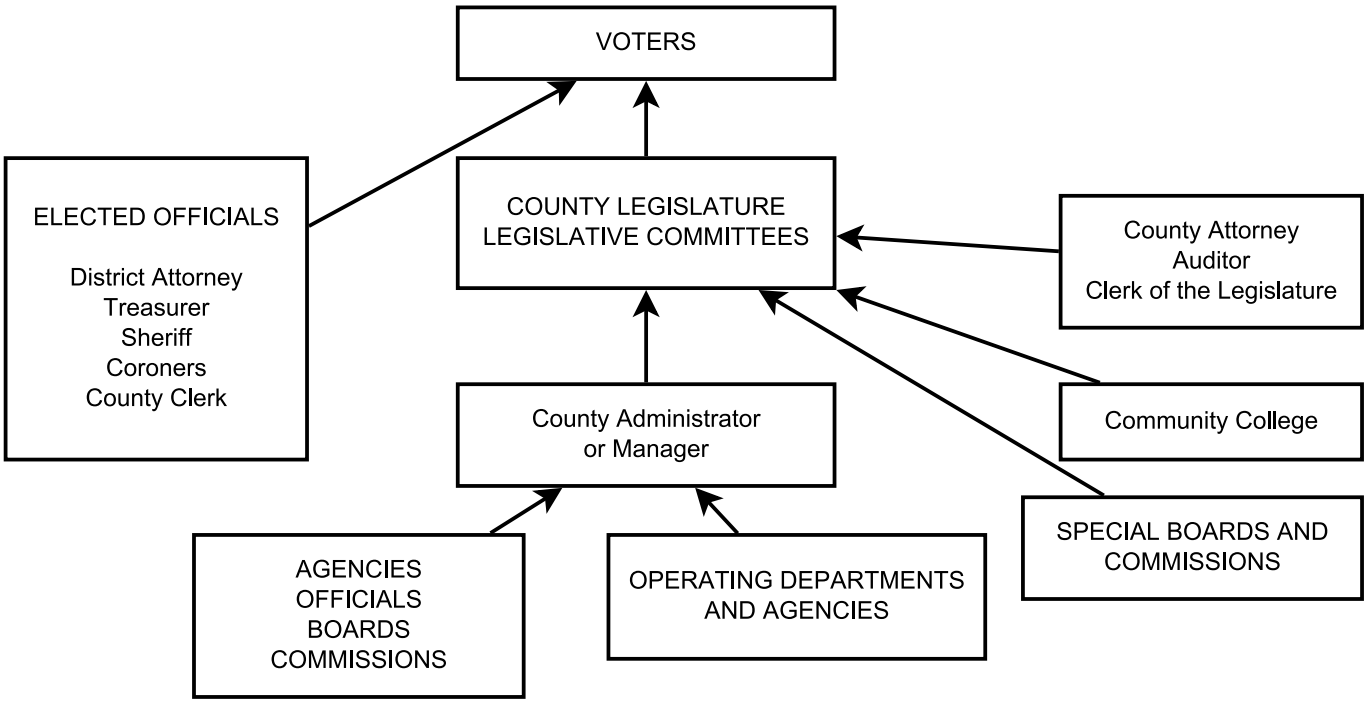

Figure 5.3: County Manager Form Organization Chart

In the large counties, however, urbanization has created a need for new patterns of administration as well as new leadership arrangements. The result has been a rapid growth in both the size and complexity of county administrative structures. These arrangements meet the needs of both ongoing traditional county functions, such as law enforcement and record keeping, as well as the newer county functions in such areas as industrial and economic development, mental health services, and the provision of recreational facilities and programs.

The administrative structures of New York counties generally fall into three categories: (1) organization under the County Law; (2) organization with an elected county executive; and (3) organization with an appointed manager or administrator. As might be expected, there are many similarities among these three forms, but there are also differences. As illustrated in Figure 5.1 [54], Figure 5.2 [54], and Figure 5.3 [55], the primary differences among the three forms are at the top, in the relationship between the elected representative body and how the county is functionally administered. The administrative structure of a county government does not depend on whether the county elects an executive, appoints a manager, or leaves administrative direction and supervision to its legislative body. However, most of the larger counties have found it desirable, if not necessary, to divide their administrative structures into many departments. This organizational structure facilitates proper direction and supervision of what have become large-scale enterprises.

5.5.4 Other Elected and Appointed Officers

In counties organized under the County Law, the following officials must be elected: district attorney, sheriff, coroner(s) and county clerk. Under a home rule charter, a county may alter some of these officers' duties, subject to referendum. The treasurer must also be elected, but this office may be eliminated under either the County Law or a home rule charter.

Many of the charter counties have dropped the office of treasurer and incorporated its functions with those of a director of finance. The office of sheriff, although based in the Constitution, may also be substantially modified. In counties with county police departments, for example, the office of sheriff has few, if any, law enforcement functions, but may retain civil functions and responsibility for operating a county correctional facility.

5.6 The Functions of County Government

At the beginning of this chapter we noted that the principal reasons for creating county governments in the colonial period were to facilitate the defense of the community against enemies and to maintain public order.

With the establishment of state government, the counties provided an already existing and readily available administrative unit through which the state could carry out a number of its functions and duties. To do this, the counties found themselves keeping records on behalf of the state, enforcing state laws and conducting elections for the state, among other state-assigned functions. In New York, as in other states, the prevailing view saw county government as an arm of state government, serving state purposes.

It is doubtful that many residents of the counties of New York ever fully shared this assessment of the nature of the county. The people of the counties appear to have felt from earliest times that the county, like the city, the town and the village, was one of "their" local governments, even though it may have performed duties for the state.

The recent fundamental changes in the nature and form of county government in New York have in some ways brought the legal concept of a county closer in line with the concept held by most of the counties' inhabitants. The impetus for this merger of the de jure with the de facto probably sprang from the rapidly expanding demands for services, which were stimulated by population growth and urbanization, which often could not be supplied by the towns, cities, and villages.

The functions of county government at the beginning of the twenty-first century scarcely resemble those of colonial times, although the county still enforces laws and maintains order. In 1980, total expenditures by county government in New York amounted to $5.5 billion. By 2010, this amount had grown to over $23.1 billion. To see what counties are doing today and to illustrate the demands now being placed on county government, it is useful to examine how county government spends its money. <<county_expenditure_trends_table>> shows the dollar amount and percent distribution of major expenditures for all counties for 1980 and 2010.

SOURCE: Office of the New York State Comptroller

Economic assistance, which includes social services programs such as Medicaid and Aid to Dependent Children, remains the largest category of expenditure for county government. However, the share of the distribution of expenditure for this category has declined as expenditures in other categories have increased and accounting for Medicaid expenditures has changed. In 1980, county expenditures for Medicaid reflected the entire cost of the program (counties paid the full cost and were then reimbursed from state and federal sources). In 2003, however, county medical expenditures reflect only the county contribution (roughly 25 per cent of total Medicaid costs), making comparisons between these years difficult. The greatest percentage of growth in dollar terms has been in the education category, which includes the counties' obligation to pay for the education of pre-school special education children as well as the costs of providing community college education to county residents. Police and public safety has also experienced significant growth and expenditures accounting for the cost of operating a jail in addition to the expenses of a sheriff's department, plus probation and rehabilitation services. General government includes staffing and administrative costs of county officials, the district attorney, public defenders, maintenance of buildings and other central operations.

5.7 Elections

A significant change in voting systems was made with the implementation of the Help America Vote Act of 2002 (HAVA), which required that voting machines and voting systems used in all states meet minimum performance standards, and for the uniform administration of the electoral process, from voter registration to the casting of the ballot. New York State Election Law, Article 7, in part, implements HAVA. One important change is the transfer of ownership of voting systems from each of New York's cities, towns, and villages to each respective County Board of Elections. Prior to this statutory change, with only several exceptions, voting machines were owned by local

municipalities. In the federal election of November 2000, there were 15,571 election districts in New York State. With the exception of voters in approximately 60 election districts, the balance of the state's voters voted on one of the 19,843 lever machines in use at that time. Central count voting systems are owned by the county boards of elections, and are used to count absentee and affidavit optical scan or punch card ballots. In compliance with HAVA, the State Legislature banned punch card absentee systems in 2005, which resulted in the use of a single technology (optical scan system) certified for use in New York. At present, the majority of county boards in the state use central count op-scan central count voting systems.

In 2006, compliance with HAVA and an implementing Federal Court order required the placement of at least one such ballot marking device in each county, though counties could provide more access than just a single device for their entire county. The State Board of Elections certified five ballot marking devices to serve as an interim compliance solution to provide access for voters with disabilities, while New York's efforts at obtaining certification for HAVA-compliant voting systems and ballot marking devices continued. Today, all county boards of elections have implemented certified transparent, accurate and verifiable optical scan poll site voting systems and ballot marking devices throughout the state's 15,005 election districts.

5.8 Transfer of Functions

Article 9, section 1(h)(l) of the State Constitution authorizes alternative forms of county government to transfer functions or duties from one unit of local government to another, subject to referenda approval. Any such transfer, whether included in a proposed county charter or charter amendment, or by local law through procedures set forth in section 33-a of the Municipal Home Rule Law, must be approved by separate majorities in the area of the county outside the cities, and in all cities in the county, if any, "considered as one unit." In addition, if a function or duty is transferred to or from any village, the transfer must also be approved by a majority of voters in all villages so affected, again "considered as one unit."

In many cases, counties have assumed new activities without formal transfer of the function. So long as the county has power to engage in a specific activity — the provision of parks, for example — it often does so at the same time that cities, towns and villages undertake similar activity. This power of the local units to carry out the same activity presents local taxpayers with recurring policy questions regarding which units can perform each service best and at least cost. In many cases cities have urged counties to assume activities, such as oversight of parks, zoos, civic centers and the like, not only to spread the cost more equitably, since all county residents are likely to use such facilities, but also because the county has greater ability to finance such activities.

5.9 Summary

Although the counties still carry out, in one way or another, their original functions and duties, they also have taken on a vast array of new ones. As a result, county governments in New York have had to adapt so that they can provide and finance these services for all the cities, towns and villages within their jurisdiction.

County government has been strengthened as a unit between the cities, towns and villages on the one hand and the state government on the other. The State Legislature and the people of the state have made it possible, through the Constitution and statutes, for the counties to restructure themselves, if they choose, to provide the executive and administrative leadership, the administrative organization and the operational procedures required meeting new demands.

In urban areas, the counties are now major providers of services, and it appears likely that county government will continue to assume new responsibilities.

Chapter 6

City Government

Each of New York State's 62 cities is a unique governmental entity with its own special charter. Two — New York and Albany — have charters of colonial origin, and the other 60 were chartered separately by the State Legislature.

Although home rule was a hard-won prize for the cities of New York State, they now have substantial home rule powers, including authority to change their charters and to adopt new charters by local action. Now New York State contains all of the major forms of city government: council-manager, strong mayor-council, weak mayor-council and commission.

New York City was originally established as a consolidated "regional" government and is now the core of a vast metropolitan region which sprawls over large areas of Connecticut and New Jersey as well as New York. In response to swift-moving social and economic changes the government of New York City has undergone important changes in both structure and allocations of authority.

When the Dutch West India Company granted what roughly amounted to a charter to New Amsterdam in 1653, it established the first city organization in the future state. New Amsterdam operated as an arm of a "higher government." The provincial governor — Peter Stuyvesant, at the time — appointed local officials. These magistrates were then granted the power to choose their successors. However, Stuyvesant reserved the right to promulgate ordinances.

The charters granted to New York City and Albany by English Governor Thomas Dongan in 1686 gave these cities more privileges and authority which they could exercise independently of the colonial government.

The first State Constitution, adopted in 1777, recognized the existing charters of New York and Albany and authorized the Legislature "…to arrange for the organization of cities and incorporated villages and to limit their power of taxation, assessment, borrowing and involvement in debt." Since that time separate special legislative acts have been necessary to establish each new city, although later developments permitted cities to replace or amend their charters by local action.

By 1834, six new cities had been chartered along the state's principal trading route, the Hudson-Mohawk arterial between New York City and Buffalo. These new cities were Brooklyn, Buffalo, Hudson, Rochester, Schenectady and Troy. Thirty-two more cities were created between 1834 and 1899, as thousands of immigrants were attracted to the state. The most recently chartered city in New York is the City of Rye, which came into being in 1942.

6.1 What is a City?

Historically, the need to provide services for population centers prompted the creation of cities. Beyond that common factor, it is difficult to ascertain common purposes or to generalize about their structures, charters granted to cities in New York differ widely.

No general law provides authority for the incorporation of cities; there is no statutory minimum size, either in population or geographical area, which must be met for an area to become a city. Furthermore, there is no concept of progression from village to city status. The primary difference between a city and a village is that the organization and powers of cities is set out in their own charters, while most villages are organized and governed pursuant to provisions of the Village Law. Also, unlike a city, a village is part of a town, and its residents pay town taxes and receive town services.

The Legislature may incorporate any community of any size as a city. In fact, most of the state's 62 cities have populations smaller than the population of the largest village, whereas over 150 of the state's 544 villages have populations greater than that of the smallest city. As a practical matter, the State Legislature does not create cities without clear evidence from a local community that its people desire incorporation. This evidence ordinarily is a locally drafted charter submitted to the Legislature for enactment and a home rule message from local governments that would be impacted by the incorporation.

6.2 Home Rule and the Cities — Historical Development

Historically, the Legislature enacted a charter to meet the specific needs of a center of population. As these centers grew, expanded and experienced changing needs, these charters were amended by special acts of the Legislature. Later on, cities gained the authority to revise and adopt new charters without the approval of the State Legislature. As a result, there is little uniformity in city charters throughout the state, as each city has, by trial and error, determined for itself what it believes to be the most effective form of government.

New York cities, as instrumentalities created individually by the Legislature, struggled long and hard for greater authority to manage their own affairs as they saw fit. Not until the late 1800's did the Legislature begin to legislate for cities generally rather than passing specific laws on individual local matters.

In 1848, the State Constitution was amended to ensure the integrity of elections of local officials. Prior to this time, there had been continual battles between the State and the cities of New York and Brooklyn over state-imposed changes of local officials who had been elected by city voters. The state would regularly move in and appoint local officials, thereby nullifying local elections. After 1848 the state could no longer do this, and in 1854 the mayor of New York City demanded, and at last received, authority to appoint his agency heads.

Despite such changes, however, cities often were subjected to legislative intervention. In 1857, for example, the Legislature created a new police force in New York City and Brooklyn because of allegations of police corruption. Nine years later the state temporarily took over New York City's health and excise departments, despite a court battle by the mayor.

Municipal home rule was a major issue at the Constitutional Convention of 1894. The Constitution of 1894, as amended in Article 12, section 2, divided cities into three classes by population: First Class — 250,000 or over; Second Class— 50,000 to 250,000; and Third Class — under 50,000. This classification was intended to provide a scheme whereby the Legislature could legislate for municipalities by passing general laws and still meet the particular problems of each type of city. It was actually a compromise between those favoring regulation of particular city affairs through special laws, and those favoring the covering of all communities in one general scheme of regulations. In addition, provision was made to require that any law not applicable to all the cities in a class had to be submitted for approval to the mayors of the cities affected by it. If the mayors disapproved, the law was returned to the Legislature for reconsideration. In practice, however, mayoral vetoes seldom were overridden. In 1907 a Constitutional amendment altered the classification of cities so that all cities with a population over 175,000 became First Class. This, of course, narrowed the population range of Second Class cities.

Over the years, the Legislature has enacted a number of major general laws affecting cities. The General Municipal Law enacted in 1892 covered cities as well as other forms of local government. The General City Law of 1909 applied specifically to cities. It granted certain powers to cities generally, and at the same time regulated their

administration. In 1913 the General City Law was amended to grant to each city the power "…to regulate, manage, and control its property and local affairs…" as well as "…the rights, privileges and jurisdiction necessary and proper for carrying such power into execution." [1]

The General City Law also granted specific powers in a number of areas, such as construction and maintenance of public works, expenditure of public funds, provision of pensions for public employees and, by an amendment in 1917, zoning. This legislation, which is still in effect, authorizes cities to implement these powers by enacting ordinances. Since the enactment of the Municipal Home Rule Law in 1964, all of these powers may also be exercised by local law.

6.3 Home Rule and the Cities — In the 1900s

Attempts by the State Legislature to address the question of city government structure included the Second Class Cities Law of 1906 and the Optional City Government Law of 1914. The Second Class Cities Law, which in effect provided a uniform charter for cities of the second class, is still operative for cities that were cities of the second class on December 31, 1923.

The way was opened in 1923 for cities to establish by local charter the form of government they wished, for in that year the voters approved a Home Rule Amendment to the Constitution and the Legislature enacted a City Home Rule Law. These actions spelled out the power of cities to amend their charters or adopt new charters by local law, without going to the Legislature. Under the Home Rule Amendment cities also were empowered to enact local laws dealing with their "property, affairs or government" as long as these laws were not inconsistent with the Constitution or general laws of the state. The Legislature was specifically prohibited from legislating on these matters, except through general laws affecting all cities alike. The tripartite constitutional classification of cities was abolished, except as it applied to the second class cities then in existence. The provisions of the City Home Rule Law were incorporated without substantial changes into the present Municipal Home Rule Law when it was enacted in 1964.

Abolition of the classification of cities in the 1923 constitutional amendment raised questions concerning the terms first, second and third class cities, which in some cases still exist. Since 1894 many statutes have referred to one or more of these designated classes of cities. Although most of these laws have been amended, revised or repealed, some are still in effect and statutes using these terms of classification have been enacted since 1923. Although it has been generally agreed that these statutes are constitutional, the problem arises as to how to interpret the classifications in the absence of a constitutional definition. References to classes of cities occurring in statutes passed prior to January 1924 are interpreted under the assumption that the statute effectively incorporated the constitutional classification which was in effect on the effective date of the statute. With respect to laws passed after 1924, the approach to interpretation is less clear. Often it is assumed that each class means what it had come to mean through prior usage.

6.4 The Forms of City Government

A city's charter forms the legal basis for the operation of the city. The charter enumerates the basic authority of the city to govern, establishes the form of government, and sets up the legislative, executive and judicial branches of city government.

Each city has enacted and amended various ordinances and local laws over time and has often codified these enactments into a code of ordinances and/or local laws. Together, the charter and code prescribe the method and extent to which a city carries out its legal powers and duties.

[1] General City Law §19, added by Chapter 247 of the Laws of 1913.

Because all cities have separate charters granted by the State Legislature and all now have the power to revise their charters by local action, it is difficult to describe a common city structure. All cities have elected councils, but elections are by wards, at large, or a combination of the two. Most cities have mayors; some mayors are elected at large by the voters, while others are selected by the council. Otherwise, city government in New York exhibits a variety of forms. In general, city government falls into four broad categories:

- council-manager, under which an appointed, professional manager is the administrative head of the city, the council is the policymaking body and the mayor, if the position exists, is mainly a ceremonial figure. The manager usually has the power to appoint and remove department heads and to prepare the budget, but does not have a veto power over council actions;
- strong mayor-council, under which an elective mayor is the chief executive and administrative head of the city, and the council is the policy making body. The mayor usually has the power to appoint and remove agency heads, with or without council confirmation; to prepare the budget; and to exercise broad veto powers over council actions. This form sometimes includes a professional administrator appointed by the mayor and is then called the "mayor-administrator plan;"
- weak mayor-council, under which the mayor is mainly a ceremonial figure. The council is not only the policy making body, it also provides a committee form of administrative leadership. It appoints and removes agency heads and prepares budgets. There is generally no mayoral veto power; and
- commission, under which commissioners are elected by the voters to administer the individual departments of the city government and together form the policy making body. In some cases one of the commissioners assumes the ceremonial duties of a mayor, on a rotating basis. This plan sometimes includes a professional manager or administrator.

All of these types of city government are found in New York State. Thirteen of the 62 cities have council-manager arrangements; three utilize the commission plan, one of which also has a city manager. The remaining 46 cities have the mayor-council form, three of which also have a city administrator; their governments are located at various points along a continuum between strong mayor and weak mayor. Within each group there are many hybrids. See Table 6.1 [62] for a listing of cities, their 2010 populations and their forms of government.

No new weak mayor-council or commission forms of city government have been adopted in recent years, although two cities with the council-manager form have switched to the mayor-council form. At present, the strong mayor-council form is the most popular form of city government in this New York.

Table 6.1: Form of City Government.[2]

City	Population 2010 Census	Rank	Form of Government	Council Members
Albany	97,856	6	Mayor-Council	16
Amsterdam	18,620	33	Mayor-Council	5+Mayor
Auburn	27,687	24	Mayor-Council-Manager	4+Mayor
Batavia	15,465	40	Council-Manager	9
Beacon	15,541	39	Mayor-Council-Administrator	6+Mayor
Binghamton	47,376	14	Mayor-Council	9
Buffalo	261,310	2	Mayor-Council	12
Canandaigua	10,545	51	Mayor-Council-Manager	8+Mayor
Cohoes	16,168	36	Mayor-Council	6+Mayor[3]

Table 6.1: (continued)

City	Population 2010 Census	Rank	Form of Government	Council Members
Corning	11,183	49	Mayor-Council-Manager	10+Mayor
Cortland	19,204	32	Mayor-Council	8+Mayor[4]
Dunkirk	12,563	46	Mayor-Council	5
Elmira	29,200	21	Mayor-Council-Manager	6+Mayor
Fulton	11,896	47	Mayor-Council	6+Mayor
Geneva	13,261	45	Mayor-Council-Manager	8+Mayor
Glen Cove	26,964	26	Mayor-Council	6+Mayor
Glens Falls	14,700	42	Mayor-Council	6+Mayor[5]
Gloversville	15,665	38	Mayor-Council	12+Mayor[6]
Hornell	8,563	56	Mayor-Council	10+Mayor[7]
Hudson	6,713	58	Mayor-Council	11
Ithaca	30,014	20	Mayor-Council	10+Mayor[8]
Jamestown	31,146	19	Mayor-Council	9
Johnstown	8,743	55	Mayor-Council	5+Mayor[9]
Kingston	23,893	28	Mayor-Council	10
Lackawanna	18,141	35	Mayor-Council	5
Little Falls	4,946	61	Mayor-Council	8+Mayor[10]
Lockport	21,165	30	Mayor-Council	8+Mayor[11]
Long Beach	33,275	16	Council-Manager	5
Mechanicville	5,196	60	Mayor-Commission	4+Mayor
Middletown	28,086	23	Mayor-Council	9
Mount Vernon	67,292	8	Mayor-Council	5
New Rochelle	77,062	7	Mayor-Council	6+Mayor
New York	8,175,133	1	Mayor-Council	51
Newburgh	28,866	22	Mayor-Council-Manager	4+Mayor
Niagara Falls	50,193	12	Mayor-Council-Administrator	7
North Tonawanda	31,568	18	Mayor-Council	5
Norwich	7,190	57	Mayor-Council	6+Mayor[12]
Ogdensburg	11,128	50	Mayor-Council-Manager	6+Mayor
Olean	14,452	43	Mayor-Council	7
Oneida	11,393	48	Mayor-Council	6+Mayor[13]
Oneonta	13,901	44	Mayor-Council	8+Mayor[14]
Oswego	18,142	34	Mayor-Council	7
Peekskill	23,583	29	Mayor-Council-Manager	6+Mayor
Plattsburgh	19,989	31	Mayor-Council	6+Mayor
Port Jervis	8,828	54	Mayor-Council	9
Poughkeepsie	32,736	17	Mayor-Council-Administrator	8
Rensselaer	9,392	53	Mayor-Council	10

Table 6.1: (continued)

City	Population 2010 Census	Rank	Form of Government	Council Members
Rochester	210,565	3	Mayor-Council	9
Rome	33,725	15	Mayor-Council	7
Rye	15,720	37	Mayor-Council-Manager	6+Mayor
Salamanca	5,815	59	Mayor-Council	5+Mayor
Saratoga Springs	26,586	27	Mayor-Commission	4+Mayor
Schenectady	66,135	9	Mayor-Council	7
Sherrill	3,071	62	Mayor-Commission-Manager	5
Syracuse	145,170	5	Mayor-Council	10
Tonawanda	15,130	41	Mayor-Council	5
Troy	50,129	13	Mayor-Council	9
Utica	62,235	10	Mayor-Council	10
Watertown	27,023	25	Mayor-Council-Manager	4+Mayor
Watervliet	10,254	52	Mayor-Council-Manager	2+Mayor
White Plains	56,853	11	Mayor-Council	6+Mayor
Yonkers	195,976	4	Mayor-Council	7

The comparatively greater frequency of the mayor-council form among New York cities can probably be attributed to both historic and socio-economic factors. The council-manager form occurs more frequently in younger cities of a more homogeneous composition found in the Midwest and the Far West. New York cities tend to be older than those in other parts of the country and tend to have more heterogeneous populations. In such cities the mayor-council form, especially with a strong mayor, has been more prevalent.

6.5 Contents of City Charters

Although cities have the home rule power to revise their charters and adopt new charters, this authority is not unlimited, and must be exercised in accordance with the State Constitution and the Legislature's grant of local law

[2] 2010 U.S. Census. Source: U.S. Bureau of the Census. Prepared by Empire State Development Corporation. Form of Government and Council Members reported by NYCOM 2007 Directory of City and Village Officials

[3] Mayor may only vote when there is a tie

[4] Mayor may only vote when there is a tie

[5] Mayor may only vote when there is a tie

[6] Mayor may only vote when there is a tie

[7] Mayor may only vote when there is a tie

[8] Mayor may only vote when there is a tie

[9] Mayor may only vote when there is a tie

[10] Mayor may only vote when there is a tie

[11] Mayor may only vote when there is a tie

[12] Mayor may only vote when there is a tie

[13] Mayor may only vote when there is a tie

[14] Mayor may only vote when there is a tie

powers to cities. Cities act by law, which include adopting and amending charters that are not inconsistent with the State Constitution and are not inconsistent with any general law of the State. A city may act in the interest of good government, its management and business, the protection of its property, and the health, safety and welfare of its inhabitants.

Generally, city charters address the following topics:

- Name of the city
- Boundaries
- Wards, districts, or other civil subdivisions
- Corporate powers
- Fiscal year
- Legislative body, e.g., City Council, Common Council, Board of Aldermen
- Legislative powers
- Composition
- Meetings
- Rules of procedure
- Chief Executive
- Mayor
- Veto power/legislative override Power of appointment
- City Manager
- Corporation Counsel or City Attorney
- City Clerk
- Departments, offices, agencies and commissions
- Budget - financial procedures
- Tax administration

6.6 Decentralization and Urban Problems

Today New York State has 62 cities, ranging in population from 3,071 to over 8,000,000. There are 30 cities with a population of more than 20,000, including 13 with more than 50,000. Their geographic areas range from 0.9 to 303.7 square miles.

The problems of the large cities in the state reflect many complex elements of social change, but population changes are often seen as both cause and effect. All of the state's large cities experienced rapid growth between 1900 and 1930. In those 30 years the populations of the six largest cities increased 98 percent — from 4,202,530 to 8,303,038 — an increase from 58 percent to 66 percent of the state's total population. This surge in population was accompanied by a corresponding development in city facilities and services. The vast New York City Transit

System was built, for example, and all cities built schools, roads, libraries, sewers, water systems, parks and a great array of other facilities to accommodate the needs and demands of their burgeoning populations.

This rapid growth tapered off during the depression decade between 1930 and 1940, and came to a halt in the 30 years from 1940 to 1970. In the period from 1970 to 1990 most cities experienced a population decline, and census estimates indicate that this trend has continued through the 2010's. The population of New York City dropped nearly 11 percent during the period from 1970 to 1980, but had recovered nearly half this loss by 1996. During the same period, the collective population of the next five largest cities declined by nearly 23 percent.

The stabilization and subsequent decrease of population in the central cities has been accompanied by growth in the surrounding suburban communities. Following closely on the heels of the residential shift to the suburbs has been a decentralization of commerce and industry. Economic considerations have prompted businesses to turn to the suburbs in search of more and cheaper space for expansion. The cost savings, coupled with the shift of the labor supply, have made it increasingly more attractive for industry to locate outside the central cities.

A transformation has occurred over the years in the characteristics of the urban population. City populations generally include a comparatively large proportion of immigrants, persons of lower incomes and persons in the youngest and oldest age groups (under 5 and over 65).

6.7 New York City

Although New York City is the oldest city in the country's 13 original states, its present city government is just over a century old. The city was assembled from a number of other counties, cities, towns and villages by the State Legislature after a more than 30-year effort by advocates of consolidation. The result of this governmental reorganization was the creation of five boroughs coterminous with county boundaries and the assembling of all five into the City of New York.

The present City of New York, the land area of which has remained basically unchanged since its consolidation in 1898, covers more than 303 square miles. Its population of over eight million is greater than that of 38 of the 50 states.

New York has been the most populous city in the United States since 1810. It currently has almost as many residents as the combined population of the next two most populous cities in the country. The city's 2010 Census population was 8,175,133.

The 42 percent of New York State's citizens who reside in New York City live in the only consolidated major local government in the state. There are five counties but no county governments. The area of the city contains no villages, no towns and no sub-city self-governing units.

In addition to the mayor, a comptroller and a public advocate are elected citywide. The council is composed of the public advocate and 51 council members, each of whom represents a council district.

In recent years, New York City has experimented with various forms of decentralization to meet a rising tide of objections from city residents that the government had become too remote and inaccessible. The most significant decentralization development has been the creation of 59 community boards.

6.7.1 The Mayor

The mayor serves as the chief executive officer of the city, and with the assistance of four deputy mayors, presides over many departments, offices, commissions and boards. The mayor may create, modify or abolish bureaus, divisions or positions within the city government. The mayor, who may be elected to serve a maximum of two four-year terms, is responsible for the budget and appoints and removes the heads of city agencies and other non-elected officials.

6.7.2 The Comptroller

The comptroller, who may be elected to serve a maximum of two four-year terms, serves as the chief fiscal officer of the city. The Comptroller advises the mayor, City Council and public of the city's financial condition, and makes recommendations on city programs and operations, fiscal policies, and financial transactions. The Comptroller also audits and examines all matters relating to the finances of the city, registers proposed contracts, verifies budget authorization and codes for contracts, determines credit needs, terms and conditions, prepares warrants for payment, issues and sells city obligations, is responsible for a post-audit, and is an ex officio member of numerous boards and commissions, most notably the board of estimate. The comptroller may investigate any financial matter, administer sinking funds, keep accounts and publish reports. The Governor may remove the comptroller, but only on charges after a hearing.

6.7.3 The Public Advocate

The public advocate is elected to a four-year term to represent the consumers of city services, in addition to presiding over meetings of the City Council. The public advocate may sponsor local legislation, is an ex officio member of all council committees, and may participate in council discussions but may not vote unless there is a tie. The public advocate reviews and investigates complaints about city services, assesses whether agencies are responsive to the public, recommends improvements in agency programs and complaint handling procedures, and serves as an ombudsman for people who are having trouble obtaining the service they need from city agencies.

6.7.4 The Council

The City Council is the city's legislative body. It has the power to enact local laws, including amendments to the city charter and the administrative code, originate home rule messages, and adopt capital and expense budgets. Members, who represent districts, are elected for a term of four years. In addition to its legislative role and oversight powers over city agencies, the Council approves the city's budget and has decision-making powers over land use issues.

6.7.5 The Borough Presidents

The five borough presidents, who are the executive officials of each borough, are also elected to four-year terms. The borough presidents' chief responsibilities involve working with the Mayor to prepare the executive budget and propose borough budget priorities directly to the Council, review and comment on major land use decisions and propose sites for City facilities within their boroughs, monitor and modify the delivery of City services within their boroughs, and engage in strategic planning for their boroughs.

6.7.6 Borough Board

Each borough has a Borough Board consisting of the Borough President, the district council members from the borough, and the chairperson of each community board in the borough.

6.7.7 Community Boards

The 59 community boards play an advisory role in zoning, other land use issues, community planning, the city budget process, and coordinating municipal services. Each board comprises up to 50 unsalaried members, appointed by the borough president in consultation with the City Council members who represent any part of the board district.

6.7.8 The Metropolitan Transportation Authority

One of the most important governmental agencies in the New York City area is the Metropolitan Transportation Authority (MTA). This agency was established by the State Legislature to provide mass transportation services within and to the City of New York, including the subway and all public bus systems, as well as the commuter systems of the Long Island Rail Road, Long Island Bus and the Metro-North Railroad. The Metropolitan Transportation Authority is also responsible for several bridges and tunnels. The Governor, with Senate advice, appoints the MTA Board which consists of a Chairman, Chief Executive Officer and 18 other members.

6.7.9 New York Metropolitan Transportation Council

The council is the official metropolitan planning organization for the New York metropolitan area, composed of elected officials, and transportation and environmental agencies.

The council is composed of nine members representing the principal jurisdictions involved in transportation planning in the downstate area: the county executives of Nassau, Putnam, Rockland, Suffolk and Westchester counties; the chairman of the New York City Planning Commission and the commissioner of the New York City Department of Transportation; the chairman of the Metropolitan Transportation Authority; and the commissioner of the New York State Department of Transportation (the permanent co-chairperson of the council). The advisory (nonvoting) members include representatives of the Port Authority of New York and New Jersey, the U.S. Department of Transportation's Federal Highway Administration and Federal Transportation Administration, the U.S. Environmental Protection Agency and the NYS Department of Environmental Conservation. The chair is shared by the NYS transportation commissioner and one other council member elected annually.

The council coordinates transportation planning in the metropolitan area, prepares travel-related forecasts for personal transportation, serves as a cooperative forum for regional transportation issues, and collects, analyzes and interprets travel-related data. Major projects include the five-year Transportation Improvement Program and a long-range transportation plan for the region.

Chapter 7

Town Government

Town government in New York can be traced to both New England and Dutch colonial government arrangements in the Hudson Valley. The state's towns encompass all territory within the state except territory within cities and Indian reservations. In size, they are the most diverse of all the units of local government.

Towns existed independently in the colonial period. When New York became a state, towns were generally regarded as creations of the State Legislature that existed to serve state purposes. Town governments now, however, have long been recognized as primary units of local government. They possess authority to provide virtually the full complement of municipal services. By statutory and constitutional adjustments, towns are flexible units that can function as rural or as highly urbanized general purpose units of government, depending on local needs.

Everyone in New York who lives outside a city or an Indian reservation lives in a town. There are more towns in New York than there are cities and villages combined.

In New York, "town government" includes both the Town of Hempstead in Nassau County, with a 2010 population of 759,757, almost three times that of the City of Buffalo and taxable real property of over $115 billion, and the Town of Red House in Cattaraugus County with 38 residents and a taxable real property of $88 million. Between these two extremes are 930 other towns, some of which provide to their residents a great number of municipal services, while others do little more than maintain a few rural roads.

7.1 The Beginnings of Town Government

Town government in New York has both Dutch and English roots, with even earlier antecedents in the Germanic tribes — the English word "town" is derived from the Teutonic "tun," meaning an enclosure.

The Dutch communities established in the Hudson Valley in the early seventeenth century were easily integrated with the strong, tightly knit version of town government brought a few years later by immigrants from Massachusetts and Connecticut to the eastern shores of Long Island. In 1664, Charles II claimed the territory between the Connecticut and the Delaware rivers by right of discovery and conveyed it to the Duke of York. His agent, Colonel Nicolls, armed with a commission as Governor, appeared with a fleet off the shore of New Amsterdam, and the Dutch quickly capitulated.

Immediately after they established British sovereignty in New York in 1664, the English began to more fully develop the patterns of local government. Issued in 1665, the Code of Laws, known as the "Duke's Laws," confirmed the boundaries of 17 existing towns and provided for basic organization of the town governments. These laws gave freeholders the right to vote and provided for a town meeting system resembling one that is still used in New England.

Town government continued to develop throughout the remainder of the Seventeenth and into the Eighteenth Century. A town court system grew up. Provision was made for a chief fiscal officer, known as a town treasurer, a forerunner of the present supervisor. In 1683 the first general property tax was imposed. In 1703 provision was made for a system of highways.

The State Constitution of 1777 recognized the existence of 14 counties and some towns. The Constitution provided that "it shall be in the power of the State Legislatures of this State for the advantages and conveniences of the good people to divide the same into such other and further counties and districts as it may then appear necessary." Between 1788 and 1801, the Legislature was especially active in dividing counties into towns. However, the form of town government remained essentially the same as it had been under British rule.

In the early decades of the Nineteenth Century, town government began to assume a more modern form. In the Ninth Edition of the Revised Statutes of New York, laws affecting towns were segregated in Chapter 20 of the General Laws. This chapter was the immediate predecessor of the Town Law. The title "Town Law" appears to have been used first in its modern sense when laws affecting towns were re-codified by Chapter 569 of the Laws of 1890 and made applicable to most towns, with certain exceptions. In 1909, another re-codification grouped statutes applicable to towns into Chapter 62 of the Consolidated Laws.

Despite these re-codifications, the Town Law still contained general statutes and special acts which duplicated each other. In 1927 a Joint Legislative Committee set about to re-codify the Town Law once again. The result is the present Town Law, which is Chapter 634 of the Laws of 1932.

7.2 Characteristics of Towns

7.2.1 Geography

Towns and cities encompass all the lands within the state, except Indian reservations, which have special legal status. The 933 towns in the state vary greatly in size, ranging from the Town of Webb in Herkimer County (which is larger than 11 counties and covers 451.2 square miles) to the Town of Green Island in Albany County (which covers only 0.7 of a square mile.)

Towns are not distributed equally among the counties. Nassau County, with a population of 1, 339, 532 in 2010, being the second most populous county outside New York City, has only three towns, while Cattaraugus County, with a population of 80,317 (less than one-sixteenth of Nassau County's population), contains 32 towns.

7.2.2 Legal Status

Courts have determined that towns are true municipal corporations. Previously the courts had ruled that towns were: "…involuntary subdivisions of the state, constituted for the purpose of the more convenient exercise of governmental functions by the state for the benefit of all its citizens" (Short v. Town of Orange, 175 A.D. 260, 161 N.Y.S., 466, (1916)). Town Law definition now confirms that towns are municipal corporations:

> "A town is a municipal corporation comprising the inhabitants within its boundaries, and formed with the purpose of exercising such powers and discharging such duties of local government and administration of public affairs as have been, or, maybe conferred or imposed upon it by law." (section 2, Town Law)

Towns were finally granted full membership in the local government partnership when, in 1964, they were constitutionally granted home rule powers (see Chapter IV).

7.2.3 Development — Rural to Suburban

Physical development came to towns before their emergence as municipal corporations. Indeed, the pressing needs arising from physical development gave impetus to their legal development. For many years towns provided only basic government functions such as organizing and supervising elections, administering judicial functions, and constructing and maintaining highways. In carrying out these governmental functions, towns served their own needs while also carrying out the state's purposes. The elective machinery took care of maintaining local political organizations as well as giving town officials contact with, and an element of control or influence in, county, state and federal political organizations. The local judicial function, in conjunction with the police function of county sheriffs and state police or military agencies, gave security to the people of the towns. Control of highways assured residents of rural towns that they would maintain contact with their neighbors and distant urban centers and that they would be able to market their crops.

Even in rural areas, however, increasing population and its clustering into hamlets gave rise to needs for services not available at the town level. Towns required all-weather roads to assure year-round access to shops, sidewalks to protect pedestrians, public water to protect public health, sewers to carry waste away, and police to protect growing populations and increasingly valuable property.

The flight of city dwellers to the suburbs, which began as early as the second decade of the twentieth century, resulted in a continuous, almost geometric growth in town population. From 1950 to 2010, the population living in towns in New York State increased by 130 percent, while the population of cities decreased by 29 percent (excluding New York City). While the past three decades have seen a significant slowdown in this shift, an increasing proportion of the total outward migration during this time period has settled in more rural (as opposed to suburban) towns. New town-dwellers, whether suburban or rural, have demanded many of the services they had been accustomed to in the cities —water, sewage disposal, refuse collection, street lighting, recreational facilities and many more. Since suburban development in many cases was formless and without identifiable business centers, village incorporation often proved problematic. The suburban challenge has fallen upon town government, a challenge to develop services where they were needed without losing the traditional role as the most local of local governments.

7.3 Government Organization

7.3.1 Classification of Towns

The Town Law divides towns into two classes based on population. All towns of 10,000 or over in population as shown by the latest federal decennial census, with the exception of towns in Suffolk and Broome Counties and the towns of Ulster and Potsdam, are by statute towns of the first class. All towns in Westchester County, regardless of population, are towns of the first class.

In addition, any town may become a town of the first class by action of the town board, subject to a permissive referendum, if it:

- has a population of 5, 000 or more, as shown in any federal census (not necessarily decennial);
- has an assessed valuation over $10 million; or
- adjoins a city having a population of 300, 000 or more.

All towns which are not first class towns are towns of the second class. Under the Town Law, there are organizational differences between first class and second class towns. The elected officers of a first class town are its supervisor, four council persons (unless increased to six or decreased to two as provided by the Town Law), town

clerk, two town justices, highway superintendent, and a receiver of taxes and assessments. Voters in second class towns, on the other hand, elect the supervisor, two councilpersons, two justices of the peace, a town clerk, a highway superintendent, three assessors and a collector.

In 1962, the Legislature created the additional classification of "Suburban Town." Suburban Towns must be towns of the first class, and must:

- have a population of at least 25, 000; or
- have a population of at least 7, 500, be within 15 miles of a city having at least 100,000 population, and have shown specified growth in population between the 1940 and 1960 decennial censuses.

Provided a town meets the above criteria, it may become a Suburban Town at the option of the town board, subject to permissive referendum.

When the classes of towns were originally authorized, there was a fairly clear-cut differentiation between the powers allotted to the different classes. As town powers were broadened, differences in powers among classes became less clear. For example, the Constitutional Home Rule Amendment in 1964 granted to all towns the local law powers formerly possessed only by Suburban Towns. Even organizational differences have become less sharply defined over time. For example, legislation enacted in 1976 granted all towns the authority to create and/or abolish elective as well as appointive offices and to restructure the administrative agencies of town government by local law. Formerly, only Suburban Towns had specific authority to departmentalize town government operations. To all intents and purposes, all towns, regardless of their statutory classification, possess roughly equivalent legal powers.

7.3.2 Legislative Leadership

The legislative body of the town is the town board. Historically, the town board consisted of the supervisor and the town justices of the peace. The dual status of justices of the peace (now designated as town justices) as judicial and legislative officers has always concerned students of government, but this was accepted in rural towns because it was less expensive than separate offices. When classification of towns was introduced, the judiciary was completely separated from the legislative branch in towns of the first class.

In 1971, the Town Law was amended to allow town boards in towns of the second class to exercise the option of removing town justices from the town board and electing two additional town councilpersons. In 1976, the Legislature amended the Town Law once again, separating the legislative and judicial functions in all town governments by removing town justices from town boards.

One of the distinguishing features of town government organization is the lack of a strong executive branch. Virtually all of a town's discretionary authority rests with the town board. What little executive power the supervisor has is granted by specific statute or by the town board. The town board, therefore, exercises both legislative and executive functions. This situation is not very different from the basic form of government prescribed by state law for counties, cities and villages. What is different, however, is that until recently, towns did not possess the same degree of home rule powers granted to the other units of government to change the basic prescribed forms of government.

It was not until 1964 that home rule was extended to towns. It had previously been extended to villages with a population in excess of 5, 000 and to counties and cities. While the extension of home rule powers to towns was a step forward in the evolution of towns to the status of full-fledged municipal corporations, towns were still generally bound by a much greater number of specific statutory directives than were counties, cities and villages.

Many of these directives fall within the constitutional definition of "general law," which could not be superseded by exercising home rule power. In this respect towns suffered in comparison to counties, cities and villages, each

of which possessed extensive grants of authority to adopt a structure of government through the home rule process suitable to their individual needs. In 1976, the Legislature remedied the situation by authorizing towns to supersede certain provisions of the Town Law relating to the property, affairs or government of the town, notwithstanding the fact that they are "general laws" as defined by the Constitution. This grant of powers can be viewed as a major expansion of home rule powers for towns, for it equipped them with powers similar to those enjoyed by other units of local government.

7.3.3 Executive Leadership

7.3.3.1 Supervisor

The Town Law does not provide for a separate executive branch of town government. Because the supervisor occupies the leader's position on the town board, and because town residents often turn to the supervisor with their problems, many people think the supervisor's position is the executive position of town government. But the supervisor is part of the legislative branch and acts as a member and presiding officer of the town board. He or she acts as a full member of the board, voting on all questions and having no additional tie-breaking or veto power.

The supervisor is more of an administrator than an executive. The supervisor's duties under law are to:

- act as treasurer and have care and custody of monies belonging to the town;
- disburse monies;
- keep an accurate and complete account of all monies;
- make reports as required;
- pay fixed salaries and other claims; and
- lease, sell, and convey properties of the town when so directed by the town board.

The basic source of the supervisor's power lies in the position's traditional political leadership and the holder's ability to use this leadership. Familiarity with day-to-day problems of the town often enables the supervisor to influence the policy decisions of the town board.

In 1938, provision was made in the Town Law for a town manager form of government, which would have made possible greater executive coordination of town functions. TThe provisions were repealed in 1957. However, in 1972, the State Legislature enacted special legislation authorizing the Town of Fallsburg to adopt a town manager plan. Then, in 1976, Article 3-B of the Town Law was enacted, once again enabling any town, by local law, to establish a town manager form of government. Since 1998, the Towns of Collins, Erwin, Mount Kisco, Putnam and Southampton have been operating under a town manager form of government.

By delegating a few more specific powers, the Suburban Town Law gives the supervisor a bit more authority. Although designated as "chief executive officer", the Suburban Town supervisor has no major new executive powers.

As noted earlier, the Legislature has authorized towns to adopt local laws superseding many specific provisions of the Town Law. The purpose of this legislation was to allow towns to restructure their form of government to provide for an executive or administrative branch separate and apart from the legislative branch of government. Offices such as town executive and town manager may be established and granted powers similar to those granted by counties, cities and villages to the offices of county executive or manager, city mayor or manager, and village mayor or manager.

In addition, section 10 of the Municipal Home Rule Law authorizes local governments to enact local laws relating to the powers, duties, qualifications, number, mode of selection and removal, and terms of office of their officers

and employees. Where it is constitutionally permissible, some offices which are elective by statute may be made appointive by local law. Conversely, offices which are appointive by statute may be made elective by local law. Both types of local laws require public referenda. A town may also change the term of office of any of its officers by local law.

7.3.4 Judicial

The state's judicial system has been described in Chapter 3 [21]. As was pointed out earlier, town justices were originally members of the town board, but uneasiness over this duality of functions led to the gradual phasing out of their legislative roles. Also, to enhance the level of professionalism of local justices, state law now mandates their training. The jurisdiction of the town court system is town-wide, even extending to village territory where it is coincident with that of village courts. The cost of the town judicial system is a town-wide charge.

7.4 Operations and Services

The operational organization of towns displays the same lack of sharp definition encountered in the legislative, executive and judicial branches of town government. Although there has been de facto departmentalization by many towns, and formal departments have been created in some instances, by specific statutory authorization or by home rule enactments, there is no general provision for departmental organization.

It is useful to differentiate the town operational structure into two general categories: 1. services provided and functions performed on a town-wide basis, including services to villages; and 2. those provided to part of the town, either to the entire area of the town outside existing villages (the "TOV") or to a specific district or area of the TOV.

7.4.1 Town-wide Organization and Services

Towns first emerged to carry out general governmental functions as distinguished from "proprietary" functions. These general functions cover the basic town-wide services still provided by the town; the operational costs are imposed town-wide. Through the years some services have been added, including those which may be carried out by a town within the territory of a village, either on a cooperative basis or with the consent of the village.

7.4.1.1 Elective Processes

One of the primary functions provided by towns on a town-wide basis is the organization and supervision of elections. The individual election district is the primary element in the election machinery. Towns, in all except Monroe, Nassau and Suffolk Counties, must establish and operate all election districts outside cities. In these districts all inspection clerks and election employees are appointed by the town board upon recommendation from the organized political parties. Party organization is also built around the election district. Party committee members, elected in each election district, form the backbone of town, county and state committees. It is likely that a town's greatest strength in maintaining and promoting its place in the governmental scheme of things rests with the electoral function. This strength can be brought to bear whenever the towns seem about to lose power to other units of government.

Representative democracy has traditionally been achieved in almost all towns through the system of electing town board members as at-large representatives. Towns of the first class (generally, towns with a population of 10,000 or more, or those towns with a smaller population that have chosen to become towns of the first class pursuant to

Town Law sections 12 and 81) usually elect a Town Supervisor and four town board members as the town legislative body, separate from other elective or appointive town offices such as clerk, justice and assessor.

Under the current at-large system, each voter may cast a vote for each vacant seat on the board. Casting multiple votes for one candidate is prohibited. The available town board positions are filled by the candidates who receive the highest vote total; a candidate need not receive a majority of votes to assume a seat on the board.

The ward system of electing town board members is an alternative to the at-large system of election and is authorized by sections 81 and 85 of the Town Law. Unlike cities in New York, which have a mix of both at-large and ward-elected board members, only a handful of towns currently elect board members by ward. As of 2012, only 11 of 933 towns in New York use the ward system, and since the mid-1970's, voters have defeated its implementation wherever it has been on the ballot.

A town of the first class may, upon the vote of the town board or upon a duly qualified petition, submit a proposition to the voters for establishing the ward system. If the voters approve the proposition, the county board of elections must divide the town into four wards and fix their boundaries. "So far as possible the division shall be so made that the number of voters in each ward shall be approximately equal" (Town Law section 85[1]). The ward system is deemed established only upon the date the county board of elections duly files a map "showing in detail the location of each ward and the boundaries thereof" (Town Law section 85[1]).

The boundaries of the wards are not generally known at the time of the ballot, but instead are fixed by the board of elections if the proposition is successful. Apart from the constitutional requirement of "one person one vote" (see, Reynolds v. Sims, 377 U.S. 533, 84 S. Ct. 1362) codified in the statute by its demand that wards contain "approximately" the same number of voters, the voter has few assurances how wards will be drawn.

If the ward system is established, the terms of the sitting board members end on December 31, after the first biennial town election held at least 120 days after the ward system is established. The terms of the board members elected by ward commence January 1 following such election.

Only a town of the first class is authorized to both establish the ward system and increase the number of board members from four to six, and such a town may submit both propositions at the same election (Op. Atty. Gen. [Inf.] 90-63; 1968 Op. Atty. Gen. [Inf.] 52; 13 Op. St. Compt. 223, 1957). May a town of the second class, which is not authorized to increase the number of board members or establish the ward system, submit a proposition to the electorate to change its classification to first class at the same election it submits the other propositions? Under the authorizing sections of sections 81 and 85 the Town Law, the answer is that the electorate must first approve a change in classification to first class, with subsequent elections necessary to increase the number of board members and establish the ward system. The Attorney General has opined, however, that a town of the second class may, by enactment of a local law, increase its number of board members and establish the ward system (Op. Atty. Gen. [Inf.] 90-63). Under the Municipal Home Rule Law (MHRL) towns, cities, counties and villages are authorized to adopt local laws not inconsistent with the Constitution or any general law, in relation to, inter alia, "the powers, duties, qualifications, number, mode of selection and removal, terms of office, compensation, hours of work, protection, welfare and safety of its officers and employees" (MHRL, section 10 [1] [ii] [a] [1], emphasis supplied). Such a local law would be itself subject to a mandatory referendum (MHRL, section 23 [2] [b], [e], [g]).

Therefore, if the voters want representation by ward they have the means to establish it.

7.4.1.2 Tax Assessment

One of the cornerstones of town government is in its authority to assess, levy, collect and enforce payment of taxes. The real property tax remains the most important source of locally raised municipal revenue despite enactments of sales and use, admissions, off-track betting and income taxes. Another major portion of municipal revenue comes from intergovernmental transfers. Fundamental to the levy and collection of real property taxes is the function of property assessment. The goal of property tax assessment is to value property consistently and fairly. The practice

has been to make uniform assessments at a constant percentage of full value within a municipality, and to equalize these rates among municipalities. This matter is discussed more fully in Chapter 11 [115].

Assessing is done in towns by an assessor or board of assessors. In the past, all towns had to have a board of three assessors. Later, towns were permitted to substitute a single assessor for the board. Still later, the Assessment Improvement Act of 1970, which required training and county assistance for local assessors, also stated that each town had to provide for a single, appointed assessor unless it took positive action, by way of mandatory referendum, to retain its elected three-member board. All towns also must provide for a board of assessment review, consisting of three to five members, to hear grievances and appeals from determinations of the assessor.

The assessment roll which the town assessor prepares serves a dual, and sometimes triple, purpose. First, it is the basis for all town general taxes and county taxes levied within the town. Second, a copy of the roll must be made available to all school districts within the town and is used, unchanged as to assessments, to prepare the school district tax roll. Third, any village, wholly or partially, within the town may adopt and use the town roll for levying village taxes instead of assessing its own properties.

7.4.1.3 Levy of Taxes

The completed tax roll is forwarded to the county together with the town budget and estimates of levies required for town purposes. These amounts, and the county taxes required within the town, are levied and recorded on the tax roll prior to December 31st of each year. At this point, unpaid school taxes from the last school tax roll, are also re-levied on the town tax roll. This process may differ within the jurisdiction covered by city school districts.

7.4.1.4 Collection and Enforcement

In towns of the first class, the collection of taxes is carried out by a receiver of taxes and assessments, an office that may be either elective or appointive by local choice. Prior to August 2016, the town receiver also collected all school taxes for school districts located wholly or partially in the town, unless the town and school district have made an agreement to the contrary. New legislation enacted in 2016 authorizes school boards to advise the town's receiver of taxes in writing by no later than February first of each year that the school district will collect its own taxes. In towns of the second class, the collecting officer is the elected town tax collector. However, such towns may abolish the office of collector and, thereafter, the town clerk must collect the taxes.

7.4.1.5 General Administration

The cost of general administration of town functions, including the salaries of town officers is levied as town-wide charges even where the functions are less than town-wide in scope. For example, the salary of the town superintendent of highways and the capital cost and operation of the town highway garage are both general (town-wide) charges, even though their functions basically cover only part of the town (the portion outside villages). On the other hand, the salaries of highway employees may be either general charges or applied to only part of the town, depending on the highway item to which their time is charged.

7.4.2 Part-town Organization

Services for part of the town may be rendered to either all of that portion of the town outside villages (TOV), or to particular areas of the town by way of improvement districts or improvement areas.

Until recent decades, the only major service that towns were required to provide to town residents living outside villages was highway maintenance. Town government provided few services other than general government

administration and basic functions, such as justice court. Lately, however, population growth in TOV areas has resulted in demands for many of the services already provided by villages. It should be noted that functions, such as waste collection and disposal, can, and often are, provided on either a town-wide or TOV basis. The more common TOV functions include:

- Appointment of a planning board to regulate subdivisions and review site plans, and assist in developing and administering zoning;
- Adoption of zoning regulations, appointment of a building inspector or zoning enforcement officer to administer and enforce them, and appointment of a zoning board of appeals to hear appeals and grant relief in proper instances;
- Police protection, which may be provided on either town-wide or TOV basis, depending upon the availability of police protection within the villages in the town; and
- Highway construction and maintenance, which must be considered a TOV function, since it normally encompasses only town streets and highways outside villages.

Since the highway function of towns predated the establishment of villages, certain highway maintenance costs are town-wide charges.

Over the years, village taxpayers' responsibility for sharing the cost of town highways has been a contentious factor in town-village relationships. Consequently, there has been a continual search for ways of promoting equity in the distribution of costs. One compromise permits towns to exempt village property from assessment for the cost of acquisition and repair of highway machinery, the cost of snow removal, and several other miscellaneous items.

7.4.2.1 Fire Protection

Fire protection is not a town function, since it can only be provided in towns through the medium of districts — fire districts, fire protection districts and fire alarm districts — all of which are discussed in Chapter 9 [91]. Since most TOV areas are covered by districts, fire protection can be considered, in a sense, a TOV service.

7.4.2.2 Special Districts

Towns in the path of suburban growth were not prepared to provide needed services on a town-wide basis. Tax bases were hardly sufficient to support town-wide water systems or sewer systems. The need was not general enough throughout the town so as to garner voter support to town-wide services. The expedient answer was, therefore, to create the special district. Large enough to serve the area of need and supported only by the property owners within the district, the special district required from the rest of the town only use of the town's credit to financially support its obligations and use of the town's organization to administer the services within the district. Districts have worked well and have multiplied in both number and type.

Unlike the districts discussed in Chapter 9 [91], special districts created under the Town Law are not units of local government, but are administered by the town board. Town improvement districts have proliferated, with lighting, water supply, sewerage, drainage, park, public parking, and refuse and garbage districts accounting for over 95 percent of all special districts. The idea has proved so flexible and has worked so well that it has been used to meet some unusual and unique needs. Escalator districts have been formed to relieve weary commuters of their climb to elevated train stations, and dock and erosion control districts have enhanced seaside properties on Long Island.

Special districts have been established, extended and consolidated until, by the end of 2010, there were approximately 6,927 improvement districts in existence — an average of more than seven for each town in the state.

Table 7.1: Town Special Improvement Districts by Type of District
As of December 31, 2010 [2]

Type of District	Number of Districts
Fire Protection	951
Drainage	582
Lighting	1,783
Park	153
Refuse and Garbage	160
Sewer	1,211
Water	1,602
Other	485
Total	6,927

Most special districts can be and are established under general provisions of Articles 12 and 12-A of the Town Law. Those which cannot must be created by act of the State Legislature.

Under Article 12, a petition from property owners in the area of the proposed district must specify the boundaries of the district and state the maximum permissible expenditure. For certain types of districts a map showing the boundaries of the district and the proposed improvements must accompany the petition. The petition must be signed by owners of more than one-half of the total assessed valuation of taxable property in the proposed district, including at least one-half of the resident-owned, taxable, assessed valuation therein. When such a petition is filed, the town board must call a public hearing on the proposal and, after consideration, approve or deny the establishment of the district. If the town board approves the establishment of a district for which the town is to incur indebtedness, it must apply to the State Comptroller for approval. The State Comptroller, after considering the application, must make an independent determination that establishment of the district will serve the public interest and that it is not an undue burden on the property or property owners who live there. After the State Comptroller approves the petition, the town board may adopt an order establishing the district.

Under Article 12-A, a petition is not required to establish a district; the town board may, on its own motion, subject to a permissive referendum, establish a district. All other procedural steps are essentially the same as under Article 12.

With the exception of 78 older special districts which retain their separate boards of commissioners, the town board acts as the administrative body for all improvement districts in a town. Specific provisions of the Town Law authorize a town board to let contracts for the construction of district improvements, determine the manner of levying assessments to cover costs, set water and sewer rents or other service charges, and provide for the issuance of obligations to cover capital costs. Although all district costs must be levied against the properties therein, the districts have no debt-incurring powers of their own. All obligations issued on their behalf must be general obligations of the town, and are chargeable to town debt limits.

7.4.2.3 Town Improvements

As towns have continued to develop in suburban areas, the need for services on a town-wide or at least TOV basis has become more pressing. The “town improvement” is a compromise between the district approach and the provision of services as a true town function. This approach allows a town board to construct infrastructure improvements in specific areas of the town while not establishing a district with defined boundaries. First authorized

[2] NYS Attorney General Office 2010

only for Suburban Towns, authority for town improvements was later extended to all towns. In establishing an improvement by this method, the town board has the option of levying the capital costs against the entire TOV area, or against the benefited areas only, or of allocating it between the two areas in any way it chooses. The cost of operating and maintaining the improvement must be levied against the entire TOV area. Thus, the town improvement procedure is simpler and more flexible than that available for creating an improvement district.

7.5 Summary

Many towns in New York are still small governments providing basic services to rural residents and they continue the pattern of town government which originated before the American Revolution. Other town governments, caught in the mass population migrations of the Twentieth Century, have had to provide services usually associated with urban living. Both kinds of town governments — and the gradations between — must deal with problems such as protecting the environment and delivering municipal services against a fiscal background of ever increasing costs. Rising costs will probably compel town government to develop new patterns of working with other governments and new ways to deliver services. Town residents and government officials, who have had to respond to similar challenges in the past, will doubtless continue town government's long tradition of responding to change.

Chapter 8

Village Government

In New York State, the village is a general purpose municipal corporation formed voluntarily by the residents of an area in one or more towns to provide themselves with municipal services. But when a village is created, its area still remains a part of the town where it is located, and its residents continue to be residents and taxpayers of that town.

The first village was incorporated at the end of the eighteenth century. The village form of municipal organization became a prominent feature of the state's growing metropolitan areas between 1900 and 1940. The patterns of village organization are similar to those of cities.

Many people think of villages as being small, rural communities. Population size alone, however, does not determine whether one community becomes a village and another remains as an unincorporated "hamlet" in a town. In New York State, a village is a legal concept; it is a municipal corporation. The largest village in the state, Hempstead in Nassau County, had more than 53,000 residents in 2010, while the smallest city, Sherrill, had 3,071. Forty-eight of New York's 62 cities had populations in the year 2010 that were smaller than Hempstead's.

Villages were originally formed within towns to provide services for clusters of residents, first in relatively rural areas and later in suburban areas around large cities. Today, many of the existing 550 villages are in the areas surrounding the state's larger cities. Many villages have public service responsibilities which differ little from those of cities, towns and counties, and village officials face the full range of municipal obligations and challenges.

8.1 What is a Village?

A village is often referred to as "incorporated." However, since legally cities, towns, villages and counties are all "incorporated," there are no "unincorporated villages." The vernacular "incorporated village" likely came about because villages are areas within towns for which an additional municipal corporation has been formed.

Many places in the state having large numbers of people living in close proximity to one another are neither villages nor cities. Many have names, like neighborhoods often do. Others may even have a post office that bears the community's name. Some, like Levittown on Long Island, have thousands of residents. If, however, the people in these informal communities have not incorporated pursuant to the Village Law, they do not constitute a village. While many people refer to such places as "hamlets", the term "hamlet" does not define a formal community like a city, town or village.

By definition, a village is a municipality which, at the time of its incorporation, met statutory requirements then established as prerequisites to that incorporation (Village Law.) Although the Village Law now sets area and population criteria for initial village incorporation, a number of existing villages have populations smaller than the present statutory minimum.

8.2 Historical Development

The earliest villages in the state were incorporated partly to circumvent the legal confusion about the nature and scope of town government that resulted from legislative modification of English statutes. Generally, in the decades after the Revolution, villages in New York were created because clusters of people in otherwise sparsely settled towns wanted to secure fire or police protection or other public services. Those inhabitants receiving the fire or police service, and not the whole town, paid for such services. A forerunner of villages appears to have been a 1787 legislative act granting special privileges to part of a town, entitled "An act for the better extinguishing of fires in the town of Brooklyn."

The appearance of the village as a formal unit of local government stems from the 1790s. Villages were created by special acts of State Legislature, but the starting date for this process is in dispute among historians due to a lack of precision in terminology in those early legislative acts. In 1790, the Legislature granted specific powers to the trustees of "… part of the town of Rensselaerwyck, commonly called Lansingburgh." The term "village" first appeared in state law in a 1794 enactment incorporating Waterford. The legislative act of 1798, providing for the incorporation of Lansingburgh and Troy as villages, is seen by many historians as the first formal authorization in the state for the village form of government. This enactment included all of the legal elements (including an incorporation clause and delegation of taxing and regulatory power) deemed necessary for a true unit of local government.

First mention of the village as a constitutional civil division appeared in a section of the 1821 Constitution prescribing qualifications of voters. The Constitution of 1846 required that the Legislature "provide for the organization of cities and incorporated villages." The Legislature passed a general Village Law in 1847, but continued to incorporate villages through the enactment of special charters, as it had for the previous half-century. Separate incorporation led to a variety of village government forms, even for villages of similar characteristics. In 1874, however, a revised Constitution forbade incorporation of villages by special act of the State Legislature. Since that time, New York State villages have been formed through local initiative pursuant to the Village Law.

An 1897 revision of the Village Law subjected those villages with charters to provisions of the Village Law that were not inconsistent with their charters. It also gave the charter villages the option of reincorporating under the general law. Although numerous charter villages did reincorporate, 12 villages still operate under charters. These are Alexander, Carthage, Catskill, Cooperstown, Deposit, Fredonia, Ilion, Mohawk, Ossining, Owego, Port Chester and Waterford.

In the first 40 years of the twentieth century, as people moved from cities into the suburbs, more than 160 villages were incorporated under the Village Law. The rapid growth of towns in suburban areas in the late 1930s and following World War II emphasized the need for alternatives to villages. To provide services, suburban areas made increasing use of the town improvement district. This had a profound effect on the growth of villages. Although more than 160 villages were formed from 1900 to 1940, 27 new villages appeared and 26 villages dissolved between 1940 and December 31, 2012.

There were 535 villages in New York State in 2018. They range in size from the Village of Dering Harbor with a 2010 Census population of 11, to the Village of Hempstead, with a 2010 Census population of 53,891. The majority of villages have populations under 2,500, although there were 24 villages between 10,000 and 20,000 population in 2010, and 11 villages with more than 20,000 population.

There are 72 villages located in two towns and 5 villages are located in three towns. There are nine villages which are in two counties. One village, Saranac Lake, lies in three towns and two counties. Five villages — Green Island in Albany County; East Rochester in Monroe County; and Scarsdale, Harrison and Mount Kisco in Westchester County — are coterminous with towns of the same name. A coterminous town-village is a unique form of local government organization. The town and village share the same boundaries and the governing body of one unit of the coterminous government may serve as the governing body of the other unit (i.e., the mayor serves as town supervisor and trustees serve as members of the town board).

8.3 Creation and Organization

The Village Law governs the incorporation of new villages and the organization of most existing villages. The 12 remaining charter villages are subject to this law only where it does not conflict with their respective charters.

8.3.1 Incorporation

A territory of 500 or more inhabitants may incorporate as a village in New York State, provided that the territory is not already part of a city or village. The territory must contain no more than five square miles at the time of incorporation, although it may be larger in land area if its boundaries are made coterminous with those of a school, fire, improvement or other district, or the entire boundaries of a town.

The incorporation process begins when a petition, signed by either 20 percent of the residents of the territory qualified to vote, or by the owners of more than 50 percent of the assessed value of real property in the territory, is submitted to the supervisor of the town in which all or the greatest part of the proposed village would lie. If the area lies in more than one town, copies of the petition are presented to the supervisors of the other affected towns.

Within 20 days from the filing of the petition the supervisor of each town affected must post a notice of public hearing on the petition. Where the proposed village is in more than one town, the giving of notice and subsequent hearing are a joint effort of the affected towns. The purpose of the hearing is to determine only whether the petition and the proposed incorporation are in conformance with the provisions of the Village Law. Other considerations and objections to the incorporation are not at issue. This formal hearing must be held between 20 and 30 days following posting of notice.

Within 10 days after the conclusion of the hearing the supervisor of the affected town must judge the legal sufficiency of the petition. If more than one town is involved and the supervisors cannot agree on a decision, their decision is deemed to be adverse to the petition. Any decision made is subject to review by the courts. If no review is sought within 30 days, the decision of the supervisor is final. If the supervisor decides against the petition, a new petition may be presented immediately. If the supervisor finds that the petition meets the requirements of the law or if the petition is sustained by the courts, a referendum is held within the proposed area no later than 40 days after the expiration of 30 days from the filing of the supervisors' favorable decision, or the filing of a final court order sustaining the petition. Only those residing in the proposed area of incorporation and qualified to vote in town elections may vote in the referendum.

Where the proposed area lies in one town, a majority of those voting is required in order to incorporate. Where more than one town is involved, an affirmative majority in the area proposed for incorporation in each town is required. If the required majorities are not obtained, then the question is defeated, and no new proceeding for incorporation of the same territory may be held for one year. If a favorable vote is obtained, and there is no court challenge, the town clerk of the town in which the original petition has been filed makes a report of incorporation.

Table 8.1: Village Incorporations Since 1940

Village	County	Date
Prattsburg	Steuben	12/07/1948
Tuxedo Park	Orange	08/13/1952
Sodus Point	Wayne	12/30/1957
New Square	Rockland	11/06/1961
Atlantic Beach	Nassau	06/21/1962
Amchir	Orange	09/09/1964
Pomona	Rockland	02/03/1967

Table 8.1: (continued)

Village	County	Date
Lake Grove	Suffolk	09/09/1968
Round Lake	Saratoga	08/07/1969
Sylvan Beach	Oneida	03/17/1971
Lansing	Tompkins	12/19/1974
Harrison	Westchester	09/09/1975
Kiryas Joel	Orange	03/02/1977
Rye Brook	Westchester	07/07/1982
Wesley Hills	Rockland	12/07/1982
New Hempstead	Rockland	03/21/1983
Islandia	Suffolk	04/17/1985
Montebello	Rockland	05/07/1986
Chestnut Ridge	Rockland	05/16/1986
Pine Valley	Suffolk	03/15/1988
Kaser	Rockland	01/25/1990
Airmont	Rockland	03/28/1991
W. Hampton Dunes	Suffolk	11/19/1993
East Nassau	Rensselaer	01/14/1998
Sagaponack	Suffolk	09/27/2005
S. Blooming Grove	Orange	07/14/2006
Woodbury	Orange	08/28/2006
Mastic Beach	Suffolk	09/21/2010

The report is sent to the Secretary of State, the State Comptroller, the State Office of Real Property Services, the county clerk and county treasurer of each county in which the village will be located, and the town clerks of each town in which the village will be located.

Upon receipt of the report, the Secretary of State prepares and files a Certificate of Incorporation. The certificate is also filed with the clerks of each town in which the village is located. The village is deemed incorporated on the date the report is filed with the Secretary of State. Within five days after the filing of the Certificate of Incorporation, the clerks of each town in which the village is located jointly appoint a resident of the new village area to serve as village clerk until a successor is chosen by the village's first elected board of trustees. Election of the board and mayor is held within 60 days of the appointment of the interim village clerk, except in instances where the new village embraces the entire territory of a town. In that case the election of village officers is held at the next regular election of town officials occurring not less than 30 days after the filing of the certificate of village incorporation.

8.3.2 The Legislative Body

The legislative body of a village — the board of trustees — is composed of the mayor and four trustees. However, the board may increase or decrease the number of trustees, subject to either referendum on petition or mandatory referendum, depending on how the local law is structured. Trustees are elected for a two-year term unless otherwise provided by local law.

The village board has broad powers to govern the affairs of the village, including:

- organizing itself and providing for rules of procedure

- adopting a budget and providing for the financing of village activities;
- abolishing or creating offices, boards, agencies and commissions, and delegating powers to these units;
- managing village properties; and
- granting final approval of appointments of all non-elected officers and employees made by the mayor.

The mayor presides over meetings of the board. A majority of the board, as fully constituted, is a quorum. No business may be transacted unless a quorum is present.

8.3.3 Executive Branch

The chief executive officer of most villages in New York State is the mayor. Unless otherwise provided by local law or charter, the mayor is elected for a two-year term. In addition to executive duties, the mayor presides over all meetings of the board of trustees and may vote on all questions coming before that body. The mayor must vote to break a tie. Unless provided by local law the mayor does not have veto power. The mayor is responsible for enforcing laws within the village and for supervising the police and other officers of the village. The mayor may share the law-enforcement responsibility with a village attorney — who may handle prosecutions for violations of village laws — and the county district attorney — who usually handles general criminal prosecutions in the county.

At the direction of the board of trustees, the mayor may initiate civil action on behalf of the village or may intervene in any legal action "necessary to protect the rights of the village and its inhabitants." Subject to the approval of the board of trustees, the mayor appoints all department and non-elected officers and employees. Except in villages which have a manager, the mayor acts as the budget officer. The mayor may, however, designate any other village officer to be budget officer. The budget officer serves at the mayor's pleasure. The mayor ensures that all claims against the village are properly investigated; the mayor may also execute contracts approved by the board of trustees and issue licenses. In certain cases, when authorized by the board of trustees, the mayor may sign checks and cosign, with the clerk, orders to pay claims.

At the annual meeting of the board of trustees, the mayor appoints one of the trustees as deputy mayor. If the mayor is absent or unable to act as mayor, the deputy mayor is vested with and may perform all the duties of that office.

8.3.4 Village Managers or Administrators

In order to provide full-time administrative supervision and direction some villages have created the office of village manager or administrator. The position of village manager is created by a local law, which fixes the powers of the office and the term of the incumbent. As an alternative to direct adoption of a local law establishing a village manager, a village may create a commission to prepare a local law establishing a village manager and defining the manager's duties and responsibilities. The commission must issue a report within the time set forth in the local law, which can be no later than two years after the appointment of its members. While there is no mandate that the commission prepare a local law creating a village manager, if the commission does prepare such a local law, it must be placed before the voters at a referendum; the board of trustees need not approve the local law.

The village manager is usually assigned administrative functions which would otherwise performed by the mayor. Under the Village Law, the manager may designate another village official as budget officer, to serve at the pleasure of the manager.

Fifty five villages in New York State had an administrator or manager in 2005; they are listed in Table 8.2 [86]. Some of these individuals hold more than one title and some are known as "coordinator".

Table 8.2: Villages Which Have Administrators/Managers [1]

Amityville	Ardsley	Attica	Bergen
Briarcliff Manor	Brockport	Bronxville	Canastota
Croton-on-Hudson	Dobbs Ferry	East Aurora	East Hampton
East Rochester	Ellenville	Elmsford	Fairport
Floral Park	Fredonia	Garden City	Great Neck Estates
Groton	Hamburg	Hastings-on-Hudson	Horseheads
Huntington Bay	Irvington	Lake Success	Lawrence
Lowville	Mamaroneck	Massapequa Park	Massena
Mount Kisco	Muttontown	Oakfield	Ocean Beach
Old Westbury	Ossining	Pelham	Pelham Manor
Pleasantville	Port Chester	Port Jefferson	Potsdam
Rockville Centre	Sea Cliff	Seneca Falls	Scarsdale
South Floral Park	Tarrytown	Thomaston	Walden

8.3.5 Other Village Officers

The village treasurer is the chief fiscal officer of the village. The treasurer maintains custody of all village funds, issues all checks and prepares an annual report of village finances.

The village clerk has responsibility for maintaining all records of the village. The clerk collects all taxes and assessments, when authorized by the village board, and orders the treasurer to pay claims. The clerk is required "on demand of any person" to "produce for inspection the books, records and papers of the office." The clerk must keep an index of written notices of defective conditions on village streets, highways, bridges or sidewalks and must bring these notices to the attention of the board at the next board meeting or within 10 days after their receipt, whichever is sooner.

Unless local law provides otherwise, the mayor appoints both the clerk and the treasurer with the approval of the board of trustees. The village board may also establish a term of office for each position by local law. In many villages, the offices of clerk and treasurer are combined and are held by a single person.

The board of trustees may establish the office of village justice. Where no village justice is established, or where the office has been abolished, the functions devolve on the justices of the town — or towns — in which the village is located.

8.3.6 Organization for Service Delivery

Differences in the size of villages and in the services they perform make it difficult to describe the organization of a "typical" village. Larger villages often have multi-departmental organizations similar to cities, while small villages may employ one or two individuals. Functions performed by villages range from basic road repair and snow removal to large-scale community development programs and public utility plants. A number of villages operate their own municipal electric systems.

[1] Source: 2005 NYCOM Directory of City & Village Officials, New York State Conference of Mayors and Municipal Officials, 2005.

8.4 Financing Village Services

Like most local governments, villages have a strong reliance on the real property tax to finance their activities. In the 2012 fiscal year the real property tax accounted for 49 percent of total village revenues in New York State. The balance of revenues comes from a variety of sources. These include user charges and other revenue from water and sewer services, electric systems, airports and marinas, as well as license and rental fees and penalties on taxes. Special activities generated 37 percent of all village revenues in fiscal 2012. Sales tax revenues in 2012 accounted for 6 percent of total revenues for villages. State and federal aid provided 8 percent of village revenue in 2012.

8.4.1 State Aid and Village Finance

The major state aid program which provides funds to villages is per capita revenue sharing. Other important components of state aid to villages include the mortgage tax, aid for the construction and operation of sewage treatment plants, and aid to youth bureaus and recreation programs. A more detailed discussion of revenue sharing and other state aid appears in Chapter 11 [115].

The mortgage tax is a state tax which is collected by counties. The allocation to towns is made according to the location of the real property covered by the mortgages upon which the tax was collected. For towns which contain a village within its limits, a portion of the town allocation is made to the village according to the proportion the assessed value of the village bears to twice the total assessed valuation of the town. While a village, under this formula, would receive aid even if no mortgages were registered in a village, the town may receive the greater amount of revenue, even though much of the property which yields the revenue may be within villages in the town.

8.5 Village Dissolution

Just as villages are formed by local action, they can be dissolved by local action. Article 17-A of the General Municipal Law, effective March 2010, provides the procedure for village officials and electors to disband their village. Since villages are formed within towns, the underlying town or towns would become fully responsible for governing the territory of the former village after it is dissolved.

The dissolution process may be commenced by the village board of trustees on its own motion or through the presentation of an appropriate petition to the board of trustees. If the board seeks to initiate dissolution process on its own motion, it may submit a proposition to dissolve the village to the electors, in accordance with a plan for dissolution. If a petition is presented, the board is obligated to hold a referendum on the dissolution question. If a majority of electors vote to dissolve, then the board must create and endorse a “dissolution plan”, which is subject to permissive referendum by the electors. In either case, the question must be decided by the voters of the village at an election.

It is not unusual for a village board to seek assistance of community members and other government officials as it explores the question of dissolution. One way of doing this is to form a study committee charged with preparing a dissolution study and a draft dissolution plan for consideration by the board of trustees. Alternatively, the board of trustees can study dissolution on its own, with the assistance of other village officers and employees. Since village dissolution results in the termination of the corporate entity, there are many issues to be considered, including:

- potential means to continue services, such as fire, police, garbage collection, water and sewer services, and the projected cost of services;
- disposition of surplus village properties;

- regulatory matters, such as the continuation of land use restrictions; and
- continuing contractual matters, including public employee contracts.

Many of these issues require implementation by the underlying town or towns, yet the statutory dissolution process provides no role for towns. Despite this, successful dissolutions have involved town officials from the start of dissolution deliberations. This can be accomplished through active participation of town officials on a village study committee or through regular joint meetings of village and town officers. While village electors alone determine whether dissolution will occur, these same electors are, and will continue to be after dissolution, town electors as well. This factor favors early and active participation by town officers as the plan for dissolution is formed.

Table 8.3: Village Dissolutions in New York State

Village	**Date**
Altmar (Oswego County)	06/01/2013
Andes (Delaware County)	12/31/2003
Belleville (Jefferson County)	04/20/1979
Bloomingdale (Essex County)	02/26/1985
Bridgewater (Oneida County)	12/31/2014
Downsville (Delaware County)	09/21/1950
East Randolph (Cattaraugus County)	12/31/2011
Edwards (St. Lawrence County)	12/31/2012
Elizabethtown (Essex County)	04/23/1981
Fillmore (Allegany County)	01/13/1994
Forestport (Oneida County)	06/18/1938
Fort Covington (Franklin County)	04/05/1976
Friendship (Allegany County	04/04/1977
Henderson (Jefferson County)	05/23/1992
Keeseville (Clinton & Essex County)	12/31/2014
LaFargeville (Jefferson County)	04/18/1922
Limestone (Cattaraugus County)	12/31/2010
Lyons (Wayne County)	12/31/2015
Marlborough (Ulster County)	04/20/1928
Mooers (Clinton County)	03/31/1994
Newfield (Tompkins County)	12/02/1926
North Bangor (Franklin County)	03/24/1939
Northville (Suffolk County)	05/16/1930
Old Forge (Herkimer County)	10/21/1933
Oramel (Allegany County)	12/23/1925
Pike (Wyoming County)	12/31/2009
Prattsburg (Steuben County)	09/22/1972
Prattsville (Greene County)	03/26/1900
Randolph (Cattaraugus County)	12/31/2011
Rifton (Ulster County)	08/18/1919
Rosendale (Ulster County)	05/23/1979
Perrysburg (Cattaraugus County)	12/31/2011
Pine Valley (Suffolk County)	04/4/1990
Pine Hill (Ulster County)	09/24/1985
Pleasant Valley (Dutchess County)	05/22/1926
Roxbury (Delaware County)	04/18/1900

Table 8.3: (continued)

Village	Date
Savannah (Wayne County)	04/25/1979
Schenevus (Otsego County)	03/29/1993
Seneca Falls (Seneca County)	12/31/2011
The Landing (Suffolk County)	05/25/1939
Ticonderoga (Essex County)	05/1/1992
Westport (Essex County)	05/29/1992
Woodhull (Steuben County)	01/13/1986

8.6 Trends

Several significant trends, issues and problems affecting village government in New York have become apparent in the last quarter of the Twentieth Century.

8.6.1 Zoning

The power to zone the area of the village separately from the remainder of the town still provides an incentive for village incorporation. The 1972 recodification of the Village Law continues the authority of the board of trustees to regulate land use, lot sizes and density of development. With certain exceptions, villages which adopt their first zoning law must establish a zoning commission to draft regulations and establish zone boundaries. They must also establish a zoning board of appeals to hear appeals from decisions made by the village official who enforces zoning regulations. A more detailed discussion of zoning and other aspects of land use regulation appears in Chapter 16 [183]. It should be noted that the proliferation of villages in Nassau County resulted in a charter provision that grants zoning authority to towns within any territory incorporated as a village on or after January 1, 1963. There have, however, been no villages incorporated on or since that date.

8.6.2 Village-Town Relations

Fiscal relations continue to be a source of contention between towns and villages. Village residents are liable for payment of taxes to the town in which their village is located, as well as to the village in which they reside. Before the advent of the automobile, village residents rarely considered this dual taxation unduly burdensome. However, the need for paved town roads and the rapid growth of population in towns near the state's metropolitan areas has greatly increased expenditures for town highways and highway-related items.

The State Highway Law exempts village residents from paying the costs of repair and improvement of town highways, thus relieving them of a substantial portion of the town highway maintenance expense. Unless exempted by the town board, however, village residents must help bear the costs of town highway equipment and snow removal on town roads. Village residents not exempted from such highway costs may believe they are being taxed for town services they do not receive or use in addition to being taxed for the same services within their village. Villages also regard as inequitable the rent the town may charge for village use of the town highway equipment that the village residents have already helped pay for through taxation.

The question of who should pay for what services has been a source of contention between towns and villages since the 1950s, but it is one which can be resolved through local cooperative action. Towns and their constituent

villages often undertake formal and informal cooperative ventures. Many share municipal buildings as well as officials and employees, or engage in cooperative purchasing, auto maintenance and emergency vehicle dispatching. For example, one government may provide library, ambulance, landfill or recreation programs to the other at a negotiated fee. More information on inter-municipal agreements is found in Chapter 17 [197].

Chapter 9

Special Purpose Units of Government

Local municipal services are provided in New York not only by the general purpose municipal corporations - counties, cities, towns and villages - but by several types of special purpose units of government. These include school districts, fire districts and a variety of public benefit corporations — often called "authorities." In most cases, such units provide only a single service or a group of closely-related services.

As demands for municipal services have increased, many new types of public benefit corporations have been established. These entities normally provide a single service or type of service, such as water and sewer services, airport management, or industrial development, rather than the gamut of government services provided by the general purpose municipality.

School districts, fire districts and "local" public benefit corporations, often referred to as authorities, are discussed within this chapter.

9.1 Public Education

The constitutional basis for school district organization appears in Article XI, section 1 of the State Constitution:

> "The legislature shall provide for the maintenance and support of free common schools, wherein all the children of the state may be educated."

The 1795 legislative session provided, on a five-year basis, a statewide system of support for schools, but comprehensive legislation establishing school districts was not enacted until 1812.

Education in New York State today represents the largest single area of expense for local governments, accounting for approximately one-third of all local government expenditures in the state.

By any measure, the most prominent elements of the educational effort are the 697 local school districts, which in 2010-11 enrolled more than 2.6 million pupils and spent over $56 billion.

School districts cover the entire area of New York State, frequently crossing city, town, village and even county lines. With the exception of the "big five" cities (over 125,000 in population), where the school budget is part of the municipal budget, each school district is a separate governmental unit having the power to levy taxes and incur debt.

The State Education Department, acting in accordance with policies determined by the Board of Regents of the University of the State of New York, supervises and provides leadership to the public schools.

Some of this responsibility is exercised through supervisory districts headed by district superintendents of schools.

9.1.1 Basic School District Types

Table 9.1: New York State School Districts, as of July 2004 [1]

Type	Number of Districts
Common School Districts	11
Union Free School Districts	161
Central School Districts	460
City School Districts	62
Central High School Districts	3
Total	697

SOURCE: Department of Education

There are five different types of school districts in New York State:

9.1.1.1 Common School Districts

The common school district, with its origins in legislation of 1812, is the oldest of the existing types. Common school districts do not have the legal authority to operate high schools but, like all school districts, are responsible for ensuring a secondary education for resident children. As a consequence, common school districts send pupils to designated high schools of neighboring school districts. As of July 2011, there were 11 common school districts operating in the state. One common district, the South Mountain Hickory District in the Town of Binghamton, does not directly provide education; it contracts for all education. Common school districts are typically governed by either a sole trustee or a three-member board of trustees.

9.1.1.2 Union Free School Districts

The 1853 session of the Legislature established the union free school district, which is generally formed from two or more common school districts joining together for the purpose of providing a high school. Many of the early union free districts had boundaries which were coterminous with, or close to, those of a village or city.

Although the original purpose of the union free district was to provide for secondary education, about one-fifth of these districts currently do not operate a high school. As of July 2011, there were 161 union free school districts, of which 28 provide less than a K-12 education. Thirteen of the latter are components of central school districts, while the rest provide secondary education by contracting with neighboring districts. Another 13 are districts that are established solely to serve children residing in specified child care institutions. These districts are often referred to as “special act” school districts. Union free school districts are governed by a board of education that is composed of between three and nine members.

9.1.1.3 Central School Districts

The central school district is the most common type of school district in New York State, with 460 in existence as of July 1, 2011. They were established as a means of providing a more comprehensive and intensive education than was possible in most of the 10,000 small common districts operating in the state at the turn of the 20th century.

[1] Source: NYS Department of Education.

The solution came in the form of the Central Rural Schools Act of 1914, which was revised in 1925. This legislation, together with state aid incentives, preceded a massive school reorganization, which resulted in the central school districts of today.

A central school district may be formed by any number of common, union free and central districts. As in the case of union free districts, central school districts have the authority to operate high schools. The governance of a central district follows essentially the same laws as a union free district; thus, it can be viewed as a variation of the union free type of district.

One difference between the two types of districts is the size of the board of education. A central district's board may consist of five, seven or nine members. Within this limitation, the size of the board or length of term (three, four or five years) may be changed by the voters of the district.

9.1.1.4 City School Districts

There are two types of organization for city school districts, the application of which depends on population.

School districts in the 57 cities of under 125,000 in population are separate governmental units. Each district is governed by its own board of education and has independent taxing and debt-incurring powers. In all of these districts, the members are elected to the school boards, which may consist of five, seven, or nine members.

Many of these city districts encompass larger geographic areas than their respective cities, and are referred to as "enlarged city school districts." Seven of these enlarged districts have been reorganized as "central city school districts," a designation limited to districts in cities with less than 125,000 population.

In the state's five cities of over 125,000 in population (the "Big Five" – Buffalo, Rochester, Syracuse, Yonkers and New York City), district boundaries are coterminous with those of their respective cities. Each of these school districts has a board or panel with varying independence and power to set policy for the school system. However, none of these boards have the power to levy taxes or incur debt for the district. Instead, funding is provided as part of the overall municipal budget. Buffalo, Rochester and Syracuse have separately-elected boards of education. In Yonkers, however, the board is appointed by the mayor. Buffalo and Yonkers each have nine-member boards, while Rochester and Syracuse have seven-member boards.

Since 2002, New York City public school system is been run as a city agency, headed by a Chancellor. Instead of a Board of Education that is responsible for setting broad policy, the Department of Education has the Panel for Educational Policy (PEP), which advises the Chancellor and approves major Department of Education initiatives, budgets and union agreements. The PEP consists of 13 appointed members and the Chancellor. Each borough president appoints one member and the mayor appoints the remaining eight. The Chancellor serves as an ex-officio non-voting member. The PEP is responsible for electing a chairperson from among the voting members.

9.1.1.5 Central High School Districts

The central high school district is the most unique organization type; as of July 2011 only three existed, all in Nassau County.

Central high school districts provide secondary education to children from at least two common or union free districts, which provide elementary education. Appointed representatives from the component districts' boards of education comprise the board of education for each central high school district.

Authorized in 1917, this type of district was seen as a way to promote reorganization of smaller school districts. However, central high school districts proved unpopular, resulting in the repeal of authority for the formation of additional districts in 1944. Thirty-seven years later, in 1981, legislation reinstated the option of central high school districts for Suffolk County only.

9.1.1.6 The Supervisory District

The supervisory district was established in 1910, as a means of providing educational supervision and leadership to the thousands of tiny school districts then in existence. A district superintendent of schools was appointed to head each supervisory district.

At the time of their founding, 208 supervisory districts were established in the state, with as many as seven located in a single county. As of July 1, 2011, 37 supervisory districts existed, each coterminous with the area served by one of the 37 Boards of Cooperative Educational Services (BOCES) in the state.

The district superintendent of schools serves as a local representative of the Education Commissioner and as chief executive officer of the BOCES. Reflecting this dual role, the district superintendent is appointed by the governing body of the BOCES from a list of candidates approved by the Education Commissioner.

9.1.1.7 The BOCES

A Board of Cooperative Educational Services (BOCES) provides a single organization through which local school districts may pool their resources to provide services which might ordinarily be beyond their individual capabilities. The BOCES is formed by a majority vote of the members of local school boards within a supervisory district. A board of five to fifteen members governs the BOCES organization. Members are elected for staggered three-year terms at an annual meeting of the boards of education of the constituent districts.

BOCES services include specialized instructional services — such as classes for students with disabilities and vocational education — as well as support services such as data processing, purchasing and the provision of specialized equipment for constituent districts.

A BOCES has no taxing authority; the sources of BOCES funds are primarily taxes levied by its component districts, state aid, and a relatively small amount of federal aid. The component districts' share of costs is based either on full valuation, a pupil count based on enrollment, or upon the Resident Weighted Average Daily Attendance (RWADA) of each district. Currently, all BOCES, except for one, use the RWADA method of allocating costs.

BOCES services include specialized instructional services – such as classes for students with disabilities and vocational education – as well as support services such as data processing, purchasing and the provision of specialized equipment for constituent districts. Specific BOCES services are financed through contracts between the BOCES and the individual school districts. Thus, a school district pays only for those services it uses. The state reimburses a portion of the individual district's payment to the BOCES for such services.

At the end of the 2010-11 school year, the number of students enrolled from constituent districts ranged from 8,413 to 203,023 students. All but nine school districts in the state were members of a BOCES. Of the nine, four are eligible to become members of BOCES; the remaining districts are the five city school districts with a population over 125,000 which are not eligible to join BOCES. The 37 BOCES served a total of 1,529,320 students in the 2010-11 fiscal year.

9.1.1.8 Charter Schools

A charter school is an independent public school that operates under a "charter," a type of contract issued by the New York State Board of Regents. Charter schools typically provide innovative curricula or other non-traditional approaches that differentiate them from regular public schools. Charter schools are financed by local, state and federal funds, but they have the flexibility to operate free of many educational laws and regulations.

Each charter school, however, is held accountable to provisions in the Charter School Law (Article 56 of the Education Law) and the charter authorizing the school. Every school must also satisfy the same health and safety, civil rights, and student achievement requirements that are applicable to other public schools. A school's charter may

be revoked for violation of charter provisions, failure to meet performance levels on state assessments, serious violations of law, fiscal mismanagement, or employee discrimination in contravention of the Civil Service Law.

A charter is originally issued for a term of up to five years. Upon the expiration of each term, a charter may be renewed for five more years. The Board of Regents may not issue more than 460 charters statewide.

9.1.2 Financing Education

9.1.2.1 Property Taxes

With few exceptions, property taxation is the only major local revenue source available to school districts. Property taxes for schools totaled more than $26.3 billion in 2010-11, or 46 percent of all school revenues. School districts are not subject to constitutional or statutory tax limits, but resident district voters approve annual school budgets, except for the "Big Five" cities. A property tax cap, enacted for school districts and other municipalities in 2011, beginning with the 2012-13 school year, limits the growth of property taxes. If the voters defeat a proposed budget, a school board may only levy taxes equal to the prior year's levy to meet costs for teachers' salaries and a number of "ordinary contingent" expenses. Levy to support capital expenditures, increases in expenditures from court orders and increases in pension cost is excluded from the property tax cap.

In each of the state's five largest cities, the city council determines the school tax levy. The board of education prepares its budget for approval by the city council. The council may increase or decrease the budget as a whole, but it may not change individual items. The levy for schools is then included in the overall city tax levy. Furthermore, the school tax levy must be accommodated within the two percent city tax limit allowed by the state constitution for Buffalo, Rochester, Syracuse and Yonkers, and 2.5 percent allowed for New York City. Nonproperty Taxes. Nonproperty taxes represent a small revenue source for school districts. In 2010-11 school districts collected $271 million from non-property tax sources, or slightly more than one percent of total revenue collected from taxes.

The only nonproperty tax a school district may levy directly is a tax on consumers' utility bills, which may be imposed at a maximum rate of three percent. This tax is limited to school districts with territory in cities of under 125,000 population. Of the 66 school districts eligible to impose this tax in 2010-11, only 24 actually did so.

While only cities and counties can impose a sales tax, the Tax Law provides that they may distribute all or part of the proceeds to school districts. Five of the counties which collected sales taxes in fiscal 2010-11 distributed a portion of the revenue to school districts.

9.1.2.2 State Aid

Receipts from state aid programs represented the second largest revenue source for school districts in the 2010-11 school year. Approximately $20 billion was received in that year, representing about 35 percent of total school revenues. There are two major categories of state aid to education: general and special aids. The latter is a group of relatively small programs, generally experimental or aimed at meeting the special needs of a specific group of pupils.

General aid is paid to all school districts, with variations related to formulas taking into account such items as taxable property, income of district residents per pupil, and district size and organization. General aid includes:

- operating expense aid;
- BOCES aid;
- transportation aid;
- high tax rate aid;

- growth aid;
- building aid;
- reorganization incentive aid.

Operating aid, which represents more than one-half of total aid provided, is for support of the general operating expenditures of a district. Other general aid formulas exist to compensate for particular cost factors in school operations, building construction costs, high tax rates and transportation costs.

9.1.2.3 Federal Aid

The third largest revenue source, but one far smaller than state aid or local revenues, is federal aid. Federal assistance represented about $4.6 billion in revenues for the 2010-11 fiscal year, or 8.2 percent of total revenues.

9.2 Organizing for Fire Protection

Fire protection services in New York have long been viewed as an essential governmental function in densely populated areas. Early on, cities as well as many villages made provisions for fire departments and the organization of fire companies using both career and volunteer services. This did not happen in towns, however, where sparse development made fire, while no less catastrophic to the individuals involved, a more personal than a communal threat.

Traditional fire protection in rural areas consisted of close neighbors forming bucket brigades. The era of the bucket brigade was followed by the formation of loosely-knit groups which accumulated rudimentary firefighting equipment. Such groups were the precursors to the modern-day volunteer fire companies, which have developed a high degree of organization and capability.

For many years volunteer fire companies supplied reasonably effective fire protection to rural areas without government assistance or support. Gradually, however, greater demands for fire protection service, the high cost of modern and specialized equipment, and the need for giving volunteers economic security in the event of duty-connected death or injury, forced the independent fire services to request assistance from the government.

In towns, the answer came through the establishment of special districts on an area-by-area basis. These districts took two basic forms: fire districts, which were true district corporations and enjoyed autonomy from town government; and other types of districts, including fire protection districts, fire alarm districts and certain water supply districts, which were little more than assessment areas that received fire protection.

9.2.1 Fire Districts

A fire district is a public corporation established for the purpose of providing fire protection and responding to certain other emergencies. The New York State Constitution (Article X) recognizes that fire districts have certain characteristics of general purpose municipal corporations, such as powers to incur indebtedness and to require the levy of taxes. Generally, fire district taxes are levied by the county and collected by the town or towns where the district exists. A fire district is almost a completely autonomous political entity; it has its own elected governing body, its own administrative officers, and it must observe its own expenditure limitations. However, it is dependent upon the parent town or towns for its initial creation and extension pursuant to Article 11 of the Town Law; to consolidate or dissolve, a fire district must follow the procedures in Article 17-A of New York State General Municipal Law.

As of December 31, 2010, New York had 864 fire districts. They are of varying sizes, including smaller districts with annual budgets of several thousand dollars and large districts, some of which feature departments that have both career and volunteer firefighters and annual budgets of several million dollars.

9.2.1.1 Establishment

A fire district is created to provide fire protection to areas of towns outside villages. Villages usually provide fire protection on their own. Towns and villages may establish joint town-village fire districts.

A town board may establish a fire district on its own motion or upon receipt of a petition from owners of at least 50 percent of the resident-owned taxable assessed valuation in the proposed district. Whichever method is used, the town board must hold a public hearing and determine that: all properties in the proposed district will benefit, all properties which benefit have been included and that the creation of the district is in the public interest.

If the town board decides to establish a district and proposes to finance an expenditure for the district by the issuance of obligations, it must request approval from the State Comptroller, who must first determine that the public interest will be served by the creation of the district and that the cost of the district will not be an undue burden on property in the district. If such approval is not required, a certified copy of the notice of hearing must be filed with the State Comptroller.

After a fire district has been established, the town board appoints the first temporary board of five fire commissioners and the first fire district treasurer. At the first election, five commissioners are elected for staggered terms of one to five years so that one term expires each year. At each subsequent election one commissioner is elected for a full term of five years. The fire district treasurer is elected for three years, although the office may subsequently be made appointive for a one-year term. A fire district secretary is appointed by the board of fire commissioners for a one-year period.

9.2.1.2 Operational Organization

After establishment and initial appointments by the town board, the fire district becomes virtually autonomous from the town in its day-to-day operations.

A fire district has only those powers that are expressly granted by statute, or which are necessarily implied by the statute. Unlike towns, villages, cities and counties, a fire district does not possess home rule powers.

The powers granted to a fire district board are extremely specific and narrowly limited. A listing of some of the more important and general powers granted to the board of fire commissioners in Town Law serves as a quick synopsis of many of the important areas of operation for fire districts:

- They shall have the powers to make any and all contracts for statutory purposes within the appropriations approved by the taxpayers or within statutory limitations;
- They may organize, operate, maintain, and equip fire companies, and provide for the removal of members for cause;
- They may adopt rules and regulations governing all fire companies and departments in the district, prescribe the duties of the members, and enforce discipline;
- They may purchase apparatus and equipment for the extinguishing and prevention of fires, for the purpose of the emergency rescue and first aid squads and the fire police squads;
- They may acquire real property and construct buildings for preservation of equipment and for social and recreational use by firefighters and residents of the district;

- They may construct and maintain fire alarm systems;
- They may purchase, develop, or contract for a supply of water for firefighting purposes; and
- They may contract to provide firefighting or emergency services outside the fire district where such services can be supplied without undue hazard to the fire district.

9.2.1.3 Financing

Fire districts are not governed by the constitutional tax or debt limits that restrict most municipal corporations. However, statutory limitations are imposed on their spending and financing authority.

Under section 176(18) of the Town Law, every fire district has a minimum basic spending limitation of $2,000, plus an additional amount related to full valuation of district taxable real property in excess of one million dollars. Several important expenditures are exempt from this spending limitation, such as certain insurance costs, salaries of career firefighters, most debt service and contracts for fire protection or water supplies. The basic spending limitation may be exceeded only if a proposition for the increase is approved by the voters of the district. Further, many capital expenditures proposed for a fire district, which would exceed the spending limitation, also require voter approval. Certain expenditures which are not chargeable to the spending limitation may also be subject to voter approval under other provisions of law (e.g., General Municipal Law §6-g, relative to capital reserve funds).

A fire district may incur debt by issuing obligations pursuant to provisions of the New York State Local Finance Law. Fire districts are subject to a statutory debt limit (generally three percent of the full valuation of taxable real property in the fire district) and mandatory referendum requirements.

Within the statutory constraints, the district has general autonomy in developing its budget. When completed, the budget is filed with the town budget officer of each of the towns where the district is located. The town board can make no changes in a fire district budget and must submit it with the town budget to the county for levy and spreading on the town tax roll. When the taxes are collected, the town supervisor must turn over to the district treasurer all taxes levied and collected for the fire district.

In 1956, the Volunteer Firefighters' Benefit Law was enacted to provide benefits similar to those provided by Workers' Compensation for volunteer firefighters injured, or die from injuries incurred, in line of duty. Cities, towns, villages and fire districts finance these benefits through their annual budgets.

9.2.1.4 Fire Department Organization

The board of fire commissioners exercises general policy control over its fire department, while the chief of the department exercises full on-line authority at emergency scenes. The fire department of a fire district encompasses all fire companies organized within the district, together with career employees who may be appointed by the board of fire commissioners. Fire companies usually are, but need not be, volunteer fire companies incorporated under the provisions of the Not-for-Profit Corporation Law. They can be formed within the fire district only with the consent of the board of fire commissioners and, thereafter, new members can only be admitted with board consent.

All officers of the fire department must be members of the department, residents of the state and, if required by the board of fire commissioners, residents of the fire district. Officers are nominated by ballot at fire department meetings, and appointments by the board can be made only from such nominated candidates.

9.2.1.5 Joint Fire Districts in Towns and Villages

Article 11-A of the Town Law and Article 22-A of the Village Law allow for the establishment of joint fire districts in one or more towns and one or more villages. Under the provisions of the Town Law, if it appears to be in the public

interest, the town board(s) and village board(s) shall hold a joint meeting for the purpose of jointly proposing the establishment of a joint fire district. If, at the joint meeting, it is decided by majority vote of each board to propose a joint district, the boards must hold, upon public notice, a joint public hearing at a location within the proposed district. If, after the public hearing, the town board(s) and village board(s) determine that the establishment of the joint fire district is in the public interest, each board may adopt a separate resolution, subject to a permissive referendum, establishing the joint fire district.

The new joint fire district established pursuant to Article 11-A of the Town Law is governed by the provisions of Article 11 of the Town Law unless there is an inconsistency between the two articles. In such case, Article 11-A would provide the prevailing language. Management of the affairs of joint fire districts is under a board of fire commissioners composed of between three and seven members, who are either appointed by the participating town boards and/or village boards of trustees in joint session, or elected as provided in Article 11.

Upon the establishment of a joint district, the town board or village board of trustees of each participating municipality shall by local law dissolve any existing fire, fire alarm or fire protection districts contained within the joint fire district. The board of trustees of a village or the board of commissioners of a fire district, all of the territory of which is embraced within the boundaries of a joint fire district, may by resolution authorize the sale or transfer of any village-owned or district-owned fire house, fire apparatus, and fire equipment to the joint district. Such transfer may occur with or without consideration, and subject to the terms and conditions deemed fitting and proper by the board of trustees or board of commissioners.

9.2.2 Fire Protection and Fire Alarm Districts

Fire protection districts and fire alarm districts are not public corporations. Both types of districts may be described as assessment areas within which a town can provide limited services and assess the cost back against the taxable properties within the district.

Fire protection districts are established for the sole purpose of providing fire protection by contract. After establishing a fire protection district, a town board may contract with any city, village, fire district or incorporated fire company maintaining suitable apparatus and appliances to provide fire protection to the district for a period not exceeding five years. A town may also acquire apparatus and equipment for use in the district and may contract with any city, village, fire district or incorporated fire company for operation, maintenance and repair of the apparatus and equipment and for the furnishing of fire protection in the district. The cost of the contracted services, together with certain other expenses incurred by reason of the establishment of the district, is then levied against the properties of the district on the annual tax roll.

Fire alarm districts are formed primarily to finance the installation and maintenance of a fire alarm system. However, a town board can contract for fire protection for these districts in a manner that is similar to the way it provides protection for fire protection districts.

9.3 Public Benefit Corporations

9.3.1 The Nature of Public Benefit Corporations

Public benefit corporations and other special purpose entities created for specific limited public purposes are often referred to as authorities. Many of these entities, however, carry other terms within their titles such as commissions, districts, corporations, foundations, agencies or funds. For the sake of clarity, this chapter limits discussion to municipal level authorities and special purpose entities.

The first public authority in New York State was created in 1921 by an interstate compact that required the approval of the United States Congress. However, the idea of public benefit corporations or local authorities with

independent powers, including the ability to incur debt and by extension the power to levy taxes in order to retire debt, was not quickly embraced by the public. In 1956, only 90 such entities existed in the state. As of 2012, 1266 such entities, including local housing authorities, urban renewal agencies, industrial development agencies and others, filed separate financial statements with the Office of the State Comptroller.[2]

Table 9.2: Local Authorities and other Special Purpose Entities [4]

Type	Number of Entities
Housing authorities	143
Parking authorities	7
Urban Renewal Agencies	46
Industrial Development Agencies	112
Public Libraries	403
Library Systems	23
Association Libraries	354
Soil & Water Conservation Districts	58
Other Town Special Districts	70
Consolidated Health Districts	50
Total	1266

The traditional purpose of the public authority was to construct, operate and finance specific types of improvements. This concept has broadened, however, and many authorities now exist to meet such diverse needs as housing, parking, water supply, sewage treatment, industrial development, solid waste management, urban renewal, transportation, and community development.

9.3.2 Objectives

Public benefit corporations have been created for a number of reasons, including to:

- overcome jurisdictional problems in the operation of facilities or services that are best provided on a regional, interstate or even international basis;
- provide an administrative entity with the ability to operate and manage public enterprises, without being subject to many of the limitations which apply to the operations of the state and its political subdivisions;
- facilitate a transition from private to public operation;
- finance public improvements or services by using rents or user charges from the improvement or service itself without having to levy additional taxes;
- permit the use of revenue bonds (secured by revenues which the improvement) in order to finance the project, rather than general obligation bonds of a municipality;
- permit financing without being subject to voter approval or constitutional debt limit restrictions; and
- provide a vehicle which can take advantage of certain types of federal grants and loans that are not easily available to general purpose municipal corporations.

[2] Office of the State Comptroller, 2013

[4] Entity totals reflect units (not including joint activity units or component units) that file separate financial statements with the Office of the State Comptroller. Note: Housing Authorities are not required to file financial statements with the Office of the State Comptroller.

9.3.3 Powers and Restraints

Public benefit corporations have many of the same powers as general purpose governments, plus some powers that are not enjoyed by general purpose governments. In addition, authorities are not subject to some of the traditional constitutional and statutory restraints imposed upon general purpose governments, such as:

- constitutional debt limitations, but they may be subject to statutory limits set forth in their own enabling legislation;
- provisions of the State Finance Law or the Local Finance Law relating to the issuance and sale of obligations, except to the extent provided in their enabling legislation, and they have greater flexibility in scheduling debt payments;
- the type of public bidding provisions applicable to state and municipal governments.

The power of each public benefit corporation is set forth in its own legislative authorization. The tendency has been to put some of the requirements applicable to general purpose governments (such as the requirement for public bidding) into the special acts establishing authorities, although often in different forms. In addition, several provisions of the Public Authorities Law contain requirements applicable to all or a class of authorities, such as requirements to adopt investment guidelines and rules for awarding personal services contracts. However, the basic financial provisions that distinguish authorities from municipalities, again subject to the requirements of their own special acts, have been kept reasonably intact. Since enhanced fiscal powers often are the most important incentive for using authorities to provide public services, it is useful to explore these powers in greater depth.

9.3.4 Fiscal Powers

Authorities generally have one fiscal limitation that distinguishes them from municipal corporations. No authority may be established having both the power to incur debt and the power to levy or require the levy of taxes or assessments.[5] This is a constitutional power generally reserved for true municipal corporations. Also, an authority cannot be created with both debt-incurring power and the power to collect rentals, charges, fees or rates for services provided, except by special act of the State Legislature.

Generally, an authority may not be created within a city with power to both contract indebtedness and to collect charges from owners or occupants of real property within the city for a service formerly provided by the city, without approval of the electorate.[6]

Subject to these restrictions, authorities may use their fiscal power to finance their authorized functions. They sometimes may even finance improvements and services that cannot be provided directly by the municipal corporations included in the area of the authority. They also often enjoy the same income tax exempt status as municipal corporations on the interest on their obligations. In consideration of these factors, many municipalities to turn to authorities to provide capital-intensive improvements or services.

In the issuance of their financial obligations, authorities generally are not bound by the maturity and certain other requirements in the provisions of the Local Finance Law. Authorities, on the other hand, may have to pay somewhat higher interest rates to borrow money, since their obligations are secured by prospective revenues only and are not backed by the full faith and credit of a municipal corporation with the ability to levy taxes.

Neither the state nor any municipality may become liable for the payment of the obligations of any authority. However, the state or a municipality, if authorized by the Legislature, is not precluded from acquiring the properties of an authority and paying its indebtedness.

[5] State Constitution, Article VIII, section 3
[6] State Constitution, Article X, section 5

Chapter 10

Citizen Participation and Involvement

If the American system of government is to function properly, citizens must actively participate in its operations at all levels, but especially at the local level. Local officials have both a responsibility and a stake in keeping citizens fully informed about local programs and activities and giving them clear opportunities to play meaningful roles in determining local public policy and in carrying it out.

The history, tradition, development and patterns of local government in New York State are based on a belief that a responsive and responsible citizenry will maintain a vigorous, informed and continuous participation in the processes of local government. A basic principle upon which New York local government, with its broad home rule authority, is constructed is that local community values can be fostered and served. Assuring meaningful participation by citizens in government at all levels in the face of the complexity of contemporary society is one of the great challenges of American democracy.

The individual citizen has numerous ways to influence government. Some of these, such as writing letters to public officials, joining interest groups and supporting lobbying efforts, are of a private nature. The structure of government itself, however, provides other avenues of a more formal character. These include applications of the electoral process through which citizens may express their interests and concerns, plus devices such as public hearings and open meetings of legislative bodies. All local officials have a basic duty to assure that citizens have ways to participate actively and meaningfully in local government affairs. Apart from making themselves accessible to their constituents, local officials can keep citizens informed about public affairs, and the citizens, in turn may express their will through the electoral process.

10.1 The Electoral Process

Abroad base of participation in local government forms the foundation of our working democracy, and the electoral process is only one of many ways in which the individual citizen can make his or her views felt at the local level.

10.1.1 Elective Offices

At the turn of the twentieth century, enlightened citizen groups recommended adoption of the short ballot along with several electoral reforms. They believed that a citizen could acquire more knowledge about candidates and issues and could therefore vote more intelligently if fewer offices appeared on the ballot. They argued further that the voter's basic concern lay with choosing officers who would make policy rather than filling jobs of an administrative or even clerical nature in which there was no decision-making authority. Despite some improvements

during the past century, the length of a ballot still seems to depend on the proximity to the citizen of the governmental level — national, state and local. In the American three-branch system of government, the minimum ballot would include a chief executive (or two), one or more legislators, and perhaps judges. At the state level, the ballot may also include the offices of attorney general, state comptroller or auditor, and others. At the local level, the ballot grows to include such miscellaneous offices as town clerk, superintendent of highways and others.

New Yorkers, in their local elections, have to vote for officers to serve in two, three, or even more different local governments. A city resident will, for example, be voting for county and city and often school district officials. A village resident will be voting not only for village officials but also for county, town and school district officials. A resident of the town outside the area of the village may be voting in a fire district election as well as in county, town and school district elections. Although there are infinite variations, the most typical elected local officials appear in the following list.

- County
- executive (charter county only)
- county legislators(s) (except in counties retaining boards of supervisors)
- county clerk
- county treasurer
- Coroner[1]
- comptroller
- sheriff
- district attorney
- county judge
- family court judge
- surrogate
- City
- mayor
- comptroller
- council members
- municipal judges
- Town
- supervisor
- board members
- justices
- town clerk

[1] Duties are performed by an appointive officer in some counties.

- superintendent of highways
- receiver of taxes or tax collector
- assessors[2]
- Village
- mayor
- trustees
- justice(s)

10.1.2 Legislative Elections

During the 1960s and 1970s, many counties changed their governing body from a board of supervisors to a county legislature, with representation based on districts. In those counties, town residents have to vote for one or more county legislators in addition to the town supervisor, who formerly served ex officio as the town's representative on the county legislative body. Counties with county legislatures elect legislators from single or multi-member districts, or a combination of single and multi-member districts. Cities elect members of the city council at-large, or from wards or districts, or both at-large and from wards or districts. Towns elect members of the town board at-large, or from wards that have been established pursuant of Town Law section 81. A few villages operate on a ward system.

10.1.3 Fire District Elections

Elections in fire districts generally occur pursuant to the Town Law, and each fire district elects five commissioners and a treasurer at large. Chapter 9 [91] discusses these officials in a greater detail.

10.1.4 School District Elections

With certain rare exceptions, all local school board members in New York are elected. The method of election varies from district to district. In all school districts that elect their board members, however, the citizens of the entire district elect all board members at large. The number of school board members prescribed by state law varies from one or three for common school districts to not more than nine for union free, central and city school districts (see Chapter 9 [91] for a more complete discussion of school boards). In most cases, the district has some latitude to decide upon the number of board members. Terms are staggered so that the entire board is never up for election at the same time.

10.1.5 Improvement Districts

In some towns, residents also elect boards of commissioners for independent improvement districts. Since it has not been possible to create additional independent districts under the Town Law since 1932, elections continue only in those districts which continue to exist.

[2] Appointive in some towns. As counties and cities adopt and revise charters, the trend is toward fewer elective offices. Changes in state legislation and expanded powers of home rule have also made it possible for towns and villages to reduce the number of elective offices by local action.

10.1.6 The Political Party System

State law provides for political party committees at the state and county level and other committees as the rules of the party provide. Generally, county committees consist of at least two members elected at primary elections from each election district within the county. As a practical matter, the party system is subdivided further into town committees and city committees. Many village elections and all school district and fire district elections are held on a nonpartisan basis, but town, county and (with a few exceptions) city elections are contests between local representatives of statewide parties.

In the absence of a primary election, candidates for local offices who are designated by party caucuses become the nominees, but a competing candidate who obtains the required number of voters' names on a petition can require that a primary be held on the statewide primary date. Primaries in New York State are closed, and voters must enroll in a party to be eligible to vote in that party's primary. Since 1967 permanent personal registration has been in effect statewide.

10.1.7 Election Calendar

Some municipal elections coincide with statewide elections, while others are also held in November, but in the "off" or odd-numbered years. In fact, a provision of the State Constitution requires that city campaigns for mayor not coincide with gubernatorial campaigns. An election may, however, be held in an even-numbered year if necessary to fill a vacancy in the office of the mayor. Village elections are generally held in March or June, but they may be held on any date the locality chooses. Except in cities, school district elections are generally held annually on the first Tuesday in May or June. Fire district elections are held annually on the second Tuesday in December.

Table 10.1: Election Calendar by Local Government Type

Type	Calendar
State	November even-numbered year
County	November odd-and even-numbered year
City	November odd-numbered year
Town	November odd-numbered year
Village	March or June annually or biennially
School District	May or June annually
Fire District	December annually

10.2 Referenda

The use of the referendum — direct vote of the people on issues — has been limited in New York State in accordance with the basic principles of a representative form of government. On the principle that voters elect government officials to make decisions on their behalf, government officials are not given broad authority to delegate decision making powers back to the electorate. Case law stipulates that a local government must find specific authority, either in the constitution or state law, to conduct an official referendum on any subject, and in the absence of such authority it may not conduct a referendum. A local government may not spend public monies to conduct a so-called "advisory referendum," one conducted to gather public opinion on a particular matter, unless state law specifically authorizes it.

10.2.1 Types of Referenda

There are general classifications of referenda available to local governments in New York State. These are mandatory, permissive, on petition and discretionary.

A mandatory referendum is one which is required and in which a local government has no choice; it must submit the particular question to referendum.

A permissive referendum is one in which the local governing body is authorized to place a matter before the voters on its own motion. Or, after the local governing body renders a decision on the matter, it may be required to wait a specified period of time (after public notice of the decision) before the matter is finally decided. During that interval, a petition may be filed demanding that the local governing body may submit the matter to referendum for a public decision. A proper petition, as defined by law, must be filed within the timeframe, set forth by law.

Referendum on petition relates to situations in which a proper petition may be circulated and filed, as defined by law, directing the local government body to schedule a referendum on the subject matter of the petition. A discretionary referendum, the most flexible variety, allows the governing body to determine whether a particular action under consideration shall be subject to referendum and if so, whether mandatory or permissive.

10.2.2 Referendum Majorities

There are a few instances in which more than a simple majority is required for the approval of a question submitted to the voters. Perhaps the most important of these is the requirement for adoption of a county charter. This requires a majority vote in any city or cities in the county and a majority vote outside the city or cities (i.e., towns). If a charter provides for the transfer of any function from the villages to the county, a majority vote in the affected villages is also required.

10.2.3 Subjects of Referenda

Generally local governments are required to conduct a referendum on any question involving basic changes in the form or structure of government, such as county or city charter adoption, changes in boundaries or in the composition of legislative bodies, and the abolition or creation of elective offices.

Procedures relating to permissive referenda must be observed in counties and cities, as well as in towns and villages, for such matters as appropriating money from reserve funds and constructing, leasing or purchasing a public utility service. In towns, permissive referenda are required for changes from second to first class if the town has between 5,000 and 10,000 in population. A permissive referendum is also required for a change from first class to suburban town status. Such actions by towns are roughly equivalent to charter adoption by a county or city, which is subject to mandatory referendum. The towns, however, are more generally bound by referendum requirements than any other type of local government unit. For example, towns, but not other units, are subject to permissive referenda when constructing, purchasing or leasing a town building or land there for and when establishing airports, public parking, parks, playgrounds, and facilities for collection and disposal of solid wastes.

Local laws of counties, cities, towns and villages are subject to referenda on petition if they result in changes in existing laws relating to such matters as public bidding, purchases, contracts, assessments, power of condemnation, auditing, and alienation or leasing of property.

The creation of improvement districts in both towns and counties is a frequent subject of referenda. The referendum for a county water, sewer, drainage or refuse district is permissive. A town improvement district can be established either on petition and action of the town board or by motion of the town board and with a permissive referendum held in the area to be included in the district.

In practice, matters subject to permissive referenda or referenda on petition are seldom actually brought to referenda, unless they become the subject of particular local controversy. Matters subject to referenda in recent elections have included:

- county charter adoption;
- increases in terms of local offices from two to four years;
- city charter amendments or revisions;
- county reapportionment plans;
- transfer of street-naming authority from cities, towns and villages to a county;
- change from at-large elections to the ward system;
- village incorporation;
- coterminous town-village; and
- village dissolution.

10.2.4 Initiative and Recall

New York State law does not recognize the principle of recall, by which an elected officeholder may be removed by a popular vote. There are very few instances in which there may be initiative, where the voters initiate and enact laws or constitutional amendments. Although not strictly an example of the initiative, citizens in New York may, by petition, require a referendum on certain actions taken by a local governing body. There are also instances in which a petition can initiate official action. The voters of a county may, by petition, require the submission of a proposition at a general election on the question of appointment of a charter commission. If approved by the voters, the county legislative body must appoint a commission.

Voters of a city may, by petition, require submission of a city charter amendment or new city charter to the electors. Since the substance of such a local law must be set forth in full in the petition, this procedure is similar to the initiative as it is known in other states. Voters in Suffolk County may, through an initiative and referendum procedure, enact amendments to the county charter. A special Act of the State Legislature provided authority for this power.

10.3 Facilitating Citizen Participation

10.3.1 Boards and Commissions

Since school board members and fire district commissioners are unpaid volunteers, and since many other local officials in New York State, including some chief executive officers and legislators, receive nominal salaries, they embody citizen participation in government. However, the growing responsibilities of local officials make it more difficult to operate local governments effectively with part-time leadership.

Citizens of New York State have many opportunities to participate in local government as members of advisory or operational special-purpose agencies, such as planning boards, environmental councils and recreation boards, to name a few. These agencies offer local officials opportunities to enlist the talents, interest and concern of the community in important aspects of local government. In addition to the many special agencies authorized by state law, local chief executives and legislative bodies have authority to establish and appoint ad hoc citizens'

advisory committees on numerous matters, such as reapportionment, historical celebrations and new municipal buildings. A municipality may also, if it wishes, have a continuing citizens' advisory committee to consider a variety of matters as they arise.

There are many reasons for local officials to encourage citizens to participate actively in their local governments, including:

- involvement of citizens in the planning stages of a program or project so as to avoid misunderstandings and problems at later stages;
- obtaining firsthand knowledge of citizen needs and problems;
- taking advantage of expertise which might otherwise not be available, especially in small communities;
- spreading the base of community support;
- improving public relations; and
- fulfilling the requirements of certain federal programs.

10.3.2 Public Hearings

The public hearing provides a convenient and useful forum for citizens to play a significant role in the governmental decision-making process. As a general rule, local governments in New York State are required to hold public hearings whenever the action of the governing body can be expected to have significant impact on the citizenry. For example, the law requires public hearings as part of the approval process for:

- local laws and ordinances;
- zoning regulations;
- capital improvements;
- budgets; and
- certain federal programs.

Local governing bodies may also conduct a hearing at any time on any subject on which they wish to obtain the views of the public. In addition, the Open Meetings Law (see "Public Information and Reporting" below) requires that all meetings of public bodies be convened open to the public and preceded by notice given to the public and news media.

The choice of whether to hold a hearing often depends upon striking a balance between democratic requirements and the interests of government efficiency. The choice may not be easy, but an informational hearing, even when not mandated, maybe advisable where the subject matter is particularly controversial.

10.3.2.1 Notice

Where there is a specific provision in law regarding notice of a public hearing, the notice should be sufficient to inform the public of the date, time, place and subject of the hearing. A small notice in a large newspaper, however, is often inadequate. When significant issues affect either a particular neighborhood or the entire community, public notices may be conspicuously displayed at several key locations in the jurisdiction affected. Public officials should write notices in a language that laymen can understand, rather than in legal language unfamiliar to most people.

Public officials should consult with the language of New York State's Open Meeting Law and the Committee on Open Government (https://www.dos.ny.gov/coog/) to ensure compliance and best practices.

10.3.2.2 Location

Although governments traditionally hold public hearings in a central municipal building, they frequently use other venues in the community to conduct hearings on issues affecting specific geographic locations. By so doing, they gain greater neighborhood participation and sharper focus of attention on an issue. Government decision makers are likely to learn more about a problem by visiting the area of the problem.

10.3.2.3 Statutory Provisions

There is no uniformity in state law with respect to public hearings and procedures. Specific provisions requiring public hearings and setting forth procedures to follow are generally spread out through the laws relating to the various types of local governments. In many cases the requirements for a hearing will vary depending on the section of law involved.

10.4 Public Information and Reporting

10.4.1 Freedom of Information Law

In 1974, the State Legislature enacted the Freedom of Information Law (Article 6, Public Officers Law). Subsequently, the law was substantially amended to provide the public with broad authority to inspect and copy records of state and local government. Under the Freedom of Information Law, all government records are available, except those records or portions of records that the law allows the government to withhold. In most instances, the law describes the grounds for denial in terms of potentially harmful effects of disclosure.

The Law created the Committee on Open Government, which consists of 11 members. The Committee includes the Secretary of State, in whose Department the Committee is housed, the Lieutenant Governor, the Director of the Budget, the Commissioner of the Office of General Services, six non-office holding citizens, and an elected official of a local government. The Governor appoints four of the public members, at least two of whom must be or have been representatives of the news media, and an elected official of a local government; the Speaker of the Assembly and the Temporary President of the Senate appoint one public member each. The Law enables the Committee:

- furnish to any agency advisory guidelines, opinions or other appropriate information regarding the law;
- furnish to any person advisory opinions or other appropriate information regarding the law;
- promulgate rules and regulations with respect to the implementation of the law;
- request from any agency such assistance, services and information as will enable the committee to effectively carry out its powers and duties; and
- report annually on its activities and findings, including recommendations for changes in the law, to the Governor and the Legislature.

Each agency in the state must adopt procedural rules consistent with (and no more restrictive than) the rules promulgated by the Committee on Open Government. In addition to rights of access to records generally, units of local government as well as state agencies must maintain and make available three types of records, including:

- a record of votes of each member in every proceeding in which a member votes;
- a record identifying every officer and employee by name, public office address, title and salary; and

- a reasonably detailed current list by subject matter, of all records in the possession of the agency, whether or not the records are available (Note: It has been advised that municipalities, by resolution, may adopt the records retention schedule issued by the State Archives and Records Administration (SARA) as the subject matter list).

In a judicial challenge to a denial of access to records, the agency has the burden of proving that the records withheld fall within one or more of the grounds for denial. It has also been held that an agency may not merely assert a ground for denial and prevail; on the contrary, it must demonstrate that the harmful effects of disclosure described in the grounds for denial would arise.

Many local government records available for inspection under the Freedom of Information Law had been available under other earlier laws. The Freedom of Information Law also preserves rights of access granted prior to its enactment by other laws or judicial determinations. The existence of, and publicity given to, the law has also produced a greater uniformity of procedures in state and local government and increased the public's use of rights to obtain records.

10.4.2 Open Meetings Law

In 1976, the State Legislature enacted the Open Meetings Law (Article 7, Public Officers Law), which is applicable to all public bodies in the state (including governing bodies) as well as their committees, subcommittees and similar bodies. Later amendments to the Law clarified vague original provisions. The Open Meetings Law does not apply to: judicial or quasi-judicial proceedings (except proceedings of zoning boards of appeals); deliberations of political committees, conferences and caucuses; or any matters made confidential by federal or state law.

The Open Meetings Law provides the people with the right to observe the performance of public officials and attend, observe, and listen to the deliberations and decisions that go into the making of public policy. Just as the Freedom of Information Law presumes the public's right of access, the Open Meetings Law presumes openness. The deliberations of public bodies must be open to the public, except when one or more among eight grounds for executive session may appropriately be cited to exclude the public. The grounds for executive session are based largely upon the harmful effects of public airing of particular issues.

In a general statement of intent, the law asserts that every meeting of a public body shall be open to the public except when an executive session is called to discuss particular subjects that are listed in the law. The statute defines "executive session" as that portion of a meeting not open to the general public. Once in executive session, a public body may vote and take final action, except that any vote to appropriate public monies must be conducted in an open meeting.

When a meeting is scheduled at least a week in advance, public notice of its time and place must be given to the news media and posted in one or more designated public locations at least 72 hours before the meeting. Public notice of the time and place of all other meetings must be given to the public and the news media to the extent practicable at a reasonable time prior to the meeting.

Minutes must be compiled for open meetings and when action is taken during executive sessions. Minutes of executive sessions must be made available within one week; minutes of open meetings must be made available within two weeks. Minutes of executive sessions need not include information not required to be disclosed under the Freedom of Information Law.

Any aggrieved person has standing to enforce the provisions of the Open Meetings Law. If a public body has taken action in violation of the law, a court has the power to declare the action null and void. A court also has discretion to award reasonable attorney fees to the successful party in a proceeding brought under the law.

Public officials should consult with the Committee on Open Government (https://www.dos.ny.gov/coog/) to ensure compliance and best practices.

10.4.3 Records Management

A sound records management program enables local governments to create, use, store, retrieve and dispose of their records in an orderly and cost-effective manner pursuant to applicable state law. Such a program helps make records readily available to staff and the public, prevents the creation of unneeded records and promotes the systematic identification and preservation of records of long-term archival value. Article 57-A of the Arts and Cultural Affairs Law, the "Local Government Records Law", requires that the governing body of a local government "promote and support a program for the orderly and efficient management of records." It also requires that each local government designate a "records management officer." In towns and villages, the clerk is always the records management officer; in fire districts, it is always the district secretary. All other local governments have discretion on whom they may assign to the records management officers. Through its Local Records Section, the State Archives and Records Administration (SARA) Unit of the State Education Department provides information and assistance to help local governments (except New York City) improve records management and archival administration. It publishes records retention and disposal schedules that list the minimum time periods during which records of all units of local government must be retained.

The State Archives also produces publications, workshops, and web resources to help all local governments better manage all their records, including electronic records. The Archives maintains nine regional offices across the state to provide local onsite advice and direction on records management to local governments.

Information on the administration of court records is provided by the state's Office of Court Administration. Within New York City, information on municipal records management is provided by the City's Department of Records, though the Archives' publications and workshops are also available for use by New York City agencies.

10.4.4 Public Reporting

10.4.4.1 Annual Reports and Newsletters

In municipal reporting, a fine line separates the need to keep the public informed from the tendency to use public funds to aggrandize an incumbent administration. Although many municipalities in New York State publish and distribute annual reports and/or periodic newsletters, state law does not require them to do so. However, both the Town Law and the Village Law authorize expenditure of funds for publication and distribution of a report relative to fiscal affairs of the municipality. This can and has been interpreted to include most of the items usually incorporated in annual reports, such as programs and services, capital projects, and land or property acquisition. Towns and villages are not expressly authorized to include items, such as biographies of incumbent officers, which are clearly non-fiscal in nature.

10.4.4.2 Informal Reporting

There are many other ways for local officials to keep the public informed both through the media and through municipal resources. In addition to traditional press releases, municipalities use:

- municipal websites that include basic information, such as agendas of meetings, minutes, proposed local laws and the ability to communicate by e-mail with local officials;
- press conferences and media interviews;
- weekly radio or TV interview programs;
- slide shows or presentations on new municipal programs, or on the budget, for distribution to civic, professional or school groups;

- displays on public services and programs at schools, shopping centers, fairs and other public gathering places;
- prominent posting of time and place of meetings (including public hearings) of the legislative body;
- rotation of legislative body meetings to various neighborhoods or communities within the municipality;
- radio or cable television broadcasts of meetings of the legislative body;
- informational meetings on new programs and significant issues;
- information centers to direct citizens to appropriate agencies; and
- publication of materials, such as a directory of local officials and municipal services, newsletters on public services and programs, and brochures or folders on specific services.

Meetings of municipal boards are frequently televised by public access TV stations. Two-way cable television systems are available in some communities and may offer opportunities for local officials to make themselves directly accessible to citizen inquiries.

10.4.4.3 Media Relations

The media can be valuable to local governments. In addition to using the media for special programs, local officials should contact the press, radio and TV as a means of keeping the public informed about governmental programs. The experience of many local officials suggests that the best approach to the media is to be as open and free with information as possible, and not to avoid controversial issues.

10.5 Handling Citizen Complaints

In larger units of government, where citizens may not have easy access to elected officials or know where to go for assistance, problems can arise which may alienate citizens from their governments. Public reporting as discussed above can enhance the ability to solve communication problems between citizens and their government. While most problems can be resolved simply through better communication, some may be insoluble because the citizen expects government to act in a manner inconsistent with or not authorized by law. But even in that case, the citizen may gain satisfaction from having gained the attention of the government and learning that the difficulty involves compliance with law rather than reluctance on the part of the government.

Some local governments have established ombudsman programs to assist citizens with problems involving their agencies. In many cases though, citizen assistance is provided by staffs of local chief executives, municipal clerks, public information officers, members of local legislative bodies and other officials in the performance of their routine duties.

Chapter 11

Administering Local Finances

The financing of local government activities in New York takes place within a number of limitations. The State Constitution limits the amounts that most municipalities may raise annually from the real property tax. Similarly, the municipalities operate under limitations on debts, with a variety of provisions which limit borrowing power. The fiscal management of local government, spelled out in the Constitution and in statutes, is subject to certain prescriptions, reviews and audits by the state.

The previous chapter discusses local government expenditure trends, principal sources of revenues and aspects of intergovernmental fiscal relations. This chapter discusses the more prominent legal limitations upon local government financing, the basic features of municipal financial administration and state supervision of local finances.

11.1 Tax and Debt Limits

11.1.1 Tax Limits

Article VIII of the State Constitution imposes limitations upon the amounts which local governments may raise by tax upon real property. These limitations have a history that goes back more than a century. They have had a pronounced impact on the financing of local government in the State of New York, particularly with regard to state aid, local non-property taxes, education financing, general purpose assistance and special city aid. The real property tax limitation has evoked much debate over the years.

Against a background of increasing state involvement in local finances, an 1884 constitutional amendment declared:

> "The amount hereafter to be raised by tax for county or city purposes, in any county containing a city of over one hundred thousand inhabitants or any such city of the state, in addition to providing for the principal and interest of existing debt, shall not, in the aggregate, exceed in any one year two percent of the assessed valuation of the real personal estate of such county or city . . . "

Thus the tax limitation first applied only to the cities of New York, Brooklyn, Buffalo and Rochester, and to New York, Kings, Erie and Monroe counties. With the consolidation of New York City in 1898, a single 2 percent limit was accepted as applying to the whole city and later to the overlying county government. As a result of population growth, Syracuse, Albany and Yonkers came within the constitutional tax limit, and with them Onondaga, Albany and Westchester counties.

11.1.1.1 Tax Limit Developments

Many other cities of the state have been subject to tax limitation under special laws or local charters. By 1920 there were 33 cities in this category. Limitations ranged from 1 to 2 percent of assessed valuations or took the form of appropriation restrictions. In virtually every instance, taxes for school purposes and debt service, as well as other municipal functions in certain of the cities, were excluded from these limitations.

After the First World War, every city suffered from inflation, a serious factor in municipal finances even in the prosperous years of the 1920s. Some of the stringency experienced by the tax-limit cities, however, probably resulted from policies of under-assessment. At its outset, the depression created difficulties because it reduced the valuations by which taxing power was measured and imposed additional expenditures for public relief.

11.1.1.2 Amendment of 1938

A 1938 amendment revised the constitutional tax limitation by substituting five-year average valuations as the measure of taxing power for the then-current annual valuations. The 2 percent limit was extended in 1944 to all the cities and villages of the state, with the provision that the Legislature might exclude amounts raised by local property taxation for school purposes in the case of villages and of cities having a population of less than 100,000. The 1938 amendment granted the Legislature the power to further restrict the authority of any county, city, town, village or school district to levy taxes on real estate.

11.1.1.3 Current Limitations

Material changes were made in the tax limits contained in Article VIII of the State Constitution during the period following World War II. They were accompanied by a series of major moves in state-local fiscal relations as they related to the distribution of shared taxes, categorical assistance, school aid, local non-property taxes and city-school relations.

Tax limit provisions of the Constitution as amended in 1949, 1951, 1953 and 1985, now provided as follows:

1. All Constitutional tax limits relate to the five year average of the full value of taxable real estate.
2. The tax limit for New York City for combined city and school purposes is fixed at 2.5 percent.
3. The tax limits for the other cities with populations of 125,000 or more are 2 percent for combined city and school purposes.
4. In cities under a population of 125,000, the tax limit is 2 percent for city purposes alone.
5. All counties outside New York City are subject to tax limits of 1.5 percent for county purposes; however any county may raise its limit to 2 percent by action of the county governing body in accordance with County Law.
6. The limit for villages is 2 percent for village purposes.
7. In certain instances, taxes levied for financing capital expenditures on a “pay-as-you go” basis and amounts raised for debt service are excluded from tax limitation.
8. School districts in cities under a population of 125,000 and towns have no Constitutional tax limit.

It may be said that the Constitutional real estate tax limit has two major components: A percentage limitation for operating purposes as listed in items (a) through (f) above, and certain exclusions of amounts required for debt service and capital improvements. Together these may be referred to as the total real property taxing power of a municipality or a school district.

11.1.1.4 Tax Limit Exclusions Challenged

To enable school districts which are coterminous with, partly within or wholly within a city having a population less than 125,000 and the cities of Buffalo, Rochester and Yonkers to meet their fiscal needs, the legislature enacted a series of statutes permitting the exclusion of annual pension requirements and social security contributions from their respective tax limitations.

The constitutionality of the statute applicable to the City of Buffalo was contested in 1973 on grounds that pension payments are ordinary annual operating expenses and consequently subject to tax limitation. In Hurd v. City of Buffalo (34 NY2d 628, 355 NYS2d 369 (1974)), the Court of Appeals affirmed that the exclusionary statute specifically applying to Buffalo was unconstitutional. The court thereby cast a shadow over the other exclusionary legislation.

Beginning in 1974, the Legislature adopted a stopgap measure to forestall the immediate impact of what has come to be known as the Hurd ruling. A Temporary State Commission on Constitutional Tax Limitations (the Bergan Commission) was created to pursue the matter.

The commission published its findings at the beginning of 1975, recommending that the issue be handled through a constitutional amendment. An amendment excluding retirement and social security costs from the tax limit was submitted for voter approval at the 1975 general election. It was defeated.

The 1976 Legislature passed a bill (Emergency City and School District Relief Act) continuing temporary relief to the cities of Buffalo and Rochester and to certain school districts by permitting them to exclude from Constitutional tax limitations certain pension and social security contributions until 1980.

In early 1978, the Court of Appeals struck down the Emergency City and School District Relief Act of 1976 and left the door open for a suit demanding a refund of tax dollars collected under the faulty legislation. In response to this decision, a special Task Force on the Financing of City School Districts was created. The Legislature implemented two principal recommendations of the task force in 1978: (1) It instituted special equalization ratios for the impacted cities and school districts and, (2) it advanced state funds to finance the "gap" on a revolving basis.

The special equalization ratios initially reduced the gap from $112 million to $20 million. However, as the growth of the cities' real property wealth has slowed down, the usefulness of these ratios has diminished. The state funds which were advanced to the districts impacted by Hurd were rolled over every year between 1978 and 1992-93. Pursuant to Chapter 53 of the Laws of 1991, advances to the districts were reduced by 50% a year and phased out in 2011-12. In addition, the state has provided these districts with grants since 1979.

Other recommendations of the Task Force were:

- require city school districts receiving advances to make maximum use of sales and utility taxes;
- redistribute or increase county sales taxes for city school district use;
- reallocate functions;
- adopt a statewide real property tax; and
- submit constitutional amendments.

11.1.2 Debt Limits

The economic collapse of 1837 exposed serious weaknesses in the credit operations of local government and the speculative character of the public improvement debt of the period. One result was that the State Constitution of 1846 directed the Legislature to restrict the municipalities' power of taxation, assessment and borrowing.

Unchecked growth in the debt of local governments continued. The Civil War was followed by inflation and great economic activity. New York City provided a special example of municipal extravagance. The unbridled expansion of local debt under Boss Tweed created acute difficulties for the city during the business depression of 1873.

11.1.2.1 Debt Limit Developments

The condition of local government finance became a matter of urgent interest to the state. A Constitutional amendment in 1884 imposed a debt limit of 10 percent of assessed valuation on cities with a population over 100,000 and on counties containing a city of the same size. In the case of New York City, the effect was a 10 percent limit on combined city and county debt, while in Brooklyn, Buffalo and Rochester the limit applied separately to city and county debt. Water debts extinguishable within 20 years were excluded.

In 1894, the 10 percent debt limitation was extended to all cities and counties in the state. No provision was made for the limitation of the indebtedness of towns, villages and school districts, although these units were restricted in their debt practices by statute.

11.1.3 Current Debt Limitations

In 1938, constitutional amendments extended debt limitation to towns and villages, prohibited the creation of new or novel units of local government possessing borrowing power, and required substantive guarantees for the repayment of municipal indebtedness.

Postwar changes in the debt provisions of the State Constitution have been numerous. The most significant occurred as a result of revisions in Article VIII which were approved in 1951. The 1938 and subsequent revisions resulted in the following features:

- All Constitutional debt limitations tied to specified percentages of the average full valuations of taxable real estate on the last completed assessment rolls and the four preceding rolls, as follows:
  - 10 percent for Nassau County;
  - 7 percent for other counties outside New York City;
  - 10 percent for New York City for combined city and school purposes;
  - 9 percent for other cities with a population of 125,000 or more for combined city and school purposes;
  - 7 percent for cities with a population of less than 125,000 for city purposes, exclusive of schools;
  - 7 percent for towns;
  - 7 percent for villages; and
  - 5 percent for school districts coterminous with, partly within, or wholly within a city with a population of less than 125,000 (with provisions for increasing the limit under certain conditions).
- A series of specific conditions governing the incurrence and management of municipal debt, such as:
  - prohibition upon the issuance of indebtedness beyond a period of probable usefulness or weighted period of probable usefulness to be specified by state law, and in no case to exceed 40 years;
  - issuance only of full faith and credit indebtedness and “tax increment financing” (Article XVI, section 6);
  - authorization for sinking fund bonds under certain circumstances and a requirement for the repayment of debt in installments, with no installment more than 50 percent in excess of the smallest prior installment, unless the governing body provides for substantially level or declining debt service payments as may be authorized by law;
  - requirement for the annual provision by appropriation for meeting principal and interest payments; and
  - prohibition upon the creation of municipal or other corporations (other than a county, city, town, village, school district, fire district or certain river regulation and drainage districts) possessing the power both to contract indebtedness and to levy or require the levy of taxes or benefit assessments upon real estate.

- Exclusions of municipal indebtedness from constitutional debt limitation, including certain water and sewer debt, certain debt issued to finance “self-liquidating” public improvements, and, in the case of New York City, certain additional exclusions for various purposes.

- Prohibitions upon the gift or loan of the credit of counties, cities, towns, villages or school districts to or in aid of any individual, public or private corporation or association or private undertaking with specified clarifications and an exception in the case of joint or certain cooperative undertakings among municipalities.

Article XVIII of the State Constitution prescribes the conditions under which a city, town, village or certain public corporations (other than a county) may aid certain low-income housing and nursing home accommodations, contract indebtedness, and provide for subsidies for these purposes. This article contains a separate 2 percent debt limit for cities, towns and villages computed on the basis of average equalized full valuations of taxable real property. Various conditions are attached to indebtedness incurred under Article XVIII.

11.2 Borrowings and Debt Management

11.2.1 Local Finance Law

To implement the 1938 constitutional amendments, the state undertook a comprehensive revision of the laws on local government financial affairs. In 1942, this effort produced the Local Finance Law. This statute regulates the issuance of municipal bonds and notes by local governments. It addresses the objects or purposes for which debt may be incurred, the maximum terms of indebtedness for various objects or purposes, the conditions of short-term loans, and the required content of municipal obligations.

11.2.2 Debt Management

While there are many legal requirements surrounding municipal debt procedures, they do not exhaust the subject of local debt management. The overlapping debt limits in the State Constitution and the safeguards and requirements of the Local Finance Law are necessarily controlling, but they are not substitutes for the exercise of prudence and sound judgment by local government officials.

Local officials may exercise discretion in debt management and borrowing policies in a number of vital respects. They make judgments as to the need for public improvements and their soundness from the standpoint of design, costs and architectural or engineering features. They decide whether such improvements are within the capacity of the community as measured by future annual costs for debt service and regular maintenance.

While state laws influence debt policies, the decisions of local officials have a direct bearing upon debt management. One feature of an orderly and manageable debt structure is early retirement of substantial amounts of outstanding debt. Another feature is to keep annual obligations for the payment of interest and principal within the limits of a reasonable relationship to total budgetary requirements. Local officials also find that it is good policy to make substantial contributions to the cost of public improvements from current revenue. Many capital outlays recur regularly, such as replacing motorized equipment or resurfacing streets, and borrowing for such purposes tends to effect on debt and debt charges.

The issuance and marketing of municipal obligations is a highly specialized subject. Since local officials wish to ensure the legality and marketability of the obligations and obtain the most favorable terms, they often utilize the services of bond counsel and other knowledgeable advisors.

11.2.3 Capital Programming

Capital programming and capital budgeting are recognized methods for implementing debt management policies. Practices among local governments in the state vary. In some cases there are detailed charter requirements for public improvement planning and financing. In other cases localities adhere to “paper” plans. Sometimes the local practice is to bring forward public improvements piecemeal and not necessarily in relation to each other, to separately authorize the funds necessary to pay for various improvements, and to defer into the future the question of how everything fits together.

A capital program, as the term is used by the Government Finance Officers Association (GFOA), is “a plan for capital expenditures to be incurred each year over a fixed period of years to meet the need for public improvements.” General Municipal Law, section 99-g contains express provision for capital programs. The capital program under section 99-g is submitted with the municipality’s regular annual budget. The capital program itself includes descriptions of proposed projects, the proposed method of financing for each project and an estimate of the effect, if any, on operating costs in the three years following the completion of the project. The factor of integration with the regular budget removes capital programming from the area of paper plans.

The goal of a capital program generally is to plan, in advance, how to pay for various improvements and how the improvements will affect the regular municipal budget in added debt service charges, appropriations from current revenue, and the annual expense of operating new facilities.

11.2.4 Debt Trends

Local government indebtedness is evaluated on an individual basis according to criteria by which financial position is customarily evaluated. Some areas of concern are growth in the amount of debt over a number of years, and purposes for which the debt is being issued. Local budgets traditionally include expenditures for which indebtedness could be issued. When local governments take expenditures that have traditionally been financed from current appropriations and begin to issue debt to finance such expenditures, it may be an indication that current revenues are not keeping pace with expenditures.

Other criteria extend beyond amounts of borrowings and debt and involve a number of factors indicative of fiscal capacity. A few such factors are the ratio of net debt to full valuations, the extent to which municipal debt is wholly or partially self-supporting, the relative amount of the municipal budget used for tax-supported debt, the amount of overlying debt, and the municipality’s tax collection.

11.3 Municipal Finance Administration

The general laws of the state are fairly explicit as to the powers and duties of local officials having fiscal responsibilities in non-charter counties, towns and villages. These statutes provide options as to the manner in which these responsibilities are assigned or organized within the structure of local governments. Options include the establishment of the office of comptroller and purchasing agent in counties, the office of purchasing director in towns and the office of auditor in villages. Pursuant to home rule authority, cities, charter counties and charter villages have latitude to amend their charters with respect to organization for finance administration.

Local government accounting, bookkeeping and record management systems vary in sophistication from simple manual systems to individual personal computers, to client server and mainframe systems. Software includes off-the shelf applications and custom applications designed to accommodate specific needs. A wide variety of software products are available to provide basic aspects of fiscal management such as budget preparation, appropriation accounting, assessment rolls preparation, payrolls, master employee records, real property tax billing and water billing.

Earlier discussion touched upon real property tax administration and municipal debt management. Further phases of municipal finance administration include budgeting, accounting, treasury functions, purchasing and contracting and audit procedures.

11.3.1 Municipal Budgeting

Local officials often regard the annual budget as perhaps their greatest single obligation, since budget preparation and continuing administration may be labor intensive and time-consuming. General state law spells out the principal steps in budget preparation and adoption in most local governments. For counties, cities and villages that have charters, budget provisions are generally contained in such charters.

The budget process generally entails many choices. These tend to be most apparent on the expenditure side of the local budget, but many choices may also exist on the revenue side. They include:

- magnitude of the real property tax levy and its relative burden expressed as a tax rate;
- local non-property taxes, as authorized by state law and implemented by local action;
- fees and earnings and use of special assessments, which are in the nature of charges against benefited properties in proportion to the benefit received, to defray the cost of certain municipal improvements or services;
- payments from other governments in the form of grants-in-aid, shared revenues and reserve fund moneys for current or capital purposes (depending upon the character, scope and availability of these payments); and
- indebtedness for authorized capital purposes, paying for improvements from current revenues (pay-as-you-go), or employing a combination of these methods of financing.

11.3.2 Budget Administration

Budget administration is generally preceded by the preparation and submission of departmental estimates. This process is usually followed by the formulation of the budget itself, which is a balanced plan of expenditures and revenues, normally prepared by or under the direction of the local government's executive or budget officer. The budget is then submitted to the local legislative body for review, approval or amendment, and enactment of appropriation orders giving effect to the budget.

Beyond the legislative phase of budget review and adoption is the stage of budget administration and enforcement. This process involves the maintenance of appropriation control accounts and procedures for budget transfers or modifications.

11.3.3 Local Initiatives

In budget preparation, presentation and subsequent administration there are opportunities for local initiatives, consistent with the basic requirements of law. Initiatives may be expressed in budget format, supporting data and comparisons, and accompanying explanatory matter in the budget message. A budget is more than an array of figures — it is also a statement of public policy.

Quite often, budgetary allotments or expenditure quotas are established. These are often made on at least a quarterly basis, are formulated from work programs or activity schedules, and developed in consultation with operating officials. Newer developments in budgeting relate the provision of money more closely to the accomplishment of program objectives and to the efficiency with which municipal activities are performed.

11.3.4 Accounting Control

Another essential aspect of municipal finance administration is the maintenance of an accounting control system. Fund accounting is a basic characteristic of municipal accounting. A "fund" is a fiscal and accounting entity with a self-balancing set of accounts. It contains recorded cash, other assets and financial resources, together with all related liabilities and residual equities or balances. A fund is segregated for the purpose of carrying on specific activities or attaining certain objectives in accordance with special regulations, restrictions or limitations.

Municipal accounting systems include a general fund and, depending upon the local government entity, such special revenue funds as highway funds, debt service funds, capital project funds, enterprise funds, internal service funds, and trust and agency funds. The central principle is that funds will be self-contained.

Accounting for municipal resources and expenditures should generally be on a modified accrual basis. A fundamental feature of budget administration is the maintenance of appropriation control accounts whereby appropriations are encumbered as obligations are incurred.

In this summary discussion, it is not feasible to outline a comprehensive system of municipal accounts or to describe prevailing practices in all the local governments of the state. For most of the municipalities the standard resource on governmental accounting procedures is the Office of the State Comptroller (OSC).

11.3.5 Financial Reporting

The systematic recording of financial information can be used "(1) as a basis for managing the municipality's affairs, (2) as a control to prevent waste and inefficiency, (3) as a check on the fidelity of persons administering municipal funds, and (4) as a means of informing interested parties of the municipality's financial condition and operations." [1]

The municipal accounting system is the source of both the municipality's fiscal year-end statements and the periodic internal reports that localities find important for management purposes. These periodic reports show whether revenues are coming in and expenditures are going out at the times and in the amounts projected by the budget plan. Monitoring of this information allows management to make appropriate budgetary modifications during the year.

General Municipal Law section 30 requires local governments to file a financial report annually with the OSC. Until 1996 the law required municipalities to file a paper report on forms provided by OSC, but an amendment in that year allowed for electronic filing. Beginning with the reporting for the fiscal year ending in 1996, counties, cities, towns, villages, school districts and joint activities have been able to transmit their reports electronically using the internet or through the Comptroller's Assistance Network (a 24 hour electronic bulletin board). Filing electronically with the free software provided by OSC (or by the State Education Department for school districts), saves time, improves accuracy and reduces paperwork.

11.3.6 Other Financial Functions

Other leading aspects of local government finance administration include the functions of cash management, purchasing and property acquisition, insurance and risk management and post audit.

11.3.6.1 Cash Management

Some local governments carry cash balances in excess of those necessary for transactions. Carrying excess funds costs the income the funds would have earned if invested. In order to anticipate their cash balance needs, local

[1] Municipal Finance Administration, Sixth Edition, International City Managers' Association, Chicago, 1962, p. 205.

government officials can prepare a cash flow analysis to forecast the cash position of the local government over the entire fiscal period. Proper cash management can provide maximum earnings and minimum borrowing for the local government. Local government officials should be aware of investment factors including legality, safety, liquidity and yield. The Office of the State Comptroller provides guidance to local officials regarding cash management and a wide variety of other topics on local government finance.

11.3.6.2 Purchasing and Property Acquisition

Other features of financial management relate to purchasing, contracting and storage, and the problem of how far these responsibilities can or should be brought under centralized procurement policies and procedures. Counties, cities, towns, villages, school districts and fire districts purchase goods, services and real property pursuant to procedures and requirements set forth in applicable law. To reduce their purchasing costs, localities sometimes participate in cooperative purchasing endeavors and utilize assistance available from the state.

The New York State Office of General Services (OGS) offers local governments the opportunity to purchase a wide range of goods at favorable prices under state contracts. In addition, OGS offers various kinds of technical assistance for local government purchasing, and assists localities with the procurement of products made by prisoners and the blind. Through OGS, local governments are assisted in the acquisition of surplus state personal and real property and surplus federal property.

11.3.6.3 Post Audit

Municipalities are subject to audit by various federal and state government agencies. In addition, municipalities may elect on their own to have general or selective audits. A post audit is an audit made after the event, when financial transactions have been recorded and completed. Municipalities' internal auditors often conduct audits of subsidiary agencies within the municipal organization on a continuing basis.

11.3.6.4 Insurance and Risk Management

Decreasing resources and increasing insurance costs are putting greater emphasis on risk management. There is often a variance between the optimal and the maximum feasible amount of insurance coverage. While most localities need to have insurance coverage for catastrophic events, they may take a number of steps to reduce costs. An acceptable safety program, self-insurance, coinsurance, blanket insurance and competitive bids can sometimes reduce costs.

11.3.7 State Supervision of Local Finances

During the 1930s, there was a depression-born trend toward state scrutiny of municipal budgets and expenditure programs, review and approval of proposed municipal borrowings, and measures designed to assist in the marketing and acceptance of local bond issues. Municipal conditions inviting state intervention during these periods included persistent weaknesses in current accounts, the incurrence of large volumes of floating indebtedness, reliance upon borrowing for current expense to shore up sagging municipal budgets, debt readjustments and refunding, and actual or incipient defaults.

From these various factors and developments emerged the main ingredients commonly associated with state supervision of local finances: legal tax and debt limitation; debt regulation through uniform bond laws and their administration; reporting, auditing and accounting requirements; central review of debt proposals and expenditure programs; varying degrees of involvement in debt planning and issuance — all fortified by advisory and technical assistance.

11.3.8 Leading Features of State Supervision

Many of the leading features of state supervision of local finances in the State of New York derive from constitutional and statutory requirements previously discussed in this chapter. Chief responsibility for state supervision of municipal finance resides in the Office of the State Comptroller. Among other services, the OSC's functions include:

- providing ongoing assistance through the OSC Division of Local Government and School of Accountability to enable and encourage local government officials to:
  - continuously improve fiscal health
  - reduce costs and improve the effectiveness of their service delivery, and
  - to account for and protect their government's assets.

This Division also performs periodic audits and reviews of local governments, conducts training for local officials and provides consulting services;

- supervising compliance of local governments with legal tax and debt limitations and requiring submission by local governments of debt statements and annual budgets;
- providing technical assistance, reviewing applications requesting approval of exclusions from the local debt limit exclusions, and the formation or extension of town improvement districts, fire districts and county special districts;
- collecting and disseminating local government financial information including statistics on revenues, expenditures and debt;
- developing uniform accounting systems and providing guidance on financial management practices;
- administering the State and Local Government Employees' Retirement Systems; and
- providing advisory legal opinions to local governments pertaining to the powers and duties of the local government under state laws of general applicability including written advisory opinions on prospective actions of local government.

11.3.9 Annual Financial Report Reviews

A review of each local government's annual financial report is performed by the OSC to assess compliance with minimum established standards. The information from this process becomes an integral part of a Uniform Risk Assessment Process (developed in 1999). Based upon analysis of identified risk areas, assistance to improve local government operations is offered as appropriate.

11.3.10 Deficit Financing Legislation

Occasionally local governments accumulate deficits to a point that the only recourse left is to obtain special state legislation that authorizes the local government to issue debt to finance the deficit. This action enables the local government to pay off a portion of the debt (through annual debt service payments) over a number of years. Such legislation generally requires the OSC to certify to the amount of the deficit before any such indebtedness can be issued. The OSC also reviews and makes recommendations on the proposed budgets of these municipalities during the period such financing is outstanding.

11.3.11 Oversight Boards

In extreme situations the State Legislature has determined that certain local governments needed additional oversight. This action has been prompted by periods of prolonged fiscal difficulty or, in rare instances, because the local government has lost access to financial markets. Oversight boards typically have powers to approve debt issuances, approve budgets and/or financial plans, approve contracts including employee contracts, and, in rare instances, assure the payment of obligations through the intercept of state aid and tax revenues. Legislation creating control boards usually provide for members to represent interested parties such as the Governor, State Comptroller, State Legislature and generally the local government and/or, local business leaders and local representatives. The legislation also establishes criteria to determine when the local government has regained its financial health. Typically, once the local government meets those criteria, the oversight board approval powers cease.

11.3.12 Local Government Data Base

The oversight activities rely heavily on an improved computerized data file known as the Local Government Data Base. This file is created and maintained by the OSC and contains comprehensive financial and other data on all local governments in the state from fiscal year 1977 onward. Much of this data is obtained from annual financial reports filed by each local government. The reports contain financial statement data (i.e., financial position and results of operations and changes in financial position) as well as detailed revenues and expenditures. This data file is regularly transmitted to the Division of the Budget, the Senate Finance Committee and the Assembly Ways and Means Committee to be used as the basis for much of the program analyses and fiscal impact studies regarding state and local relations.

11.3.13 Generally Accepted Accounting Principles (GAAP)

Since the early 1900's the Office of the State Comptroller has prescribed Uniform Systems of Accounts for local governments. The purpose of these systems has been to provide a means of gathering financial data from local governments that is consistent in classification and content. This information is used by financial analysts in the Comptroller's Office, other agencies and the State Legislature.

These systems do not set Generally Accepted Accounting Principles (GAAP). They are promulgated by the Governmental Accounting Standards Board (GASB). GAAP is a technical term used to describe the conventions, rules and procedures that constitute accepted accounting practices on a nationwide basis.

Since the late 1970's the Office of the State Comptroller has determined that adherence to Generally Accepted Accounting Principles is in the best interest of New York State and its local governments. Consequently the Uniform Systems of Accounts prescribed by the Comptroller are periodically updated to reflect changes in GAAP. In addition, the Comptroller's Office issues accounting bulletins and conducts training sessions for local officials.

11.3.14 Governmental Accounting Standards Board (GASB)

The Governmental Accounting Standards Board, which is the standard-setting body for establishing governmental accounting and financial reporting principles, from time to time will issue statements that prescribe accounting and financial reporting requirements for certain transactions. When a new accounting/financial reporting standard is issued by GASB, it must be critiqued by the Office of the State Comptroller to identify the accounting issues involved as well as what information is required in order to comply. As part of the accounting issues determination process, both financial reporting requirements and the affect on the State's financial position must be identified. Input from the units, that may be impacted by the change, in OSC will be solicited. Based upon this information obtained, a decision is made whether to recommend implementation of the statement.

Chapter 12

Financing Local Government

The balancing of municipal programs and activities against available fiscal resources is the key element in financing local government. The task is performed in an environment essentially different from that of a business enterprise in the private sector since laws, constitutions, and public accountability, as well as considerations of public policy, all impose constraints.

Broadly speaking, financing local government is a twofold proposition. It involves a determination, on the expenditure side, of the quantity and quality of activities, services and improvements that will be undertaken by the community; and an allocation of resources from revenues and borrowing within the capacity of the community. Political, economic and social considerations are involved in the process. All enter into the formulation of financial plans, which are most visible in the budget of a municipality, where commitments and resources are brought into balance on an annual basis.

Compared to the private sector, local governmental financial decisions seem largely removed from the classical marketplace. They are constrained within a framework of State Constitution, state statutes, and legal restrictions found in charters, local laws and ordinances. The legal setting of local finances is one of the first things to impress public officials upon taking office. It permeates many aspects of municipal finance administration.

Local governments may spend money only for what are deemed public purposes, a basic condition which springs from the State Constitution and appears in statutes and official opinions of state agencies. Strict conditions are attached to the delegation of the state's taxing power. Many local governments are restricted as to the amounts they may raise by levies upon real property, and they may levy taxes other than property taxes only as authorized by the Legislature. New York State law also closely constrains local governments with respect to incurring indebtedness, including limitations on its purposes, the types of municipal obligations, maximum terms of debt for different purposes and basic conditions of bond sale and guarantees. Financing local government takes place in an arena of competing demands and conflicting interests. The individual local government faces internal and external pressures; the state and federal governments are very much in the picture. Local officials are responsible for striking a balance among these interests and pressures.

12.1 Local Expenditures in New York

Local government expenditures may be divided into current operations, equipment and capital outlays, and debt service costs. Equipment and Capital outlays cover expenditures for equipment purchases and the construction, improvement and acquisition of fixed assets. Debt service costs include the payments of principal and interest on debt. All other local costs fall into the current expense category, which accounts for the largest share of expenditures — 86 percent of local government costs in New York State in 2012.

12.1.1 Expenditure Patterns

Table 12.1 [128] and Table 12.2 [129] summarize 2012 current expenditures by general purpose local governments, excluding the City of New York. It presents a generalized profile, in dollar terms, of the service responsibilities of these local governments.

- Counties are heavily involved in social services programs. The expenditure profile, however, confirms the diversification of county services;
- City and village expenditures show a similarity in the application of resources to public safety;
- Traditional town responsibilities for general government and highway functions are reflected in the table. Towns are also heavily involved in water and sewer services, refuse management and public safety.

12.1.2 Expenditure Factors

Expenditures for social services and health programs mandated and partly financed by the state and federal governments have greatly increased. Population and economic changes pose challenges for local governments throughout the State of New York.

Central cities focus on a wide variety of municipal services including police and fire services, roads, health, transportation, economic assistance, culture and recreation, sanitation, sewer and water service, and upgrading deteriorating infrastructure and facilities. City officials are often looking for ways to conserve their cities' existing residential, commercial and industrial assets, and to attract and hold new enterprises. Towns, on the other hand, are more generally concerned with community development, the extension of necessary municipal services, the installation of public improvements and other typical demands of growth due to out-migration from cities.

Table 12.1: Local Government Current Expenditures by Function, 2012 (Excluding New York City) Amounts in Millions of Dollars.[2]

Function	Counties	Cities	Towns	Villages	Total
General Government	$4,126.6	$615.2	$1,049.3	$400.4	$6,191.5
Education	1,158.4	10.2	4.7	0.1	1,173.4
Public Safety	2,983.2	1,121.9	986.9	523.9	5,615.9
Health	1,810.2	1.2	51.7	1.7	1,864.8
Transportation	1,488.0	369.8	1,391.6	289.2	3,538.6
Social Services	5,699.0	57.1	89.6	24.8	5,870.5
Economic Development	259.9	139.8	49.4	25.1	474.2
Culture and Recreation	262.2	171.3	579.7	141.7	1,154.9
Community Services	254.9	41.5	98.8	24.2	419.4
Utilities	109.1	197.1	363.5	336.7	1,006.4
Sanitation	892.1	243.4	849.7	265.9	2,251.1
Employee Benefits	3,326.8	1,012.0	1,170.7	468.7	5,978.2
Debt Service	1,384.1	324.7	768.9	244.4	2,722.1
Total	$23,754.5	$4,305.2	$7,454.5	$2,746.8	$38,261.0

Table 12.2: Local Government Current Expenditures by Function, 2012 (Excluding New York City) Percent Distribution.[4]

Function	Counties	Cities	Towns	Villages	Total
General Government	17.4	14.3	14.1	14.6	16.2
Education	4.9	0.1	0.1	0	3.1
Public Safety	12.5	26.0	13.2	19.1	14.7
Health	7.6	0.1	0.7	0.1	4.9
Transportation	6.3	8.6	18.7	10.5	9.2
Social Services	24.0	1.3	1.2	0.9	15.4
Economic Development	1.1	3.2	0.7	0.9	1.2
Culture and Recreation	1.1	4.0	7.8	5.2	3.0
Community Services	1.0	1.0	1.2	0.9	1.1
Utilities	0.5	4.6	4.9	12.2	2.6
Sanitation	3.8	5.7	11.4	9.7	5.9
Employee Benefits	14.0	23.5	15.7	17.0	15.6
Debt Service	5.8	7.6	10.3	8.9	7.1
Total	100.0	100.0	100.0	100.0	100.0

Table 12.3 [129] reflects growth in current expenditures from 2007 through 2012 for each respective unit of general and special purpose local government, excluding New York City. During the five-year period 2007 through 2012, local governments experienced a 10 percent increase in current expenditures. Growth of expenditures in school districts outpaced that experienced by other local governments during this period.

Table 12.3: Local Government Current Expenditures, 2007 and 2012 (Amounts in Millions of Dollars)

Government Unit	2007	2012	Percent Increase
Counties (excluding New York City counties)	$21,698.5	$23,754.5	9.5
Cities (excluding New York City)	4,213.7	4,305.2	2.2
Towns	7,411.3	7,454.5	0.6
Villages	2,599.4	2,746.8	5.7
School Districts (excluding New York City)	32,686.5	37,340.3	14.2

[2] Office of the State Comptroller
[4] Office of the State Comptroller

Table 12.3: (continued)

Government Unit	2007	2012	Percent Increase
Fire Districts	665.6	722.9	8.6
Total	$69,275.0	$76,324.2	10.2

12.2 Local Government Revenues

Total local government revenues in New York State increased by about 10 percent during the period 2007 to 2012, from $66.2 billion to $72.6 billion. A significant development in local revenue sources during the sixties and seventies was the growing importance of intergovernmental aid. The federal government, through its array of categorical grant programs, transferred substantial sums to state and local governments.

New York State also increased its aid to local governments, providing more general assistance as well as funds for specific programs.

The introduction of federal general revenue sharing in 1972 signaled the shift from categorical to block grants. Local government was thus provided with more control over the disposition of its federal monies, but with a reduced amount available, beginning in the second half of the seventies. The federal revenue sharing program expired in 1986. The early 1980's witnessed increased efforts to consolidate numerous categorical grant programs in such areas as education, social services and health into a greatly reduced number of block grants and has not changed dramatically since. The federal contribution to local revenues in New York State in 2012 was $5.1 billion, 29 percent more than the 2007 level of $4.0 billion. State aid of $ 16.1 billion in 2012 was 4 percent more than the 2007 amount of $15.6 billion, with increases in school aid a significant factor in state aid growth over the period.

Local government property tax in New York State rose from 59.5 percent of all local revenue in 2007 to 62.1 percent in 2012. Property taxes in 2012 totaled close to $32.1 billion, about 15 percent more than 5 years earlier.

Table 12.4 [131] shows total tax revenue for New York State and its local governments by type of tax. The real property tax raises significantly more revenue in the state than any other single tax.

12.3 Property Taxation

The property tax in New York State is a tax based on the value of real property (land and improvements). It occupies a special place in the financing of local government not only because of its yield in relation to total local revenue, but also because of its key position in the municipal budget process.

12.3.1 Property Tax and Local Budgets

Municipal budgeting follows a procedure which first estimates expenditures or appropriations and then deducts estimated revenues from sources other than the property tax to arrive at a remainder, which is the tax levy. Thus the property tax levy becomes the balancing item on the revenue side of the municipal budget. This process is constrained by the existence of legal limitations upon the amounts which may be raised by certain jurisdictions from the real property tax.

Table 12.4: Local Taxes in New York State, 2007 and 2012 (Amounts in Billions of Dollars).[6]

Local Taxes	2007 Amount	2012 Amount
Real Property	$27.8	$32.1
Sales	8.6	9.1
Other Taxes and Fees[7]	0.3	0.3
Total	$36.7	$41.5

The final step is fixing the local tax rate. The tax levy is divided by the total dollar amount of the taxable assessed valuation of real estate within the local government. The result is a percentage figure, which is expressed as a tax rate, normally so many dollars and cents per $1,000 of assessed valuation.

Where the tax levy for a county, school district or improvement district is spread between or among two or more municipalities, assessed valuations are equalized for each municipality through the use of equalization rates. Equalization is intended to ensure equity where a property tax is levied over several local government units that assess properties at different percentages of value.

For school apportionment and for county apportionment in most counties, the equalization rates are determined by the State Office of Real Property Tax Services (ORPTS). In other counties — except Nassau County and the counties in New York City — equalization rates are established by the county legislative body, subject to review by ORPTS.

12.3.2 Property Tax and Local Revenues

Table 12.5 [131] illustrates the position which real property taxes occupied in the general revenue structure of local governments and school and fire districts in 2012. Property taxes continue to play a prominent role in financing school district, town and village expenditures. Fire districts also depend heavily upon this revenue source.

Table 12.5: 2012 Local Government Revenue Sources Percent Distribution

Government Unit	Real Property Taxes and Assessments	Non-property Taxes	State Aid	Federal Aid	All Others	Total
Counties (excluding New York City counties)	23.2	32.2	11.8	11.6	21.2	100.0
Cities (excluding New York City)	26.5	20.8	18.8	5.9	28.0	100.0

[6] Office of the State Comptroller, Detail may not add due to rounding.

[7] Includes sales tax credits to towns used to reduce real property tax levy, utility gross receipts tax, consumer utility tax (if not included in sales tax), OTB surtax, hotel occupancy tax, harness and flat track admission tax, privilege tax on coin-operated devices, revenues from franchises, interest and penalties on non-property taxes, etc.

Table 12.5: (continued)

Government Unit	Real Property Taxes and Assess-ments	Non-property Taxes	State Aid	Federal Aid	All Others	Total
Towns	53.3	11.3	6.7	4.8	23.9	100.0
Villages	48.9	7.1	4.4	3.5	36.1	100.0
School Districts (excluding New York City)	55.9	0.7	33.9	5.1	4.4	100.0
Fire Districts	94.0	0	0.1	0.5	5.4	100.0
Total — All Units	43.9	12.9	22.2	7.0	14.0	100.0

Table 12.6 [132] shows the increase in real property tax income between 2007 and 2012 for all levels of local government. Overall, real property taxes in 2005 were about 34 percent higher than in 2000.

Table 12.6: Local Government Real Property Tax Revenue by Type of Government, 2007 and 2012 (Amounts in Millions of Dollars).[9]

Government Unit	2007	2012	Percent Increase
Counties	$4,648.6	$5,254.6	13.0
Cities	1,014.7	1,131.7	11.5
Towns	3,231.9	3,711.4	14.8
Villages	1,087.0	1,285.0	18.2
School Districts (excluding New York City)	17,238.4	20,086.7	16.5
Fire Districts	582.1	676.6	16.2
Total	$27,802.7	$32,146.0	15.6

12.3.3 Property Tax Exemptions

The exemption of federal property from local taxation springs from the American constitutional doctrine of intergovernmental immunity. The exemption of state property from local taxation rests on the principle that the sovereign entity cannot be taxed by subordinate political units and still be sovereign. When so determined by the Legislature, however, the state does permit taxation of its property.

The exemption of certain privately-owned property from local taxation is grounded in theory, history and practice. The underlying principle is that real property used exclusively for religious, educational or charitable purposes

[9] Office of the State Comptroller

serves a public purpose by contributing to moral improvement, public welfare and the protection of public health. Although such property is wholly exempt from general municipal and school district taxes, it does pay a share of the costs of certain capital improvements made by improvement districts (such as water supply and sewer systems).

Exemptions from property taxation may be granted in the State of New York only by general law. References to the subject comprise some of the most extensive and complex provisions of the Real Property Tax Law. State law in some instances mandates exemption and in other instances allows exemption upon enactment of local legislation.

12.3.3.1 Non-fiscal Purposes

The use of the property tax for what may be described as non-fiscal purposes — to accomplish goals other than raising municipal revenue — is a controversial topic, particularly as such uses extend beyond the traditional confines of religious, educational, or charitable purposes and are directed toward economic, environmental and social ends. The following are examples of types of property which may be partially or fully tax-exempt: public housing, privately owned multiple dwellings, industrial development agency facilities, commercial and industrial facilities, railroads, air pollution control facilities, industrial waste treatment facilities, agricultural and forest lands, and the residences of veterans and low-income senior citizens.

Property tax exemptions may cause financial stresses on local governments. Exemptions do not reduce tax levies, but instead shift a greater portion of the levy to remaining taxpayers, who consequently must pay higher taxes. An exception is the School Tax Relief (STAR) exemption, a partial school tax exemption applicable to most residential property, which is State-funded. Many challenge the use of property tax exemptions for non-fiscal purposes, arguing that subsidies for such purposes might better come from broader revenue sources than the limited base of the local property tax.

The standard source at the state level for technical assistance on the law and practice of property tax exemption is the State Board of Real Property Tax Services. The Board has published a number of reports on the impact of various exemptions on local tax bases. In addition, it annually publishes a statistical report detailing the value and location of exempt property in the state.

The value of exempt property is often obscure. Many assessors conclude that they have no reason to place realistic values on property which will not be taxed. Furthermore, many assessors do not revise exempt property lists, even periodically, since the figures are not utilized for any apparent purpose. However, where a tax levy is spread between or among two or more municipalities, the equalized value of tax exempt properties is used when calculating the tax rates, so unrealistic values on tax exempt properties can affect a tax levy. Consequently, the reported valuations of exempt properties in New York State in all likelihood do not reflect their full impact on municipal tax bases or the revenue they would return if they were made taxable. With that caveat in mind, it is worth noting that the ratio of exempt valuation to the total of taxable and exempt valuation in New York State rose from 11 percent at the turn of the twentieth century to about 32 percent in 2005.

12.3.3.2 Exemptions in Cities and Towns

In 2005 there were 4.5 million property tax exemptions on assessment rolls in New York. The value of exempt property in cities and towns totaled $678 billion in 2005, almost 32 percent of the state's real property assessed value. In nine of New York's cities, more than half of the value of the real property contained therein was exempt from taxation. Twenty-three of the 933 towns in New York had in excess of 50 percent of their total real property value exempt from taxation on their 2005 assessment rolls.

Property owned by government and quasi-government entities, such as public authorities, accounts for 47 percent of the total value of exempt property. As for private owners, the largest proportion of exempt property is owned by

community service organizations, social organizations and professional societies (13 percent of all exempt property). As for exempt residential property other than multiple dwellings, the leading categories of exemption based on value are the School Tax Relief (STAR) Program (23 percent of total exempt value), property owned by veterans (almost 5 percent) and property owned by senior citizens (about 2.5 percent).

The percentage of exempt value attributable to state-mandated exemptions statewide was 94 percent. In absolute terms, the total value of state-mandated exemptions on 2005 assessment rolls was $637 billion.

12.3.4 Property Tax Administration

The administration of the real property tax involves four tasks:

1. the discovery and identification of land and buildings;
2. their valuation by a defensible method or suitable combination of methods;
3. the preparation of the final assessment roll against which property taxes are levied; and
4. the review of assessed valuations for the correction of inequalities.

12.3.4.1 Organization for Assessment

The first three of the above tasks are the duty of local assessors. In New York State the assessing units include the 62 cities and 933 towns. Other local governments use the assessment rolls as they require them. County and school tax levies, it was noted earlier, are distributed among constituent municipalities in relation to their equalized values. Although the 550 villages are empowered to assess property for purposes of village taxation, many accept the town rolls and a majority have terminated their status as assessing units and transferred that function to the towns.

There are two county assessing units in the state: Tompkins County and Nassau County. Under the Tompkins County Charter, an appointed county director of assessment assesses all real property in the county subject to taxation for county, town, village, school district or improvement district purposes. The Nassau County Government Law establishes a county board of assessors, consisting of four appointed members and a chairman and executive officer who is elected from the county at large. The board assesses real property on a countywide basis for purposes of county, town, school district and improvement district taxation.

Local assessors are either elected or appointed to their positions. All but two cities have a single appointed assessor or appointed boards of assessors. Since 1927 village assessors have been appointed, and villages have either one or three assessors. In some villages, the village trustees act as assessors.

Title 2 of Article 3 of the Real Property Tax Law provides that, except in Tompkins and Nassau Counties, cities under 100,000 population and all towns shall have a single assessor, appointed to a six-year term of office. In any city or town where one or more of the offices of assessors was elective, the governing body was empowered to retain elective assessors by enactment of a local law, providing such action was taken prior to April 30, 1971. About 50 percent of towns retained elected assessors under this option.

12.3.4.2 Property Valuation

There are three basic methods for arriving at the value of real estate for tax assessment purposes - sales analysis and comparison, income capitalization, and the replacement cost of improvements. The separate valuation of land entails a further set of value factors and a judgment as to their combined effect upon a give parcel of land.

Among the various considerations are prevailing land use or classification, sales and income data, and the establishment of separate units of value (such as front foot), subject to modification for reasons of lot size, depth or irregularities.

The basic issues in property valuation are treating the owners of taxable property fairly and administering the property tax efficiently in the interest of both the municipality and the taxpayers. Until December, 1981, Section 306 of the Real Property Tax Law required all assessments to be set at full value. Historically, however, real property in this state was usually assessed at a percentage of full value. Inequities had long existed among and within different classes of property, e.g., residential, industrial, commercial. These inequities stimulated a series of court challenges to the property tax assessment system in New York State. The most notable cases are Hellerstein v. Assessor of the Town of Islip 37 NY2d 1,371 NYS2d 388 (1975) modified by 39 NY2d 920,386 NYS2d 406 (1976) and Guth v. Gingold (34 NY2d 440,358 NYS2d 367 (1974)).

In its June 1975 decision in Hellerstein, the Court of Appeals found that assessment of real property must be at its full value since the Real Property Tax Law did not, at that time, authorize fractional assessments. In Guth, the Court of Appeals determined that a property owner could use the equalization rate established by the State Board of Equalization and Assessment (now the State Board of Real Property Tax Services) as a sole means of proving inequality with respect to the assessment of a property.

In December 1981, the State Legislature repealed Section 306 of the Real Property Tax Law thereby removing the full value assessment requirement. Section 305 of the Real Property Tax Law authorizes the continuation of existing methods of assessment in each assessing unit. However, it specifically requires assessment at a uniform percentage of value (fractional assessment) within each assessing unit.

Special provisions applicable to New York City and Nassau County prescribe a classification system. In all other areas of the state, assessing units are authorized to preserve homestead class tax shares on taxing jurisdictions completely within the assessing unit - predominantly cities, towns or villages. This means they may reduce the tax burden on residential real property (dwellings for three or fewer families) and farmhouses relative to other types of property.

12.3.4.3 Assessment Improvement

Efforts at the local level to improve assessment administration take various forms such as assessor training, improved record-keeping, tax maps and computerization of assessment data. Many municipalities have conducted comprehensive reappraisals. State financial assistance on a per parcel basis is available to assessing units which conduct reappraisals. Statewide, however, wide disparities still exist among classes of property and within classes of property regarding a uniform and equitable relationship of property assessments to full value.

The State Board of Real Property Tax Services maintains a comprehensive system of software programs called the Real Property System (RPS) which is available, for free, to all assessing units. It is capable of maintaining assessment, physical property inventory, and valuation information for any type of real property. In addition, RPS has the ability to conduct a mass appraisal of an entire municipality and is capable of producing assessment rolls, tax rolls and tax bills. In addition, it includes a Geographic Information System (GIS) and ten layers of State-provided geographic coverage data (roads, municipal boundaries, wetlands, school district boundaries, etc.). A document image management system (DIM) allows any document, such as a photograph, a sketch, a deed or a map, to be electronically attached to a parcel of property. A custom report writer (CRW) provides the assessor with the ability to create reports regarding assessment, sale or inventory data. Other municipal systems or off-the-shelf software can be easily integrated with the RPS system. The Office of Real Property Tax Services (ORPTS) periodically develops updates to the RPS system.

Legislation passed in 1970 provided for the appointment of property tax directors at the county level to coordinate and assist local assessment functions; gave towns the option of converting from elected to appointed assessors; created boards of assessment review in each municipality; required all counties with the exception of Westchester

and those in New York City to provide assessors with modern, accurate tax maps; established minimum qualifications for appointed assessors; and required many town and most city assessors to achieve certification from the State Board of Real Property Tax Services. The legislation also provided for advisory appraisals of taxable utility property by the State Board upon local request.

In 1977, the State Legislature enacted Article 15-B of the Real Property Tax Law. This article provides for state financial assistance to local governments which implement improved systems for real property tax administration. This program has been revised several times, including to encourage cyclical reassessments. The "Aid for Cyclical Reassessments" replaces the previous Aid programs. Assessing units that commit to conducting reappraisals of all property at least once every four years may receive up to $5 per parcel in the year of a full reappraisal with additional payments of up to $2 per parcel in interim years.

Effective in 1982, the legislature amended the Real Property Tax Law to make training mandatory for all assessors, whether elected or appointed, as well as for directors of county real property tax services. In addition, the State Board of Real Property Tax Services was given authority to review the qualifications of appointed assessors and county directors to determine if they meet the minimum qualification standards.

12.4 Local Non-Property Taxes

The power of taxation is an inherent attribute of state sovereignty, not possessed by its political subdivisions. Article XVI of the State Constitution declares:

> "The power of taxation shall never be surrendered, suspended or contracted away, except as to securities issued for public purposes pursuant to law. Any laws which delegate the taxing power shall specify the types of taxes which may be imposed thereunder and provide for their review."

Using this authority, the State Legislature has authorized the imposition of what have come to be known as local non-property taxes.

12.4.1 New York City Taxes

New York State began to utilize local non-property taxes because of the difficulties the City of New York experienced during the Great Depression in the 1930s. Delegation of local taxing power on a significant scale started with New York City. At the emergency session of 1933, the Legislature granted the City power to impose, for a six-month period, any type of tax which the State itself could impose. This initial grant of power was to expire six months after its effective date. Amid much controversy the initial grant was renewed and modified, but the broad outlines of state policy with regard to special local taxes did not emerge until 1939. After the 1938 Constitutional Convention, the State altered its home-rule stance toward New York City's authority to tax. From this point forward the Legislature narrowed the range of special taxes available to New York City and began to limit maximum rates. By the postwar period, New York City possessed the power to impose a variety of special taxes, which, under economic conditions in some degree peculiar to the City, became an important source of revenue. These included taxes on hotel room occupancy, sales, utilities, gross income, business gross receipts and pari-mutuel wagering.

12.4.2 Local Utility Taxes

In 1937, the Legislature extended optional, local taxing power to the upstate cities when it authorized upstate cities to levy a local one percent tax on the gross income of public utilities. Initially, the proceeds could only go to pay for relief. In 1942, the Legislature removed the welfare restriction upon the use of utility tax proceeds and receipts could thereafter be applied to general municipal purposes. The utilities gross income tax proved attractive, and cities throughout the state adopted it.

12.4.3 Housing Subsidy Taxes

Following a 1938 housing amendment to the State Constitution, the Legislature authorized a series of special non-property taxes, which could be levied by cities and by villages with a population of 5,000 or more. The proceeds were to cover periodic housing subsidies or to meet service charges for local housing debt incurred outside the normal constitutional debt limit. Although the only two municipalities that took advantage of this legislation — the Cities of Buffalo and New York — have since repealed their local statutes, the enabling legislation marked another phase in the development of local taxing power.

12.4.4 Extension of Permissive Taxing Power

The further extension of permissive local taxing power occurred in New York State at the same time it was expanding elsewhere. After the Second World War, municipal costs soared. Many people felt that the full weight of these additional expenditures should not fall upon the property tax base. Local government officials and finance officers throughout the country expressed interest in gaining authority to adopt non-property taxes at local option. One conspicuous result was the well-known "home rule" tax law adopted by the Commonwealth of Pennsylvania in 1947. In 1947 and 1948 the New York State Legislature also enacted permissive local tax laws, applicable to cities and counties. A principal factor stimulating their enactment had been the adoption of a permanent teachers' salary law. These permissive tax laws reflected state policy that optional local taxes had to be defined and that they would neither supplant nor supplement the principal existing sources of state revenue.

The most productive local tax contained in the law was the sales tax. Other items included a business gross receipts tax (later denied upstate), a tax on consumers' utility bills, and an array of miscellaneous taxes or excises. The permissive tax law has been frequently amended and additional local taxes or options have been made available under other provisions of law.

12.4.5 Adoption of Permissive Taxes

Among the important developments with respect to optional local taxing powers are the following:

- All 57 counties (outside of New York City) have adopted a sales and use tax. As of September 2005, 49 of these counties plus New York City have local sales tax rates that exceed the 3 percent statutory limit, including eight counties with local rates exceeding 4 percent.
- Extension of limited optional local taxing power to city school districts, with the result that by 2005, 21 city school districts had adopted a consumers utility tax.
- 60 cities, other than New York City, and 348 villages, have accepted at least a one percent tax on the gross income of utility companies.
- Ten of the 61 eligible cities, other than New York City, have adopted the miscellaneous taxes and excises allowed by law, including taxes on coin-operated amusement devices, hotel room occupancy, real estate transfers, restaurant meals, amusement admissions and the consumer utility tax.

Special local taxes now occupy a prominent place in the financing of local government in the State of New York. Table 12.5 [131] shows the proportion of total revenue provided by local non-property taxes in 2012. Non-property taxes were approximately one-quarter of total revenues for counties and cities other than New York City. Special local taxes were a less significant income-producer proportionately for towns, villages, and school districts in New York State.

The local non-property tax revenues of cities, other than New York City, towns, and school districts outside New York City reflect, in varying degrees, the distribution of county sales tax receipts. More jurisdictions have adopted higher sales tax rates in recent years. The 2007 to 2012 comparison in Table 12.7 [138] shows that jurisdictions are gaining larger sales tax yields. The methods of distribution specified in the Tax Law are varied and complex, and further variations are permissible with the approval of the State Comptroller. Methods employed to distribute county sales tax revenues are the responsibility of county governing bodies.

12.5 Special Charges, Fees and Earnings

Local governments in the State of New York derive substantial revenues from special charges, fees and the earnings of municipal enterprises. In cities, for example, fees and charges may be made for licenses, permits, rentals, departmental fees and charges, sales, recoveries, fines, forfeits and other items. Earnings of municipal enterprises and special activities include user payments and miscellaneous revenues of such operations as water service, bus transportation, airports, hospitals, stadiums and public auditoriums, off-street parking, and municipally-owned public utilities. In the aggregate, local government revenues from special charges, fees and municipal enterprises rose from $5.1 billion in 2000 to $6.7 billion in 2005, an increase of 32 percent.

Table 12.7: Local Non-property Tax Revenue, 2007 and 2012 (Amounts in Millions of Dollars) SOURCE: Office of the State Comptroller

Government Unit	2007	2012	Percent Increase
Counties (excluding New York City counties)	6,879.3	7,299.4	6.1
Cities (excluding New York City)	831.3	890.0	7.1
Towns	710.7	784.8	10.4
Villages	175.2	186.3	6.3
School Districts (excluding New York City)	278.3	269.2	-3.3
Fire Districts	0	0	0
Total	$8,874.8	$9,429.7	6.3

12.5.1 Municipal Practices

Local governments have some latitude in establishing user charges and fixing rates, although fees collected by local officials are often controlled by state law, particularly in the administration of justice and offices of record. In general, the amount of a regulatory license or permit fee must be reasonably related to the cost to the municipality of the particular regulatory program, and the fees established for the use of a municipal service or facility must be reasonably related to the cost of providing the service or operating the facility. Municipalities have found it profitable to reexamine their charges periodically and bring them in line with current costs. Policy issues, local choice, and practical considerations are involved in the imposition of user fees. For example, many local governments will cover, or more than cover, the costs of a water supply and distribution system through water rates. In the case of certain enterprises such as airports, hospitals, public auditoriums, bus transportation and rapid transit, however, considerations other than the recovery of full annual costs may prevail.

At this time, there is no general authority for the imposition of service charges for established responsibilities of local governments such as police, fire, public works and libraries. There are exceptions as to particular aspects of these services, but, in general, these services are viewed as providing benefits to the public at large without relation to particular benefits provided to individuals.

12.6 State Aid

Intergovernmental payments by the state to local governments are a major aspect of local finances. State aid consists of grants-in-aid, which are payments to local governments for specified purposes, and general assistance. State assistance during 2012 accounted for slightly under one-quarter of all revenues received by municipalities and school districts. Overall state aid, in actual dollars, increased 4.2 percent from 2007 to 2012.

12.6.1 Background of State Aid

12.6.1.1 Early Origins

Origins of state aid in New York go back to the early days of statehood. References to state aid for common schools appear in 1795, and education aid began to assume real importance with the free public school movement of the 1840's, although the principle of free schools was not fully realized until after the Civil War. A leading purpose of school aid in this era was to compensate for revenue losses which resulted from eliminating local tuition. At a later point, the state introduced incentive grants to stimulate local participation in particular aspects of public education. These purposes - providing assistance in meeting the costs of state-originated programs and providing an incentive for localities to participate in such programs - have continued to this day.

12.6.1.2 Growth and Expansion

State aid has grown from its small beginnings to its present dimensions because of various economic and social developments. These include free schools; the coming of the automobile; statewide initiatives in health and mental health, sanitation and public welfare; and, more recently, concern with the environment and natural resources, educational opportunity beyond twelfth grade, public safety and mass transportation.

12.6.2 Amount of State Aid

Table 12.5 [131] illustrates the position which state aid occupies in the general revenue structure of local governments in the state in 2012. Overall, state aid supplied 22.2 percent of all local government revenues in 2012. State aid is a very important revenue source for school districts outside New York City, representing 33.9 percent of their revenues in 2012.

Table 12.8 [139] illustrates the percentage increase in state aid between 2007 and 2012 for the different classes of government in the State.

Table 12.8: State Aid Payments to Local Governments by Type of Government, 2007 and 2012 (Amounts in Millions of Dollars).[11]

Government Unit	2007	2012	Percent Increase
Counties (excluding New York City counties)	$2,828.5	$2,678.5	-5.3%

Table 12.8: (continued)

Government Unit	2007	2012	Percent Increase
Cities (excluding New York City)	827.0	801.6	-3.1
Towns	640.2	468.8	-26.8
Villages	154.3	114.6	-25.7
School Districts (excluding New York City)	11,126.1	12,167.1	9.4
Fire Districts	1.8	0.6	-66.7
Total	$15,577.9	$16,231.2	4.2%

12.6.3 State Aid to Local Governments

12.6.3.1 General Purpose Assistance

General purpose assistance can be defined as financial aid for the support of local government functions without limitation as to the use of such aid and without the substantive program and procedural conditions that are routinely attached to categorical grants-in-aid. In the late 1990's, interest centered on the General Purpose Local Government Assistance program, which distributed over $770 million to cities, towns and villages during state fiscal year 1999-2000. The program, which had been titled "Revenue Sharing" in the early 1970's, grew to include four distinct components: General Purpose Local Government Aid (GPLGA); Emergency Financial Aid to Certain Cities; Emergency Financial Aid to Eligible Municipalities, and Supplemental Municipal Aid. The 2005-06 budget established the Aid and Incentives for Municipalities (AIM) Program, which collapsed these four programs into one "base level grant" for all cities, towns and villages statewide.

New York State has provided financial aid to its municipalities since 1789. Early programs included categorical grants for activities encouraged by the state and the shared tax system whereby localities received portions of taxes they had participated in collecting. The per capita aid program instituted in 1946 allocated specific dollar amounts per capita to cities, towns and villages. In 1965, a statutory formula was established to calculate aid based on fiscal need, effort and capacity indicators.

The revenue sharing program created in 1970 was designed to eliminate the complexity and uncertainty of previous state aid programs and to provide municipalities with flexible, equitable and predictable aid. New York State Finance Law Article 4-A, section 54 outlines the framework of the Revenue Sharing Program, which is based on the previous Per Capita Aid Program. This program was designed to allocate specific amounts to counties, cities, towns and villages (with special emphasis on cities), based on population and full value data. The original legislation envisioned a distribution of aid equaling 21 percent of Personal Income Tax (PIT) revenues and that such aid would grow annually keeping pace with growth in the State's major revenue source.

The revenue sharing program underwent numerous changes in the 1970s. Before the program was even implemented, allocations were cut in 1971 to 18 percent of PIT receipts. In 1977-78, the State capped distributions at the 1976-77 level. In 1978-79, revenue sharing aid was further restricted when statute was amended to change the basis of funding from 18 percent of PIT receipts to 8 percent of total State tax collections. In 1979-80, the State froze revenue sharing at the 1978-79 level, and until 1984-85, funding was capped at $800 million.

[11] Office of the State Comptroller

The program peaked in fiscal year 1988-89 at nearly $1.1 billion. During the early 1990's, New York reduced numerous programs, including unrestricted local government aid by roughly 50 percent over four years. By 1992-93, revenue sharing had been decreased by more than $500 million to a low of $532 million.

12.6.4 AIM Program

The Aid and Incentives for Municipalities (AIM) program enacted in 2005 – 2006, increased unrestricted aid to cities, towns and villages by $57 million. The 2007-2008 enacted Budget restructured the AIM program to target additional State aid primarily to fiscally distressed municipalities. An AIM increase of $450 million was authorized in 2007-2008, and in each of the three following years, for a four-year total of $200 million. These increases were tied to enhanced accountability requirements that encouraged local fiscal improvement. The 2007-2008 AIM program included $15 million in grants for a range of local shared services activities. In addition, a new $10 million consolidation incentive aid is created under SMSI provides a recurring 25 percent AIM increase to municipalities that merged or consolidated in 2007-2008.

12.7 Federal Aid

The role of federal aid in local finances from 2007 through 2012 is indicated in Table 12.9 [142]. During this period federal assistance to local governments in the state increased from $4.0 billion in 2007 to over $5.1 billion in 2012.

Under pressure from state and local governments, which were overwhelmed by the multiplicity of federal programs and their individual requirements and administration, Congress enacted legislation during the 1970s that consolidated various categorical aid programs into block grants in the broad functional areas of education, manpower, law enforcement, and housing and community development. These programs have been broadly characterized as "special revenue sharing" programs. Among the objectives of this legislation were the simplification of grant administration, the provision of increased discretion in the use of funds allocated to state and local government grant recipients, and the elimination of conventional matching requirements. This system of categorical block grants to local governments is still presently utilized.

A major development in federal aid was the passage of federal general revenue sharing in 1972. For the first time, the national government distributed aid to local and state governments with very few restrictions on how the money could be spent and without requiring governments to apply for the grants. A local government's allocation was based on a complex formula which, at the local level, took into account the adjusted taxes, per capita income, population and intergovernmental transfers of each governmental unit.

State and local governments received their first revenue sharing checks in December 1972 for the entitlement period January 1 through June 30, 1972. The federal general revenue sharing program was discontinued in the mid 1980's.

12.7.1 Amount of Federal Aid

Table 12.5 [131] illustrates the position which federal aid occupies in the general revenue structure of the local governments in the state in 2012. Overall, federal aid supplied 7.0 percent of all local government revenues in 2012.

Table 12.9 [142] reflects the growth of federal aid from 2007 through 2012 for each respective class of government, both in actual dollars and by percent increase.

Table 12.9: Federal Aid Payments to Local Governments, 2007 and 2012 by Type of Unit (Amounts in Millions of Dollars).[13]

Government Unit	2007	2012	Percent Increase
Counties (excluding New York City counties)	$1,988.5	$2,630.5	32.3
Cities (excluding New York City)	262.0	252.2	-3.7
Towns	212.6	337.4	58.7
Villages	85.6	91.2	6.5
School Districts (excluding New York City)	1,401.6	1,815.0	29.5
Fire Districts	3.2	3.2	0
Total	$3.953.5	$5,129.5	29.7

[13] Office of the State Comptroller

Chapter 13

Personnel Administration

Personnel administration in New York local governments is subject in many important respects to the State Civil Service Law. In general, the law makes several options available to local governments for civil service administration. Although the specific responsibilities of a municipal personnel agency may vary, a sound personnel program rests on clearly drawn local laws, rules and regulations which encompass such matters as recruitment, selection, and placement, performance appraisal; position classification and pay plans, fringe benefits, working conditions, separation, training and career development.

Personnel administration encompasses all of the activities concerned with the human resources of an organization and includes a series of functions which relate to its overall operation. These functions include position classification'` determination of salary scales, fringe benefits, recruitment and selection of employees, performance appraisal, training, establishment of policies and procedures for conduct and discipline, and the development of programs related to health, safety, affirmative action and retirement programs.

Numerous factors - economic and social resources, technological advances, intermunicipal relations, politics and political leadership, special interest groups such as employee unions, and concern for career services — greatly influence personnel programs.

13.1 Historical Development

To understand the goals and purposes of public personnel administration, it is helpful to trace its historic development and, in particular, to note the major role that New York State played in the civil service reform movement. Initially, the philosophy and practices of patronage almost universally governed personnel administration in the United States. Patronage involved giving government jobs to supporters of those who won elections and resulted in the famed and controversial spoils system. Jobs were filled with party workers and with friends and relatives of elected officials. During the nineteenth century the patronage system and its abuses produced increasing alarm. It was charged with lowering morale, encouraging disloyalty and dishonesty, obstructing reward for good work, and discouraging competent people from entering government service.

It is no coincidence that New York generated much of the early impetus for civil service reform, since the spoils system had become most pervasive in the Empire State." As one observer noted, “It was the politicians of New York who gave it its organized impulse. It was in response to Henry Clay’s taunt at the New York system that a New York senator made the famous defense that to the victor belong the spoils of his enemy.” [1] It is not surprising that civil service reformers were most active in New York State, where the problems were most acute. Organized in 1877, the New York Civil Service Reform Association stimulated the rapid development of similar associations

[1] Jerome Lefkowitz, The Legal Basis of Employee Relations of New York State Employees (Association of Labor Mediation Agencies, 1973), p. 2.

in other states. This reform movement led to the enactment of the federal Pendleton Act in January 1883. This law required establishment of a bipartisan civil service commission to conduct competitive examinations and to assure the appointment and promotion of government employees based on merit. Later that year, New York State enacted its first civil service law.

13.2 New York State Civil Service Law

New York State has the oldest civil service system of any state in the nation. Beginning in 1883, as a reaction to the spoils system, it concentrated on the development of examinations and other recruitment devices. The state subsequently adopted a special classification system in order to determining titles and salaries. As state government assumed greater responsibilities and as the state's work force grew, the civil service system was modified and refined by legislation and administrative action. It became a highly complex and sophisticated system, which is now administered by the State Department of Civil Service. Within the department, separate divisions concentrate on specific personnel functions, such as classification, examination and placement. New York State's Civil Service Law also includes provisions for the administration of civil service at the local government level.

13.2.1 Forms of Local Civil Service Administration

The Civil Service Law specifies optional forms of civil service administration for the purpose of administering the law in the counties (including political subdivisions within counties), in the cities and in suburban towns with a population of more than 50,000. Villages have no authority to administer a separate civil service system, but must comply with state law and with locally adopted civil service rules and the regulations of the regional or county civil service commission or personnel officer.

Municipalities can select one of two major options for direct administration of civil service law - the civil service commission or the personnel officer. The commission consists of three persons with no more than two from the same political party. They are appointed either by the governing body or by the chief executive officer of the municipality. Their six-year terms of office are staggered, with one term expiring every two years.

Like the Civil Service Commission, the personnel officer is appointed by the governing body or chief executive for six years and the responsibilities of the office include those of the municipal civil service commission. In addition, the personnel officer often has non-civil service responsibilities of personnel management and human resources administration, such as labor relations, affirmative action and staff development activities. Other governments have developed a hybrid form of civil service/personnel administration. Typically, this joint system of administration consists of a part-time civil service commission and a personnel director. The civil service commission administers the Civil Service Law and promulgates local civil service rules and regulations, while the personnel director carries out the non-civil service functions.

In the event that a county or city chooses to not directly administer a separate civil service system, it may join with one or more other counties or cities, in the same or adjoining counties, to establish a regional civil service commission or a regional personnel officer position. This regional alternative for civil service administration may be established by written agreement approved by the governing bodies of each participating county and city. There are no regional operations in New York State at present.

Political subdivisions with populations of less than 5,000 fall into a special category. The State Civil Service Commission has standards for determining whether or not it is practical in such subdivisions to have civil service examinations for their employees.

13.2.2 Categories of Positions

Sections 35 and 40 of the Civil Service Law establish two major groups of municipal employee positions - the classified and unclassified services.

Positions in the unclassified service are defined by statute and include all elected officials, all officers and employees with duties and responsibilities directly related to either the legislative or elective functions, chief administrators (i.e., department heads) of government, and those individuals with instructional responsibilities within school districts, boards of cooperative educational services, county vocational education and extension boards, or the state university system.

Within the classified service there are four jurisdictional classifications of positions: competitive, exempt, noncompetitive and labor. All positions which are outside the competitive class must be specifically named by the civil service commission and approved by the State Civil Service Commission.

The basis for determining whether a position shall be in the competitive class is the practicality of ascertaining merit and fitness by competitive examination. This process may utilize any, or a combination, of several different tests: written, oral, performance, physical, and review of training and experience. If a position in the classified service is ruled to be outside the competitive class, it is placed in one of the other three classes in accordance with criteria found in the Civil Service Law.

Exempt class positions are designated primarily for positions of a policymaking or confidential nature for which a competitive or noncompetitive examination is impractical. The appointing authority selects employees in this class without regard to civil service rules and regulations governing eligible lists. The intention is that executive and judicial officers should have some latitude and flexibility in selecting, retaining and discharging their closest associates. Another important aspect of exempt positions is that there are no specified minimum qualifications as there are in competitive, non-competitive and labor class positions.

Noncompetitive class positions are positions for which there are established qualifications with respect to education and experience, but it is not practical to determine merit and fitness of applicants by competitive examination. The appointing authority can make appointments without regard to relative standing on eligible lists. There are no noncompetitive eligible lists The labor class includes all unskilled laborers, except those for which a competitive examination can be given. The local civil service commission or personnel officer may require applicants to take examinations for labor class positions if it is practical.

13.3 Local Civil Service Administration

13.3.1 Scope and Responsibility

The municipal civil service commission or personnel officer administers the Civil Service Law for classified municipal employees. Rules adopted by the commission or personnel officer are subject to approval by the State Civil Service Commission. The local commission or personnel officer must maintain extensive employee records for certifying payrolls, conducting examinations required by law and preparing appropriate lists of people eligible for appointment.

Regardless of the form chosen, the civil service commission or personnel officer of a county administers the Civil Service Law for the county and the political subdivisions within the county, including towns, villages and school districts, except for suburban towns with a population of 50, 000 or more and cities that choose to operate independently. In the case of a city or suburban town that opts to have its own civil service commission or personnel officer, the administration covers all officers and employees of the town or city, including the city school district. The jurisdiction of a regional commission or personnel officer includes all municipal employees within the region, who would otherwise be subject to the jurisdiction of the local civil service administration of the respective counties and cities within the region.

13.3.2 Changing the Form

The Civil Service law also makes provision for changing the system of administering civil service law in counties, cities and suburban towns. The governing body of a county, city or suburban town may elect to change from a civil service commission to the office of personnel officer or vice versa. They may choose to join with another municipality either within the county or on a regional basis to administer civil service jointly under either a commission or personnel officer. The law also establishes the effective dates of such changes, the duration of time before further changes may be made, and the authority of the governing body to revoke its action regarding changes. The advice and counsel of a municipal attorney may be helpful in interpreting and implementing the complicated procedures involved in changing the form of civil service administration.

13.3.3 The Functions of Personnel Administration

The specific responsibilities of a municipal personnel agency vary from one locality to another and from one level of government to another, depending upon size, jurisdiction and numbers of municipal employees. An effectively administered personnel program requires a strong legal base, a comprehensive and concise set of rules and regulations, and assistance and support from the municipality's legislative body.

These components are necessary to achieve continuity of policy and practice and to allow managers to make informed decisions and solve personnel problems. New York State's Civil Service Law includes the following elements in the personnel function: the principle of merit and fitness, rule-making authority, and a procedure for appeal. The administrative guidelines of such a program should emphasize stability of policy and flexibility of procedure. The following paragraphs briefly describe some of the major responsibilities of a personnel organization.

13.3.4 Classification and Salary Plans

Two of the most important functions of a personnel department are position classification and salary administration. To administer an organization effectively, management must have relevant facts about the specific jobs required to accomplish goals and objectives. Management must determine: first, what work must be done to attain the organization's goals; second, what skills are necessary to accomplish this work; and third, how much of this work can be accomplished by one person. On the basis of this information the personnel department classifies positions, determines qualifications and salaries and recruits suitable people to do the work. The information also underlies all testing programs.

The personnel department usually administers a salary plan on the basis of position classification. Sometimes the personnel staff develops the salary plan, but it is common for the department to hire an outside consultant who specializes in the area of personnel administration. However, the final adoption of the plan, including salary and wage scales, is a legislative prerogative. Establishment of a salary policy occurs in two phases: the first determines the general level of wages in an organization; and the second devises a plan to provide consistent internal salary relations. Both social and economic factors affect wage levels in government, and the salary plan must reflect balances between these factors. Wage levels must take the following into consideration:

- financial condition of the organization;
- wage scale of competitors;
- bargaining power of the employees;
- cost of living;
- federal and state regulations;

- internal equity;
- external competitiveness;
- difficulty of work performed;
- education/license required; and
- any special situations, such as hazardous working conditions, shift pay, etc.

13.3.5 Recruitment, Selection and Placement

When the personnel department recruits people to perform jobs, it takes several actions that are part of a continuous process. These actions include recruitment, selection, placement and probation. The recruitment program must reach out and attract the best minds and skills without discrimination. The department may develop and implement affirmative action recruitment programs.

The department then screens applicants for jobs, most frequently by examination and/or interview, and develops lists of eligible candidates. It must plan selection programs carefully so that they include the following kinds of measurements about applicants: skills, knowledge, abilities, personality traits, interests, physical traits (where relevant) and medical conditions.

Working from the eligible list established by the selection process, the department then certifies to the appointing authority the top ranking candidates most qualified for the job. After an individual is appointed, most agencies require a probationary period and provide for periodic performance evaluation. Newly hired employees should participate in an effective orientation and training program during their probation.

The activities composing a municipal personnel program must take place within the limitations and requirements of the state's Human Rights Law as it applies to public employment. This law recognizes as a civil right the opportunity to obtain employment, including public employment, without discrimination because of race, creed, sex, color, age, disability, marital status or national origin. The following practices are among those considered unlawful and discriminatory:

- for an employer to refuse to hire or to discriminate against the employment of an individual or to discharge an employee because of the above factors;
- for an employment agency to discriminate against any individual for these reasons in receiving, classifying, disposing of, or otherwise acting on applications for services;
- for a labor organization to expel or deny membership to an individual for those reasons;
- for an employer or employment agency to promote any advertisement or publication which expresses, directly or indirectly, any prohibited limitations, specifications or discriminations; and
- for an employer, labor organization or employment agency to discharge or expel or otherwise discriminate against any person who has filed complaints pursuant to the Human Rights Law.

In addition, this law specifies that it is an unlawful discriminatory practice for an employer, labor organization or employment agency to control the selection of applicants for apprentice training programs. Numerous other discriminatory practices are listed, but those mentioned above are most specifically related to municipal personnel and training practices.

13.3.6 Performance Appraisal

Every supervisor in a municipal government should conduct a continuous evaluation of an employees' development and whether they utilize their abilities most effectively. Periodic employee performance appraisal promotes the effective operation of an organization. A performance appraisal system:

- informs employees of what is expected of them;
- informs employees of how they are performing;
- recognizes and rewards good work;
- determines employee weaknesses and suggests alternatives for improvement;
- identifies employee training needs;
- maintains a continuing record of employee performance;
- guides promotions, transfers and appropriate placement; and
- checks the reasonableness of performance standards, the accuracy of job descriptions and classification, and the effectiveness of recruitment procedures.

There is no standard method for performance evaluation. Numerous techniques are utilized and each requires a different degree of detail. The organization's objectives and management's concerns usually determine the techniques chosen.

13.3.7 Fringe Benefits and Working Conditions

Personnel administration must also be concerned with working conditions and fringe benefits, as specified in labor agreements. Such items are over and above salaries and wages; they include vacation arrangements, sick leave, insurance policies, retirement plans, physical working facilities, hours of work, and employee safety and health programs.

13.3.8 Training and Development

Recruiting, selecting and placing employees are only the beginning of the personnel program. One of the most important aspects of personnel administration is employee training and development. Every employee must learn certain skills, new techniques, appropriate procedures, etc. Employees must be trained - they must be given the opportunity to learn how to effectively perform their present and future work. Training programs can:

- orient employees to a new job;
- assist employees to acquire specific skills or knowledge required to perform their jobs;
- increase the scope of the employees' experiences and prepare them for greater responsibilities;
- encourage employees to take pride in their work;
- promote concern among employees for their own personal and career development; and
- increase worker safety.

The area of employee training and development has been drawing increased concern and interest over the past several years. Many municipalities are establishing separate training units to plan and administer total training programs. Training is integral to the total personnel process; it influences productivity, morale, motivation and realization of organization goals.

13.3.9 Separation

Another aspect of the personnel process is the development of appropriate procedures for separation. These include such activities as reduction in work force, disciplinary suspensions, terminations and separation during the probationary period. Such procedures as required by the Civil Service Law, the Human Rights Law and several court decisions specify due process must rights be granted to employees.

Civil Service Law specifies the procedures for the discipline and discharge of public employees who: hold competitive class appointments, are veterans or exempt volunteer fire fighters, or have completed five years of continuous service as non-competitive employees. However, local governments may negotiate alternative disciplinary procedures to replace or modify those procedures.

Similarly, Civil Service Law governs the separation due to a reduction in work force of competitive class employees and those who are veterans and volunteer firefighters. In addition, local governments may agree to establish specific layoff procedures for noncompetitive and labor class employees through collective bargaining.

13.4 Federal Acts Affecting Personnel Administration

13.4.1 The Americans With Disabilities Act

The Americans With Disabilities Act, commonly referred to as the ADA (42 U.S.C. section 12101 et seq.), became law in 1990. It is intended to eliminate discrimination against people with qualifying disabilities in all areas of life including employment opportunities, access to governmental services, architectural barriers and telecommunications. Title I of the ADA, Employment, is of importance to local government personnel administration since it makes significant changes to all employment related activities, from recruitment and on the job performance, to attendance at work related social functions. Since its enactment, hundreds of cases concerning the ADA have been decided in the Federal Courts. These, along with implementing regulations promulgated by the United States Equal Employment Opportunity Commission (EEOC) and United States Attorney General, provide guidance for compliance with the Act.

Under Title I of the ADA, no employer, including local governments, may discriminate against an individual with a qualifying disability in the terms and conditions of employment. Under the ADA, an individual is disabled primarily if they have a physical or mental impairment (or are regarded as having such an impairment) which substantially limits one or more of the individual's major life activities, such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, working and moving. The term "qualified individual with a disability" is defined in section 12111(8) of the Act as:

> "…an individual with a disability who, with or without a reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For purposes of this title, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job."

Section 12111(9) provides with regard to the term "reasonable accommodation":

> The term "reasonable accommodation" may include:
>
> A. making existing facilities used by employees readily accessible to and useable by individuals with disabilities; and

B. job restructuring, part-time or modified work schedules, reassignment to vacant positions, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

In essence, once a local government has made a determination that an applicant for employment or an existing employee is a qualified individual with a disability; the employer may be obligated, through an interactive process with the employee, to provide the employee with a reasonable accommodation. While there are many rules and nuances to the ADA, some key points to remember are: the employer, not the employee, makes the final decision on what the reasonable accommodation will be; pre-job offer and post-job offer questions and medical examination requirements are dictated by the Act; and if the employee cannot perform the essential duties of the job, even with a reasonable accommodation, the employer need not hire them or may take appropriate steps to separate the employee from service.

Because of the ADA's complexities, it is recommended that local governments confer with knowledgeable counsel, affirmative action officers, and other available sources when confronted with issues arising under the Act.

13.4.2 The Family Medical Leave Act

The Family Medical Leave Act, or FMLA, (29 U.S.C. section 2601 et seq.) became law in 1993. It is intended to balance the demands of the work place with the needs of families. By providing workers faced with family obligations or serious family or personal illness with reasonable amounts of leave, the FMLA encourages stability in the family and productivity in the workplace.

The FMLA gives eligible employees of covered employers the right to take unpaid leave, or paid leave charged to appropriate leave credits under certain circumstances, for a period of up to 12 work weeks in a 12 month period due to: 1) the birth of a child or the placement of a child for adoption or foster care; 2) the employee's need to care for a family member (child, spouse or parent) with a serious health condition; or 3) the employee's own serious health condition which makes the employee unable to do his or her job. Under certain circumstances, FMLA leave may be taken on an intermittent basis. Employees are also entitled to continuation of health and certain other insurances, provided the employee pays his or her share of the premiums during the period of leave.

The employer has a right of 30 days advance notice from the employee, where practicable. In addition, the employer may require the employee to submit certification from a health care provider to substantiate that the leave is due to the serious health condition of the employee or a member of the family. The employer may also require, as a condition of return to work, medical documentation from an employee absent due to personal illness.

13.4.3 The Immigration and Naturalization Act

In 1990, the Immigration and Naturalization Act (Title 8 of the United States Code) provides the foundation for immigration law. It was passed in 1952 and has been amended several times. Section 1324a of Title 8 imposes requirements on employers to attest their examination of certain documents produced by employees that verify employment authorization and identity.

13.5 State Assistance and Training

A number of state agencies and other organizations, offer assistance to local governments in specific areas of staff development or personnel program administration. Training and technical assistance provided by state agencies is intended primarily to improve the capability of local employees whose activities help meet program objectives of those agencies. Summarized below are some of the kinds of training and other assistance available to local governments.

13.5.1 Department of Civil Service

The Department of Civil Service is the primary source of technical assistance to local governments assisting with setting up and operating local personnel programs. Local officials can obtain a variety of specific administrative and operational assistance from the Municipal Services Division of the department. For instance, if a municipality does not have an appropriate eligible list for a position, the department can provide names from appropriate state eligible lists. The list may be limited to residents from the locality or civil division in which the appointments are to be made, and may be used until it runs out or is superseded by a list established by the municipality.

On request, the Department of Civil Service also provides on-site advice and technical assistance concerning the following:

- the State Civil Service Law and municipal rules and regulations;
- job classification systems, job standards and specifications;
- the development of procedural and training manuals;
- the establishment of salary plans and fringe benefits;
- surveys of local civil service or personnel agencies;
- training in municipal personnel practices;
- setting up and conducting examination programs; and
- minority group training and placement.

13.5.2 Other State Agencies

The following list indicates the scope and range of the type of local government training that is offered by other state agencies:

The Education Department provides training for local school superintendents and members of local boards of education.

The Department of Environmental Conservation (DEC) provides in-house training, invests in information management, and partners with universities and other state agencies and professional organizations. These initiatives are designed to help specialized staff, such as wastewater treatment plant operators and air pollution control engineers, meet professional requirements.

The Department of Health provides training to help specialized local government staff, including water treatment plant operators, meet certification requirements.

The Office of Real Property Tax Services provides training to help local assessment officials perform their functions and duties effectively and meet certification requirements.

The Office of the State Comptroller offers training for fiscal officers of local governments.

The Office of Mental Health offers program-related training to staffs of local mental health agencies.

The Office for People with Developmental Disabilities makes its own staff training programs available to appropriate local employees.

The Department of Labor makes available to appropriate local government employees, where possible, its in-service training programs on such matters as placement, supervision and unemployment insurance.

The New York State Office of Children and Family Services (OCFS) makes appropriate training available for local social services program staff and others, including case workers, supervisors, day care workers, parent aides, foster parents and investigators.

The Office of Alcohol and Substance Abuse Services offers training in such topics as counseling, program development and prevention to staffs of local agencies it funds and other appropriate agencies.

The Office of Fire Prevention and Control of the Division of Homeland Security and Emergency Services offers training for local fire fighters about fire services and prevention and hazardous materials.

The State Emergency Management Office (SEMO) of the Division of Military and Naval Affairs provides training for local government emergency management staff on such matters as emergency planning, communication, creative financing, decision making, hazardous materials and legal issues.

13.5.3 Department of State

The Department of State offers certain kinds of technical assistance and training to promote effective local government operations. The department makes available training in enforcement of the Uniform Fire Prevention and Building Code, State Energy Code, land use planning and regulation, management of community action programs, and in specific areas of municipal management. Technical assistance is also provided in the above areas, as well as in municipal law, intergovernmental cooperation, local government organization and operations, sources of financial assistance and local waterfront revitalization.

13.5.4 Other Organizations

Assistance with staff development and training is offered to local governments through a number of non-state organizations. Statewide, these include the municipal associations (NYS Association of Counties, NYS Conference of Mayors and Other Municipal Officials, Association of Towns of the State of New York and the NYS School Boards Association), their affiliate groups, and such specialized organizations as the New York Planning Federation. These organizations often provide training at their annual meetings or through special seminars, and they frequently accommodate training sessions of state agencies and other organizations at their meetings.

13.6 Summary

Effective personnel administration at the local government level requires:

- compliance with New York State Civil Service and Human Rights laws, Federal laws and local civil service rules and regulations;
- formalized personnel policy;
- strong but flexible legal framework;
- organized activities;
- clearly defined goals and objectives;
- concern for human factors as well as for operational results;
- positive personnel activities to stimulate and motivate employees;
- concern for employee development; and
- awareness of the need for, and benefits of, training and education.

Chapter 14

Labor-Management Relations

Collective bargaining became a legal right of public employees at all levels in New York State in 1967. Unionization of public employees spread rapidly the state. A set of procedures developed within the provisions of the Taylor Law, which now regulates labor-management relations in government at the local as well as the state level.

All local governments in the State of New York are public employers. Local Government officials need to be aware of and understand the rules and procedures that apply to relations between the governmental unit and its employees.

14.1 Historical Background

Prior to 1967, public employees in New York State did not have a statutory right to bargain collectively. The only statute regulating conditions of employment for public employees, the Condon-Wadlin Act of 1947, did not give public employees any rights to participate in decisions regarding such conditions. This act, passed following labor disputes among public employees in Rochester, Buffalo and New York City, prohibited strikes by public employees and established severe penalties for violation of its provisions.

The Condon-Wadlin Act failed to make any provision for the amelioration of conditions which led to strikes. The growing realization that the Condon-Wadlin Act did not deter strikes, combined with an increasing demand by public employees for bargaining rights, generated pressure for amendment or replacement of the act. Several bills to do so were introduced in the State Legislature between 1960 and 1963, but none passed. They generally provided for some modification of penalties for striking and for the establishment of various forms of grievance procedures for public employees.

Several events in the 1950's and early 1960's encouraged employees of state and local governments had been to assert their desires for collective negotiations. In 1950, Governor Thomas E. Dewey guaranteed to state employees the right to join employee organizations and created a grievance procedure. In 1954, Mayor Robert Wagner of New York City issued an interim Executive Order that granted limited collective bargaining rights to New York City transit workers. In later years, other employee groups were also granted these rights.

Interest in collective bargaining for public employees was also stirring in the State Legislature. In 1962, a staff report to the Joint Legislative Committee on Industrial and Labor Conditions stressed the need for a "more rational labor relations program for public employees."

The strike penalties of the Condon-Wadlin Act were softened for a period between 1963 and 1965. However, the original act was restored, when two work stoppages occurred in New York City in the following year. When the penalties prescribed by the Condon-Wadlin Act were once again circumvented, Governor Rockefeller responded by appointing a blue ribbon committee on public employee relations. The legislation proposed by this committee, and enacted in 1967, came to be known as the Taylor Law (named for its chairman, George Taylor). The Taylor Law

thus became the first comprehensive labor relations law for public employees in New York State and was among the first in the country. The Taylor Law applies to the State of New York, its counties, cities, towns, villages, public authorities, school districts, and certain of its special service districts.

The Taylor Law:

- grants public employees the right to organize and negotiate collectively with their employers;
- gives public employees the right to be represented by employee organizations of their own choice;
- requires public employers to negotiate with their employees and enter into written agreements with public employee organizations representing specific negotiation units of workers;
- establishes impasse procedures for the resolution of deadlocks in negotiations;
- mandates binding arbitration of disputes in police and fire negotiations;
- prohibits as “improper practices” certain acts by employers and employee organizations;
- prohibits strikes by public employees; and
- establishes a neutral agency — the Public Employment Relations Board (PERB) to administer the law and “referee” public sector labor relations.

14.2 The Public Employment Relations Board

The Public Employment Relations Board (PERB) is an integral part of the Taylor Law’s philosophy of labor relations. This board was created to serve as an independent, neutral agency to administer the provisions of the Taylor Law and to promote cooperative relationships between public employers and their employees. To this end, PERB has the following functions and powers:

- administration of the Taylor Law statewide within a framework of policies set by the Legislature;
- adoption of rules and regulations;
- resolution of representation disputes;
- provision of conciliation service to assist contract negotiations;
- adjudication of improper practice charges;
- determination of culpability of employee organizations for striking and order of forfeiture of dues and agency shop fee check-off privileges as a penalty; and
- recommendation of changes in the Taylor Law.

Although the Taylor Law provides local governments with the option of handling their own public employment relations matters, few have chosen to do so. At one time, there were 34 local boards, but only five remain in existence. These local boards exercise most of the responsibilities of the state PERB, but have no jurisdiction over improper practice charges and do not perform research.

In New York City, the Office of Collective Bargaining (OCB) fulfills PERB functions. For several years, authority over improper practice cases in New York City resided with PERB, but in 1979 the Legislature returned this responsibility to OCB.

14.3 Elements in the Bargaining Process

14.3.1 The Negotiating Unit

A negotiating unit is a group of employees who are held by PERB to constitute a body appropriate for bargaining purposes, or who are voluntarily recognized as such by a public employer. All employees of the jurisdiction may be joined into a single unit for purposes of collective bargaining, or they may be divided into several separate units which negotiate independently. The latter is more common.

When the employer "recognizes" the unit, no legal proceedings are necessary to determine the unit's composition. However, when the employer does not recognize the unit, PERB must determine its appropriateness. The Taylor Law specifies that PERB must apply certain standards in determining negotiating units.

PERB also may exclude management/confidential personnel from negotiating units. Management personnel are employees who formulate policy, are directly involved in collective bargaining, or have a major role in administering a collective bargaining agreement or personnel administration. Confidential employees are those who assist or act in a confidential capacity to management personnel who are directly involved with labor relations, contract administration or personnel administration. Both the state and local governments that wish to exclude management/confidential personnel from existing negotiating units may apply to PERB for such exclusions. Negotiating units may also apply to PERB to have management/confidential positions reclassified as negotiating unit positions.

14.3.2 The Bargaining Agent

After the appropriate negotiating unit is defined by employer recognition or by PERB, employees in the unit may exercise the right to be represented by an employee organization of their choice. The chosen organization, once it is recognized or certified, is known as the "bargaining agent" and serves as the exclusive representative of all workers in the negotiating unit, whether or not they are members of the union.

Public employers may voluntarily recognize a particular employee organization as the bargaining agent for a specific negotiating unit. This action is called "recognition." If, however, the employer does not voluntarily recognize the employee organization, the union must petition PERB for certification, which designates the union as the exclusive bargaining agent for all employees in the negotiating unit for a fixed period of time.

PERB may conduct an election among the members of the negotiating unit to determine which bargaining agent should be certified. Employees face different choices in different elections: they may be asked to choose between competing employee organizations or between an organization and no bargaining agent. After an election, PERB certifies the winner as the bargaining agent. In most cases where only one union seeks bargaining agent status, an election is not held. Rather, PERB grants certification upon a showing by the employee organization that the majority of members in the negotiating unit have signed cards — generally dues check-off cards — indicating their support for the organization seeking certification.

Once certified, the union has the right to represent the employees in the bargaining unit without challenge by the employer or another organization until seven months before the expiration of the collective agreement between the union and the employer. One month earlier, a "window period" opens. During this period, petitions may be filed to change the negotiating unit.

Changes in the certification itself may also occur during the window period. For example, a challenging employee organization may launch a petition drive at this time to force an election against the incumbent bargaining agent. If the challenger demonstrates sufficient support (30 percent of the members of the unit), PERB will schedule an election giving employees a choice between the challenger, the incumbent bargaining agent, and no representative.

14.3.3 Contract Bargaining

Once the bargaining agent has been certified, the Taylor Law requires a public employer negotiate with the bargaining agent over the wages, hours, and other terms and conditions of employment for employees in the negotiating unit. The Taylor Law charges both employers and employee organizations to bargain in good faith. Generally, public employers should be aware that for them good faith means:

- bargaining with employee organizations at reasonable times and places;
- listening to and considering bargaining positions put forth by employee groups with respect to terms and conditions of employment; and
- working positively toward a settlement.

Good-faith bargaining does not require employers to agree to specific union proposals, either in whole or in part, nor does it require employers to make counter proposals to specific union demands. However, good faith does require that both parties negotiate with the intention of concluding an agreement.

14.3.4 Scope of Bargaining

The scope of negotiations — the actual subject matter that management and labor may negotiate at the bargaining table — is broad. As the New York State Court of Appeals noted in its landmark Huntington decision:

> "Under the Taylor Law, the obligation to bargain as to all terms and conditions of employment is a broad and unqualified one, and there is no reason why the mandatory provision of that act should be limited in any way except in cases where some other applicable statutory provision explicitly and definitively prohibits the public employer from making an agreement as to a term or condition of employment." [1]

PERB categorizes subjects of negotiations as mandatory, non-mandatory or prohibited.[2]

The parties must, upon demand, negotiate mandatory subjects of collective negotiations, and the employee bargaining agent and the employer must jointly reach a decision. Examples of mandatory subjects are:

- wages — all compensation paid to public employees;
- fringe benefits — sick and personal leave time, vacation time, and medical insurance;
- hours of work — the amount of time spent on the job;
- seniority — preference accorded employees on the basis of length of service;
- grievance procedure;
- subcontracting — a decision to let out to a private contractor services currently being performed by public employees; and
- impact on unit members of a reduction in work force.

[1] Board of Education of UFSD No. 3, Town of Huntington v. Associated Teachers of Huntington, 30 N.Y. 2d 122, 331 N.Y.S. 2d 17 (1972).

[2] The lists of mandatory, nonmandatory and prohibited subjects in this section are drawn from PERB case law and court decisions. PERB provides full summaries on request.

Non-mandatory — permissive — subjects of negotiation are those issues which are negotiable on a voluntary basis. These issues do not involve working conditions and are management prerogatives. A management prerogative is an act or a decision which relates directly to the authority of a public employer to establish government policy in accordance with its public mission. Examples of non-mandatory subjects of negotiation include:

- overall policies and mission of government;
- residency requirements for future employees;[3]
- employment qualifications; and
- filling of vacancies.

Non-mandatory subjects which have been voluntarily agreed upon and incorporated into a collective bargaining agreement are deemed converted into mandatory subjects of collective negotiations.[4]

Prohibited subjects may not be negotiated under any circumstances. As noted earlier, a public employer's obligation to bargain terms and conditions of employment is broad.

Prohibited subjects of negotiation are few, but include: retirement benefits, except the negotiation of improved retirement benefits among the options offered by the state, and subjects void as against public policy.

Local governments should recognize that they may be bound not only by the terms which are spelled out in their negotiated agreements but also by practices that have developed in the workplace over a period of years. These work conditions are called "past practices," and if they constitute terms and conditions of employment they generally may not be changed without negotiation.

14.3.5 Resolution of Bargaining Deadlocks

Strikes or lockouts are sometimes invoked to break bargaining deadlocks in the private sector. The Taylor Law, which prohibits strikes, prescribes several forms of third-party intervention to resolve bargaining deadlocks. The Taylor Law also allows negotiating parties to develop jointly their own procedures for breaking deadlocks. Either bargaining party, or PERB, may declare an impasse at anytime within 120 days before the date the contract expires. Table 14.1 [157] illustrates the sequence of the three different impasse procedures in the law.

Table 14.1: Steps to Resolve Bargaining Deadlock

Step	Police and Firefighters, New York City Transit and Miscellaneous other Public Safety Personnel	Educational Personnel	All Others
I	Impasse declared by PERB	Impasse declared by PERB	Impasse declared by PERB
II	Mediation	Mediation	Mediation
III	Binding arbitration	Fact finding	Fact finding
IV		Continued negotiations until agreement is reached	Legislative hearing
V			Legislative settlement

[3] Residency requirements for current employees are a mandatory subject of negotiations.
[4] City of Cohoes, 31 PERB 3020 (1998).

14.3.5.1 Mediation

A mediator, appointed by PERB, acts in a confidential capacity to each side. While acting as a buffer between the parties, the mediator attempts to revive the bargaining process. If the mediator effects an agreement, the result is the same as if the bargaining parties had successfully completed negotiations on their own.

14.3.5.2 Fact Finding

PERB may appoint a fact finder who: takes evidence; may hold hearings; receive data, briefs and other supporting information; and then makes public recommendations for a settlement. Only mandatory subjects of negotiations may be taken to fact finding, unless the parties agree mutually to do otherwise. PERB encourages fact finders to mediate after they issue their reports to help reconcile remaining differences.

14.3.5.3 Legislative Hearing and Settlement

One or both parties may reject the fact finder's recommendations. The legislative body may, after a hearing required by the law, "…take such action as it deems to be in the public interest, including the interest of the public employees involved." While the Taylor Law is silent with respect to the length of a legislatively imposed settlement, PERB has determined that one-year terms are appropriate. Legislatively imposed settlements are, in fact, extremely rare since the parties in most cases reach settlement through negotiations. A resolution imposed by the legislative body may not change the terms of an expired collective bargaining agreement without the union's consent. It may, without the union's consent, reimpose the terms of the expired agreement or impose new terms which do not change any of the terms of the expired agreement.

14.3.5.4 Board Meeting

In education disputes the Taylor Law provides that PERB may give the parties a chance to explain their positions on the fact finder's report at a meeting at which the legislative body (i.e., the school board) or its committee is present. However, PERB views the law to mean that there is no final resolution in educational unit disputes except through agreement between the bargaining parties. In cases where the fact finder's report does not result in agreement, PERB will make further mediation efforts at its discretion. This assistance is called "conciliation."

14.3.5.5 Binding Arbitration

In police, fire fighter and other miscellaneous disputes, a three-member tripartite panel chosen by the parties hold hearings and decide each issue by majority vote. Only mandatory subjects may be taken to binding arbitration. Issues may be returned to the parties for further negotiation. A panel's determination is final and binding on the employer and employees, subject to appropriate judicial review.

Strikes

The Taylor Law expressly prohibits "…any strike or other concerted stoppage of work or slowdown by public employees." In the event of a strike:

- PERB may order the suspension of the dues and agency shop fee check-off privileges of the employee organization upon its own finding that a strike has occurred;

- the employer may initiate disciplinary action against individual employees involved in the strike;
- the public employer is required to deduct two days' pay from each striking employee for each day (or part thereof) on strike. Employees must pay income taxes on the full amount of wages lost; and
- the public employer must seek a court injunction against the striking organization.

If an injunction is ignored, the court may impose fines against the organization and jail terms of up to 30 days against union leaders.

14.3.6 The Agreement

The Taylor Law requires that all negotiated contacts be in writing upon demand. When negotiations are concluded, PERB's role is limited to serving as a repository for the final agreement. A 1977 amendment of the Taylor Law excludes PERB from any role involving enforcement of a negotiated agreement. PERB's authority is limited to review of actions which constitute improper employer or employee practices.

14.4 Improper Practices

The orderly conduct of labor-management relations requires that all participants conform to mutually recognized and equitable standards in fulfilling their obligations under the law. As a result, the Taylor Law prohibits certain practices of management and labor, such as interference with the representation rights of employees or the orderly flow of collective negotiations.

14.4.1 Practices Prohibited

Employers:

- interference with, restraint or coercion of public employees in the exercise of their right to form, join or participate in, or to refrain from forming, joining or participating in, any employee organization, for the purpose of depriving the employees of such rights;
- domination of or interference with the formation or administration of any employee organization, for the purpose of depriving the employees of such rights;
- discrimination against any employee for the purpose of encouraging or discouraging membership in, or participation in, the activities of any employee organization;
- refusal to negotiate in good faith;
- refusal to continue any of the terms of an expired collective bargaining agreement until a new agreement is negotiated; and
- using state funds to discourage union organizing.

Activities Prohibited — Employee Organizations:

- interference with, restraint or coercion of public employees in the exercise of their right to form, join or participate in, or to refrain from forming, joining or participating in, any employee organization;

- causing, or attempting to cause, a public employer to interfere with these employee rights;
- refusal to negotiate in good faith; and
- breach of its duty to fairly represent all employees in the negotiating unit.

A party which believes that one of its rights has been violated may file an improper practice charge with PERB.

The Taylor Law gives PERB broad remedial authority in issues regarding a refusal to negotiate in good faith. For example, if PERB were to find that an employer has increased the hours of work without negotiation upon contract expiration, PERB might order restoration of the old work schedule and award compensation to affected employees. On some rare occasions, PERB has found that improper practices by employers were of such magnitude as to constitute a provocation of a subsequent strike. In these cases, PERB limited the length of time the bargaining agent lost its dues and agency shop fee check-off privileges.

The major purpose of the improper practice procedure is to establish and preserve rules of fair play in the conduct of labor-management relations.

14.5 Contract Administration

It has been said that management is no more than halfway through the labor relations job when a signed agreement is achieved. While negotiation is the more visible phase of collective bargaining, the real payoff is in day-to-day working relationships.[5]

The management task is far easier when contract terms are clear and unambiguous, but even then, certain responsibilities commonly arise in all contract situations. Management shares with union officials the duty to explain and interpret new contract provisions. In addition, government officials should always be available to meet with employee representatives to learn about changing employee attitudes and problems.

Since employee organizations are the chosen representatives of the employees, government officials should take care not to bypass union agents or undermine the union's authority.

Government officials should exercise care in the administration of a contract, because failure to do so may result in employee grievances. For this reason, larger jurisdictions often retain an employee relations staff to provide expert advice in contract administration.

14.5.1 Grievance Procedures

Grievance procedures provide a method for settling disputes that arise concerning the meaning or application of an existing collective bargaining agreement.

The United States Department of Labor has summarized the function of a "grievance procedure" as follows

> "The essence of a grievance procedure is to provide a means by which an employee, without jeopardizing his job, can express a complaint about his work or working conditions and obtain a fair hearing through progressively higher levels of management." [6]

[5] Dale Yader, et al., Handbook of Personnel Management and Labor Relations (New York: McGraw-Hill Book Co., Inc., 1958), p. 431.

[6] Collective Bargaining Agreements: Grievance Procedures (U.S. Department of Labor, Bureau of Labor Statistics Bulletin No. 142501, Washington, D.C., 1964), p. 1.

The requirement that public employers in New York State establish grievance procedures predates the Taylor Law. As early as 1962, the General Municipal Law required that all public employers with more than 100 employees provide a grievance procedure conforming to specified statutory standards. Under the Taylor Law, public employers must negotiate a grievance procedure with the recognized or certified bargaining agent.

Most grievance procedures culminate in binding arbitration. This type of arbitration is called "rights arbitration," because it involves resolution of a dispute as to an employee's rights under an existing collective bargaining agreement. It should be distinguished from "interest arbitration" for police and firefighters in New York State, which involves resolution of a dispute over the terms of a new collective agreement. Whether or not a grievance procedure culminates in binding arbitration is a subject of negotiation.

14.5.2 Union Security

Union security arrangements are devices to assure the financial support of employee organizations. Union security arrangements available under the Taylor Law are the right of exclusive representation and membership dues deduction. The Taylor Law entitles all recognized or certified bargaining agents to an automatic deduction of union dues from employees' wages once the agent obtains signed authorization cards. This helps an employee organization in two ways. First, it reduces dues collection expenses significantly. Second, it is easier and more likely for the organization to maintain a large membership because the organization does not have to rely on employees for periodic payment of dues. If an employee organization engages in an illegal work stoppage, PERB may withdraw the dues and agency shop fee check-off privilege for a period of time. However, individual employees may with draw their dues or agency shop fee authorization at any time.

The Taylor Law requires an employer to deduct an agency shop fee deduction from the salary or wages of employees in the unit who decide not to become a member of the union. An agency shop fee requires an employee who does not join a union that represents his bargaining unit to pay a service fee substantially equal to the dues of that union. The employee need not join the union. The principal rationale of the agency shop fee is that all employees should share the costs of representation incurred by the bargaining agent.

14.5.3 Retirement Systems

Among the fringe benefits of public employment are retirement benefits. These are long-term liabilities upon the employer, and they are also a major element of employee concern in labor management relations.

The New York State and Local Employees' Retirement System and the New York State and Local Police and Fire Retirement System serve as the administrators of the pension system for virtually all public employees, except teachers, outside of New York City.

Each jurisdiction participating in these systems was previously able to select from a broad spectrum of retirement plans. However, since 1976, members' benefits generally have been determined by the date the employee becomes a member of the retirement system.

The New York State Teachers' Retirement System covers academics in school districts throughout the state. New York City operates five retirement systems for the benefit of City employees.

The cost of a pension system depends on three variables: the number of employees covered by the plan; the salaries paid these employees; and the specific terms or benefits of the pension plan.

An increase in any of these factors has the effect of creating unfunded pension liabilities which must be amortized by an increase in the amount of money contributed to the pension system and/or increased earnings on invested assets.

While the effect of increasing the number of employees is fairly obvious, the latter two variables have a somewhat different effect. For changes in these it is necessary to increase payments to the pension system in order to compensate for past payments based on the lower previous salary rates or benefits, as well as for future payments. Thus, changes in salaries or pension benefits have a retroactive, as well as prospective effect on the costs of a pension system.

14.6 Summary

The practice of labor-management relations has matured since passage of the Taylor Law in 1967. The Taylor Law's primary purpose was to bring order to public sector labor relations under commonly understood rules of behavior. After a period of hesitancy and confusion this goal has, to a large extent, been achieved. New relationships have developed that previously would have been unimaginable. Future changes in labor-management relations are more likely to be incremental than fundamental.

Chapter 15

Public Services

Local governments provide services essential to daily living. Some services fulfill basic human needs for food, shelter and medical care. Others provide an attractive environment and opportunities for recreational and cultural activities. Since many public services are shared responsibilities among units of government, local officials need to understand the organization, structure and interplay of various government units to achieve better delivery of services.

15.1 State Agency Operations

State agencies are the operating arm of state government. By virtue of their many functions and services, state agencies often are in close contact with local governments. State agencies vary widely in terms of purpose, authority and nature of services. Some agencies, such as the Office of the State Comptroller and the Office of Real Property Tax Services, have functions so extensively related to basic local government operations that they are treated in detail elsewhere in this Handbook. Others, like the Health Department, play highly significant roles in determining how local governments provide certain services. Programs of some agencies, such as the departments of Education, Environmental Conservation, Health, and Motor Vehicles, often touch upon citizens as they go about their daily affairs. Services of these agencies involve or affect many individuals, have an enormous fiscal impact and involve the exercise of authority over local governments which deliver these services. Other agencies, such as the Departments of Labor and Transportation, affect the public directly by channeling funds for local, as well as for state or federal purposes.

Many agencies serve the public directly through the exercise of regulatory authority. The Department of Public Service, through the Public Service Commission, regulates utility rates, and has a role which is almost exclusively regulatory. Many agencies provide services directly to the public and to local governments. Under Article 6-B of the Executive Law, the Department of State is authorized to provide assistance to local governments, and much of this assistance is in the areas of coastal management, community development, economic opportunity, intermunicipal cooperation, labor relations, legal assistance, organization and management improvement, and basic planning and zoning training. Other agencies and departments are primarily service-oriented, and neither regulate local activities nor administer major grant programs. Among these are the Office of General Services and the Department of Financial Services. Such agencies provide help to local governments largely in the form of technical assistance, informational materials, training, inspection services and/or legal advice.

15.2 Social Service and Public Health Programs

15.2.1 Children and Family Services

The Office of Children and Family Services (OCFS) integrates services for children, youth and families, and vulnerable adult populations. OCFS promotes the development of its client population and works to protect them from violence, neglect, abuse and abandonment. OCFS regulates and inspects child care providers and administers funds to child care programs. It supervises and regulates protective services for adults; inspects, supervises and monitors foster care agencies; administers the State Adoption Service; and operates the Statewide Central Register of Child Abuse and Maltreatment (SCR).

The New York State Commission for the Blind (NYSCB) within OCFS administers services to legally blind citizens and assists eligible individuals with job training and placement. The agency also operates a residential care system consisting of five limited-secure facilities, four secure centers, two non-secure centers and one reception center. There are also 15 Community Multi-Services Offices (CMSO) statewide that are responsible for services to youth and families from the first day of placement. OCFS works closely with municipalities, local social services districts and county youth bureaus so that adequate youth development services and programs are available. A plan for youth development services is prepared through the county comprehensive planning process. The county departments of social services and New York City's Administration for Children Services (ACS) administer local foster care programs and child welfare services.

15.2.2 Programs for the Aged

The New York State Office for the Aging plans and coordinates programs and services for more than three million New Yorkers aged 60 and over. As a primary advocate for older New Yorkers, the Office is empowered to review and comment on state agencies' program policies and legislative proposals which may have a significant impact on the elderly. The Office identifies issues and concerns through its two advisory committees --- the Governor's Advisory Committee on Aging and the Aging Services Advisory Committee. In addition, the Office conducts public forums throughout the state.

The Office operates a statewide toll-free Senior Citizens Hot Line at 800-342-9871, which is staffed during normal business hours. Hot Line staff provides information, crisis intervention and problem solving assistance, and maintain current county-by-county resource files of services. Further information is made available through the Office's websites, its quarterly newsletter, and television programs which air on cable-access stations across the state.

The Office for the Aging cooperates with and assists local governments in developing and implementing local programs. With the exception of grants-in-aid the Office's programs are administered through the 59 local offices for the aging which serve the citizens of the state. Such programs include: the Community Services for the Elderly Program (CASE), which provides community-based, supportive services to frail, low-income elderly who need assistance to maintain their independence at home; the Expanded In-home Services for the Elderly Program (AESOP), managed by local offices for the aging, which is a uniform, statewide program of case management, non-medical in-home services, respite and ancillary services for the elderly who need long term care but are not eligible for Medicaid; the Supplemental Nutrition Assistance Program (SNAP), which provides home-delivered meals and other nutritional services to at-risk elderly; the Retired and Senior Volunteer Program (RSVP), which recruits and places older adults and retirees in volunteer positions tailored to their talents, skills and interests; the Foster Grandparent Program, which provides an opportunity for low-income people aged 60 and over to provide companionship and guidance to children with special or exceptional needs; and the grants-in-aid, through which funds are appropriated by the Legislature to the Office for contracts to public and private not-for-profit agencies to provide a range of locally-determined services for older New Yorkers.

The Office for the Aging also administers statewide plans under the federal Older Americans Act, including: Title III-B, which provides for advocacy, planning and coordination of services including transportation, information

and referral outreach, in-home and legal services to meet specific needs of the elderly; Title III-C-1, which provides for nutritious meals and other services to the elderly and their spouses of any age, in congregate settings; Title III-C-2, which provides for nutritious meals to the homebound elderly and their spouses of any age; and Title V, which provides for part-time employment, training and placement assistance for low-income individuals aged 55 and over.

15.2.3 Temporary and Disability Assistance

The State Office of Temporary and Disability Assistance (OTDA) promote personal self-sufficiency through the delivery of temporary assistance, disability assistance, and the collection of child support. OTDA is responsible for providing policy, technical and systems support to the state's 58 social services districts. OTDA provides economic assistance to aged and disabled persons who are unable to work and transitional support to public assistance recipients while they are working toward self-sufficiency. The Division for Disability Determinations evaluates the medical eligibility of disability claimants for the federal Supplemental Security Income (SSI) and Social Security Disability Insurance. The ODTA's programs include Family Assistance, Safety Net Assistance, Supplemental Security Income, Food Stamps, Home Energy Assistance (HEAP), Child Support Services, Housing Services, and Refugee and Immigration Services. The State has been divided into 57 county and one city (New York City) social services districts for purposes of providing public assistance and care. A Commissioner heads each of the local social services districts. This official has responsibility for administration of public assistance, medical assistance and social services, and must implement the policies and programs which the OTDA, Department of Health (DOH), OCFS, Department of Labor (DOL) and the federal government formulate. The Commissioner also supervises the expenditure of public funds allocated to his or her district.

15.2.4 Community Services Block Grants

Created in 1981 by the federal Omnibus Budget Reconciliation Act, this program was reauthorized by the "Community Opportunities Accountability, and Training and Educational Services Act of 1998" for the purpose of reducing poverty, revitalizing low-income communities, and empowering low income families and individuals in rural and urban areas to become fully self-sufficient. Federal funds are allocated to provide direct services, mobilize resources and organize community activities to assist low-income and poor individuals. Grantees provide comprehensive services to solve problems that block the achievement of self-sufficiency, helping to secure employment, attain an adequate education, maintain a suitable living environment, and meet emergency needs.

Most of the Community Services Block Grant (CSBG) funds allocated to New York are awarded as a statutory allocation to designated eligible entities, which include community action agencies (CAAs) serving every county in the state and organizations serving migrant and seasonal farm workers. Also funded are four Indian tribes and tribal organizations. At the state level, funds are set aside to be used by grantees in the event of a disaster and to provide professional development opportunities to the staff and board members of grantee agencies. Under state and federal law, one-third of the members of CAA boards of directors must be elected local officials. The local government/CAA partnership is strengthened by the direct appropriation of non-federal funds to assist in the delivery of comprehensive human services by CSBG grantees.

15.2.5 Public Health Programs

15.2.5.1 Shared Responsibilities

The State and local governments share responsibility for public health. As of 2007, two cities and 33 counties maintain full-time health agencies. In the absence of a local health department, the district office of the State Department of Health (DOH) provides appropriate services.

15.2.5.2 Regulatory Functions

DOH oversees and regulates all of New York's residential health facilities, adult homes, emergency medical services providers, managed-care organizations, hospitals, diagnostic and treatment centers (clinics), and home-care providers. DOH's Office of Health Systems Management ensures that providers render services in accordance with state and federal standards. The Office also reviews and certifies health-provider applications to construct, renovate, add or delete beds or services, and purchase major new equipment. Other regulatory activities relate to adequate water supply, the avoidance and/or elimination of environmental health problems and the control of sanitation in food establishments.

15.2.5.3 Direct Services

DOH works closely with local health and social services agencies to provide funding and assistance in a variety of direct services to families and individuals. These include communicable disease control, child health, nutrition, dental health and handicapped children's programs.

15.2.6 Mental Hygiene Programs

Scope of Programs: The State's mental hygiene programs are overseen by three autonomous agencies that together constitute the State Department of Mental Hygiene: the Office of Mental Health (OMH), the Office for People With Developmental Disabilities (OPWDD), and the Office of Alcoholism and Substance Abuse Services (OASAS). OMH provides special care and treatment to approximately 772,000 individuals per year through the direct provision of services in State-operated programs, and indirectly through the regulation and funding of voluntary-operated community-based services. OMH also performs research through two State-operated research institutes. OPWDD currently provides services to more than 136,000 individuals with intellectual and developmental disabilities. While some services are provided directly by the State, private not-for-profit agencies provide approximately eighty percent of the services for people with developmental disabilities. This service system has evolved from one which was institutionally-based to one which is now community-based with an emphasis on person-centered approaches. OPWDD also performs research through a State-operated research institute. All services are certified and regulated by OPWDD. OASAS oversees one of the largest chemical dependence service systems in the nation, which includes a full array of services to address prevention, treatment, and recovery. OASAS is also responsible for the prevention and treatment of problem gambling. During 2015, the OASAS chemical dependence treatment system served approximately 234,000 individuals through crisis, inpatient, residential, outpatient, and opioid treatment programs. These individuals were served in 12 State-operated programs and over 900 OASAS-certified community-based programs. Approximately 336,000 youth received a direct prevention service during the 2015-16 school year.

15.2.7 The Local Role

The Mental Hygiene Law (Section 41.13) requires local governments - specifically, counties and the City of New York - "to direct and administer the development of a local comprehensive plan for all [mental hygiene] services," which must be submitted to the respective mental hygiene agencies on an annual basis. These local plans consequently inform the respective State mental hygiene agencies' statewide comprehensive plans, pursuant to Section 5.07 of NYS Mental Hygiene Law.

15.2.8 Alcoholism and Substance Abuse Programs

The Office of Alcoholism and Substance Abuse Services (OASAS) is responsible for licensing and evaluating service providers, and for advocating and implementing policies and programs for the prevention, early intervention,

and treatment of alcoholism and substance abuse. In cooperation with local governments, service providers and communities, OASAS works to ensure that a full range of necessary and cost-effective services are provided for addicted persons and those at risk of addiction.

15.2.8.1 The Federal Role

Federal funding is provided to the State under the Substance Abuse Prevention and Treatment (SAPT) Block Grant. Block grant funds are made available to localities in accordance with OASAS funding policies and procedures.

15.2.9 The State Role

OASAS directly operates 13 Addiction Treatment Centers, which provide inpatient rehabilitation serves to approximately 7,000 patients annually. It also licenses, regulates and funds over 1, 200 private, non-profit, local government and school district prevention and treatment service providers.

15.2.10 The Local Role

Local Governmental Units (LGU) are responsible for assessing local needs and developing necessary resources. Service providers, counties, and the City of New York, develop Local Services Plans, which form the basis for the Office's Comprehensive Five-Year Plan.

15.3 Community Development

15.3.1 Affordable Housing

15.3.1.1 Housing and Community Renewal====

The Division of Housing and Community Renewal's (DHCR) mission is to make New York a better place to live by supporting community efforts to preserve and expand affordable housing, home ownership and economic opportunities, and by providing equal access to safe, decent and affordable housing. The DHCR is responsible for the supervision, maintenance and development of affordable low and moderate-income housing. The Division performs a number of activities in fulfillment of this mission, including: oversight regulation of the state's public and publicly-assisted rental housing; administration of housing development and community preservation programs, including state and federal grants and loans to housing developers to partially finance construction or renovation of affordable housing; and administration of the rent regulation process for more than one million rent-regulated apartments in New York City and in those localities in the counties of Albany, Erie, Nassau, Rockland, Schenectady, Rensselaer and Westchester subject to rent laws.

15.3.1.2 Housing Finance Agency

The New York State Housing Finance Agency (HFA) was created as a public benefit corporation in 1960, under Article III of the Private Housing Finance Law, to finance low-income housing by raising funds through the issuance of municipal securities and the making of mortgage loans to eligible borrowers. In recent years, HFA has also financed federally subsidized low-income housing developments. The Agency's employees are specialists in real estate finance and law, capital market financing, asset management, construction and program development. Together, they encourage and assist in the creation of affordable housing to meet the needs of the state's residents.

Housing Trust Fund Chapter 67 of the Laws of 1985 created the Housing Trust Fund Corporation (HTFC), a public benefit corporation which administers the Low-Income Housing Trust Fund Program (HTF). The Housing Trust Fund Program was established under Article XVIII of the Private Housing Finance Law to help meet the critical need for decent, opportunities for low-income people. HTF provides funding to eligible applicants to construct low-income housing, to rehabilitate vacant or underutilized residential property, or to convert vacant non-residential property to residential use for occupancy by low-income homesteaders, tenants, tenant-cooperators or condominium owners.

15.3.1.3 Affordable Mortgages

The State of New York Mortgage Agency (SONYMA) is a public benefit corporation created by statute in 1970. The purpose of SONYMA is to make mortgages available to low and moderate income first-time buyers and to other qualifying home buyers. Under its various programs, SONYMA purchases new mortgages from participating lenders across the state. Funds for SONYMA's low interest mortgages are derived primarily from the sale of tax-exempt bonds although some funding has come from the sale of taxable bonds. Since its inception through October 31, 1998, SONYMA has issued approximately $9.7 billion in mortgages.

15.3.1.4 Municipal Housing

Through a special act of the State Legislature, any city, village or town may create a housing authority. As of the end of the 1998 session, 186 municipal housing authorities had been created. A municipal housing authority has the power to investigate living conditions in the municipality and determine where unsanitary or substandard housing conditions exist. The authority may construct, improve or repair dwelling units for persons of low income. In addition, an authority can construct and revitalize stores, offices and recreational facilities in a depressed neighborhood. A municipal authority may undertake projects with funds obtained solely from the sale of its bonds to private individuals, firms or corporations, provided that the municipality approves the project. Authorities may also receive assistance from the state and federal government.

15.3.2 Appalachian Regional Development

The Appalachian Regional Development program, administered at the federal level by the Appalachian Regional Commission (ARC) and in New York by the New York State Department of State, is a joint federal/state/local program which seeks to improve the economy and quality of life in a region covering parts of 13 states. In New York, 14 counties are eligible for assistance: Allegany, Broome, Cattaraugus, Chautauqua, Chemung, Chenango, Cortland, Delaware, Otsego, Schoharie, Schuyler, Steuben, Tioga and Tompkins. The Department of State prepares an annual State Strategy Statement which guides the Appalachian Regional Investment package for submission by the Governor to ARC. This package includes local and regional projects in any of the five Strategic Goal areas: (1) skills and knowledge—which includes projects for basic skills, educational excellence, child care programs and telecommunications; (2) physical infrastructure; (3) community capacity—which includes leadership and local assistance demonstration projects; (4) dynamic local economies—which includes business development and assistance projects focusing on local development, and recapitalization of existing regional revolving loan funds; and (5) health care projects—which includes telemedicine and rural health projects.

15.3.3 The Arts

Established in 1960, the New York State Council on the Arts is a funding agency that provides support towards the activities of nonprofit organizations in the state and helps to bring artistic performances and high quality programs

to the state's residents. The Council invites nonprofit organizations that meet eligibility requirements to apply for local assistance funds to provide cultural services to the people through Cultural Services contracts. These services cover a broad range of activities. The State and Local Partnership Program (SLP) fosters the growth and development of the arts and culture at the local level. SLP primarily supports multi-arts organizations that are committed to the long-term cultural development of their communities or regions. Financial support is currently available in 16 program areas including architecture, planning and design, arts in education, capital projects, dance electronic media and film, folk arts, literature, museum, music, theater and visual arts, and state and local partnerships.

15.3.4 Business Development

The State Department of Economic Development/ Empire State Development (ESD) Corporation is dedicated to creating jobs and encouraging prosperity by strengthening and supporting businesses in New York. The agency maintains regional and international offices to provide one-stop access to the state's products and services for business. It also provides direct services ranging from financial incentives for joint ventures to technical expertise in site selection and development. The agency works in partnership with local governments and regional organizations which desire to attract business.

ESD assists local governments in establishing industrial development agencies. As the State's primary agency in the development of tourism, ESD works with counties and their designees to administer a tourism matching fund program. State funds appropriated for this program by the Legislature are apportioned to support local and regional tourism advertising according to guidelines set by state law.

State-local efforts to help distressed communities achieve economic growth have been intensified under the New York State Economic Development Zones Act, Chapter 686 of the Laws of 1986. Empire State Development administers this program in cooperation with other agencies and participating counties, cities, towns and villages. Nineteen such zones may be designated over the first three years of the program by the State Zone Designation Board, and provided with special incentives to spur economic growth. The incentives offered include assistance with financing and business permits, as well as various tax and local incentives.

15.3.5 Campus and Institutional Housing

The State Dormitory Authority is a public corporation established in 1944 to finance and construct dormitories for state teachers' colleges. Its functions have since been expanded to include design, financing and construction project management services for a wide range of higher education, healthcare and public-purpose facilities. The authority serves the State University of New York; the City University of New York; independent colleges and universities; community colleges; special education schools; court facilities for cities and counties; facilities for the State Departments of Health and Education and for the Offices of Mental Health, Mental Retardation and Developmental Disabilities, and Alcoholism and Substance Abuse Services; the New York City Health and Hospitals Corporation; long-term health care facilities; independent hospitals, primary care facilities, diagnostic and treatment centers, medical research centers; and public-purpose institutions authorized by statute. The Authority is also authorized to provide tax-exempt equipment leasing.

15.3.6 Office of Planning and Development

Administered by the Department of State with federal and state funding, this program guides and coordinates local, state and federal development and preservation decisions for the state's 3,200 miles of coastline. Specific guidance is provided by the program's coastal policies addressing a variety of concerns and issues. Funding through the Environmental Protection Fund and technical assistance are offered to help coastal municipalities

prepare and implement Local Waterfront Revitalization Programs (LWRP). Through local programs, municipalities may refine and supplement state coastal policies to reflect local conditions and needs. Chapter 366 of the Laws of 1986 extended the LWRP concept to inland waterways in the state, including the Barge Canal System and major lakes and rivers.

15.3.7 Community Development Block Grants

The Federal Community Development Act of 1974, as amended, established the Community Development Block Grant (CDBG) Program. The program provides annual grants on a formula basis to eligible metropolitan cities, towns with populations of at least 50, 000, and urban counties. Program funds may be used for housing activities, economic development, public facilities (such as day care centers or health centers), public improvements (such as street improvements), public services (such as social programs for the elderly, youth or abused persons), and planning and administration. Funds must primarily benefit low and moderate-income persons, although grantees may also fund activities which aid in the prevention or elimination of slums or blight or address an urgent community development need.

The U.S. Department of Housing and Urban Development (HUD) also awards annual grants to 48 states and the Commonwealth of Puerto Rico, which in turn award and administer grants to small cities and counties not covered by the regular CDBG eligibility standards. The Department's Buffalo office awards non-entitlement grants annually to small cities and counties in New York.

15.3.8 Parks, Recreation and Historic Preservation

New Yorkers enjoy a rich heritage of parks and historic and cultural resources that contribute to the quality of their communities. Responsibility for developing and carrying through statewide plans for the use of recreational and historical assets rests with the Office of Parks, Recreation and Historic Preservation (OPRHP). OPRHP coordinates state and federal aid for parks, recreation and historic preservation programs. It serves as the state's liaison with the federal government for matters relating to preservation provisions of the Federal Tax Reform Act of 1976 and the National Historic Preservation Act. OPRHP administers three major pass programs allowing discounts in the use of state park and recreational facilities. In cooperation with local education systems, OPRHP operates outdoor learning programs at parks in most regions. It also administers state planning efforts for the Urban Cultural Park Program and sponsors various athletic programs including: the Empire State Games, the Games for the Physically Challenged, and the Senior Games. In addition, OPRHP administers the State Navigation Law and conducts the Marine and Recreational Vehicles program. This effort includes the Law Enforcement Subsidy, the Safety and Education programs and the Marine Services Program. These provide local law enforcement agencies with assistance in the education and training of youths regarding boat and snowmobile safety, in public facilities inspection and in the placement of buoys in the state's inland waterways.

Regional park, recreation and historic preservation commissions advise the OPRHP Commissioner on the promulgation of rules and regulations for park regions to ensure they are consistent with state policies and regulations. The State Council of Parks, Recreation and Historic Preservation aids the Commissioner by reviewing and making recommendations on policy, budget and state aid plans. The Council serves as the central advisory board on all matters affecting parks, recreation and historic preservation. The State Board of Historic Preservation advises the Commissioner and the Council on policy matters affecting historic preservation and the historic sites system and on priorities among historic preservation opportunities. The Board also reviews and makes recommendations to the Commissioner on the nomination of properties to the National or State Registers. At the local level counties, cities, towns and villages have concurrent powers to establish and maintain parks. They may acquire and dedicate land for park and recreational purposes and can utilize zoning powers to plan and set aside land for park purposes to meet the needs of local residents.

15.3.9 Weatherization Assistance

This federally-funded program, administered in New York by DHCR, funds the installation of energy conservation measures to reduce the energy costs of low-income families and individuals. It has been credited with significantly reducing energy costs and increasing the health and comfort of low-income participants. Funding is provided by the U.S. Department of Energy and the U.S. Department of Health and Human Services. Under the Program, DHCR funds local sub-grantees under contract to perform the work. These local sub-grantees, which deliver services on a statewide basis, include community action agencies, community-based organizations, counties, and Indian tribal organizations. Since the program commenced in 1977, over 385,000 dwelling units in the state have been weatherized.

15.4 Public Safety

Protection of life and property is one of the oldest functions of local government. In New York State most of the early municipal incorporations were little more than efforts to provide fire and/or police services to built-up areas. Today, public safety represents the third largest expense of local government. Only education and social services command a larger share of the local dollar.

15.4.1 Correctional Programs

Four state entities share with local governments certain responsibilities for caring for offenders and restoring them to society.

The Department of Correctional Services (DOC) is primarily responsible for the institutional care and confinement of 72, 000 felons housed in 69 correctional facilities across New York State. Its 32, 500 employees provide for the safety and security of the system. DOC's also interacts with communities, sending supervised work crews out into the community for nearly two million hours each to perform public service projects for governments and not-for-profit organizations. Staff is responsible for the operation of an array of academic, vocational, drug treatment and work programs designed to provide all offenders with the basic skills they will need to function as responsible and law-abiding citizens upon their release from custody. The Department also operates a 900-bed drug treatment campus that serves parole violators as well as felons newly-sentenced by the courts to a drug treatment program.

The State Commission of Correction is charged with general oversight responsibility for all prisons, jails and lock-ups throughout the state. This mandate is aimed at improving the administration of correctional facilities, and the conditions which affect the lives and safety of inmates and staff. The Commission consists of three members appointed by the Governor. One member serves as Chairperson, while each of the others serves, respectively, as Chairperson of the Medical Review Board and Chairperson of the Citizens' Policy and Complaint Review Council. The Commission establishes minimum standards for care, custody, treatment, and supervision of all persons confined in State and local correctional facilities. It inspects facilities to ensure adherence to these standards and handles grievances filed with respect to those standards. The Commission's Medical Review Board investigates and issues a report on all in-custody deaths.

The Division of Probation and Correctional Alternatives (DPCA) exercises general supervision over the administration of local probation agencies and in the use of correctional alternative programs. The DPCA promotes and facilitates probation and other community corrections programs through funding and oversight. It administers a program of state aid funding for approved local probation services and for municipalities and private non-profit agencies which have approved alternative-to incarceration service plans that enable localities to maintain inmates in local correctional facilities more efficiently. It also funds designated demonstration and other specialized programs.

The State Director of Probation also adopts rules concerning methods and procedure used in the administration of local probation services, and develops standards for the operation of alternative-to incarceration programs. The State Director also serves as the Chair of the State Probation Commission. The Commission members, appointed by the Governor, provide advice and consultation to the State Director on all matters relating to probation. The State Board of Parole, an administrative body within the Division of Parole, is responsible for the release of certain prisoners in State correctional institutions. The Division is responsible for community protection and offender risk control through the administration of parole services.

15.4.2 Criminal Justice

The Division of Criminal Justice Services (DCJS) seeks to increase the effectiveness and vitality of the criminal justice system in New York State. It's Identification and Criminal History Operation, a data bank of criminal records, gives even the smallest department's access to a massive record system. Through DCJS, local police may also obtain criminal information from the Federal Bureau of Investigation. The Division's Bureau for Municipal Police advises all municipal police agencies in the state.

15.4.3 Emergency Medical Services

Both the public and private sectors provide pre-hospital emergency medical services. In some cities, a single commercial ambulance service provides paramedic-level services. In other cities, the fire department provides paramedic services while commercial ambulance service provides basic life support and transportation services. In small communities and suburban and rural areas, voluntary ambulance services predominate. These voluntary services are under the auspices of fire departments or districts, independent squads or (in a few cases) hospitals. Voluntary services are sometimes supported by fire or special improvement district taxes, but more often rely upon donations from the public and/or fees under contract from local governments. All commercial as well as volunteer ambulance services must now be certified by the State Health Department. To receive certification, ambulance services must meet specific training and equipment requirements and quality assurance mandates.

15.4.4 Fire Protection

Firefighting service in New York State is provided through a variety of municipal and intermunicipal arrangements. About 19,000 full-time career firefighters and over 110,000 volunteer firefighters work in more than 1,800 fire protection/prevention organizations (federal, state, and local) across the state.

In cities and villages, firefighting is commonly provided by a municipal fire department, composed either of career or volunteer firefighters or a combination of the two. In larger communities that utilize volunteers, the local department generally contains several independent fire companies. Each has its own officers, buildings and apparatus. The fire chief is usually appointed by the local chief executive upon nomination by members of the fire company. In instances where a village maintains no fire department, it contracts with a neighboring community or fire district for fire protection services.

Unlike villages and cities, towns are not legally empowered to provide direct firefighting services. Generally, town boards create one or more fire districts or fire protection districts to cover all or part of a town. A few areas have no fire service protection. These arrangements are more fully described in Chapter 7 [69] and Chapter 9 [91]. Although towns do not directly provide firefighting services, they do provide valuable fire protection services. Many larger towns have a fire prevention and inspection staff. Others, particularly those with a large number of fire districts or fire protection districts, provide central dispatching and training facilities.

15.4.4.1 County Role

Counties, guided by their Fire Advisory Boards, provide valuable services for fire protection, including the maintenance of specialized firefighting equipment for departments within their jurisdiction. Most counties have a fire coordinator, who is a key link between state and local activities. Appointed by the county's legislative body under section 225-a, of the County Law, the coordinator has the responsibility of coordinating mutual aid responses by fire departments within the county and of administering education and training programs. To improve fire department response efficiency, many coordinators have developed countywide radio communication systems.

15.4.4.2 State Role

The State does not generally provide fire services directly to the public except at certain State-owned institutions and, in the case of forest fires, where the Division of Forest Protection and Fire Management in the Department of Environmental Conservation coordinates responsibility for fire protection. The State does, however, provide technical assistance to municipalities in arson investigation and hazardous materials control. Otherwise, the State provides direct support to local fire service units through its command function in activating the State Fire Mobilization and Mutual Aid Plan to cope with major disasters. The plan is administered through the Office of Fire Prevention and Control (OFPC) in the Division of Homeland Security and Emergency Services.

Through OFPC, headed by the State Fire Administrator, the State provides training and specialized services to deal with arson and other fire protection issues at all levels of state and local government. The Office makes training available top aid and volunteer firefighters, other government officials, and emergency response personnel, on an in-residence basis at its State Academy of Fire Science in Montour Falls and at the Academy's Camp Smith Annex in Peekskill, as well as on a commuter basis at remote locations across the state.

15.4.4.3 Fire Boards and Commissions

The Fire Safety Advisory Board, a 12-member unpaid body appointed by the Governor, assists the Secretary of State and State Fire Administrator in all aspects of fire protection and legislation. A 15-member Arson Board has been established to advise and assist the Secretary of State and State Fire Administrator on arson problems. The New York State Emergency Services Revolving Loan Board reviews and makes recommendations to the Secretary of State for low-interest loans to municipalities and fire districts that meet specific criteria.

The Fire Fighting and Code Enforcement Personnel Standards and Education Commission recommend training standards to the Governor which establishes minimum qualifications for firefighters and code enforcement personnel. The Commission consists of the Secretary of State, State Fire Administrator, and five members appointed by the Governor with the consent of the Senate.

15.4.4.4 Building Code Administration and Enforcement

The New York State Uniform Fire Prevention and Building Code (Uniform Code), which became effective January 1, 1984, superseded all existing local fire and building codes except in New York City, which has its own code in effect. Municipalities may, however, adopt and enforce more stringent local provisions with State approval.

Except in a minority of localities, administration and enforcement of the Uniform Code are carried out directly by local governments through local laws, and in accordance with minimum standards promulgated by the Secretary of State. Those municipalities must enforce the Code through locally-appointed officers, although support services may be (and often are) contracted out to private organizations. Some municipalities have entered into cooperative agreements under Article 5-G of the General Municipal Law. Such a pooling of resources has been attractive in rural areas. A municipality or a county may choose not to enforce the Uniform Code by enacting a

local law providing that it will “opt out” of enforcement. Responsibility for enforcement is then automatically transferred to the county, or, where the county has “opted out”, to the State.

The Department of State’s Division of Code Enforcement and Administration is charged with administration of the Uniform Code to local governments, state agencies, and the public. Effective July 13, 1996, additional responsibilities were transferred to the Department of State from the Division of Housing and Community Renewal, including interpretation of the Uniform Code, providing staff to the Code Council, a HUD sponsored mobile home oversight and complaint program, approval of modular home construction plans and a third party plant inspection program, issuance of Certificates of Acceptability for construction materials, methods and devices, and other associated functions. Effective January 1, 1999, the Department assumed responsibility for the State Energy Conservation Construction Code.

The Department has eleven regional field service offices providing technical assistance and coordinating variance requests with local government officials. Through its regional field service offices, the Department of State conducts reviews of local code enforcement programs and administers a complaint resolution program. The regional field service offices employ State code enforcement officers in municipalities or counties where the State has code enforcement responsibility. Municipalities and counties may regain their local enforcement authority by repealing their opt-out enactment. The Secretary of State is also empowered to investigate local administration and enforcement of the code and take remedial actions as warranted.

Responsibility for formulating and amending the Uniform Code rests with the State Fire Prevention and Building Code Council, a 17-member body chaired by the Secretary of State, and composed of the State Fire Administrator, Commissioner of Health, Commissioner of Labor and 13 members appointed by the Governor (seven with the consent of the Senate).

The Department of State’s Educational Services Unit provides a statewide code enforcement training program, having as its priority the basic training and continuing education of code enforcement officers. The Department’s services are available to elected and appointed officials, the general public, contractors, architects, engineers, and manufacturers.

15.4.5 Emergency Management

An integrated emergency management system is the legal responsibility of the State and local governments, pursuant to Article 2-B of the Executive law and the New York State Defense Emergency Act.

The State Role The State Disaster Preparedness Commission, through the New York State Emergency Management Office (SEMO), is responsible for coordinating and implementing emergency management programs, financial assistance and work plans at the state and local levels of government. This includes provision for hazard identification and analysis, coordination and conduct of emergency and disaster management training programs, comprehensive emergency management planning, and statewide communications and warning systems.

The Local Role The responsibility for disaster preparedness rests with the chief executive of each county, city, town and village. Every county and city should develop comprehensive emergency management plans. In the event of a disaster or emergency, the local chief executive may declare a local state of emergency, which permits the use of wide-ranging emergency powers as long as the procedures governing their declaration are followed. A local chief executive may also request that the Governor declare a state disaster emergency, which would result in implementation of the State Comprehensive Emergency Management Plan to support county response and recovery operations. Before such a request is made, all county resources must be fully involved with the disaster and considered insufficient to cope with it. Cities, towns and villages should first request aid from their counties before approaching the State.

15.4.6 Police Services

Over 400 separate county, city, town and village police agencies share responsibility for the enforcement of state and local laws in New York. These range in size from New York City's Department, with over 37,000 sworn officers, to 11 agencies with only one or two part-time police officers. Communities in New York State employ over 55,000 full-time and over 1,800 part-time municipal police personnel at a cost of almost five billion dollars annually.

State Police The New York State Police was established by Executive Law on April 11, 1917. Its goal at that time was, and continues to be, to provide effective, cost-efficient police service to the people of New York State. Its members strive to preserve peace, enforce laws, protect life and property, detect and protect against crime and arrest violators.

For the purpose of administration, the state is divided into eleven geographical areas (Troops), each of which is further divided into zones, stations and satellite offices. Special detail offices are located in many cities. The Uniform Trooper is the field officer who most frequently comes into direct contact with the citizens. State Troopers work closely with the Division's Bureau of Criminal Investigation (BCI) as well as other state, county, local and federal law enforcement agencies. A number of specialized support groups also operate within the State Police. In many areas, State Police have the primary responsibility for law enforcement, as many municipalities have only small or no police forces. Even communities with a full-time police agency must frequently call upon the BCI to provide investigative and technical expertise which is lacking in many small departments. The State Police Laboratory often provides its services to larger departments.

15.5 Environmental Protection

15.5.1 Conservation Councils,Commissions and Boards

Volunteer environmental management councils (EMCs) support county governments through environmental analysis at the state level. Volunteer citizen advisory commissions (CACs) perform a similar function at the town, village and municipal level. The New York State Conservation Fund Advisory Board (CFAB), makes recommendations to state agencies on state government plans, policies, and programs that specifically affect fish and wildlife.

15.5.2 Flood Control, Water Resources and Wastewater Programs

DEC assists localities with their efforts to mitigate flooding, helps obtain funds for flood-control measures, coordinates the National Flood Insurance Program, and works with SEMO to assist communities in preparing for flood emergencies. DEC also helps local governments develop small projects for watershed protection, and assists them in planning and implementing strategies for protecting, developing and using local water. DEC issues general wastewater and storm water permits and, with partners, identifies funding sources for sustainable wastewater infrastructure programs. DEC also enforces standards for sewage treatment, and tests and certifies operators for municipal wastewater treatment plants.

15.5.3 Environmental Facilities

The Environmental Facilities Corporation (EFC) is a public benefit corporation that promotes environmental quality by providing low-cost capital and expert technical assistance to municipalities, businesses and state agencies for environmental projects throughout New York State. Its purpose is to help public and private entities comply with federal and state environmental requirements.

EFC oversees several major programs designed to promote environmental quality at an affordable cost. The EFC currently has two Revolving Loan Funds. The Clean Water State Revolving Loan Fund is used to make low-interest loans to municipalities to help pay for water pollution control facilities, such as wastewater treatment plants, and for water quality remediation measures associated with landfill closures. The Drinking Water State Revolving Loan Fund is operated jointly by the EFC and the Department of Health to provide low-interest loans to public and private water systems to undertake needed drinking water infrastructure improvements. Grants are available for drinking water projects in communities facing financial hardship.

The Technical Advisory Services program helps business and government understand and comply with state environmental requirements, and provides services for protecting the New York City Watershed and helping small businesses comply with air pollution standards. The Industrial Finance Program provides low-cost loans to private entities seeking to borrow for capital facilities that deal with solid waste, sewage treatment, drinking water, limited hazardous waste disposal and site remediation. The Financial Assistance to Business program helps businesses comply with air and water quality environmental regulations and provides grants to small businesses for specific pollution control or prevention projects.

15.5.4 Forest Resources

15.5.5 Programs

DEC gathers, analyzes and reports on tree pest and disease information for private and public forest landowners and managers. It places the highest priority on early detection and rapid response to high-impact invasive species that threaten forests. For private forest management, DEC foresters provide expert advice and technical assistance on managing timber products, improving wildlife habitat, controlling erosion, planting trees, enhancing recreation and managing sugar bushes.

15.5.6 Air Resources Programs

DEC's Division of Air Resources (DAR) works to improve and maintain air quality throughout New York. It collaborates with academic institutions on various air pollution research projects, and is actively involved with national and regional air pollution/air quality management associations.

15.5.7 Marine Resources Programs

Both salt and freshwater estuaries and ocean coastal waters, where marine species live, feed and reproduce, are managed by DEC's Division of Marine Resources (DMR) and Hudson River Estuary Program (HREP). Other state, local and federal agencies, the scientific community, and private citizens work cooperatively with DEC in managing New York's Marine District.

15.5.8 Plant and Animal Protection

Among DEC's main responsibilities is to manage and protect New York State's wild animal and plant populations. To do this, DEC conserves crucial habitats and establishes and enforces regulations and policies to support plants and animals.

15.5.9 Climate Smart Communities Program

DEC's Office of Climate Change (OCC) was created to build a climate resilient future for the state by working to reduce atmospheric greenhouse gases (GHGs) and developing market-based solutions to climate-change. OCC works with local governments through its Climate Smart Communities Program, a network of New York State communities engaged in reducing GHG emissions, improving climate resilience, and adapting to changing climate.

15.5.10 Oil and Chemical Spill Response Program

About 16,000 oil and chemical spills are reported to DEC annually and about 90 percent involve petroleum products. Before staff from DEC's Spill Response Program take action, they assess spill content, potential environmental damage, and any threats to public safety.

15.5.11 SEQRA Assistance Services

New York's Environmental Quality Review Act (SEQRA) requires all state and local government agencies to assess environmental impacts equally with social and economic factors during discretionary decision-making on proposed activities and projects. DEC is charged with issuing regulations regarding the SEQR process, and may provide technical assistance when needed.

15.5.12 Waste Management and Recycling Program

DEC provides technical and regulatory assistance to communities regarding waste management. In addition, the agency uses inspections to assess the operational compliance of solid waste management facilities (SWMF). DEC's Hazardous Waste Management Program helps prevent and manage the generation of industrial hazardous wastes. DEC issues permits, conducts inspections, signs consent orders, and gathers and processes data. DEC administers state assistance grants for waste reduction, recycling and household hazardous waste (HHW) programs. Funding is provided on a 50% reimbursement rate for eligible costs.

15.5.13 Water and Wastewater Services

Water and sewerage services have long been available in urbanized areas and are also available in many suburban areas. The extension of these facilities has a major impact on the extent direction of development.

Localities utilize several kinds of organizational mechanisms to provide sewage and water services. The most prevalent are the municipal water or sewer departments in cities and villages and the water or sewer districts in towns. Most cities and many villages have developed their own sources of water supply and have constructed sewage treatment plants. While some town districts have developed these capital facilities, many purchase the services from adjoining localities. Town districts frequently purchase water or sewage treatment services as a part of a growing regionalization of water and sewage services. In the sewage area, state and federal grant requirements often dictate intermunicipal action. County sewer districts frequently provide major capital facilities for a multi-municipal sewage treatment project. These county districts and other intermunicipal arrangements allow the use of sophisticated techniques, often at considerably lower unit costs than a number of smaller, independent facilities could obtain.

In addition to county districts, local governments have occasionally established authorities to provide water or sewage service over a wide area. An example is the Monroe County Water Authority, which serves a large area around the city of Rochester.

In some areas the private sector plays a large role in the delivery of water and sewage service. Even in an urban area such as New York City, the Borough of Queens is served by a private water company. In a number of suburban developments, the developer often creates small water or sewage companies. Towns or villages control the rates private companies charge for sewage service. The State Public Service Commission regulates the price private water firms charge for their services.

The State plays a role in the regulation of municipal water and sewer agencies. The Department of Health enforces water supply standards and the Department of Environmental Conservation enforces sewage treatment standards. Both departments, through their use of aid programs, strongly encourage an intermunicipal approach to water and sewage services.

15.6 Transportation

15.6.1 Aviation

Many counties, cities, towns and villages in New York State own and operate airports that provide a variety of air services to their communities. The Department of Transportation (DOT) coordinates the state's overall aviation improvement program with local communities. In addition to providing state funds for capital improvements for local airports and aviation facilities, DOT provides guidance and assistance to local communities in obtaining federal aid for airport improvements.

15.6.2 Mass Transit

DOT is concerned with the provision of local, regional and intercity public transportation at reasonable cost, while conserving energy and attending to the needs of such groups as commuters, the elderly, young people, the needy and the disabled. DOT's role in local public mass transit activities encompasses short-range mass transit planning, as well as the provision of state aid for capital and operating costs to local governments and other entities operating local transit service.

15.6.3 Railroads

DOT has general statutory authority over all railroads, except the Metropolitan Transportation Authority. The DOT Commissioner is empowered to examine railroad facilities and operations and to order compliance with the Railroad Law. The Railroad Law allows municipalities which have jurisdiction over a highway to petition the DOT Commissioner for the replacement or reconstruction of an existing bridge that separates a non-state public highway and a railroad. If DOT determines that the bridge should be replaced or reconstructed, plans are developed and a contract prepared, with costs shared on a percentage basis. The Transportation Law permits the governing body of any municipality in which a highway-railroad at-grade crossing is located to petition the DOT Commissioner to institute procedures for the elimination of the crossing at grade. If DOT determines that the crossing should be eliminated, plans are prepared and a contract is let, with the State bearing all costs. Localities may apply to DOT for funding from the federal Active Grade Crossing Improvement Program. This program identifies projects for grade-crossing safety improvements, including the installation of flashing lights, protective gates and smoother, more reliable crossing surfaces. Since 1974 over 500 grade-crossing sites in need of improvement have been identified, and approximately half have been improved. DOT administers capital programs for rail improvements and oversees intercity passenger service provided by Amtrak.

15.6.4 State Programs

As of the printing of this publication, the state transportation network includes: a state and local highway system which annually handles over 100 billion vehicle miles, encompassing over 110,000 miles and 17,000 bridges; a 5,000-mile rail network over which 42 million tons of equipment, raw materials, manufactured goods and produce are shipped each year; a 524-mile canal system; 484 public and private aviation facilities through which more than 31 million people travel each year; five major ports, which annually handle 50 million tons of freight; and over 130 public transit operators, serving over 5.2 million passengers each day.

DOT focuses on the state's growing transportation needs and is responsible for developing and coordinating statewide transportation policy. To carry out that responsibility, DOT develops strategic transportation plans to enhance the state's economy, preserve the transportation infrastructure and ensure basic personal mobility for New Yorkers. It coordinates this planning activity with those of federal, state and local entities and other organizations.

DOT coordinates and helps develop and operate transportation facilities and services, and plans for the development of commuter and general transportation facilities. It also administers public safety and regulatory programs for rail and motor carriers in intrastate commerce, and oversees the safe operation of bus lines and commuter rail and subway systems which are subsidized with state funds.

DOT certifies municipal applications for the State funding of local highway improvements under the Consolidated Local Street and Highway Improvement Program (CHIPS), and coordinates with Metropolitan Planning Organizations (MPOs) to administer the Federally-funded Safe, Accountable, Flexible, Efficient, Transportation Equity Act: A Legacy for Users (SAFETEA-LU). There are currently 13 MPOs across the state. Each is responsible for developing, in cooperation with the State and affected transit operators, a long-range transportation plan and a Transportation Improvement Program (TIP) for its area.

15.6.5 Streets and Highways

The State has responsibility for the state and interstate highway systems. It does not, however, maintain those portions of state highways within cities. Within towns, state highways are a State responsibility, although counties and towns may provide snow and ice control under contract.

County governments maintain a county road system that is designated by the county's legislative body. Like the State, counties do not maintain roadways within cities. The degree to which counties actually perform maintenance on the county road system varies. Some counties maintain large and well-equipped maintenance organizations and perform most of the needed work. Others maintain only a small work force and contract with towns for much of the maintenance.

15.6.6 State Canals

The New York State Canal System serves the people of the state in many ways: as a means for transportation, a water source for industry and agriculture, a source of hydroelectric power, an outdoor recreation resource and as a water control mechanism for much of New York. The New York State Canal Corporation within the State Thruway Authority operates and maintains the 524-mile system, which consists of the Champlain, Erie, Oswego and Cayuga/Seneca Canals. The Corporation is implementing a $32.3 million, five-year Canal Revitalization Program to help develop the recreational potential of the System. The Department of Transportation assists public ports, and works with the Council of Upstate Ports of New York to ensure adequate port facilities for shippers and consignees.

15.7 Consumer Protection Services

New York State and its local governments work together to protect consumers from questionable or illegal practices in certain business and occupations. Many state agencies which have regulatory responsibilities operate consumer protection programs to assist citizens and local officials. Coordination for consumer protection at the state level is provided by the Division of Consumer Protection. At the local level, many counties and some cities, towns and villages have established agencies for consumer protection. These local agencies look to the Division of Consumer Protection for support. The Division is empowered to conduct investigations, receive and refer consumer complaints, intervene in proceedings before the Public Service Commission and other agencies, and coordinate the consumer protection activities of state agencies. In addition, the Division recommends new legislation for consumer protection, initiates and encourages consumer protection programs, conducts outreach activities, surveys significant consumer issues and distributes publications on consumer matters including the New York State Consumer Law Help Manual.

Among state agencies' consumer protection programs are the following: The Department of Agriculture and Markets, in cooperation with county and city officials, enforces the law relating to weights and measures. In 1995 the Public Service Commission (PSC) took over regulatory authority of cable television from the former Cable TV Commission. The PSC responds to complaints by cable television consumers, and provides information and technical assistance to local officials concerning cable television franchise questions. Cities, towns and villages have the responsibility of granting franchises to cable television companies and monitoring their operations, but PSC sets standards and provides assistance to local franchising authorities. PSC also regulates other modes of communications as well as electric, gas and water utilities. It operates a consumer outreach and education program, and responds to consumer complaints concerning the regulated entities.

The State Board of Regents and State Education Department license and/or regulate practitioners in a number of professions, including architecture, dentistry, engineering, land surveying, medicine, nursing, occupational therapy, optometry, pharmacy, physical therapy, psychology, public accountancy, social work, speech pathology and veterinary medicine. Regulation is carried out through the Office of Professional Discipline and the respective licensing boards. Regulation of physicians and their assistants is carried out jointly with the State Health Department.

The Department of Health regulates the delivery of health care by institutions and individual providers, and responds to consumer complaints. Its Professional Medical Conduct Unit investigates complaints about physicians and their assistants. The Department of Financial Services licenses and regulates insurers, agents, brokers, bail bondsmen, adjusters and others. Its Consumer Services Bureau responds to consumer questions and complaints. The Office of the Attorney General offers, through its Consumer Frauds and Protection Bureau, help for consumers in the form of public education and mediation, as well as legal action in cases of repeated fraud. The Attorney General prosecutes criminal violations by licensed or registered professionals, fraudulent sales of stocks and securities, frauds against consumers, and monopolies in restraint of trade. Major charities which solicit in the state are registered by the Attorney General's Charities Bureau.

The Department of State licenses and/or regulates certain nonprofessional businesses and occupations. Its Division of Licensing Services regulates armored car carriers and guards, barbers, estheticians, natural hair stylists, cosmetologists, waxing practitioners, nail specialists, bedding manufacturers, coin processors, hearing aid dispensers and dealers, notaries public, private investigators, watch, guard and patrol agencies, real estate brokers and salespersons, and apartment information vendors. Nonsectarian cemeteries as well as pet cemeteries are regulated by its Division of Cemeteries.

15.8 Labor and Working Conditions

The Department of Labor ensures the safety and health of all public and many private employees in the workplace, and administers unemployment assistance. The Department also serves as the principal source of labor market information in the state, including current and predicted economic trends affecting the state's economy. The Department also enforces state labor laws and federal laws relating to working conditions and compensation.

The Division of Employment Services administers job placement assistance, skill assessment and career counseling services. Local and state agencies and not-for-profit organizations are encouraged by the Division to co-locate and coordinate services provided by on-site staff assistance to customers. The Unemployment Insurance Division provides unemployment insurance benefits funded by a tax paid by employers.

The Department administers the worker-protection provisions of the State Labor Law. The Labor Standards Division administers the provisions of the Labor Law concerning minimum wage, hours of work, child labor, payment of wages and wage supplements, industrial homework, farm labor and the apparel industry. The Division of Safety and Health enforces occupational safety and health standards for employees of the state and local governments. The Bureau of Public Work enforces the payment of prevailing wages and supplements on public construction projects and building service contracts. The Welfare-to-Work Division oversees state and local programs under the Temporary Assistance for Needy Families program (TANF), the Food Stamp Employment and Training Program (FEST), the Welfare-to-Work Block Grant program and the Safety Net program. Oversight includes policy development, technical assistance to local social services districts and provider agencies, contract reporting and monitoring, program oversight of state level programs and supervision of local social services districts. The Workforce Development and Training Division administer federal and state funds for programs that offer employment and training services to youth and adults.

15.9 Other Services

State-local partnerships are also involved in the following services and programs areas:

The Office of Advocate for the Disabled works with local governments to ensure that the state's estimated 2.5 million disabled citizens have access to public services and equal opportunity. The Office, established by Executive Order and given a legislative base by Chapter 718 of the Laws of 1982, provides technical assistance and information to help local governments, service providers and others integrate disabled residents into all facets of community life. The Office also keeps the Governor, Legislature and agencies informed about the needs of the disabled; promotes cooperative efforts to develop employment opportunities; helps develop innovative strategies to meet special needs; and operates an information and referral service.

Local governments control dogs pursuant to a combination of state and local laws and in accordance with regulations of the Department of Agriculture and Markets, which maintains a master list of licensed dogs. The Department also promulgates and maintains a uniform code of weights and measures for use in commerce throughout the state. Counties, cities, towns and villages are authorized to establish commissions on human rights, and many have done so. They work closely with the State Division of Human Rights in eliminating and preventing discrimination based on race, creed, color, national origin, sex, age, disability, marital status, or arrest and/or conviction record; in credit transactions, employment, housing and public accommodations.

The New York State Energy Research and Development Authority (NYSERDA) develops innovative energy-efficient technologies to help enhance environmental quality. The Authority assists businesses, residents, municipalities and institutions to be more energy-efficient by investing funds into cost effective energy efficiency deployment strategies, renewable energy sources and clean-fuel technologies.

The State Department of Motor Vehicles (DMV) shares responsibility with county clerks for the issuance of drivers' licenses and registration of motor vehicles. Under the Vehicle and Traffic Law, cities, towns and villages are re-

quired to issue handicapped parking permits to eligible individuals. The DMV also registers and regulates motor vehicle repair shops. Its Division of Vehicle Safety Services responds to consumer complaints.

Chapter 16

Land Use Planning and Regulation

One of the most powerful tools in the local government arsenal is the power to regulate the physical development of the municipality. This power is exercised through a variety of available authorizations and regulatory mechanisms. Through control of land use and development, each municipality is able to develop and display the most desirable physical features of the community.

16.1 The Police Power

Police power is the power government has to provide for public order, peace, health, safety, morals and general welfare. It resides in the sovereign state, but may be delegated by the State to its municipalities. Land use controls are an exercise of the police power long recognized by the United States Supreme Court. In New York, the power to control land use is granted to each municipal government by reference in Article IX, section 2, of the State Constitution and by the various state enabling statutes.

With few exceptions, the exercise of the police power to control land use is a city, town or village function in New York State. This includes the decision whether to control land use, and, if so, to determine the nature of the controls. When exercised, the power to control land use is governed by the state enabling statutes which have granted the power to local governments:..the General City Law, the Town Law, the Village Law, the General Municipal Law, the Municipal Home Rule Law and its companion Statute of Local Governments.

16.2 The Planning Board

The local legislative bodies of cities, towns and villages may create planning boards in a manner provided for by state statute or municipal charter, and may grant various powers to the planning board (General City Law section 27; Town Law section 271; Village Law section 7-718). The statutes authorize municipal legislative bodies to provide for the referral of any municipal matter to the planning board for its review and report prior to final action. While the functions of a planning board may extend beyond land use, in most municipalities the planning board performs primarily a land use control function. Many local zoning laws or ordinances establish a procedure for referral to the local planning board of all applications for rezoning, variances and special use permits. Such planning board reports and recommendations are often of vital importance in deciding these matters. In addition, the local planning board can have an advisory role in preparing and amending comprehensive plans, zoning regulations, official maps, long-range capital programs, special purpose controls and compliance with the State Environmental Quality Review Act (SEQRA). Further, the local legislative body may grant the planning board such regulatory functions as control of land subdivision, site plan review and issuance of special use permits. Where these and

related functions are effectively administered, the local planning board can do much to advance the land use and development policies of the local legislative body.

16.3 Comprehensive Planning

Comprehensive planning may be performed by all municipalities, whether or not it results in a set of land use controls. Comprehensive planning logically forms the basis of all efforts by the community to guide the development of its governmental structure as well as its natural and built environment. Nonetheless, the most significant feature of comprehensive planning in most communities is its foundation for land use controls. Most successful planning efforts begin with a survey of existing conditions and a determination of the municipality's vision for the future. This process should not be confused with zoning or other land use regulatory tools. Instead, the comprehensive plan should be thought of as a blueprint on which zoning and other land use regulations are based.

The state statutes define a comprehensive plan as "the materials, written and/or graphic, including but not limited to maps, charts, studies, resolutions, reports and other descriptive material that identify the goals, objectives, principles, guidelines, policies, standards, devices and instruments for the immediate and long-range protection, enhancement, growth and development" of the municipality (General City Law section 28a(3)(a); Town Law section 272-a(2)(a); Village Law section 7-722(2)(a)). While the use of the state comprehensive plan statutes is optional, they can guide boards through the comprehensive plan process (General City Law section 28-a; Town Law section 272-a; Village Law section 7-722). An important component of the process is public participation. Under the statutes, this occurs both formally, through mandatory hearings held by the preparing board and by the legislative body prior to adoption of the plan, and informally, through the participation of the public at workshops and informational sessions.

Municipalities that do not have professional planners on staff to assist in the preparation of a comprehensive plan have several resources available to them. They may be able to receive assistance from their county or regional planning agency. They may also be able to contract with a professional planning or engineering firm which provides planning services. Also, municipal residents may possess expertise in planning or other environmental or design disciplines. However long or detailed the plan is, its real value is in how it is used and implemented. Since each municipality that has the power to regulate land use has a different set of constraints and options, the final form of each comprehensive plan will be unique. The size and format of the comprehensive plan will vary from municipality to municipality (and possibly from consultant to consultant). It may consist of a few pages, or it may be a thick volume of information.

16.4 County Planning

New York's counties have the statutory power to create planning boards (General Municipal Law section 239-c). The county legislative body may prepare a county comprehensive plan or delegate its preparation to the county planning board or to a "special board" (General Municipal Law section 239-d). Prior to adopting or amending a county official map, the county legislative body must refer the proposed changes to the county planning board and other municipal bodies (General Municipal Law section 239-e). In addition, the county legislative body may authorize the county planning board to review certain planning and zoning actions, including certain subdivision plats, by municipalities within the county (General Municipal Law section 239-c(3)).

State laws require that any city, town or village located in a county possessing a "county planning agency" or "regional planning council" must refer to that agency certain zoning matters before taking final action on those matters. In addition, where authorized by the county legislative body, certain subdivision plats must be referred to the county by the town, village or city planning board before taking final action. Generally, referral must be made where a proposed zoning matter or subdivision plat affects real property within 500 feet of one or more

enumerated geographic features, such as a municipal boundary. Referral to the county planning agency or regional planning council is an important aid to the local planning and zoning process. It provides local planning and zoning bodies with advice and assistance from professional county and regional staff and can result in better coordination of zoning actions among municipalities by inter-jecting inter-community considerations. In addition, it allows other planning agencies (county, regional and state) to better orient studies and proposals for solving local as well as county and regional needs.

16.5 Zoning and Related Regulatory Controls

16.5.1 Zoning

Zoning regulates the use of land, the density of land use, and the siting of development. Zoning is a land use technique that operates prospectively to help implement a municipality's comprehensive plan. It is the most commonly and extensively used local technique for regulating use of land as a means of accomplishing municipal goals. According to a 2008 survey by the Legislative Commission on Rural Resources, 100 percent of cities, 71 percent of towns and 89 percent of villages in New York had adopted zoning laws or ordinances.

Zoning commonly consists of two components: a zoning map and a set of zoning regulations. The zoning map divides a municipality into various land use districts, such as residential, commercial, or industrial. The land use districts that a municipality establishes can be even more specific, such as high, medium and low density residential, neighborhood commercial, central business district, or highway commercial, light industrial, heavy industrial, or agriculture. Mixed-use districts may also be appropriate, depending upon local planning and development goals as set forth in a comprehensive plan. Zoning regulations commonly describe the permissible land uses in each of the various zoning districts identified on the zoning map. They also include dimensional standards for each district, such as the height of buildings, minimum distances (setbacks) from buildings to property lines, and the density of development. These are referred to as "area" standards, as opposed to "use" standards. Zoning regulations will also set forth the steps necessary for approval by the type of use, the zoning district involved, or by both. For example, a single-family home is often permitted "as-of-right" in a low-density residential zoning district. "As-of-right" uses, if they meet the dimensional standards, require no further zoning approvals, and need only a building or zoning permit in order for construction to begin.

16.5.2 The Zoning Board of Appeals

Zoning boards of appeal (ZBAs) are an essential part of zoning administration. The state zoning enabling statutes prescribe that zoning boards of appeals must be created when a municipality enacts zoning (General City Law section 81; Town Law section 267; Village Law section 7-712). ZBAs serve as "safety valves" in order to provide relief, in appropriate circumstances, from overly restrictive zoning provisions. In this capacity, they function as appellate entities, with their powers derived directly from state law. In addition to their inherent appellate jurisdiction, municipal legislative bodies may give ZBAs "original" jurisdiction over other specified matters, such as special use permits and site plan reviews.

By state law, the ZBA must serve to provide for relief from the strict application of regulations that may affect the economic viability of a particular parcel or that may obstruct reasonable dimensional expansion. The state statutes give two varieties of appellate jurisdiction to ZBAs. An appeal seeking an interpretation of provisions of the zoning regulations is an appeal claiming that the decision of the administrative official charged with zoning enforcement is incorrect. It is a claim that the zoning enforcement officer misapplied the zoning map or regulations, or wrongly issued or denied a permit. By contrast, in an appeal for a variance, there is no dispute over the enforcement officer's application of zoning provisions. Instead, the applicant feels there should be an exception made in his or her case, and that some of the zoning rules should not apply in a particular circumstance. A ZBA must then apply the criteria set forth in the state statutes in determining whether to grant the requested variance.

Board of appeals members are appointed by the municipality's legislative body in a manner provided for by state statute or municipal charter. ZBAs function free of any oversight by the municipal legislative body. Where the zoning board of appeals has final decision-making authority, the legislative body may not review the grant or denial of variances, special use permits, or any other decisions; the statutes provide for review of ZBA decisions by the state courts in Article 78 proceedings.

For more information on the zoning board of appeals, please see the New York Department of State publication "Zoning Board of Appeals" at https://www.dos.ny.gov/lg/publications/Zoning_Board_of_Appeals.pdf.

16.5.3 Related Controls

In some communities, the basic use and density separation provided by traditional zoning is all that is necessary to achieve municipal development goals and objectives. Many communities desire, however, development patterns which may be only partially achieved through basic zoning. For example, a municipality may wish to strongly encourage a particular type of development in a certain area, or may wish to limit new development to infrastructure capacity. There are other land-use regulatory techniques available to address those objectives. Use of one or more particular techniques can serve to encourage and "market" the type of development and growth a municipality desires, more closely linking a municipality's comprehensive plan with the means to achieve it. Six of these techniques (special use permits, site plan review, subdivision review cluster, incentive zoning, and transfer of development rights) are provided for in the enabling statutes and briefly discussed below.

16.5.4 Special Use Permits

In most municipal zoning regulations, many uses are permitted within a zoning district as-of-right, with no discretionary review of the proposed project. On the other hand, municipalities may require a closer examination of certain designated uses. The special use permit zoning technique (sometimes referred to as conditional uses, special permits or special exceptions) allows a board discretionary authority to review a proposed development project in order to assure that it is in harmony with the zoning and will not adversely affect the neighborhood. A special use permit is applied for and granted by the reviewing board if the proposal meets the special use permit standards found in the zoning regulations. Typically, the standards are designed to avoid possible negative impacts of the proposed project with adjoining land uses or with other municipal development concerns or objectives, such as traffic impacts, noise, lighting, or landscaping. State statutes prescribe the procedure for all special use permit applications.

16.5.5 Site Plan Review

Site plan review is concerned with how a particular parcel is developed. A site plan shows the arrangement, layout and design of the proposed use of a single parcel of land. Site plan review can include both small and large-scale proposals, ranging from gas stations, drive-through facilities and small office buildings, to shopping centers, apartment complexes, and industrial parks. Site plan review can be used as a regulatory procedure standing alone, but is also often required in connection with other needed zoning approvals such as special use permits. The authority to require site plan review is derived from the state enabling statutes (General City Law section 27-a; Town Law section 274-a; Village Law section 7-725-a). A local site plan review requirement may be incorporated into the zoning law or ordinance, or may be adopted as a set of separate regulations. As in the case of special use permits, the local legislative body has the power to delegate site plan review to the planning board, zoning board of appeals, or another board. Alternatively, the legislative body may retain the power to exercise such reviews.

The local site plan review regulations or local zoning regulations determine what uses require site plan approval. Uses subject to review may be (1) identified by the zoning district in which they are proposed; (2) identified by

use, regardless of the zoning district or proposed location within the community; or (3) located in areas identified as needing specialized design restrictions by way of an overlay zone approach, such as a flood zone or historic district.

Site plan issues should be addressed through a set of general or specific requirements included in the local site plan review regulations. As an alternative to the installation of required infrastructure and improvements, the site plan statute allows a municipality to require the applicant to post a performance guarantee to cover their cost.

16.5.6 Subdivision Review

There is probably no form of land use activity that has as much potential impact upon a municipality as the subdivision of land. The subdivision process controls the manner by which land is divided into smaller parcels. While a subdivision is typically thought of as the division of land into separate building lots that are sold to individual buyers, subdivision provisions may also apply to a simple division of land offered as a gift or which changes lot lines for some other reason. Subdivision regulations should ensure that when development does occur, streets, lots, open space and infrastructure are properly and safely designed, and the municipality's land use objectives are met.

Planning boards, when authorized by local governing bodies, may conduct subdivision plat review. A "plat" is a map prepared by a professional that shows the layout of lots, roads, driveways, details of water and sewer facilities, and, ideally, much other useful information regarding the development of a tract of land into smaller parcels or sites. The state enabling statutes contain specific procedures for the review of both preliminary and final plats (General City Law sections 32, 33; Town Law sections 276, 277; Village Law sections 7-728, 7-730). Most municipalities use the two-step (preliminary and final plat) process.

Subdivision review is a critical tool in a municipality's land use management scheme and has important consequences for overall municipal development. The subdivision of large tracts may induce other related development in the neighborhood, produce demands for rezoning of neighboring land, or trigger the need for additional municipal infrastructure.

For more information about subdivision review and procedure, please see the New York Department of State publication "Subdivision Review in New York State" at https://www.dos.ny.gov/lg/publications/Subdivision_Review_in_NYS.p

16.5.7 Cluster Development

Cluster development is a technique that allows flexibility in the design and subdivision of land (General City Law section 37; Town Law section 278; Village Law section 7-738). By clustering a new subdivision, certain community planning objectives can be achieved. The use of cluster development can greatly enhance a municipality's ability to maintain its traditional physical character while at the same time providing (and encouraging) new development. It also allows a municipality to achieve planning goals that may call for protection of open space, scenic views, agricultural lands, woodlands and other open landscapes, and may limit encroachment of development in, and adjacent to, environmentally sensitive areas. Cluster development is also attractive to developers because it can result in reduced development expenses relating to roadways, sewer lines, and other infrastructure, as well as lower costs to maintain that infrastructure.

When it is used according to the enabling statutes, cluster development is a variation of conventional subdivision plat approval. Cluster development concentrates the overall maximum density allowed on property onto the most appropriate portion of the property for development. The maximum number of units allowed on the parcel is no greater than would be allowed under a conventional subdivision layout for the same parcel.

16.5.8 Incentive Zoning (Bonus Zoning)

The authority to incorporate incentive zoning into a municipality's zoning regulations is set forth in the state planning and zoning enabling statutes (General City Law section 81-d; Town Law section 261-b; Village Law section 7-703). Incentive zoning is an innovative and flexible technique that can be used to encourage desired types of development in targeted locations. Conceptually, incentive zoning allows developers to exceed the dimensional, density, or other limitations of zoning regulations in return for providing certain benefits or amenities to the municipality. A classic example of incentive zoning would be an authorization to exceed height limits by a specified amount, in exchange for the provision of public open space, such as a plaza.

If a municipality desires a certain type of development in particular locations, it can usually only wait to see if a developer will find it economical to build. Incentive zoning changes this dynamic by providing economic incentives for development that otherwise may not occur. Incentive zoning is also a method for a municipality to obtain needed public benefits or amenities in certain zoning districts through the development process. Local incentive zoning laws can even be structured to require cash contributions from developers in lieu of physical amenities, under certain circumstances.

16.5.9 Transfer of Development Rights (TDR)

Transfer of Development Rights (TDR) is a complex growth management technique. It is based on the real property concept that ownership of land gives the owner a "bundle of rights," each of which may be separated from the rest. For example, one of these rights is the right to develop land. With a TDR system, landowners are able to retain their land, but sell the development rights for use on other properties.

Under the state zoning enabling statutes (General City Law section 20-f; Town Law section 261-a; Village Law section 7-701), areas of the municipality that have been identified through the planning process as in need of preservation (e.g., agricultural land) or areas where development should be avoided (e.g., municipal drinking water supply protection areas) are established as "sending districts." Development of land in such districts may be heavily restricted, but owners are granted rights under the TDR regulations to sell the rights to develop their lands. Those development rights may thereby be transferred to lands located in designated "receiving districts."

Transferable development rights usually take the form of a number of units per acre, or gross square footage of floor space, or an increase in height. The rights are used to increase the density of development in a receiving district. Receiving districts are established after the municipality has determined that they are appropriate for increased density, based upon a study of the effects of increased density in such areas. Such a study is best incorporated within the municipality's comprehensive plan.

The state zoning enabling statutes require that lands from which development rights are transferred are subject to a conservation easement, limiting the future development of the property. The statutes also require that the assessed valuation of properties be adjusted to reflect the change in development potential for real property tax purposes. For more on transfer of development of rights and their application, please see the New York Department of State publication "Transfer of Development Rights" at https://www.dos.ny.gov/lg/publications/-Transfer_of_Development_Rights.pdf.

16.6 Other Land Use Controls

In addition to the six techniques described above, four others are often employed: overlay zoning, performance zoning, and floating zones and planned unit development. They are not treated specifically in the enabling statutes, but have been considered to be lawful within the general statutory grants of zoning power.

16.6.1 Overlay Zoning

The overlay zoning technique is a modification of the system of conventionally-mapped zoning districts. An overlay zone applies a common set of standards to a designated area that may cut across several different conventional or "underlying" zoning districts. The standards of the overlay zone apply in addition to those of the underlying zoning district. Some common examples of overlay zones are the flood zones administered by many communities under the National Flood Insurance Program, historic district overlay zones, areas of very severe slopes, waterfront zones and environmentally sensitive areas. The state enabling statutes do not contain provisions dealing with overlay zoning, but it is employed most often in conjunction with special use permits.

16.6.2 Performance Zoning

Some municipalities have enacted zoning regulations that establish performance standards, rather than strict numerical limits on building size or location, as is the case with conventional zoning. Performance zoning, as it is commonly called, regulates development based on the permissible effects or impacts of a proposed use, rather than by the traditional zoning parameters of use, area and density. Under performance zoning, proposed uses whose impacts would exceed specified standards are prohibited unless the impacts can be mitigated.

Performance zoning is often used to address municipal issues concerning noise, dust, vibration, lighting, and other impacts of industrial uses. It is also used by municipalities to regulate environmental impacts, such as stormwater runoff, scenic and visual quality impacts, and defined impacts on community character. The complexity and sophistication of these performance standards vary widely from one municipality to another, depending on the objectives of the program and the capacity of the locality to administer it.

16.6.3 The Floating Zone

Floating zones allow municipalities flexibility in the location of a particular type of use and allow for a use of land that may not currently be needed, but which may be desired in the future. The floating zone is also a way of scrutinizing significant projects for municipal impacts. The local legislative body must approve floating zones. The standards and allowable uses for a floating zone are set forth in the text of the municipality's zoning regulations, but the actual district is not mapped; rather, the district "floats" in the abstract until a development proposal is made for a specific parcel of land and the project is determined to be in accordance with all of the applicable floating zone standards. At that time, the local legislative body maps the floating zone by attaching it to a particular parcel or parcels on the zoning map. Because the floating zone is not part of the zoning map until a particular proposal is approved, the establishment of its boundaries on the zoning map constitutes an amendment to the municipal zoning regulations.

16.6.4 Planned Unit Developments (PUDs)

Planned Unit Developments (PUDs) describe the development of a tract of land (usually a large tract of land) in a comprehensive, unified manner where the development is planned to be built as a "unit." As a mapping designation, they are also known as Planned Development Districts (PDD), and are often a form of floating zone; they are not made a part of the zoning map until a PUD project is approved. The PUDs that are shown on a zoning map may require approval by special use permit.

The PUD concept allows a combination of land uses, such as single and multiple-family residential, industrial, and commercial, on a single parcel of land. It also may allow a planned mix of building types and densities. For example, a single project might contain dwellings of several types, shopping facilities, office space, open areas, and

recreation areas. In creating a PUD, a municipal legislative body would need to follow the procedure for amending zoning to create a new zoning district or to establish special use permit provisions. An application for a PUD district is typically reviewed by the planning board, and a recommendation is made to the legislative body, which may then choose to rezone the parcel.

16.7 Supplementary Controls

The following is a discussion of "stand alone" laws that are commonly adopted to address specific municipal concerns, although they may also be usefully incorporated into zoning, site plan review or subdivision regulations.

16.7.1 Official Map

For any municipality to develop logical, efficient and economical street and drainage systems, it must protect the future rights-of-way needed for these systems. Such preventive action saves a municipality the cost of acquiring an improved lot and structure at an excessive cost or resorting to an undesirable adjustment in the system. To protect these rights-of-ways, state statutes allow a municipality to establish and change an official map of its area, showing the streets, highways, parks and drainage systems (General City Law sections 26, 29; Town Law sections 270, 273; Village Law section 7-724; General Municipal Law section 239-e). Future requirements for facilities may be added to the official map. Without the consent of the municipality, the reserved land may not be used for other purposes.

The official map is final and conclusive in respect to the location and width of streets, highways and drainage systems, and locations of parks shown on it. Streets shown on an official map serve as one form of qualification for access requirements which must be met prior to the issuance of a building permit (General City Law sections 35, 35-a, 36; Town Law sections 280, 280-a, 281; Village Law sections 7-734, 7-736; General Municipal Law section 239-f).

16.7.2 Sign Control

The use and location of signs are typically subject to municipal regulation, either as part of a zoning law or as a separate regulation. Attention is focused on the number, size, type, design and location of signs.

The issues a municipality considers important can be brought together in a sign control program. Without a program, signs can overwhelm a municipality, damaging its character and reducing the effectiveness of communication, including traffic safety messages. With an effective program, signs can aesthetically enhance community character.

A municipality is generally free to prescribe the location, size, dimensions, and manner of construction and design of signs. However, the U.S. Supreme Court has examined the constitutional questions concerning freedom of speech with respect to sign controls, and has placed limits on the authority of municipalities to control the content of the message conveyed on signs.

For more information about the aspects of signage municipalities may regulate, please see the New York Department of State publication "Municipal Control of Signs" at https://www.dos.ny.gov/lg/publications/Municipal%20Control%20of

16.7.3 Historic Preservation

A community policy to protect historic resources and an identification of the particular resources to be protected in the community are the first steps to providing recognition of the historic value of a property or collection of

buildings. Once a municipality has established a policy of historic preservation, it can seek to formally recognize individual historic structures or groups of structures.

The historical importance of a building can be recognized at the state or national level through listing on the State or National Register of Historic Places. These listings are managed, respectively, by the state [Office of Parks, Recreation, and Historic Preservation], and the federal Department of the Interior, in cooperation with the property owner and local municipality. The National Register listing includes recognition of the historical importance of a single property, a group of properties, or a set of properties related by a theme.

Listing on the National Register of Historic Places is an important recognition of a property or an area's historic and cultural significance. Designation can make the property eligible for tax credits and sometimes grants. Additionally, any federal action that might impact such property must undergo a special review that is designed to protect the property's integrity. Similarly, listing on the State Register of Historic Places means that state agency actions that effect a designated property are subject to closer review, and makes the property eligible for grant assistance. Neither a listing on the National nor State Register of Historic Places will protect a structure from the owner's interest in redesigning or demolishing the historic structure. Only a locally-adopted historic preservation law can control such actions.

In adopting a local historic preservation law, the municipality designates individual properties as local historic landmarks, or groups of properties as local historic districts. Such a local law is also likely to provide standards for protection of these designated properties.

If a municipality does not wish to adopt a local historic preservation law, it may want to consider a demolition law. Such a law could require review or a delay before demolition of a historically significant building. This allows time for a community to examine alternatives to demolition, such as purchase of the property by a government or not-for-profit group.

16.7.4 Architectural Design Control

Many aspects of a building's design are regulated through standards for siting, orientation, density, height and setback in a municipality's zoning ordinance or law. Some municipalities wish to go beyond dealing with the general size and siting of a building and its physical relationship with adjacent properties, to dealing with the appropriateness of the architectural design of the building. The review may include examining such design elements as facades, roof lines, window placement, architectural detailing, materials and color.

Architectural review generally requires a more subjective analysis of private development proposals than is possible within most zoning regulations. To do this, municipalities often establish an architectural review board, which should be able to offer guidance on design issues to other boards, such as the planning board or zoning board of appeals. Where authorized, an architectural review board may conduct an independent review of the architectural features of a proposed project. Often, a community chooses to link design review to historic preservation controls, with a focus on the design of new buildings and alterations to existing buildings within historic districts.

16.7.5 Junk Yard Regulations

If a municipality does not have its own junk yard regulations or zoning regulations addressing the siting of junk yards, it must apply the standards set forth in General Municipal Law section 136 for automobile junk yards. This law regulates the collection of junk automobiles, including the licensing of junk yards and regulation of certain aesthetic factors. The application of this state law is limited to sites storing two or more unregistered, old or secondhand motor vehicles which are not intended or in condition for legal use on public highways. The law also applies to used motor vehicle parts, which, in bulk, equal at least two motor vehicles. A municipality may expand the state definition of "junk yard" to encompass other types of junk, such as old appliances, household waste, or uninhabitable mobile homes, in order to regulate aspects of junk not covered by state law and to ensure greater compatibility with surrounding land uses.

16.7.6 Control of Mining

The New York State Mined Land Reclamation Law (Environmental Conservation Law section 23-2703 et seq.) regulates mining operations which remove more than one thousand tons or 750 cubic yards (whichever is less) of minerals from the earth annually. Mines that meet or exceed such thresholds require approval by the New York State Department of Environmental Conservation (DEC). Smaller mines may be regulated by a local mining or zoning regulation. However, even though DEC regulates larger mines, a municipality may regulate the location of all mines through its zoning regulations or prohibit mining altogether from the municipality.

When a municipality permits state-regulated mining to occur within its borders through a special use permit process, conditions placed on the permit may pertain to entrances and exits to and from the mine on roads controlled by the municipality, routing of mineral transport vehicles on roads controlled by the municipality, enforcement of the reclamation conditions set forth in the DEC mining permit, and certain other requirements specified in the state permit (ECL section 23-2703).

16.7.7 Scenic Resource Protection

Scenic resources are important in defining community character. Policies to protect scenic resources may be included in a municipality's comprehensive plan, along with maps illustrating the scenic resource. Once this has been done, it is important to integrate policies into regulations. Appropriate use, density, siting and design standards can protect scenic resources by such methods as limiting the height of buildings or fences in important scenic areas.

16.7.8 Open Space Preservation

Many communities recognize the value of "open space", i.e. vacant land and land without significant structural development. A good way for a municipality to assess the importance of its open space resources is to produce an open space plan or to include an assessment of open space resources as part of its comprehensive plan. Here, a municipality decides how to categorize its open space resources, examine their use and function in the municipality, identify priority areas to be protected, and consider the best means of land conservation. When a municipality has identified its open space resources, it can develop policies to protect them. Those policies should be expressed in the open space plan and/or in the municipality's comprehensive plan, along with the maps showing open spaces. Once this has been done, it is important to ensure the open space policies of the comprehensive plan are implemented through the municipality's land use controls.

16.7.9 Protection of Agricultural Land

One of the critical issues involved in land use planning decisions for agricultural uses is to ensure that agriculture protection deals primarily with the preservation of agriculture as an economic activity and not just as a use of open space. Traditionally, agricultural uses are part of large lot, low density, residential zoning districts.

Article 25-AA of the Agriculture and Markets Law is intended to conserve and protect agricultural land for agricultural production and as a valued natural and ecological resource. Under this statute, collections of parcels can be designated as an agricultural district. To be eligible for designation, an agricultural district must be certified by the county for participation in the state program. Once a district is designated, participating farmers within it may receive reduced property assessments and relief from local nuisance claims and certain forms of local regulation.

Agricultural district designation under Article 25-AA does not generally prescribe land uses. However, under section 305-a of Article 25-AA, municipalities are restricted from adopting regulations, applicable to farm operations

in agricultural districts, which unreasonably restrict or regulate farm structures or practices, unless such regulations are directly related to the public health or safety (Agriculture & Markets Law, section 305-a(1); Town Law section 283-a; Village Law section 7-739). The law also requires municipalities to evaluate and consider the possible impacts of certain projects on the functioning of nearby farms.

Projects that require "agricultural data statements" include certain land subdivisions, site plans, special use permits, and use variances.

Farm operations within agricultural districts also enjoy a measure of protection from proposals by municipalities to construct infrastructure such as water and sewer systems, which are intended to serve nonfarm structures. Under Agriculture and Markets Law, section 305, the municipality must file a notice of intent with both the state and the county in advance of such construction. The notice must detail the plans and the potential impact of the plans on agricultural operations. If, on review at either the county or state levels, the Commissioner of Agriculture and Markets determines that there would be an unreasonable adverse impact, he or she may issue an order delaying construction, and may hold a public hearing on the issue. If construction eventually goes forward, the municipality must make adequate documented findings that all adverse impacts on agriculture will be mitigated to the maximum extent practicable.

"Right-to-farm" is a term that has gained widespread recognition in the state's rural areas within the past several decades. Section 308 of the Agriculture and Markets Law grants protection from nuisance lawsuits to farm operators within agricultural districts or on land outside a district subject to an agricultural assessment under section 306 of the Law. The protection is granted to the operator for any farm activity that the Commissioner has determined to be a "sound agricultural practice." Locally, many rural municipalities have used their home rule power to adopt local "right-to-farm" laws. These local laws commonly grant particular land-use rights to farm owners and restrict activities on neighboring non-farm land that might interfere with agricultural practices.

A purchase of development-rights (PDR) system involves the purchase by a municipal or county government of development rights from private landowners whose land it seeks to preserve in its current state without further development. The PDR system, which has been used extensively in Suffolk County to preserve farmland, can also protect ecologically important lands or scenic parcels essential to rural character of the community. Under PDR, the land remains in private ownership and the government acquires non-agricultural development rights. These development rights, once purchased, are held and remain unsold. The farmer receives payment equal to the development value of the farmland. In return, the farmer agrees to keep the land forever in agriculture. The owner typically files property covenants similar to a conservation easement limiting the use of the property to agricultural production. The nation's first purchase of development rights program to preserve farmland was the Suffolk County in 1974.

The Commissioner of the Department of Agriculture and Markets is authorized to administer two matching grant programs focused on farmland protection. One assists county governments in developing agricultural and farmland protection plans to maintain the economic viability of the state's agricultural industry and its supporting land base; the other assists local governments in implementing their farmland protection plans and has focused on preserving the land base by purchasing the development rights on farms (Article 25-AA of the Agriculture and Markets Law).

The PDR system may have advantages over the TDR system, in that there is a ready market for the purchase and sale of development rights at all times. In addition, the prices of various categories of development rights may be more easily maintained at or near market value, and kept uniform under the PDR system.

16.7.10 Floodplain Management

Floodplain regulations govern the amount, type and location of development within defined flood-prone areas. Federal standards, applicable to communities that are eligible for federal flood insurance protection, include identification of primary flood hazard areas, usually defined as being within the 100-year floodplain. Within flood hazard areas, certain restrictions are placed on development activities. Such restrictions include a requirement that

buildings be elevated above flood elevations or be flood-proofed, and also include prohibitions on the filling of land within a floodplain. Municipalities can adopt their own floodplain regulations, which may be more stringent than the federal standards. Local floodplain regulations can identify a larger hazard area (such as a 500-year floodplain), and may prohibit certain types of construction within flood hazard areas. Municipalities must adopt local floodplain regulations to be eligible for participation in the National Flood Insurance Program.

16.7.11 Wetland Protection

"Wetlands" are areas that are submerged much of the time in either fresh or salt water. In state regulations, they are defined chiefly by the forms of vegetation present. Wetlands provide a number of benefits to a community. Besides providing wildlife habitat, wetlands also provide habitat protection, recreational opportunities, water supply protection, and provide open space and scenic beauty that can enhance local property values. Wetlands also serve as storage for storm water runoff, thus reducing flood damage and filtering pollutants. In coastal communities, they also serve as a buffer against shoreline erosion. The preservation of wetlands can go a long way toward protecting water quality; increasing flood protection; supporting hunting, fishing and shell fishing; providing opportunities for recreation, tourism and education; and enhancing scenic beauty, open space, and property values.

State wetland regulations protect freshwater wetlands greater than 12.4 acres, and 1 acre in the Adirondack Park, freshwater wetlands of unusual local importance, and tidal wetlands. The state has established adjacent wetland buffer zones, prohibiting or restricting certain activities within such areas, and has established standards for permit issuance. Under the Environmental Conservation Law (ECL), DEC shares concurrent jurisdiction with local governments to regulate tidal wetlands.

With respect to freshwater wetlands, three regulatory possibilities are present:

1. All wetlands smaller than 12.4 acres and not deemed of "unusual importance," are subject to the exclusive jurisdiction of the municipalities where the wetlands are located (ECL section 24-0507).
2. Under ECL, section 24-0501, a local government may enact a freshwater wetlands protection law to fully assume jurisdiction over all freshwater wetlands within its jurisdiction from DEC, provided its law is no less protective of wetlands than Article 24 of the ECL and provided that DEC certifies that the municipality is capable of administering the Act. There is also a limited opportunity for counties to assume wetlands jurisdiction if the local government declines.
3. Under ECL, section 24-0509, local governments can now adopt freshwater wetland regulations applying to wetlands already mapped and under the jurisdiction of DEC, provided that the local regulations are more protective of wetlands than the state regulations in effect. No pre-certification by DEC is required.

The United States Government, through the Army Corps of Engineers, also regulates federally defined wetlands. The Corps does not, however, map wetlands in advance of development proposals. When a proposal is made which may impact a wetland falling within federal definitions, the Corps will make a permit determination and impose appropriate conditions to protect the wetland.

16.7.12 Water Resource Protection

One of New York's greatest resources is its abundant water supply, which is safeguarded to protect municipal and private drinking water supplies from disease-causing microorganisms, protect fishery resources, enhance recreational opportunities, prevent erosion and harmful sedimentation, and to protect the environmental quality of adjacent land. Failure to adequately protect drinking water supplies can result in public health hazards and lead to the need for treatment of drinking water at great expense to municipalities.

Municipalities may adopt laws to protect groundwater recharge areas, watersheds and surface waters. Local sanitary codes can be adopted to regulate land use practices that have the potential to contaminate water supplies. Sanitary codes may address the design of storm water drainage systems, the location of drinking water wells, and the design and placement of on-site sanitary waste disposal systems. Water resources can be further protected through the adoption of land use laws that prohibit certain potentially polluting land uses in recharge areas, watersheds and near surface waters. Site plan review laws and subdivision regulations may also be used to minimize the amount of impervious surfaces, and to require that storm water systems be designed to protect water supplies.

Municipalities also have authority under the Public Health Law (PHL) to enact regulations for the protection of their water supplies, even if located outside of the municipality's territorial boundaries. Such regulations must be approved by the New York State Department of Health. Also, under state statutes, "realty subdivisions" – those containing five or more lots that are five acres or less in size – must undergo approval of their water supply and sewerage facilities by the county health department. (This requirement is under Public Health Law, Art. 11, Title II and Environmental Conservation Law, Art. 17, Title 15.)

The Federal Safe Drinking Water Act (SDWA) Amendments of 1996 established stringent water-supply capacity and quality standards for all public drinking water sources eligible for Federal assistance or otherwise coming within Federal regulatory jurisdiction. Originally the SDWA focused primarily on treatment as the means of providing safe drinking water at the tap. The 1996 amendments greatly enhanced the existing law by recognizing source water protection, operator training, funding for water system improvements, and public information as important components of safe drinking water. This approach ensures the quality of drinking water by protecting it from source to tap.

16.7.13 Erosion and Sedimentation Control

Development, earth-moving and some agricultural practices can create significant soil erosion and the sedimentation that frequently follows. Through the adoption of proper erosion, sedimentation, and vegetation-clearing controls, a municipality can protect its land and infrastructure and private property from costly damage, retain valuable soils, protect water quality, and preserve aesthetics within the municipality. Such regulations can be specifically directed at grading, filling, excavating and other site preparation activities, such as the clear-cutting of trees or the removal of vegetation. Local regulations may require the use of particular methods and compliance with minimum standards when carrying out construction and other activities.

New York State has a program for the control of waste-water and storm water discharges in accordance with the Federal Clean Water Act, known as the State Pollutant Discharge Elimination System (SPDES). Article 17 of the Environmental Conservation Law (ECL), entitled "Water Pollution Control", authorized creation of the SPDES program to maintain New York's waters with reasonable standards of purity. The program is designed to eliminate the pollution of New York waters and to maintain the highest quality of water possible, consistent with public health, public enjoyment of the resource, protection and propagation of fish and wildlife, and industrial development in the state. New York State's law is broader in scope than that required by the Clean Water Act in that it controls point-source discharges to groundwater as well as surface water.

16.7.14 Environmental Review

The State Environmental Quality Review Act (SEQRA) was established to provide a procedural framework whereby a suitable balance of social, economic, and environmental factors would be incorporated into the community planning and decision-making processes. SEQRA applies to all state agencies and local governments when they propose to undertake an "action" such as constructing a public building, or approving or funding projects proposed by private owners. (Environmental Conservation Law Article 8; Title 6, NY Codes, Rules & Regulations, Part 617). The intent of SEQRA is to review the environmental impacts of a proposed project and to take those impacts

into account when deciding whether to undertake or allow the project to proceed. Impacts that cannot be avoided through modification of the project should be mitigated by conditions imposed on it.

State regulations categorize all actions as either “Type I” (more likely to have a significant environmental impact), “Type II” (no significant impact), or “Unlisted”, with differing procedural requirements applicable to each. SEQRA review can serve to supplement local controls when the scope and environmental impacts of a project exceed those anticipated by existing land use laws. SEQRA is a far-reaching statute that can provide a municipality with critical information about the impacts of a land development project, so that a more informed decision may be made on the project. The SEQRA process also helps to establish a clear record of decision-making should the municipality ever have to defend its actions. Several publications available from the Department of Environmental Conservation thoroughly explain the SEQRA process.

16.7.15 Moratoria

A moratorium is a local law or ordinance used to temporarily halt new land development projects while the municipality revises its comprehensive plan, its land use regulations, or both. In some cases, moratoria are enacted to halt development while a municipality seeks to upgrade its public facilities or its infrastructure. Moratoria, or interim development regulations, are designed to restrict development for a limited period of time. The courts have placed strict guidelines on the enactment and content of moratorium laws.

16.8 Conclusion

It is apparent from the foregoing discussion that a panoply of land use techniques are available to local governments to assist them in carrying out their comprehensive planning goals to enhance community development and character.

Chapter 17

Public Authorities, Regional Agencies, and Intergovernmental Cooperation

Historically, New York has been and continues to be a true defender of home rule. Under certain conditions and situations, however, there have been issues which are of a statewide concern that cannot be managed under the narrow view of local authority and financial capability in order to bring forward a regional solution.

17.1 The Era of the Authority

New York State has a complex system of public authorities that are formed to achieve public or quasi-public objectives, including financing, building and managing public projects or improving a variety of governmental functions. There are both state and local public authorities in New York. A state authority is a public authority or public benefit corporation established by the State Legislature, with one or more of its members appointed by the governor or who serve as members by virtue of holding a civil office of the state. A local authority is: a public authority or public benefit corporation created by the State Legislature whose members do not hold a civil office of the state, are not appointed by the governor or are appointed by the governor specifically upon the recommendation of the local government; or a not-for-profit corporation affiliated with, sponsored by, or created by a county, city, town or village government; or a local industrial development agency or authority or local public benefit corporation; or an affiliate of such local authority; or a land bank corporation created pursuant to not-for-profit corporation law.

There are also interstate or international authorities in New York State, which are created pursuant to agreement or compact with another state or with a foreign power.

Most public authorities have the power to incur debt and collect user charges, but not to levy taxes or benefit assessments on real estate. While many public authorities have officials who are appointed or serve virtue of another office, the public authority is to act independently and autonomous and has legal flexibility not otherwise permitted to a state department or agency.

Public authorities often raise money through the sale of bonds and operate on little or no state dollars. In theory, a public authority must be self-supporting and able to meet debt obligations through revenues obtained from its own valuable assets, such as fares and user fees. To prevent the State from assuming public authority debt as a moral obligation, the present New York State Constitution explicitly empowers public authorities to issue bonds and incur debt but prevents the State from assuming that liability. (New York Constitution, Art X, section 5)

In Schulz v. State of New York, 84 NY2d 231, 616 NYS2d 343, 350 (1994), the Court of Appeals held that the state is not legally or technically liable on authority bonds nor for authority debt. The state may, however, choose to honor a public authority liability as a moral obligation.

The Port Authority of New York and New Jersey was the first public authority having a regional or statewide purpose, and it was the first of its kind in the Western Hemisphere. It was created under a clause of the United States Constitution permitting compacts between states and approved by the United States Congress. In 1960, only 13 authorities existed in the state which, for the most part, focused upon the construction or management of facilities which had regional significance or were of high economic importance such as ports, bridges, tunnels and highways. The ensuing years, however, might be called "the era of the authority" during which many authorities, having a variety of functions were created. As of June 30th, 2016 there were approximately 577 statewide authorities in existence in New York.[1]

Table 17.1: State, International, and Interstate Public Authorities by Date Created

Name	Year
1920's	
The Port Authority of New York & New Jersey(5 subsidiaries)	1921
Albany Port District Commission	1925
1930's	
Buffalo and Fort Erie Public Bridge Authority	1933
Industrial Exhibit Authority	1936
NYS Bridge Authority	1939
Triborough Bridge and Tunnel Authority[2]	1939
Power Authority of the State of NY	1939
1940's	
Dormitory Authority of the State of New York (2 subsidiaries)	1944
1950's	
NYS Thruway Authority (1 subsidiary)	1950
Ogdensburg Bridge and Port Authority	1950
New York City Transit Authority and Manhattan & Bronx Surface Transit Operating Authority[2]	1953
Port of Oswego Authority	1955
Hudson River-Black River Regulating District	1959
1960's	
NYS Housing Finance Agency (3 subsidiaries)	1961
New York Job Development Authority D/B/A Empire State Development Corp. (1 subsidiary)[3]	1961
State University Construction Fund	1962
Metropolitan Transportation Authority (10 subsidiaries)	1965
Metropolitan Suburban Bus Authority1[2]	1965
Metro-North Commuter Railroad1	1965
Staten Island Rapid Operating Authority[2]	1965
Long Island Railroad[2]	1965
City University Construction Fund	1966
Niagara Frontier Transportation Authority (1 subsidiary)	1967
Battery Park City Authority	1968
NYS Urban Development Corporation (107 subsidiaries)[3]	1968
Natural Heritage Trust	1968
Facilities Development Corporation - part of Dormitory Authority	1968
United Nations Development Corporation	1968
Community Facilities Project Guarantee Fund	1969
Rochester-Genesee Regional Transportation Authority (11 subsidiaries)	1969
State of New York Mortgage Agency	1970

[1] 2006 Comptroller's Report on the Financial Condition of New York State, Office of the State Comptroller.

Table 17.1: (continued)

Name	Year
1970's	
Central New York Regional Transportation Authority (7 subsidiaries)	1970
Capital District Transportation Authority (5 subsidiaries)	1970
NYS Environmental Facilities Corp.	1970
Municipal Bond Bank Agency (1 subsidiary)	1972
NYS Medical Care Facilities Finance Agency - part of Dormitory Authority[4]	1973
NYS Project Finance Agency	1975
NYS Energy Research and Development Authority	1975
Municipal Assistance Corporation for the City of New York	1975
Jacob Javits Convention Center Operating Corporation	1979
Jacob K. Javits Convention Center Development Corporation	1979
NAR Empire State Plaza Performing Arts Center Corporation	1979
1980's	
NYS Science and Technology D/B/A Empire State Development Corp.	1981
NYS Olympic Regional Development Authority	1981
NYS Quarterhorse Breeding and Development Fund Corporation[5]	1982
NYS Thoroughbred Breeding and Development Fund Corporation	1983
Agriculture and NYS Horse Breeding and Development Fund	1983
NYS Thoroughbred Racing Capital Investment Fund	1983
Roosevelt Island Operating Corp.	1984
Development Authority of the North Country	1985
Housing Trust Fund Corporation[6]	1985
NYS Affordable Housing Corporation[6]	1985
Long Island Power Authority (1 subsidiary)	1986
1990's	
Homeless Housing Assistance Corp.	1990
New York Local Government Assistance Corp.	1990
NYS Theatre Institute Corporation	1992
Executive Mansion Trust	1993
Municipal Assistance for the City of Troy	1995
Nassau Health Care Corporation	1997
Roswell Park Cancer Institute Corporation	1997
Westchester County Health Care Corporation	1997
Hudson River Park Trust	1998
2000's	
Nassau County Interim Finance Authority	2000
Buffalo Fiscal Stability Authority	2003
Erie County Medical Center Corporation	2004
New York State Foundation for Science Technology and Innovation	2005
Erie County Fiscal Stability Authority	2005

[2] Subsidiary of MTA or an agency under its jurisdiction

[3] UDC, JDA, and part of NYS Science & Technology Foundation operate under a joint business certificate (D/B/A) using the name Empire State Development Corporation

[4] Dormitory Authority took over operation of MCFFA and FDC, but they retain their separate legal status.

[5] Inactive

[6] Subsidiary of Housing Finance Agency

17.1.1 Establishment of Authorities

State authorities and local authorities, with the exception of not-for-profits, are created by special acts of the legislature that gives the entities explicit powers and limitations. Not-for-profit entities that are determined to be a local authority, based on being affiliated, sponsored or created by a municipality are not created by a special act of legislature, but are organized pursuant to not-for-profit law. As a result, authorities display wide variation with respect to their powers and limitations. The Public Authorities Accountability Act (PAAA) of 2005 and Public Authorities Reform Act (PARA) of 2009 established general provisions in Public Authorities Law that apply to state and local authorities.

17.1.2 Advantages and Disadvantages

The growth in the number and power of public authorities resulted in the creation of the Public Authorities Control Board (PACB) in 1976.[7]

PACB has approval authority over the financing, acquisition or construction commitments of a number of state public authorities, including the Dormitory Authority, Housing Finance Agency, Urban Development Corporation, Job Development Authority and Environmental Facilities Corporation. The Public Authorities Control Board consists of five members appointed by the Governor, four of whom are recommended by the Senate and Assembly leadership. The Governor appoints the Chair.

A 2006 Report by the Office of the State Comptroller found that the State's largest public authorities had outstanding debt of over $124 billion, including more than $42 billion in State-supported debt.[8]

Although debt service on State-supported debt is paid by taxpayers, such debt has not been approved by voters. Additionally, another report by the Office of the State Comptroller noted that only 11 of the state's public authorities have their borrowing reviewed by the Public Authorities Control Board.

17.1.3 Recent Oversight Changes

The Public Authorities Accountability Act (PAAA) (Chapter 766 of the Laws of 2005) and the Public Authorities Reform Act of 2009 (PARA) represent reforms that recognize the differences between state agencies and public authorities and the importance of those distinctions. At the same time, the Reform Act acknowledges that public authorities are created by, and would not exist but for their relationship with, New York State. As a result of this relationship with state government, public authorities must exhibit a commitment to protecting the interests of New York taxpayers and meet the highest standards of effective and ethical operation.

Accordingly, with the enactment of PAAA, the Authorities Budget Office (ABO) was first created in unconsolidated law as the Authority Budget Office. The ABO was re-established as an independent office when PARA took effect on March 1, 2010. From its inception, the ABO's mission has been to make public authorities more accountable and transparent and to act in ways consistent with their governing statutes and public purpose. The ABO carries out its mission by: collecting, analyzing and disseminating to the public information on the finances and operations of state and local public authorities; conducting reviews to assess the operating and governance practices of public authorities and compliance with state laws; promoting good governance principles through training, policy guidance, the issuance of best practices recommendations and assistance to public authority staff and board members; and investigating complaints made against public authorities for noncompliance or inappropriate conduct.

[7] Laws of 1976, Chapter 39, as amended

[8] 2006 Comptroller's Report on the Financial Condition of New York State, Office of the State Comptroller.

The legislation also established an inspector general, banned procurement lobbying, strengthened provisions for public access to information; provided new rules for the disposing of public authority property, and established codes of ethical conduct for authority directors, officers and employees. PARA includes the following provisions:

- Identification of Public Authorities
  - defines public authorities as state, local, interstate or international, and affiliates or subsidiaries thereof.
- Improved Governance
  - requires board members to sign an acknowledgement of fiduciary duty
  - requires independent board members on State and local authorities and finance committees for those authorities that issue debt;
  - establishes roles and responsibilities of board members for State and local authorities;
  - mandates audit and governance committees for all State and local authorities;
  - mandates training for board members;
  - bans personal loans to board members, officers and employees; and
  - requires financial disclosure.
- Improved Independent Audit Standards
  - requires independent audits;
  - requires rotation of auditors every five years;
  - prohibits non-audit services, unless receiving previous written approval by the audit -committee; and
  - prohibits a firm from performing an authority audit if any executive officer was employed by that firm and participated in any capacity in the audit of such authority during the one-year period preceding the date of the initiation of the audit.
- Increased Transparency
  - continues reporting requirements for state authorities and local authorities.

Table 17.2: Revised Breakdown of Public Authorities By Class

Class	**Description**	**Number**
A	Major public authorities with statewide or regional significance and their subsidiaries	190
B	Entities affiliated with a State agency, or entities created by the State that have limited jurisdiction but a majority of Board appointments made by the Governor or other State officials	68
C	Entities with local jurisdiction	474
D	Entities with interstate or international jurisdiction and their subsidiaries	8
Total		740

17.2 Regional Agencies

In the course of the state's population growth and the expansion of towns, cities and villages there arose concern among the population that some of the state's natural resources could be threatened. There also arose a concern that under certain circumstances, nature itself would unleash its destructive power upon the urbanizing areas of the state. In response to these concerns, the state established a number of agencies with a regional focus to the issues which transcended political boundaries. Regional authorities now carry out such diverse functions as operating regional transportation systems, managing airports, regulating rivers, constructing facilities for colleges and hospitals, developing and operating ports and carrying out urban and economic development activities.

17.2.1 Port Authority of New York and New Jersey

Several interstate regional authorities exist in the New York metropolitan area, including the Port Authority of New York and New Jersey. This authority is operated by a 12 member board of commissioners, half of whom are appointed by the State of New York and half by the State of New Jersey. The Port Authority is responsible for all aspects of port commerce in and around New York City, the Hudson River bridges and tunnels, as well as for the operation of Kennedy, LaGuardia and Newark Airports and numerous other transportation facilities. In addition, the Port authority operates the Port Authority Trans-Hudson Corporation Rapid Transit system (PATH) under the Hudson River between the two states.

17.2.2 Adirondack Park Agency

The https://www.ny.gov/agencies/adirondack-park-agency [Adirondack Park Agency] is an independent, bipartisan state agency responsible for developing long-range park policy in a forum that balances statewide concerns and the interests of local governments in the Park. It was created by New York State law in 1971. The legislation defined the makeup and functions of the agency and authorized the agency to develop two plans for lands within the Adirondack Park. The approximately 2.5 million acres of public lands in the Park are managed according to the Adirondack Park State Land Master Plan. The Adirondack Park Land Use and Development Plan regulates land use and development activities on the 2.9 million acres of privately owned lands in the park.

The agency also administers the Adirondack Park Agency State Wild, Scenic and Recreational Rivers System Act for private lands adjacent to designated rivers in the park, and the State Freshwater Wetlands Act within the Park.

The Agency Board is composed of 11 members, eight of whom are New York State residents nominated by the Governor and approved by the State Senate. Five of the appointed members must reside within the boundaries of the Park. In addition to the eight appointed members, three members serve ex-officio. These are the Commissioners of Departments of Environmental Conservation and Economic Development, and the Secretary of State. Each member from within the Park must represent a different county and no more than five members can be from one political party.

The agency provides several types of service to landowners considering new land use and development within the Park which include:

- Jurisdictional advice: The agency will provide a letter informing a landowner whether a permit is needed for a new land use and development or subdivision, or whether a variance is needed from the shoreline standards of the agency. In many cases the letter advises that no permit or variance is needed. This determination is often helpful in completing financing and other arrangements related to new development in the park.

- Wetland advice: The agency will determine the location of regulated wetlands on a property or the need for a wetland permit.
- Permit application: A landowner proposing new land use or development who knows an agency permit is required may initiate a permit application without first receiving jurisdictional advice.
- Changes to the Park Plan Map: agency staff will advise on criteria, boundaries, and the process for amendment of the Official Map.

17.2.3 Tug Hill Commission

The Tug Hill Region lies between Lake Ontario and the Adirondacks. Larger than the states of Delaware or Rhode Island, its 2,100 square miles comprise one of the most rural and remote sections of New York State and the Northeast. A scattering of public lands covers a tenth of the region, with most of that land used extensively for timber production, hunting, and recreation. The rest is privately owned forest, farms, and homes.

Tug Hill's total population is just over 100,000, two-thirds of which is concentrated in villages around its edge. Its densely forested core of about 800 square miles is among New York's most remote areas, with a population of just a few thousand and few public roads.

The uniqueness of the Tug Hill region and its natural resources were recognized by New York State in 1972 when it created the Temporary Commission on the Tug Hill, a non-regulatory state agency charged with helping local governments, organizations, and citizens shape the future of the region, especially its environment and economy. In 1992, the state legislature passed the Tug Reserve Act, further recognizing the statewide importance of the region's natural resources. Congress has recognized the region as an integral part of the Northern Forest Lands area.

In 1998, new state legislative authorization for the Tug Hill Commission (permanently establishing the Commission within New York State's Executive Law, Article 37, section 847) noted Tug Hill's "lands and waters are important to the State of New York as municipal water supply, as wildlife habitat, as key resources supporting forest industry, farming, recreation and tourism and traditional land uses such as hunting and fishing." Other legislation in 1998 (Chapter 419, Laws of 1998) supported the State's purchase of conservation easements in the Tug Hill region, adding it to similar provisions that apply in New York's Adirondack Park, Catskill Park and watershed of the City of Rochester.

The nine members of its governing body are all residents of the region.

17.2.4 Lake George Park Commission

The Lake George Park and the Lake George Park Commission are established by Article 43 of the Environmental Conservation Law. The purpose of the Commission generally is to preserve, protect, and enhance the unique natural, scenic and recreational resources of the Lake George Park, which consists of Lake George and its land drainage areas. It is entirely within the Adirondack Park. The Commission has specific regulatory and enforcement powers relating to activities on the lake, along the shoreline and within the land drainage basin.

Among other duties, the commission: operates the Lake George Park Commission Marine Patrol (a law enforcement and public safety function); administers regulations governing wharfs, docks and moorings, marinas, navigation, and recreational activities; and administers regulations for the preparation of local storm water management plans and storm water regulatory programs for areas within the park where development is occurring. It must also develop and administer regulations for the discharge of treated sewage effluent, conduct a water quality monitoring program and investigate, identify and abate sources of ground and surface water contamination.

17.2.5 Hudson River Valley Greenway

The Hudson River Valley Greenway is a unique state-sponsored program established by the Greenway Act of 1991. The program is designed to encourage projects and initiatives related to the intersecting goals of natural and cultural resource protection, regional planning, economic development, public access, and heritage and environmental education. It provides technical assistance and catalytic grant funding for planning, water and land trails, and other projects that reinforce these goals. The legislatively defined Greenway area includes all of the municipalities within these counties: Albany, Columbia, Dutchess, Orange, Putnam, Rensselaer, Rockland, Saratoga, Ulster, Washington, Westchester, municipalities in Greene County outside of the Catskill Park, and those portions of New York and Bronx counties adjacent to the Hudson River and within the city's waterfront revitalization program. In keeping with the New York tradition of home rule, the Greenway program has no regulatory authority and participation by municipalities in Greenway programs and projects is entirely voluntary. The Greenway also manages the Hudson River Valley National Heritage Area in partnership with the National Park Service.

17.2.6 Central Pine Barrens Commission

New York's most southeastern county, Suffolk County, occupies the eastern end of Long Island, and comprises over 900 square miles of terrestrial and marine environments. Three of Suffolk County's ten towns are host to a 105,000+ acre, New York State-designated region known as the https://pb.state.ny.us/ (Central Pine Barrens).

A rich concoction of terrestrial and aquatic ecosystems, interconnected surface and ground waters, recreational niches, historic locales, farmlands, and residential communities, this region contains the largest remnant of a forest thought to have once encompassed over a quarter million acres on Long Island. New York State and Suffolk County recognized a need to protect groundwater quality because it is the sole source of drinking water. The region lies over an underground drinking water aquifer known as a "deep recharge area" which supplies much of the area's public water supply. In addition, the Central Pine Barrens region contains fire-dependent, fire-adapted ecosystem and landscape, found in only a few locations in the United States, which contains one of the greatest concentrations of rare, endangered and threatened plans and animals in New York State.

In 1993, New York State's Long Island Pine Barrens Protection Act officially defined this region at the junction of the Towns of Brookhaven, Riverhead, and Southampton, and started a process for regional planning and permitting which continues today. The 1993 Act created a five member Central Pine Barrens Joint Planning and Policy Commission, an Advisory Committee, and a "planning calendar" (now completed), which led to the June 1995 adoption of the Central Pine Barrens Comprehensive Land Use Plan.

The Commission possesses the combined duties of a state agency, a planning board and a park commission and has joint land use review and regulation, permitting, and enforcement authority along with local municipalities. The implementation of the land use plan is overseen and managed by the Commission. In addition, the Commission operates a transfer of development rights and conservation easement program and also engages in a number of stewardship and ecological management activities.

17.3 The Regional Planning Councils

Unlike state-created regional agencies, regional planning councils are locally formed by the agreement of adjoining counties. The primary function of regional planning councils is to study the needs and conditions of an entire region and to develop strategies that enhance the region's communities. Recognition was given to the regional council concept when the federal government authorized the establishment of area-wide planning agencies. These agencies were permitted to receive federal planning funds. The federal government then required proposals for federal funding to be reviewed on a regional level to determine district-wide significance and potential conflict with master planning. This review was undertaken by the regional planning councils. The federal

government later rescinded this requirement, but in the interest of regional planning, New York State continued the program.

Regional councils were created to provide a regional approach to concerns that cross the lines of local governments' jurisdictions. Nationwide, there are over 670 of these regional councils, representing almost all 50 states. These councils are a vehicle for local governments to share their resources, and to make the most of funding, planning, and human resources.

Most are voluntary associations, and do not have the power to regulate or tax. They are primarily funded by local governments, as well as by state and federal funds. The councils are responsible to the representatives of the communities in their regions.

The regional view encourages an impartial, bipartisan conduit for the exchange of information. This exchange allows for objective recommendations for the resolution of problems, including the ability to interrelate many key areas such as housing, transportation, and economic development. Joint municipal presentation also gives local governments more influence with funding sources and legislative bodies.

Planning services provided by regional councils include transportation, housing and community development, groundwater protection, water resource management, wastewater treatment, solid waste disposal, land use, and rural preservation planning. Information services provided by regional councils include the operation of regional data centers, public education and information, and maintenance of regional Geographic Information Systems (GIS). Other services provided by regional councils may include special services for low-income and aging populations, job training and employment services, economic development activities, and small business promotion.

Technical assistance to local governments may also be offered, and can include supplementation of local planning efforts, preparations of grant applications and coordination, cost effective regional purchasing, public administration, financial expertise, and information systems.

17.3.1 Legislation

Articles 12-B and 5-G of the New York State General Municipal Law give affiliated municipalities the legal authority to create regional or metropolitan planning boards and joint-purpose municipal corporations. Programs

New York's regional planning councils provide comprehensive planning for the coordinated growth and development of their regions. This involves conducting regional studies to assess needs, promoting the region's economic climate, environmental health, recreational opportunities, etc., and providing technical assistance to communities within the region.

By presenting a regional perspective on issues, regional councils promote intergovernmental cooperation and serve as a liaison between the State and federal governments and municipalities.

Regional Councils in New York State consist of nine locally created regional planning boards in New York State, and represents 45 of the State's 62 counties. The regional councils in New York are as follows:

Table 17.3: Regional Planning Commissions and Councils

Council	**Participating Counties**
Capital District Regional Planning Commission	Albany, Rensselaer, Saratoga, & Schenectady
Central New York Regional Planning & Development Board	Cayuga, Madison, Onondaga, & Oswego
Genesee/Finger Lakes Regional Planning Council	Genesee, Livingston, Monroe, Ontario, Orleans, Seneca, Wayne, Wyoming, & Yates
Herkimer-Oneida Counties Comprehensive Planning Program	Herkimer & Oneida

Table 17.3: (continued)

Council	Participating Counties
Hudson Valley Regional Council	Dutchess, Orange, Putnam, Rockland, Sullivan, Ulster, & Westchester
Lake Champlain-Lake George Regional Planning Board	Clinton, Essex, Hamilton, Warren, & Washington
Southern Tier Central Regional Planning & Development Board	Chemung, Schuyler, & Steuben
Southern Tier East Regional Planning Development Board	Broome, Chenango, Cortland, Delaware, Otsego, Schoharie, Tioga, & Tompkins
Southern Tier West Regional Planning & Development Board	Allegany, Cattaraugus, & Chautauqua

17.3.2 Metropolitan Planning Organizations

Federal highway and transit statutes require, as a condition for spending federal highway or transit funds in urbanized areas, the designation of MPO's which have responsibility for planning, programming and coordination of federal highway and transit investments.

While the earliest beginnings of urban transportation planning go back to the post-World War II years, the federal requirement for urban transportation planning emerged during the early 1960's. The Federal Aid Highway Act of 1962 created the federal requirement for urban transportation planning largely in response to the construction of the Interstate Highway System and the planning of routes through and around urban areas. The Act requires, as a condition attached to federal transportation financial assistance, that transportation projects in urbanized areas of 50,000 or more in population be based on a continuing, comprehensive, urban transportation planning process undertaken cooperatively by the states and local governments — the birth of the so-called 3C, "continuing, comprehensive and cooperative" planning process.

In New York State there are twelve MPO's as follows:

- Adirondack-Glens Falls Transportation Council
- Binghamton Metropolitan Transportation Study
- Capital District Transportation Committee
- Executive Transportation Committee for Chemung County
- Genesee Transportation Council
- Greater Buffalo Niagara Regional Transportation Council
- Herkimer-Oneida Transportation Study
- Ithaca Tompkins County Transportation Council
- Newburg-Orange County Transportation Council
- New York Metropolitan Transportation Council
- Poughkeepsie-Dutchess County Transportation Council
- Syracuse Metropolitan Transportation Council

17.3.3 Regional Solutions through Intergovernmental Cooperation

Voter approval in 1959 of an amendment to the New York Constitution's prohibition on gifts and loans of credit by one local government to another paved the way for general legislative authorization for local governments to participate in a wide variety of intermunicipal endeavors.[9] Article 5-G of the General Municipal law was soon enacted to provide municipal corporations and districts with the power to enter into cooperative or joint agreements between or among them to provide any function, power or duty that each has authority to undertake on its own.

The term "municipal corporation" includes counties (outside of New York City), cities, towns, villages, boards of cooperative educational services, fire districts and school districts. The term "district" includes certain county and town improvement districts;[10] therefore, a very large number and broad range of local government entities are authorized to undertake cooperative activities. Since these local governments are empowered to undertake together any activity each may undertake alone, the opportunity to use an intergovernmental agreement to provide services or projects is only limited by the powers of each participant.[11]

Undertaking a cooperative or joint venture is essentially a business arrangement, and Article 5-G provides substantial leeway for contracting parties to address the many issues that typically are addressed in a business arrangement. Generally, an intermunicipal agreement may contain "any matters as are reasonably necessary and proper to effectuate and progress the joint service" [12] and typically include:

- a description of the joint service or project, an identification of the participants and the authority pursuant to which each will be undertaking the service or project;
- descriptions of the roles of each of the participating entities, and the identification of the managing participant, if any;
- fiscal matters, such as the method for allocating costs;
- the manner for employing and compensating employees;
- timetables and processes for contract review and renegotiation;
- methods for dispute resolution during a contract term; and
- responsibility for liabilities.

Agreements entered into pursuant to Article 5-G require the approval of a majority vote of the full strength of the governing body of each participating municipal corporation or district, unless the governing bodies have adopted mutual sharing plans which allow their respective officers or employees to undertake or authorize the receipt of a joint service in accordance with the plan. A mutual sharing plan can anticipate the potential need to obtain assistance from another eligible local government, either on a routine or extraordinary basis. It contemplates the "handshake" deal between cooperating local governments. Fashioning a cooperative agreement frequently necessitates the identification and resolution of many, sometimes complex, issues. Water, sewer and other joint construction projects will require resolution of design issues and permitting needs in addition to fiscal and operational matters. Participating local governments may choose to form joint committees charged with developing preliminary consensus through the development of recommendations to the involved governing bodies.

Some intermunicipal agreements require implementation through the adoption of complementary local laws. When a joint planning board is created, for instance, the participating local governments will need to adopt, in

[9] Amendment to Article VIII, §1 of the New York State Constitution, approved by the electors in 1959; chapter 102 of the Laws of 1960 implemented this change.

[10] General Municipal Law, §119-n(a) and (b).

[11] General Municipal Law, §119-n(c).

[12] General Municipal Law, section 119-o(2).

addition to the cooperative agreement, compatible local laws that reflect the existence of the joint planning board and provide its authority and responsibilities.

Intermunicipal agreements allow local governments to seek regional, and sometimes creative, solutions to common problems without giving up their underlying authority or jurisdiction. For this reason, they are popular vehicles for achieving cost savings or service improvements in a wide variety of ways. The following is a partial list of examples of topics that may be the subject of Intermunicipal agreements:

- joint water and sewer projects;
- garbage collection;
- recycling centers;
- highway maintenance;
- snowplowing;
- shared recreational and cultural facilities;
- shared government offices;
- computer/data processing;
- joint purchasing;
- shared code compliance personnel;
- joint zoning boards;
- joint land use planning activities;
- joint economic development planning
- coordinated assessment services; and
- shared public safety functions.

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Legislation (/keywords/legislation)

JUNE 20, 2022 | Albany, NY

Governor Hochul Signs Landmark John R. Lewis Voting Rights Act of New York Into Law

Legislation S.1046-E/A.6678-E Establishes the Most Expansive State Level Voting Rights Act in the Country

Expands Access to Voting by Prohibiting Voter Dilution, Suppression, Intimidation, Deception, or Obstruction

Requires Jurisdictions with a History of Civil or Voting Rights Violations to Seek Preclearance for Changes to Important Election Policies and Practices

Governor Kathy Hochul today, at Medgar Evers College in Brooklyn, signed the landmark John. R. Lewis Voting Rights Act of New York (S.1046-E/A.6678-E) into law cementing New York State's place as a national leader on voting rights and fulfilling a key part of the Governor's 2022 State of the State agenda. The Governor signed the bill alongside Senate Majority Leader Andrea Stewart-Cousins, State Senator Zellnor Myrie, Assemblymember Latrice Walker, President of the NAACP New York State Conference Dr. Hazel N. Dukes and key voting rights advocates.

"At a time when the very foundation of our democracy is under threat, New York is leading the nation with new laws protecting the fundamental right to vote," **Governor Hochul said.** "Today, we honor the work of the late Congressman John Lewis and activists like Medgar Evers as we make meaningful changes to our laws that enfranchise voters and ensure the voices of the people are heard in our democracy. Where the federal government fails to act, New York will continue to step up and lead the way: we did it with abortion protections, we did it with gun safety reforms, and I'm so proud to say we are doing it again with voting rights."

https://www.youtube.com/embed/vI0d-sizTu4

AUDIO

PHOTOS

"As a black man who represented a district in Congress that is nearly 90 percent white, in one of the most rural parts of the country, and as the first person of color to ever represent upstate New York in Congress, my experience is proof that voting can bring about change that once might have seemed out of reach," **said Lieutenant Governor Antonio Delgado.** "By amending the voter laws in New York State, we are providing all people, regardless of the color of their skin or where they live, with an equal opportunity to have their voices heard at the polls."

Senate Majority Leader Andrea Stewart-Cousins said, "The John R. Lewis Voting Rights Act of New York will expand and codify voter protections, empower citizens at the ballot box, and promote accountability among elected officials. I am proud that New York is standing as a true bastion of voting rights despite the anti-democratic rollbacks being set forth by Republicans across the nation."

Assembly Speaker Carl Heastie said, "Voting rights are under attack across the nation and New York must protect this sacred constitutional right. While other states work to disenfranchise voters and dilute votes, I want to thank the Chair of the Elections Committee Latrice Walker, our Assembly and Senate colleagues, and Governor Hochul for their commitment to passing the strongest voting rights protections in the nation."

> ***Today, we honor the work of the late Congressman John Lewis and activists like Medgar Evers as we make meaningful changes to our laws that enfranchise voters and ensure the voices of the people are heard in our democracy.***
>
> **Governor Kathy Hochul**

Legislation S.1046-E/A.6678-E will encourage participation in voting by all eligible voters by ensuring that barriers to accessing the polls are removed. In particular, members of racial, ethnic, and language-minority groups will now be protected by new measures that will ensure they have an equal opportunity to vote in the State of New York. This legislation does so by addressing:

- **Voter Dilution.** Prohibits methods of election that eliminate the voting strength of a protected class and establishes legal protections for violations.
- **Voter Suppression.** Prohibits election-related laws and practices from being implemented in ways that deny members of a protected class the right to vote and establishes legal protections for violations.
- **Voter Intimidation, Deception or Obstruction.** Prohibits acts of intimidation, deception, or obstruction that impact the ability of New Yorkers to access their right to vote and establishes legal protections for violations.
- **Expanded Language Assistance.** Requires election-related language assistance beyond what is required by the federal Voting Rights Act.
- **Preclearance.** Establishes a state analogue to the now dormant "section 5 preclearance" of the federal Voting Rights Act, requiring covered jurisdictions to "preclear" any changes to certain important election-related laws and policies before they can implement them. Under the new law, covered jurisdictions seeking to make a change to a range of election measures will first need to have those changes reviewed to ensure they will not violate the voting rights of a protected class. Covered jurisdictions are those with a history of civil or voting rights violations.

State Senator Zellnor Myrie said, "By enacting the strongest voter protection law of any state in the country, New York is sending a powerful message: every voter counts and every vote should be counted. I'm grateful to Governor Hochul for signing the VRA today and to my partner Assemblymember Latrice Walker for getting this bill over the finish line. We must always continue to defend and strengthen voting rights: our democracy depends on it."

Assemblymember Latrice Walker said, "The John R. Lewis Voting Rights Act of New York is one of the most important bills to be signed into law in recent history and it will deliver the strongest and most comprehensive voter protections of any state In America. It will codify the very cornerstone of our democracy — the right to vote. At the same time, we have honored the legacy of the late Representative John R. Lewis, who once said, "The vote is precious. It is almost sacred. It is the most powerful nonviolent tool we have in a democracy." Thank you to all the tireless advocates, my colleagues, Governor Hochul, and organizations like the NAACP and the NYCLU. As the Assembly sponsor of the bill, I could not be more proud."

President of the NAACP New York State Conference Dr. Hazel N. Dukes said, "For too long our communities have suffered injustices, but were unable to vote to change them because of suppression at the polls. Today, New York leads the way, yet again, to right the wrongs of our past and ensure that the voices of all can be heard. I applaud Assemblymember Latrice Walker and Senator Zellnor Myrie, the sponsors of this historic legislation, for expanding voter protections for New Yorkers across the state. Thank you Governor Hochul, Leader Andrea Stewart-Cousins, and Speaker Carl Heastie for working together on this landmark legislation."

New York Civil Liberties Union Executive Director Donna Lieberman said, "Amidst a backdrop of nationwide attacks on voting and a lack of federal leadership, New York just enacted one of the strongest voting rights laws in the nation. Today, Governor Hochul made an enormous stride toward ensuring communities that have historically been denied an equal opportunity to participate in the political process can cast a meaningful ballot without obstruction, interference, or discrimination. As we work to implement the John R. Lewis Voting Rights Act — from challenging racial gerrymandering and voter intimidation to expanding language assistance and polling access — we must ensure its protections remain strong. Lawmakers must resist any attempt to walk back our progress and must fight to protect the right to vote."

Medgar Evers College President Dr. Patricia Ramsey said, “The signing into law of the John R. Lewis Voting Rights Act of New York, by Governor Kathy Hochul, was a historic day for the people of New York and for Medgar Evers College; a College birthed out of the Central Brooklyn Community, with social justice in its DNA and named for civil rights leader Medgar Wiley Evers, field secretary for the NAACP who was slain because of his advocacy for the rights of Blacks in Mississippi to vote. As President of Medgar Evers College, I am extremely proud that Dr. Hazel Dukes and members of the NAACP advocated for this historic signing to take place at our college, in honor of Medgar Wiley Evers. I’m grateful to Governor Kathy Hochul, Majority Leader Stewart-Cousins, Senator Myrie, Assemblymember Walker and all involved in bringing this to fruition. Juneteenth 2022 will be in the annals of history as the day that the John R. Lewis Voting Rights Act of New York was signed into law, at Medgar Evers College.”

Center for Law and Social Justice at Medgar Evers College Executive Director Lurie Daniel Favors Esq. said, "The signing of the New York State John R Lewis Voting Rights Act today at Medgar Evers College was an historic and momentous occasion that solidifies New York's position as an emerging leader when it comes to protecting voting rights. As voting rights protections fall across the nation and in light of the Supreme Court's willingness to align with the retrenchment of voter protections, it is imperative that organizers, activists and elected officials at the state and local level work to protect voters. This legislation includes a preclearance provision, it expands protections for language minorities, and incorporates a democracy canon that ensures the legislation is interpreted in a way that centers the needs of voters. New York has now set a model for how to protect voters and it is one that the rest of the nation should follow."

LatinoJustice PRLDEF Associate Counsel Fulvia Vargas-De Leon said, "Signing the John R. Lewis Voting Rights Act of New York into law places our state at the forefront of protecting communities of color from discriminatory actions that limit equal participation in our democracy. This right should not be controversial or political. Our fight for full and equitable access to the ballot is far from over, but this law gives us a strong tool to come one step closer to a democracy representative and inclusive of all voters."

Contact the Governor's Press Office

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McKinney's Consolidated Laws of New York Annotated
Constitution of the State of New York (Refs & Annos)
Article I. Bill of Rights (Refs & Annos)

McKinney's Const. Art. 1, § 11

§ 11. [Equal protection of laws; discrimination in civil rights prohibited]

Effective: January 1, 2002 to December 31, 2024
Currentness

No person shall be denied the equal protection of the laws of this state or any subdivision thereof. No person shall, because of race, color, creed or religion, be subjected to any discrimination in his or her civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state.

Credits
(Adopted Nov. 8, 1938, eff. Jan. 1, 1939. Amended Nov. 6, 2001, eff. Jan. 1, 2002.)

McKinney's Const. Art. 1, § 11, NY CONST Art. 1, § 11
Current through L.2024, chapters 1 to 545. Some statute sections may be more current, see credits for details.

End of Document